STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JULIE LESLIE, Complainant, vs. NORTH KITSAP SCHOOL DISTRICT, Respondent.	CASE 136244-U-23 DECISION 13679 - PECB CAUSE OF ACTION STATEMENT AND ORDER OF PARTIAL DISMISSAL

Julie Leslie, Complainant.

Lester "Buzz" Porter Jr. and *F. Chase Bonwell*, Attorneys at Law, Porter Foster Rorick LLP for the North Kitsap School District.

On February 22, 2023, Julie Leslie (complainant) filed an unfair labor practice complaint against the North Kitsap School District (employer). The complaint was reviewed under WAC 391-45-110.[1] A deficiency notice issued on March 24, 2023, notified Leslie that a cause of action could not be found at that time. Leslie was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the deficient allegations.

On April 14, 2023, the North Kitsap Athletics and Activities Alliance (union) filed an amended complaint. The amended complaint clarified that the union was the complainant to the case and was filing on behalf of Julie Leslie and other bargaining unit employees. The Unfair Labor Practice Administrator dismisses the deficient allegations and issues a preliminary ruling for other allegations of the amended complaint.

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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.

ISSUES

The amended complaint alleges the following:

> Employer discrimination violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed by removing one of Julie Leslie's stipends in reprisal for union activities protected by chapter 41.56 RCW.
>
> Employer domination or assistance of a union in violation of RCW 41.56.140(2) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by adding the building principal and building athletic director to a step five grievance meeting.
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> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by
>
> (a) Employer officials circumventing the union through direct dealing with employees represented by the union, by changing the Athletic Trainer's pay, without notifying the union.
>
> (b) Employer officials circumventing the union through direct dealing with employees represented by the union, by meeting with Julie Leslie to negotiate adjustments to Leslie's hours, without notifying and bargaining with the union.
>
> (c) Refusing to provide relevant information requested by the union concerning preparation for a grievance filing and negotiations for Athletic Trainer's wages.

(d) Unilaterally changing the Athletic Trainer's wages, without providing the union an opportunity to bargain.

(e) Breaching its good faith bargaining obligations in refusing to meet and consider union proposals related to the Athletic Trainer's wages.

(f) Skimming or contracting out unidentified bargaining unit work performed by the bargaining unit employees, without providing an opportunity for bargaining.

The circumvention related to adjustments of Leslie's hours, refusal to provide information, unilateral change, and breach of good faith bargaining obligation allegations of the amended complaint states a cause of action under WAC 391-45-110(2) for further case proceedings before the Commission.

The discrimination, domination, circumvention related to changing the Athletic Trainer's pay, and skimming allegations of the amended complaint do not state a cause of action and are dismissed.

BACKGROUND

The North Kitsap Athletics and Activities Alliance (union) represents a bargaining unit of Coaches and Athletic Trainers at North Kitsap School District (employer). Julie Leslie is an Athletic Trainer and a member of the bargaining unit. Anden Hormann was an Athletic Trainer and member of the bargaining unit until October 10, 2022. The union and employer are parties to a collective bargaining agreement effective 2021-2023.

Hormann was hired as the Athletic Trainer January 8, 2019, and the employer began paying Hormann two stipends for his position: both the head and assistant athletic training stipends. On August 11, 2022, Hormann received an email from the employer allegedly stating Hormann would need to resign his assistant athletic training position. On August 17, 2022, Hormann responded to the employer with questions about the August 11 email. The employer allegedly did not provide a

response to the questions. On September 30, 2022, Hormann was not paid both stipends. The union was allegedly not notified of this change. Hormann resigned his position as head and assistant Athletic Trainer positions on October 10, 2022.

In the spring of 2022, Julie Leslie received two stipends: both the head and assistant athletic training stipends because Leslie had been performing the duties of both positions. On September 30, 2022, Leslie did not receive both stipends.

On October 5, 2022, the employer met with Leslie, without union representation to discuss adjusting Leslie's hours. The employer was allegedly trying to adjust Leslie's hours to compensate for Leslie's change in pay. Allegedly after the meeting the union received a hard copy agreement of the change.

