

*Bainbridge Island School District (Bainbridge Island Educational Support Professional Association)*, Decision 13410-A (PECB, 2022)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID MUELLER,  Complainant,  vs.  BAINBRIDGE ISLAND SCHOOL DISTRICT,  Respondent.	CASE 134379-U-21  DECISION 13410-A - PECB  DECISION OF COMMISSION
DAVID MUELLER,  Complainant,  vs.  BAINBRIDGE ISLAND EDUCATIONAL SUPPORT PROFESSIONAL ASSOCIATION,  Respondent.	CASE 134380-U-21  DECISION 13411-A - PECB  DECISION OF COMMISSION

*David Mueller*, the complainant.

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

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

On August 6, 2021, David Mueller (complainant) filed unfair labor practice complaints against the Bainbridge Island School District (employer) and the Bainbridge Island Educational Support Professional Association (union). The complainant filed amended complaints on August 17 and 19, 2021.

On August 31, 2021, Unfair Labor Practice Administrator Emily Whitney (Administrator) issued deficiency notices in the cases against the employer and the union. The Administrator concluded the complaints were deficient because the complaints alleged violations of chapter 42.56 RCW, the Public Records Act (PRA), over which the Commission does not have jurisdiction; the complaints against the employer lacked facts alleging the employer made threats of reprisal or force, or promises of benefit, to the complainant related to protected activity; and the complaints against the union did not allege union tactics involving violence, intimidation, and reprisal related to the pursuit of protected rights. While the complaints against the union alleged the union did not process the complainant's grievance, the union had discretion to determine how to settle disputes.

The complainant filed amended complaints on September 7, 2021. The Administrator reviewed the amended complaints and dismissed the complaints for failure to state a cause of action. *Bainbridge Island School District*, Decision 13410 (PECB, 2021); *Bainbridge Island School District (Bainbridge Island Educational Support Professional Association)*, Decision 13411 (PECB, 2021). The complainant filed timely appeals.<sup>1</sup>

After appealing the dismissals, the complainant began filing new evidence with the agency. On October 25, 2021, the complainant filed a motion requesting the Commission consider the newly filed evidence.

On October 22, 2021, the complainant filed his appeal briefs. On November 5, 2021, the employer filed a response brief and opposed the motion to admit new evidence. The union did not file a brief.

On December 20, 2021, the employer's attorney emailed Executive Director Michael Sellars. The employer notified the Executive Director that the complainant had passed away. Mr. Mueller died on December 13, 2021.<sup>2</sup>

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<sup>1</sup> The cases against the employer and against the union were docketed separately. The appeals have been consolidated.

<sup>2</sup> COOK FAMILY FUNERAL HOME & CREMATION SERVICES,  
<https://www.cookfamilyfuneralhome.com/obituaries/David-John-Mueller?obId=23377433#/celebrationWall>  
(last visited Jan. 27, 2022).

## ISSUES

The issues before the Commission are: (1) whether the appeals are moot because the complainant passed away; (2) whether the motion to consider new evidence should be granted; and (3) whether the complaints state a cause of action.

We conclude that these cases are procedurally ripe for consideration by the Commission. We deny the motion to consider newly filed evidence. We affirm the Administrator; the complaints do not state a cause of action.

## ANALYSIS

### Applicable Legal Standards

#### *Newly Filed Evidence*

The Administrator reviews facts alleged in the complaint to determine whether the complaint states a cause of action. WAC 391-45-110. The Commission does not allow parties to bring forth new facts or claims on appeal. *King County*, Decision 11221-A (PECB, 2012); *King County (Amalgamated Transit Union Local 587)*, Decision 8630-A (PECB, 2005) (citing *Tacoma School District (Tacoma Education Association)*, Decision 5465-E (EDUC, 1997)). “We rely only on those facts alleged in the complaint and the amended complaint.” *King County*, Decision 11221-A.

#### *Standard of Review*

An unfair labor practice complaint is reviewed under WAC 391-45-110 to determine whether the facts, as alleged, state a cause of action under chapter 41.56 RCW. At the preliminary ruling stage, all alleged facts are assumed true and provable. *Whatcom County*, Decision 8245-A (PECB, 2004).

### Application of Standards

*The preconditions to the appeal are satisfied.*

The appeals in this case are ripe for the Commission’s review. The complainant filed timely appeals on October 11, 2021. The complainant filed appeal briefs on October 22, 2021. The employer filed a response brief on November 5, 2021, and the appeals were properly before the

Commission for a decision.<sup>3</sup> On December 20, 2021, the employer's attorney notified the agency that the complainant had passed away.

