STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BENTON COUNTY, Employer.	
HUBERT GILMORE, Complainant, vs. TEAMSTERS LOCAL 839, Respondent.	CASE 135929-U-22 DECISION 13788 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hubert Gilmore, the complainant.

David W. Ballew, Attorney at Law, Reid, Ballew, Leahy & Holland, L.L.P, for Teamsters Local 839.

Hubert Gilmore claims that Teamsters Local 839 (union) breached its duty of fair representation by not supporting his grievance. Because Gilmore does not show that the union's actions were arbitrary, discriminatory, or in bad faith, the complaint is dismissed.

ISSUE

As stated in the preliminary ruling on November 21, 2022, the issue in this case is as follows:

> Union interference in violation of RCW 41.56.150(1) within six months of the date the complaint was filed, by breaching the duty of fair representation owed to Hubert Gilmore when the union failed to file and/or support employee grievances on Gilmore's behalf.

BACKGROUND

Hubert Gilmore works as a Corrections Officer for Benton County (employer) and is represented by Teamsters Local 839. Gilmore is African American.[1]

The union and the employer are parties to a collective bargaining agreement (CBA), 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 from 8 hours to 12 hours.

The MOU also provided that all employees would schedule two 12-hour shifts of overtime each month. According to a follow-up email from Chief of Corrections Robert Guerrero, these provisions were intended to "reduce the unexpected mandatory overtime and improve the working conditions for all."

The record indicates that around the time the MOU was promulgated, Gilmore was on an extended vacation.

On July 7, 2022, Police Corporal John Elfering emailed Gilmore writing, "you wanted me to pick your voluntary overtime day since you weren't familiar [with] how the process worked . . .." On July 11, 2022, Gilmore responded explaining that he would not be "volunteering" for any overtime, so if he was assigned overtime, he felt it should be treated as "mandatory" overtime under the CBA. Later that day, Sergeant Lacey Ammons-Slater emailed Gilmore and stated the following:

> I have attached the MOU that 839 signed on 6/22/22, to hopefully help you understand the situation a little better. I know it's challenging being gone for so long on vacation and coming back to change, so I hope this gives you some clarity.

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[1] In his first amended complaint, Gilmore also asserted that he was "no longer a member of the union." However, at the hearing, Gilmore did not actually provide any testimony, documentation, or other evidence regarding his union membership or lack thereof.

> Regarding your overtime date, if you have a better day . . . in mind for your overtime, I would like to discuss options with you . . ..
>
> Please note, we are trying to be fair and accommodate the fact that you were on vacation for nearly half the month and gone during all these major changes . . . With that all being said, we are only requesting you pick one (1) date for your overtime shift this month (July), not two. Moving forward to August and as it states [in the] MOU, you will need to pick two shifts of overtime . . ..

On July 15, 2022, Gilmore filed a grievance with Guerrero. Gilmore asserted that the MOU was not "circulated and posted prominently," in violation of Article 10.5 of the CBA, which provides the following:

> When existing work rules or policy procedures are changed or new rules or procedures established, employees whose work assignment is affected shall be notified by circulating memorandum and the new rule or procedure shall be posted prominently on appropriate bulletin boards prior to the effective date.

Gilmore also asserted that the MOU provision that all officers would preschedule two overtime shifts per month was inconsistent with the CBA provisions about voluntary and mandatory overtime.

There is no evidence that Gilmore consulted with or sought assistance from the union when he filed the grievance. Gilmore did not copy the union when he sent his grievance to Guerrero. Guerrero forwarded the grievance to Teamsters Local 839 Business Agent Jesus Alvarez, Jr.

Shortly after Gilmore submitted his Step 1 grievance on July 15, Guerrero sent an email on the same day to the corrections department staff as well as to Alvarez in which he stated, "I heard that there were some things about the recent MOU that were not being followed the way that I understood the agreement." Guererro asserted that he met with the union, and they had agreed to "follow the MOU as written." The language and tenor of Guerrero's email indicates that the recipients were already aware of the MOU, as he repeatedly references "the MOU" without the kind of background explanation one would expect if he was introducing the MOU to the workforce for the first time.