On October 24, 2022, the union, Leslie, and the employer met to discuss the Athletic Trainers pay. During the meeting the union president requested information regarding the payment of both stipends for the previous five years and the employers concern with paying two stipends being illegal. On October 25, 2022, the union asked the employer to negotiate a memorandum of agreement (MOU) regarding the athletic training stipends. On November 8, 2022, the union again asked the employer to negotiate regarding the athletic training stipends. The union made a second request for information on November 14, 2022. On November 22, 2022, the employer provided the union with Article VIII, Section 7 of the Washington constitution. On November 22, 2022, the union and employer met to negotiate an MOU, but no agreement was reached.

On January 3, 2023, Leslie filed a grievance related to the change in the pay of stipends. During the second step grievance the employer allegedly stated that it directed Leslie to only cover the volume of work of the head Athletic Trainer. Leslie had been taking on the duties of both the head Athletic Trainer and assistant Athletic Trainer. The grievance continued through step five of the grievance process. The employer included the building principal and athletic coordinator during the step five process at a March 22, 2023, meeting. No agreement was reached during the March 22, 2023, meeting.

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 complaint was filed on February 22, 2023. In order to be timely filed the amended complaint will need to include events that occurred on or after August 22, 2022. Some of the facts alleged in the amended complaint occurred outside the six-month statute of limitations. Any facts alleged outside the six-month statute of limitations will be used as background information only.

Discrimination

Applicable Legal Standard

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.56.140(1). 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. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). 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 participated in an activity protected by the collective bargaining statute or communicated to the employer an intent to do so;

2. The employer deprived the employee 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).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its nondiscriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standards

The amended complaint does not allege facts necessary for a discrimination violation. The complaint does not allege that Leslie was engaged in protected activity or informed the employer an intent to do so. The amended complaint does allege that Leslie did not receive both stipends on September 30, 2022. There are no allegations that the deprivation of the two stipends was causally connected to Leslie engaging in protected activity. After the deprivation of the two stipends, Leslie did engage in the grievance process beginning January 3, 2023, which has been found to be protected activity, but this activity occurred after the deprivation of the two stipends. Because the amended complaint lacks facts alleging Leslie was engaged in protected activity or informed the employer of an intent to do so and lacks facts alleging a causal connection between the employer's actions and the protected activity, the discrimination allegation must be dismissed.

Domination

Applicable Legal Standard

The complaint alleges employer domination or assistance of a union in violation of RCW 41.56.140(2). Other than referencing this statue, the complaint does not explain or develop this allegation. None of the facts alleged in the complaint suggest that the employer involved itself in the internal affairs or finances of the union or that the employer attempted to create, fund, or control a "company union." A cause of action for employer domination is provided for in all statutes administered by the Commission. The origins of the violation are based upon the concerns set forth in the test's second clause; that is, whether an employer has attempted to create, fund, or control a company union. *See* State – *Washington State Patrol*, Decision 2900 (PECB, 1988).

Commission decisions on employer domination have generally revolved around whether employers have unlawfully rendered assistance to unions. Examples of such assistance are allowing the free use of employer buildings and resources for union business, providing aid to employees serving as union officers, or favoring one union over another during a representation proceeding. The meaning of the term "domination" is thus directly tied to the term "assistance" and does not imply a cause of action for alleged negative acts directed toward the union or union members.

An employer's actual or attempted control of a union through assistance, ranging from favoritism to a full-fledged company union, is deleterious to the collective bargaining rights of employees; however, those actions are distinct from interference. It is appropriate to file a complaint alleging employer domination or assistance of a union if the facts suggest that the employer is violating the statute through such acts as rendering assistance to a union or union officers, supporting a company union, or showing favoritism to one union over another during an organizing campaign.

Application of Standards

The amended complaint does not allege facts describing employer domination of the union. The amended complaint alleges the employer included a building principal and building athletic director in the step five grievance meeting on March 10, 2023. There are no facts alleging how the inclusion of these positions in the meeting controlled or interfered with the administration of the

union. The amended complaint alleges these positions are not listed in the collective bargaining agreement grievance process, but violations of the collective bargaining agreement would need to be processed through the grievance and arbitration machinery within the contract. *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); *City of Walla Walla*, Decision 104 (PECB, 1976)). Because the complaint lacks facts necessary to allege a domination violation, the domination allegation must be dismissed.

