City of Kirkland, Decision 7179 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRKLAND POLICE OFFICERS GUILD,	)	
	)	
Complainant,	)	CASE 14685-U-99-3684
	)	
vs.	)	DECISION 7179 - PECB
	)	
CITY OF KIRKLAND,	)	ORDER OF PARTIAL
	)	DISMISSAL AND
Respondent.	)	PRELIMINARY RULING
	)	
	)	

On April 26, 2000, the Kirkland Police Officers Guild (union) filed a third amended complaint in the above-captioned matter,[1] seeking to modify a complaint which had already been processed under WAC 391-45-110.[2] The hearing scheduled in the matter was postponed. The new complaint adds three paragraphs of allegations, bringing the total numbered paragraphs in the complaint to 53. Additionally, counsel who entered an appearance on behalf of the City of Kirkland (employer) on April 27, 2000, sought clarification of the

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[1] This proceeding was commenced by a complaint charging unfair labor practices filed with the Commission on July 2, 1999. The union filed an amended complaint on December 23, 1999, and it was the subject of a deficiency notice issued on January 24, 2000. The union filed a second amended complaint on February 7, 2000, together with an extensive explanatory letter.

[2] At this stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable. The question at hand is whether the complaint states a claim for relief available through unfair labor practice proceedings before the Commission. In this case, a preliminary ruling letter issued on February 24, 2000, framed two causes of action, but did not expressly dismiss other allegations.

scope and nature of the proceedings in a letter filed on May 1, 2000. The case has thus been returned to the Executive Director for further processing under WAC 391-45-110. Each of the numbered paragraphs in the statement of facts, as amended, is examined here.

Paragraphs 1, 2, 3 and 4 merely set forth general materials about the parties and their relationships, and do not set forth any separate causes of action. Evidence concerning these matters would only be admissible as background information.

Paragraphs 5, 6 and 7 describe a grievance filed by the union concerning entitlement of employees performing Community Resource Officer (CRO) assignments to overtime compensation for certain work they allegedly performed. These events took place in 1997, and are clearly untimely under the six-month statute of limitations set forth RCW 41.56.160(1). Evidence concerning these matters would only be admissible as background information (e.g., concerning the exercise of protected rights and/or employer animus), and could not be a basis for any remedial order in this case.

Paragraph 8 describes a "hostile work environment" complaint filed by bargaining unit member Sean Riley against Police Chief Pleas Green at an unspecified time. The deficiency notice pointed out that the allegation appeared to be untimely, and the union has done nothing to rehabilitate the allegation. Although the incident may reflect the police chief's attitude concerning grievance filing, the allegation cannot be processed or provide basis for a remedy in this case.

Paragraph 9 describes a foregone opportunity, when the union did not file an unfair labor practice complaint concerning the removal of bargaining unit employee Michael DeAguiar from CRO responsibili-

ties in 1998. Those events occurred prior to the earliest date for which this complaint can be considered timely, and do not state a cause of action for relief available in this case.

Paragraphs 10, 11 and 12, taken together, allege that Officer Riley was an active union leader who tried to ensure that the terms of the collective bargaining agreement were enforced, that the employer removed Riley from his CRO position effective January 3, 1999, that the union initially withheld the filing of an unfair labor practice complaint, and that the union subsequently received information that the employer's action was motivated by anti-union animus. While paragraph 11 falls short of alleging a concealment sufficient to overcome the statute of limitations as to paragraph 9, **these paragraphs state a cause of action for "discrimination" as to the removal of Riley from the CRO assignment.**

Paragraph 13 details changes made in the parties' 1998 - 2000 collective bargaining agreement, particularly in the area of overtime payment for "CRO" work. It is further alleged that CRO officers were subtly pressured to use "flex" time, rather than submit overtime claims. This paragraph may set forth the basis for a grievance, but the Public Employment Relations Commission does not determine or remedy contract violations through the unfair labor practice provisions of the statute.

Paragraphs 14 and 15 detail Officer Riley's efforts to determine whether another bargaining unit member assigned to CRO duties had been pressured into using "flex" time, rather than putting in for overtime pay, describe Riley's concerns about a detrimental effect on the bargaining unit, describe Riley's report of his findings to the union's executive board, and describe a grievance that was filed on February 1, 1999. These paragraphs do not allege any

employer misconduct actionable in unfair labor practice proceedings, but may be admissible as background information.

Paragraph 16 alleges that, on a date unspecified other than "the day after the employer received the grievance", the employer met with bargaining unit employees assigned to the CRO unit and required them to sign documents stating that the employer had not committed contract violations by its administration of CRO work. Giving the union the benefit of the doubt that the "grievance" being referred to in this instance is the one filed on or after February 1, 1999 (as described in paragraph 15), **this paragraph states a cause of action for "interference" and "circumvention".**

Paragraph 17 alleges that Chief Green responded to the grievance on February 9, 1999, denying any violation of the contract. This paragraph further alleges that the employee whose activities Riley had monitored filed a complaint claiming that Riley had created a "hostile work environment". While this paragraph alleges the availability of an inference that Chief Green solicited the complaint against Riley, that is conclusory in the absence of any substantive facts supporting the proposed inference. This allegation is thus insufficient under WAC 391-45-050(2), and thus does not state a cause of action.

