STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| HUBERT GILMORE,<br><br>Complainant,<br><br>vs.<br><br>BENTON COUNTY,<br><br>Respondent. | CASE 136002-U-22<br><br>DECISION 13709 - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

*Hubert Gilmore*, the complainant.

*Stephen J. Hallstrom*, Senior Deputy Prosecuting Attorney, Benton County Prosecuting Attorney Eric Eisinger, for Benton County.

Hubert Gilmore claims that Benton County (employer) discriminated against him for filing an unfair labor practice complaint by denying a grievance. Gilmore filed the unfair labor practice complaint *after* the grievance was denied. Because Gilmore has not established a prima facie case of discrimination, the case is dismissed.

## ISSUE

As stated in the preliminary ruling of December 19, 2022, the issue in this case is as follows:

> Employer discrimination in violation of RCW 41.56.140(3) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by denying a grievance for filing an unfair labor practice charge.

## BACKGROUND

Hubert Gilmore works as a corrections officer at Benton County and is represented by Teamsters Local 839 (union).

The union and the employer are parties to a collective bargaining agreement which is effective from January 1, 2022, through December 31, 2024. On June 22, 2022, the union and the employer signed a Memorandum of Understanding (MOU) modifying the requirements of the collective bargaining agreement. The MOU changed the duration of shifts worked by corrections officers to 12-hour shifts. The MOU also provided that some officers would have prescheduled overtime shifts. The purpose of prescheduling overtime shifts was to reduce the need for unplanned mandatory overtime.

Gilmore did not want to schedule his overtime shifts, so Gilmore's supervisor selected his overtime days for him.

On July 15, 2022, Gilmore filed a grievance asserting that the MOU had not been properly adopted and that the collective bargaining agreement provisions about mandatory overtime were not being followed. On July 29, 2022, Chief of Corrections Robert Guerrero denied the grievance at Step 1. Guerrero asserted that Gilmore's grievance was untimely and did not contain a grievable matter. Guerrero also asserted that Gilmore did not have standing to enforce the collective bargaining agreement between the employer and the union. Guerrero also explained that the employer had not violated the collective bargaining agreement.

Gilmore advanced his grievance to Step 2 on August 3, 2022. Gilmore reiterated his arguments that the collective bargaining agreement had been violated and disputed points made by Guerrero in the Step 1 grievance denial. Guerrero denied the grievance at Step 2 on August 18, 2022. Again, Guerrero explained that the collective bargaining agreement had not been violated.

On August 18, 2022, Gilmore sent Guerrero a letter stating he was not satisfied with Guerrero's Step 2 letter and that he would "be taking this to the next level." On August 19, 2022, Gilmore sent Guerrero an email stating, "I am not satisfied with your response. I do not agree that the denial is valid. I believe Benton County Corrections violated the [collective bargaining agreement] . . . ." On September 9, 2022, Guerrero responded to Gilmore's August 19 email by letter, reiterating that no contract violations had occurred. There is no evidence that Gilmore advanced the grievance any further in the grievance procedure.

On September 23, 2022, Gilmore filed an unfair labor practice complaint against the union, docketed as case 135929-U-22.[1] Case 135929-U-22 is a separate case from this matter and, at the time of this decision's publication, has not yet proceeded to a hearing.

Procedural History

On October 31, 2022, Gilmore filed the original unfair labor practice complaint in this matter. On November 15, 2022, an unfair labor practice administrator issued a deficiency notice informing Gilmore that his allegation of racial discrimination did not state a cause of action within the Commission's jurisdiction. On November 22, 2022, Gilmore filed an amended complaint. On December 19, 2022, the unfair labor practice administrator issued a preliminary ruling finding that Gilmore had stated a claim for further processing. The employer filed an answer on January 9, 2023. On February 8, 2023, I denied the employer's request for deferral because the case did not satisfy the conditions for deferral under WAC 391-45-110(3)(a). On June 7, 2023, a hearing was conducted in Kennewick, Washington. The parties filed post-hearing briefs on August 14, 2023, to complete the record.

ANALYSIS

Applicable Legal Standard

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Tacoma School District (Tacoma Education Association),* Decision 5466-D (EDUC, 1997); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348 (2014) (citing *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46

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[1] In his amended complaint in this case, dated November 2022, Gilmore asserted, "I submitted an Unfair Labor Practice Complaint against Teamsters Local 839 with PERC, see Case #135929-U-22, filed September 22, 2022, a protected activity." At the hearing, Gilmore testified, "I filed a PERC ULP complaint in January of 2023 . . . ." Gilmore did not provide any further information, but presumably he is referring to the amended complaint he filed in case 135929-U-22 on January 6, 2023.