Circumvention

Applicable Legal Standard

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning a mandatory subject of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

Application of Standards

The amended complaint alleges various circumvention allegations. The amended complaint lacks facts alleging circumvention related to the change of the Athletic Trainers pay. The amended complaint alleges that the employer changed the Athletic Trainers pay by only paying them one stipend. The two Athletic Trainers allegedly reached out to the employer to ask questions regarding the change, but the employer allegedly did not respond to the employees regarding the change in pay. There is no allegation of a negotiation between the individual employees and the employer. Because the amended complaint lacks facts alleging there was a negotiation between the employer and the individual employees regarding the change in pay, the circumvention allegation regarding the Athletic Trainers pay must be dismissed.

Skimming

Applicable Legal Standard

Historically, the Commission has applied the same standard to cases involving the duty to bargain a decision to contract out bargaining unit work or a decision to assign bargaining unit work to nonbargaining unit employees (skimming). Therefore, discussion of Commission precedent involves both contracting out and skimming cases. Contracting out involves an employer contracting with another entity and having the contractor's employees perform the work. Skimming involves other, nonbargaining unit employees of the employer performing bargaining unit work.

The Commission clarified the standard for these types of cases in *Central Washington University*, Decision 12305-A (PSRA, 2016). As the Commission explained, the threshold question is whether the work that was contracted out is bargaining unit work. If the work is not bargaining unit work, then the analysis would stop and the employer would not have had an obligation to bargain its decision to contract out work. If the work was bargaining unit work, then the *City of Richland* balancing test should be applied to determine whether the decision to contract out bargaining unit work is a mandatory subject of bargaining.

There must be an actual unilateral change for a cause of action for skimming to exist. *State-Office of the Governor*, Decision 10948-A (PSRA, 2011). Skimming does not occur until work has actually been assigned to employees outside of the bargaining unit. Therefore, in a skimming case the statute of limitations does not begin to run until bargaining unit work is assigned to nonbargaining unit employees. *Lake Washington School District*, Decision 11913-A (PECB, 2014).

A complainant's prophecy of future events at the preliminary ruling stage of proceedings is insufficient to state a cause of action for a unilateral change. *Kitsap County*, Decision 11610-A (PECB, 2013). In order for a cause of action for a unilateral change to exist, there must have been a change. *Kitsap County*, Decision 11610-A.

Application of Standards

The amended complaint lacks facts alleging bargaining unit work has been assigned to employees outside the bargaining unit. The amended complaint alleges that Leslie performed the work of both the Athletic Trainer and Assistant Athletic Trainer. The employer allegedly directed Leslie to only cover the volume of work of the Head Athletic Trainer. The complaint does not allege that any of the Assistant Athletic Trainer work was assigned to any employees outside the bargaining unit. Because there is no allegation that the work was assigned outside the bargaining unit, the skimming allegation must be dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, the circumvention related to adjustments of Leslie's hours, refusal to provide information, unilateral change, and breach of good faith bargaining obligation allegations of the amended complaint state a cause of action, summarized as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by
>
> (a) Employer officials circumventing the union through direct dealing with employees represented by the union, by meeting with Julie Leslie to negotiate adjustments to Leslie's hours, without notifying and bargaining with the union.
>
> (b) Refusing to provide relevant information requested by the union concerning preparation for a grievance filing and negotiations for Athletic Trainer's wages.
>
> (c) Unilaterally changing the Athletic Trainer's wages, without providing the union an opportunity to bargain.
>
> (d) Breaching its good faith bargaining obligations in refusing to meet and consider union proposals related to the Athletic Trainer's wages.

These allegations will be the subject of further proceedings under chapter 391-45 WAC.

2. The respondent shall file and serve an answer to the allegations listed in paragraph 1 of this order within 21 days following the date of this order. The answer shall

   (a) specifically admit, deny, or explain each fact alleged in the amended complaint, except if the respondent states it is without knowledge of the fact, that statement will operate as a denial; and

   (b) assert any affirmative defenses that are claimed to exist in the matter.

   The answer shall be filed and served in accordance with WAC 391-08-120. Except for good cause shown, if the respondent fails to file a timely answer or to file an answer that specifically denies or explains facts alleged in the amended complaint, the respondent will be deemed to have admitted and waived its right to a hearing on those facts. WAC 391-45-210.

3. The allegations of the amended complaint concerning discrimination, domination, circumvention related to changing the Athletic Trainer's pay, and skimming allegations are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 21st day of June, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Unfair Labor Practice Administrator

Paragraph 3 of this order will be the final order of the agency on any defective allegations, 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 06/21/2023

DECISION 13679 - 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 136244-U-23

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