Paragraphs 18 and 19 concern interactions between the employee monitored by Riley and the union's Executive Board. Even though the employee is alleged to have sent copies of documents to the employer, these allegations do not allege any misconduct attributable to the employer, and thus do not state a cause of action.

Paragraphs 20 and 21, together with paragraphs 23 and 25 concern an internal investigation begun by the employer against Riley on March

2, 1999, citing "harassment" and "promoting a hostile work environment". It is alleged that internal investigations had historically been reserved for very serious matters, that the employer officials knew from the outset that the complaint concerned Riley's efforts on behalf of the union rather than any sexual overtures, gender discrimination, harassment or work rule violation, that the employer refused to terminate the internal investigation after being notified that Riley's efforts were on behalf of the union, and that the employer officials confirmed that the complaint had nothing to do with sexual harassment. **These allegations state a cause of action for "discrimination".**

Paragraph 22 alleges that the union's attorney sent a letter to the employer on March 4, 1999, asserting that the internal affairs investigation violated Officer Riley's rights under the collective bargaining act, because the investigation really arose from Riley's efforts to monitor overtime payment and practices. This background to subsequent allegations does not allege any misconduct attributable to the employer, and so does not state a cause of action.

Paragraph 24 alleges that, during the internal investigation, the employer ordered bargaining unit employees to divulge information about conversations with and between union officials. **This allegation states a cause of action for "interference".**

Paragraph 26 states that the investigation did not comply with the employer's own guidelines for sexual harassment investigations. The Commission does not determine or remedy violations of employer policies and procedures, so this allegation does not state a cause of action.

Paragraphs 27, 28 and 29 concern a warning letter placed in Riley's personnel file following "inconclusive" findings in the internal investigation process. While the merits of an "inconclusive" versus "unfounded" debate would be a matter for resolution through a grievance or under the employer's internal procedures, **a narrow cause of action for "discrimination" can be decided in this unfair labor practice proceeding.**

Paragraph 30 alleges that the employer's actions against Riley could create a "chilling effect" on other employees who believed that terms of the collective bargaining agreement were being violated. **This allegation states a cause of action for "interference".**

Paragraphs 31 and 32 concern the union's investigation of grievances, allege that the employer directed employees to take up such issues with their supervisors, and that Riley was given a letter of reprimand characterizing his discussion of grievance issues with other employees as "insubordination". **These allegations state a cause of action for "interference", and for "discrimination" as to the letter of reprimand.**

Paragraph 33 alleges that Riley was nominated to be union president in spring 1999, and that his representation style could be characterized as "aggressive". This background to subsequent allegations does not allege any misconduct attributable to the employer, and so does not state a cause of action.

Paragraph 34 alleges that Chief Green recruited another union member to run for office against Riley. Even though the person allegedly recruited declined to run against Riley, **this allegation states a cause of action for "interference" and "domination".**

Paragraphs 35, 36 and 37 repeat and detail the previous allegation that the union learned in April or May that Riley and DeAguiar were transferred from their CRO duties as a form of retaliation for filing grievances. As with paragraphs 10, 11 and 12, discussed above, these paragraphs fall short of alleging any employer concealment which would have prevented the union from discovering the same facts sooner, by exercise of due diligence. These paragraphs do not state a cause of action.

Paragraph 38 alleges that it was uncommon to have grievances filed with the department, and that there was no real history of how grievances would be handled by department officials. This background to subsequent allegations does not allege any misconduct attributable to the employer, and so does not state a cause of action.

Paragraphs 39, 40 and 41 concern a posting for a school resource officer position in May of 1999, a revised posting which would have excluded Riley and DeAguiar from consideration for that position, a protest by the union, and a second revision which allowed Riley and DeAguiar to take the test for the position. The deficiency notice questioned whether any further remedy was available as to this sequence of events, since it appeared the matter was resolved through the grievance procedure.[3] The union has not offered any explanation as to why these allegations should be pursued, and they therefore do not state a cause of action.

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[3] In Anacortes School District, Decision 2464-A (EDUC, 1986), the Commission sharply criticized a union which took up the time and resources of the agency to re-litigate a matter that was already settled through the grievance procedure of the parties' contract.