(1991)). To prove discrimination, the complainant must first establish a prima facie case by showing the following:

1. The employee participated in protected activity 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.

*City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 348. If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *Id.*; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate nondiscriminatory reason for the adverse employment action. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. The respondent bears the burden of production, not of persuasion. *Id.* If the respondent meets its burden of production, the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

Application of Standard

According to the preliminary ruling, the issue is whether the employer discriminated against Gilmore for filing an unfair labor practice charge by denying a grievance.

In his brief, Gilmore argued that the employer had violated the Washington State Law Against Discrimination. This claim is not within the jurisdiction of the Public Employment Relations Commission. As the Commission recently stated in *Ben Franklin Transit,* Decision 13649-A (PECB, 2023),

> [t]he Commission does not have the authority to remedy allegations of employment discrimination based on race, national origin, or other protected characteristics. That authority rests with a different state agency, the Washington Human Rights Commission. Thus, where a party alleges this type of discrimination, the charge is properly dismissed by the Public Employment Relations Commission.

(citations omitted).

Gilmore has not established a prima facie case of discrimination. Filing an unfair labor practice complaint is a protected activity, satisfying the first element of the prima facie case. However, denying a grievance is a procedural act in a dispute resolution procedure that does not itself substantively deprive an employee of some ascertainable right, benefit, or status. Therefore, Gilmore has not satisfied the second element of the prima facie case.

Most significantly, Gilmore has not satisfied the third element of the prima facie case—that a causal connection exists between the employee's exercise of a protected activity and the employer's action. "An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a right protected by the collective bargaining statute . . . ." *Seattle School District*, Decision 5237-B (EDUC, 1996). Putting aside the perplexing nature of Gilmore's allegation that the *employer* retaliated against Gilmore for filing an unfair labor practice complaint against the *union*, the alleged adverse action of denying the grievance (July and August 2022) occurred *before* Gilmore filed the unfair labor practice complaint (September 2022). There is no evidence that the employer retaliated against Gilmore for an unfair labor practice charge that had not yet been filed. Thus, a causal connection does not exist.

Even if Gilmore had established a prima facie case, the employer provided a legitimate nondiscriminatory reason for denying the grievance: Guerrero believed that the employer had not violated the collective bargaining agreement. Gilmore has not carried his burden of proving that this was actually a pretext and that Guerrero's true motivation in denying the grievance was to retaliate against Gilmore for filing an unfair labor practice complaint against the union.

## CONCLUSION

For the foregoing reasons, the complaint is dismissed.

## FINDINGS OF FACT

1. Benton County (employer) is a public employer within the meaning of RCW 41.56.030(13).

2. Hubert Gilmore is a public employee within the meaning of RCW 41.56.030(12) and works for the employer as a corrections officer.

3. Teamsters Local 839 (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and is the exclusive bargaining representative of a bargaining unit of the employer's corrections officers, including the position held by Gilmore.

4. The union and the employer are parties to a collective bargaining agreement which is effective from January 1, 2022, through December 31, 2024.

5. Robert Guerrero is the employer's Chief of Corrections.

6. On June 22, 2022, the union and the employer signed a Memorandum of Understanding (MOU) modifying the requirements of the collective bargaining agreement.

7. On July 15, 2022, Gilmore filed a grievance asserting that the MOU had not been properly adopted and that the collective bargaining agreement provisions about mandatory overtime were not being followed.

8. On July 29, 2022, Guerrero denied the grievance at Step 1. Guerrero asserted that Gilmore's grievance was untimely and did not contain a grievable matter. Guerrero also asserted that Gilmore did not have standing to enforce the collective bargaining agreement between the employer and the union. Guerrero also explained that the employer had not violated the collective bargaining agreement.

9. Gilmore advanced his grievance to Step 2 on August 3, 2022. Gilmore reiterated his arguments that the collective bargaining agreement had been violated and disputed points made by Guerrero in the Step 1 grievance denial.

10. Guerrero denied the grievance at Step 2 on August 18, 2022. Again, Guerrero explained that the collective bargaining agreement had not been violated.

11. On August 18, 2022, Gilmore sent Guerrero a letter stating he was not satisfied with Guerrero's Step 2 letter and that he would "be taking this to the next level." On August 19, 2022, Gilmore sent Guerrero an email stating, "I am not satisfied with your response. I do

not agree that the denial is valid. I believe Benton County Corrections violated the [collective bargaining agreement] . . . ."

12. On September 9, 2022, Guerrero responded to Gilmore's August 19 email by letter, reiterating that no contract violations had occurred.

13. On September 23, 2022, Gilmore filed an unfair labor practice complaint against the union, docketed as case 135929-U-22.

## 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. As described in findings of fact 6 through 13, the employer did not discriminate against Gilmore in violation of RCW 41.56.140(3) by denying a grievance in retaliation for his filing of an unfair labor practice charge.

## ORDER

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

ISSUED at Olympia, Washington, this 5th day of September, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN M. LEONARD, 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 09/05/2023

DECISION 13709 – 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 136002-U-22

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