Relying upon *Pasco Housing Authority*, Decision 6823 (PECB, 1999), our dissenting colleague concludes that there is no party with standing in this matter. In *Pasco Housing Authority*, the Executive Director dismissed a representation petition after determining that the petitioner was no longer employed by the employer. In a representation case, a petitioning employee must meet the definition of employee in WAC 391-25-010 at all stages in the proceeding. Consequently, the decertification petitioner continued to be a necessary party to processing the petition and was required to engage in the process for the agency to continue to process the petition.<sup>4</sup> In the absence of an eligible petitioner, the agency could no longer process the case.

In contrast, the complainant here did not need to take further action for the Commission to rule on the appeals. The matters before us are appeals of dismissals of complaint at the preliminary ruling stage. After the filing of the employer's response brief and the due date of the union's response brief passed without the union filing a brief, the appeals were ready for the Commission to decide. The parties have satisfied the requirements of an appeal. Further action by the parties is necessary only if the Commission determines that the complaints state a cause of action. Therefore, all procedural requirements for a ruling on the appeal have been met and the Commission can issue an order.

Our dissenting colleague would also conclude that the death of the complainant renders the appeals moot. We disagree. The Commission can reach a decision on the appeals and order effective relief. Our colleague reasons that if the appeals were granted, a hearing could not effectively be conducted. If we were to conclude that causes of action existed, it would not be necessary for the Commission to speculate whether a personal representative would appear in the matter or what evidence the representative would present at hearing.

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<sup>3</sup> Other than filing a notice of appearance, the union has filed no other documents in this matter.

<sup>4</sup> Public Employment Relations Commission, *Representation FAQ*, pdf link [www.perc.wa.gov/wp-content/uploads/2019/02/E-FAQ.pdf](http://www.perc.wa.gov/wp-content/uploads/2019/02/E-FAQ.pdf).

The complainant, or his authorized representative, have not withdrawn the appeals. Neither the employer nor the union has raised the issue of whether the appeals are moot due to Mr. Mueller's death. Because all filings were received before Mr. Mueller's death, we conclude that it is appropriate to consider the merits of the appeals.

*The motion to accept new evidence is denied.*

After filing his notices of appeal, the complainant began filing new documentary evidence. This evidence was not presented to the Administrator when she reviewed the complaints to determine whether they stated a cause of action. As the employer observed in its response brief, the complainant did not cite to specific documents filed after the appeals in his appeal briefs.

When reviewing a complaint to determine whether a cause of action exists, the Commission reviews only the evidence presented with the complaint and considered by the Administrator. *King County*, Decision 11221-A. Accordingly, the motion to accept new evidence is denied.

*The complaints do not state a cause of action.*

After reviewing the complaints and assuming all facts are true and provable, we conclude the complaints do not state a cause of action.

### CONCLUSION

The appeals were ready for the Commission's consideration before the complainant passed away; therefore, it is appropriate for us to rule on the appeals. The motion to accept new evidence is denied. The decisions of the Administrator are affirmed.

### ORDER

The Orders of Dismissal issued by the Unfair Labor Practice Administrator are AFFIRMED.

ISSUED at Olympia, Washington, this 15th day of March, 2022.

## PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



MARK BUSTO, Commissioner

DISSENTING OPINION

The complainant David Mueller filed appeals from the decisions of an agency Administrator dismissing his complaints against his employer and union at the preliminary ruling stage. Complainant filed appeals with the Commission on October 11, 2021, and briefs in support of his appeals on October 22, 2021. Complainant, who worked as a school bus driver, represented himself *pro se*. The employer filed a responsive brief on November 5, 2021. The union did not file a brief in response.

On December 20, 2021, counsel for the employer notified the Executive Director via email that the complainant had died. Notice is taken of an obituary on the website of a Bainbridge Island funeral home listing complainant's date of death as December 13, 2021. The obituary refers to no spouse and states that complainant is survived by a daughter. There has been no motion for substitution of a personal representative filed. *See, e.g.*, CR 25(a)(1); RAP 18.9(c)(2).

While I agree with my colleagues that the motion to consider new evidence should be denied, I disagree with their decision to address the merits of the decedent Mr. Mueller's appeal.