Paragraphs 42, 43, 44, 45, 46 and 47 allege that the test for the new position was given, that the practice had been that the top-scoring applicant got the position, that Riley had the highest score and DeAguiar had the second-highest score on the exam, that Chief Green asked the scoring board to change the method of scoring to a "pass/fail" system never used before, that Riley and DeAguiar both got passing grades under the new grading system, that the new grading system is a significant change in working conditions, and that these facts give rise to the inference that Chief Green was seeking to deny Riley the new position because of Riley's earlier difficulties with the department. Taken together, **these allegations state a cause of action for "refusal to bargain" and "interference".**

Paragraphs 48, 49 and 50 allege that Chief Green told Riley he was being "considered" for the new position even after the only other candidate (DeAguiar) withdrew from consideration, that Green altered a past practice of three-year appointments by offering this appointment for one year only, and that Green issued a new job description which altered past practice of one-hour leave increments by limiting leave requests to four hour increments. Taken together, **these allegations state a cause of action for "refusal to bargain" and "interference".**

Paragraphs 51 through 53 are new material in the third amended complaint. They allege that the employee who the chief recruited to run for union office against Riley has since resigned, that he recently came forward with new information that Chief Green had asked him to report on union internal discussions, and that the union could not reasonably have known of the chief's request until the former employee came forward with the information. **This allegation is deemed to be closely related to the previous**

allegations concerning employer surveillance of internal union conversations (Paragraph 24, above) and employer recruitment of the individual to run for union office (Paragraph 34, above), and is found to state a cause of action for "interference" notwithstanding the passage of time since the events occurred, conditioned upon the union demonstrating the alleged concealment of the employer's actions.

NOW, THEREFORE, it is

ORDERED

1. The preliminary ruling issued in this matter on February 24, 2000, is withdrawn.

2. Assuming all of the facts alleged in them to be true and provable, certain paragraphs of the third amended complaint are found to state claims for relief available through unfair labor practice proceedings before the Commission, as follows:

   a. Paragraphs 10, 11 and 12, taken together, for discrimination as to Riley only;

   b. Paragraph 16 for interference and discrimination;

   c. Paragraphs 20, 21, 23 and 25, taken together, for discrimination;

   d. Paragraph 24 for interference;

   e. Paragraphs 27, 28 and 29, taken together, for discrimination only;

f. Paragraph 30 for interference;

g. Paragraph 31 for interference;

h. Paragraph 32 for interference and for discrimination as to the letter of reprimand;

i. Paragraph 34 for employer domination of the union;

j. Paragraphs 42, 43, 44, 45, 46 and 47, taken together, for refusal to bargain by implementation of a unilateral change, and derivative interference with employee rights;

k. Paragraphs 48, 49, and 50, taken together, for refusal to bargain by implementation of a unilateral change, and derivative interference with employee rights; and

l. Paragraphs 51, 52 and 53, taken together and subject to the union sustaining the burden of proof as to concealment of the facts from it, for interference by employer surveillance of union affairs.

3. The allegations listed in paragraph 2 of this order shall be the subject of further proceedings under Chapter 391-45 WAC, as follows:

a. Having filed an answer, the employer is entitled to file an amended answer under WAC 391-45-110(2), which **requires the filing of an answer** in response to a preliminary ruling which finds a cause of action to exist. Cases are reviewed after the answer is filed, to evaluate the

propriety of a settlement conference under WAC 391-45-260, priority processing, or other special handling.

b. If the employer chooses to file an amended answer, it shall **file and serve its amended answer to the complaint within 21 days following the date of this order**. The original answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the complaint. Service shall be completed no later than the day of filing. An answer shall:

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

2. Assert any affirmative defenses that are claimed to exist in the matter.

Except for good cause shown, a failure to file an answer within the time specified, or the failure to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

c. The matter is remanded to Examiner Kenneth J. Latsch for further proceedings under Chapter 391-45 WAC. The Examiner will issue a notice of hearing. A party desiring a change of hearing dates must comply with the procedure set forth in WAC 391-08-180, including making

contact to determine the position of the other party prior to presenting the request to the Examiner.

4. Evidence concerning paragraphs 1, 2, 3, 4, 5, 6, 7, 14, 15, 22, 33, and 38 of the third amended complaint shall only be admissible to establish background to the operative allegations listed in paragraph 2 of this order, and those shall not be subject to determination or remedy in this proceeding.

5. The following paragraphs of the third amended complaint fail to state a cause of action under Chapter 391-45 WAC:

   a. Paragraph 8 as untimely and insufficiently detailed;

   b. Paragraph 9 as untimely;

   c. Paragraph 13 for lack of jurisdiction to remedy contract violations;

   d. Paragraph 17 as insufficiently detailed;

   e. Paragraphs 18 and 19, taken together, as insufficiently detailed;

   f. Paragraph 26 for lack of jurisdiction to enforce employer policies;

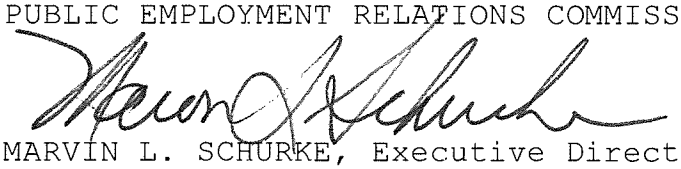
   g. Paragraphs 35, 36 and 37, taken together, as untimely;

   h. Paragraphs 39, 40 and 41, taken together, as failing to set forth any present controversy;

Those allegations are hereby DISMISSED, and shall not be a subject of hearing or further proceedings in this matter.

Issued at Olympia, Washington, on the 19th day of September, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

Paragraphs 4 and 5 of this order will be the final order of the agency on the matters covered, unless a notice of appeal is filed with the Commission under WAC 391-45-350.