STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF SEATTLE, Employer.	
KIRK CALKINS, Complainant, vs. PROTEC17, Respondent.	CASE 139008-U-24 DECISION 13914 - PECB ORDER OF DISMISSAL

Kirk Calkins, the complainant.

Mark Watson, Union Representative, for PROTEC17.

On May 17, 2024, Kirk Calkins (complainant) filed an unfair labor practice complaint against PROTEC17 (union). The complaint was reviewed under WAC 391-45-110.[1] A deficiency notice issued on June 4, 2024, notified Calkins that a cause of action could not be found at that time. Calkins was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case. On June 14, 2024, Calkins filed an 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.

ISSUE

The amended complaint alleges the following:

> Union interference in violation of RCW 41.56.150(1) within six months of the date the complaint was filed, by breaching its duty of fair representation owed to Kirk Calkins by failing to advance a grievance concerning his termination to arbitration.

The amended complaint is dismissed for failure to state a cause of action.

BACKGROUND

Kirk Calkins worked for the City of Seattle Department of Transportation. His position was represented by the union for purposes of collective bargaining.

Calkins's original complaint alleged that in 2021 and 2022, the employer purposefully kept from Calkins and employees who were similarly situated as Calkins a Lead Overtime Process. Calkins allegedly complained to the employer and union. According to the original complaint, Calkins filed an unfair labor practice complaint against the City of Seattle (employer) in April 2022 which alleged the employer and union were not transparent regarding a Lead Overtime Process.

Calkins's original complaint claimed that the employer and union retaliated against him for making complaints. The original complaint asserted that the employer subsequently initiated an investigation into his conduct and placed him on administrative leave. Calkins's employment was apparently terminated on an unidentified date.

Calkins asserted his union representatives did not adequately represent him during the employer's investigation. Although the original complaint describes certain events that Calkins believes constitutes a violation of the collective bargaining laws, the facts described in the complaint

occurred in 2022. The union ultimately declined to submit Calkins's grievance to arbitration and the complaint lacks facts indicating how the union's decision constitutes an unfair labor practice.[2]

Calkins' amended complaint reiterated many of the same facts outlined above.[3] The complaint also alleges that in November 2023, the union and employer conducted a 3rd stage grievance hearing concerning the decision to terminate Calkins' employment. Calkins claims that the City of Seattle Labor Relations Director Shaun Van Eyk purposely delayed processing the grievance and that Van Eyk should not have been hearing the matter due to his previous role with the union. The union did nothing to protest or rebuttal this process.

The amended complaint also asserts that on May 9, 2024, Calkins met with the union's Executive Board to request that his grievance be moved to the 4th stage in the process. On May 10, 2024, the union informed Calkins that it was not moving his grievance to the 4th stage. The union formed Calkins that this decision was based upon Calkins's employment history and the union allegedly stated that it did not believe it would be successful in the 4th stage.

ANALYSIS

Statute of Limitations

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 have known 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

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[2] Calkins included with his complaint two letters from the union informing Calkins that his grievance would not be forwarded to arbitration. Those documents were not considered when reviewing Calkins' complaint.

[3] Calkins filed additional documents both before and after the amended complaint that he asserts support his claim.

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)).

Duty of Fair Representation

Applicable Legal Standard

It is an unfair labor practice for a union to interfere with, restrain, or coerce public employees in the exercise of their rights. RCW 41.56.150(1). The duty of fair representation originated with decisions of the Supreme Court of the United States holding that an exclusive bargaining representative has the duty to fairly represent all of those for whom it acts, without discrimination. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). 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 statute. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002) (citing *City of Seattle (International Federation of Professional and Technical Engineers, Local 17)*, Decision 3199-B (PECB, 1991)).

The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute and does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. *Bremerton School District*, Decision 5722-A (PECB, 1997). While the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances, the Commission does process other types of "breach of duty of fair representation" complaints against unions. *City of Port Townsend (Teamsters Local 589)*, Decision 6433-B (PECB, 2000). 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. *City of Redmond (Redmond Employees Association)*, Decision 886 (PECB, 1980); *Vaca v. Sipes*, 386 U.S. 171 (1967). The employee claiming a breach of the duty of fair representation has the burden of proof. *City of Renton (Washington State Council of County and City Employees)*, Decision 1825 (PECB, 1984).

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.

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*, 100 Wn.2d at 375. 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. A union member's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

A union may also, with reason, decline to pursue a grievance at any stage of the grievance procedure. *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). 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 8261 (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 lack merit, the union has no obligation to file a grievance.

The Commission will assert jurisdiction in duty of fair representation cases only where a union is accused of aligning itself in interest against employees it represents based on invidious discrimination. *Seattle School District (Seattle Education Association)*, Decision 4917-A (EDUC, 1995).

Application of Standards

Calkins filed his complaint on May 17, 2024. Accordingly, only those facts that occurred after November 17, 2023, are timely.

Calkins's complaint against the union arises out of the union's failure to submit a grievance concerning his termination. Calkins has not alleged timely facts demonstrating that the union breached its duty of fair representation by failing to take the grievance concerning his termination to arbitration.

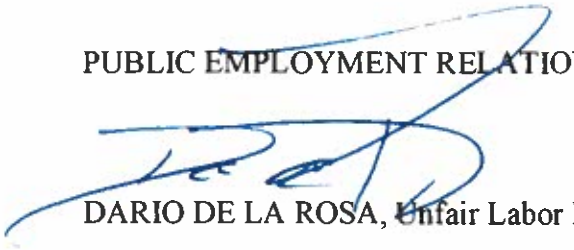
The complaint has not alleged that on or after November 17, 2023, the union failed to process the grievance based upon invidious discrimination, such as race, gender, or sexual orientation. Absent facts demonstrating the union declined to process Calkins's grievance due to invidious discrimination, the complaint cannot be processed.

ORDER

The amended complaint charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 18th day of July, 2024.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DARIO DE LA ROSA, 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 07/18/2024

DECISION 13914 - 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 139008-U-24

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