On July 29, 2022, Guerrero denied the grievance at Step 1. He asserted that Gilmore's grievance was "untimely" and did not contain a grievable matter and that Gilmore did not have standing to

enforce the terms and conditions of the collective bargaining agreement between the employer and the union. Guerrero also asserted that the employer had not violated the collective bargaining agreement. He explained that the MOU did not "constitute a work rule or policy procedure, within the contemplation of the CBA" and that posting of the MOU was therefore not required by Article 10.5 of the CBA. Guererro copied Alvarez in his Step 1 response.

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. Gilmore copied Alvarez on his Step 2 grievance, but there is no evidence that he sought to consult or receive assistance from the union in his grievance at this time.

Guerrero denied the grievance at Step 2 on August 18, 2022. The same day, Gilmore sent Guerrero a letter stating that he was not satisfied with Guerrero's Step 2 response and that he would "be taking this to the next level." On August 19, 2022, Gilmore sent Guerrero an email reiterating, "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] . . .." Gilmore also sent the email to Alvarez.

On August 24, 2022, Alvarez responded to Gilmore's August 19, 2022, email and stated the following:

> While you do not address advancing the grievance any further, I want to ensure that there is clarity on any expectations you may have regarding the status of the grievance.
>
> Under Article 21 of the collective bargaining agreement an employee may file and process a grievance up through Step 2 of the grievance procedure. At Step 3 grievances may only be moved to arbitration by either the Union or Employer. While you have not requested that the Union pursue the grievance to arbitration, I have reviewed the matter.
>
> The union has concluded that the County has not violated the collective bargaining agreement as alleged in your grievance. The County's actions were consistent with the collective bargaining agreement and Memorandum of Understanding executed between the bargaining parties in June 2022. As such, while you have not requested that the grievance be advanced to Step 3, the Union will not advance the grievance to arbitration.

Please let me know if you have any questions concerning the status of the grievance.

On August 26, 2022, Gilmore responded to Alvarez saying, "Chief Guerrero should have received a certified letter which should satisfy the requirement for advancing this grievance. This MOU was not and still is not posted." This appears to be Gilmore's sole communication addressed directly to the union relating to this grievance.

On September 10, 2022, Gilmore sent an email to Alvarez stating, "Today. . . is the first time I have seen this MOU posted anywhere in the facility."

Gilmore filed an unfair labor practice complaint in this matter with the Public Employment Relations Commission on September 23, 2022. On October 11, 2022, Unfair Labor Practice Administrator Dario de la Rosa issued a deficiency notice finding that Gilmore's complaint failed to state a cause of action. On October 28, 2022, Gilmore filed an amended complaint asserting that the union breached its duty of fair representation "for two discriminatory reasons: I am an African-American officer [and] I am no longer a member of the union." On November 21, 2022, Unfair Labor Practice Administrator de la Rosa issued a preliminary ruling finding that Gilmore's amended complaint stated a claim for breach of duty of fair representation. On December 12, 2022, the union filed a motion for summary judgment. On December 15, Daniel Comeau was assigned as the Hearing Examiner. On January 5, 2023, Hearing Examiner Comeau denied the union's motion for summary judgment. The case was reassigned to me on January 18, 2023. The union filed an answer on January 19, 2023. A hearing was conducted in Pasco, Washington on November 16 and 17, 2023. The parties filed briefs to complete the record on January 5, 2024.

ANALYSIS

Applicable Legal Standard

Duty of Fair Representation

The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a collective bargaining agreement. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002) (citing *City of Seattle (IFPTE, Local 17)*, Decision 3199-B (PECB, 1991)). The Commission is

vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty of fair representation:

1. The union must treat all factions and segments of its membership without hostility or discrimination.

2. The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.

3. The union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation.

A union breaches its duty of fair representation when its conduct is more than merely negligent; it must be arbitrary, discriminatory, or in bad faith; or be based on considerations that are irrelevant, invidious, or unfair. *Washington State Liquor and Cannabis Board (Washington Federation of State Employees)*, Decision 13333 (PSRA, 2021), *aff'd,* Decision 13333-A (PSRA, 2021) (citing *City of Redmond (Redmond Employees Association)*, Decision 886 (PECB, 1980); *Vaca v. Sipes*, 386 U.S. 171 (1967)). The Commission may assert jurisdiction where an employee shows that a union's breach of its duty of fair representation is "invidious discrimination," including that based on gender and race. *State – Washington State Patrol (Washington State Patrol Troopers Association)*, Decision 12967-A (PECB, 2019) (citing *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012)); *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

The employee claiming a breach of the duty of fair representation has the burden of proof and must demonstrate that the union's actions or inactions were arbitrary, discriminatory, or in bad faith. *City of Renton (WSCCCE)*, Decision 1825 (PECB, 1984).