**A. There is no party with standing to pursue the complaint.**

A complaint charging unfair labor practices “may be filed by any employee, employee organization, employer, or their agents.” WAC 391-45-010. With the death of the complainant, and in the absence of intervention by a personal representative of his estate, there is no person with legal standing to attend to his appeal. The case thus resembles *Pasco Housing Authority*, Decision 6823 (PECB, 1999), in which a decertification petitioner left employment while her petition was blocked by the filing of an unfair labor practice charge in accordance with WAC 391-25-370. When the agency resumed processing the decertification petition after resolution of the “blocking” unfair labor practice charge, it learned that the petitioner no longer worked for the employer. Executive Director Marvin Schurke then ordered the decertification petition dismissed, noting that WAC 391-25-010, the regulation defining those who may file a petition, excluded her once she became a non-employee. As such, “she no longer has legal standing to be a party in the representation proceeding she initiated,” the Executive Director concluded. *Pasco Housing Authority*, Decision 6823. The petition was dismissed.

The regulation defining who has standing to file an unfair labor practice charge is functionally identical to the one defining who may file a representation petition as was at issue in *Pasco Housing Authority*:

A complaint charging that a person has engaged in or is engaging in an unfair labor practice may be filed by any employee, employee organization, employer, or their agents.

WAC 391-45-010. As the initiator of the unfair labor practice complaint herein is deceased and no personal representative has appeared in the matter as representative of his estate, there is no one with legal standing to serve as party representative in the complaints he initiated under WAC 391-45-010. As with the petition in *Pasco Housing Authority*, the complaint here should be dismissed for lack of standing.

**B. The death of the complainant renders the case moot.**

In addition, the complainant's death renders his appeals moot. These matters were dismissed by the agency at the preliminary ruling stage under WAC 391-45-110. The only relief which the Commission could order at this point if the complainant were still living, and if his appeals were successful, would be a remand to the agency with instructions to schedule a hearing. Yet no hearing could be effectively conducted because the complainant was both representing himself *pro se* and apparently serving as principal witness at the time of his death. There is thus no one to prosecute the case on remand. It is inappropriate to resolve the merits of an appeal where, as here, no viable complainant remains in the matter, and where there is no one to challenge the majority's decision on further appeal to superior court.

An appeal is moot where it presents a purely academic issue and where it is not possible for the court to render effective relief. *In re Marriage of Horner*, 151 Wn.2d 884, 891 (2004). Courts typically refuse to review a case which has become moot. "This is to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984). The death of the complainant prevents him from zealously advocating his position by, for example, appealing the majority decision to superior court. The appeal should accordingly be dismissed as moot.<sup>5</sup>

Courts will hear a matter that would otherwise be deemed moot if the issues presented on appeal involve matters of substantial public interest. For example, the court in *Sorensen v. City of Bellingham*,

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<sup>5</sup> The majority contends that notwithstanding the death of the complainant, "[t]he Commission can reach a decision on the appeal and order effective relief." To reach that conclusion requires my colleagues to leap over preliminary issues of standing and mootness to rule against the deceased complainant on the merits. This may provide "effective relief" to the union and employer in this case, but the majority could under no circumstances afford relief to the deceased complainant because he is no longer in the case. The hazards of this approach are evident. If in a similar future case the majority were to rule instead in favor of a deceased complainant on the merits, and to order the case remanded for a hearing, there would be no complainant to prosecute the matter on remand. That case would undeniably meet the definition of mootness, and so does this one.



80 Wn.2d 547, 558 (1972), held that a county rule barring aspirants to a county freeholder position from election if they did not own property presented compelling issues under the equal protection clause of the Fourteenth Amendment to the United States Constitution. It thus addressed the merits of the case even though the matter was moot in that the election had concluded before the matter reached the court. *Id.* at 558–59.

These are not cases presenting important policy or constitutional issues. The complaints arise from alleged actions of the Union and Employer in entering into a memorandum of understanding in the wake of the Governor’s “Stay Home – Stay Healthy” and related proclamations rendered in response to the COVID-19 pandemic. The complainant’s death renders the matters moot, and his complaint should be dismissed on that basis.

Because I would dismiss the appeal as moot, I dissent.

  
KENNETH J. PEDERSEN, Commissioner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under RCW 34.05.542.



# RECORD OF SERVICE

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ISSUED ON 03/15/2022

DECISION 13410-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 134379-U-21

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# RECORD OF SERVICE

ISSUED ON 03/15/2022

DECISION 13411-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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