A union member's dissatisfaction with the level and skill of representation does not form a basis for a cause of action unless the member can prove that the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A.

Application of Standard

The record does not show that Gilmore ever sought the assistance of the union in pursuing his grievance. Nonetheless, Alvarez wrote to Gilmore and explained that the union would not bring the grievance to arbitration because the union found that there was no violation of the CBA or the MOU. Alvarez' explanation was reasonable. With respect to Gilmore's allegation that the MOU had not been "posted," Guerrero's position that the MOU was not an employer promulgated work rule or policy procedure within the meaning of Article 10.5, and therefore that its posting was not required, is reasonable. It also seems, particularly from Guererro's July 15, 2022, "Clarification on MOU" email, that the MOU was circulated to the workforce in some manner after it was adopted, but Gilmore was on vacation at the time.

With respect to Gilmore's allegation that the agreement regarding prescheduling of overtime violated the CBA provisions about voluntary and mandatory overtime, I find it was also reasonable for Alvarez to conclude that no such violation had occurred. It would be nonsensical for the union to pursue a grievance alleging that, by agreeing to the MOU with the union, the employer had thereby breached the collective bargaining agreement with the union.

I do not find that the union acted arbitrarily or in bad faith with respect to Gilmore's grievance. There is also no evidence that the union based its decision to not arbitrate Gilmore's grievance on any impermissible or discriminatory factor. Gilmore introduced pre-complaint evidence about unrelated events that he argues shows discriminatory tendencies by the union. For example, Gilmore offered into evidence an investigatory report which concluded that a racial harassment complaint he filed in 2019 was unsubstantiated. Gilmore also introduced evidence that, in the past, the union, and Alvarez specifically, had assisted him, represented him, and filed grievances on his behalf. For example, Gilmore's evidence shows that in 2019, Gilmore and Alvarez interacted extensively about a possible grievance regarding Gilmore's performance evaluation. Alvarez appeared to be courteous, professional, and fully willing to help Gilmore. There is no evidence

that Gilmore's race, union membership, union activity, or any other protected characteristic have ever been a factor in the union's dealings with him.

CONCLUSION

Gilmore does not carry his burden of proof that the union's actions were arbitrary, discriminatory, or in bad faith. As such, he does not establish that the union breached its duty of fair representation. 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. Jesus Alvarez, Jr. is the union's Business Agent.

7. On June 22, 2022, the union and the employer signed a memorandum of understanding (MOU) modifying the requirements of the collective bargaining agreement.

8. 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.

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

10. 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.

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

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

13. On August 24, 2022, Alvarez sent Gilmore an email explaining that the union would not bring his grievance to arbitration because the County had not violated the collective bargaining agreement.

14. Gilmore did not seek the assistance of the union in pursuing his grievance, nor did he request that the union take his grievance to arbitration.

15. The union did not act arbitrarily, discriminatorily, or in bad faith with respect to Gilmore's grievance.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.

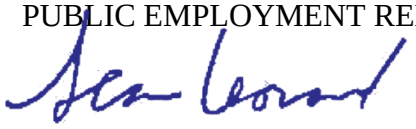
2. As described in findings of fact 7 through 15, the union did not interfere with employee rights in violation of RCW 41.56.150(1) by breaching the duty of fair representation owed to Hubert Gilmore through failing to file and/or support employee grievances on Gilmore's behalf.

ORDER

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

ISSUED at Olympia, Washington, this 12th day of February, 2024.

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 02/12/2024

DECISION 13788 PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: REBECCA VANCE

CASE 135929-U-22

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