

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL FRIEBEL)	
)	
Complainant,)	CASE 21287-U-07-5433
)	
vs.)	DECISION 9898 - PSRA
)	
WASHINGTON STATE - HEALTH,)	
)	
Respondent.)	ORDER OF DISMISSAL
_____)	
)	
TODD TERHAAR,)	
)	
Complainant,)	CASE 21288-U-07-5434
)	
vs.)	DECISION 9899 - PSRA
)	
WASHINGTON STATE - HEALTH)	
)	
Respondent.)	ORDER OF DISMISSAL
_____)	

On October 4, 2007, Michael Friebel filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington State Department of Health (employer) as respondent. The complaint was docketed as Case 21287-U-07-5433. On the same date, Todd Terhaar filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, also naming the employer as respondent. The case was docketed as Case 21288-U-07-5434. WAC 10-08-085 provides that "multiple adjudicative proceedings involving common issues or parties" may be consolidated. The cases involve the same issues as well as a common respondent and are consolidated for the purposes of this order.

The complaints were reviewed under WAC 391-45-110, and deficiency notices issued on October 9, 2007, indicated that it was not

possible to conclude that causes of action existed at that time. Friebel and Terhaar were given a period of 21 days in which to file and serve amended complaints, or face dismissal of the cases.

On October 25, 2007, Friebel and Terhaar filed amended complaints.¹ The Unfair Labor Practice Manager dismisses the amended complaints for failures to state causes of action.

DISCUSSION

Friebel's Complaint in Case 21287-U-07-5433

The allegations of the complaint concern the employer's breach of an agreement to pay Friebel at a promised rate of pay and failure to pay Friebel at a rate equal to other employees performing the same function.

The deficiency notice pointed out the defects of the complaint. First, Chapter 391-45 WAC governs the filing of unfair labor practice complaints and appeals. Complaints must conform to WAC 391-45-050.

WAC 391-45-050 CONTENTS OF COMPLAINT

Each complaint charging unfair labor practices shall contain, in separate numbered paragraphs:

. . . .
(2) Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

. . . .
(5) Information concerning the parties' relationships, including:

. . . .

¹ At this stage of the proceedings, all of the facts alleged in the amended complaints are assumed to be true and provable. The question at hand is whether, as a matter of law, the amended complaints state claims for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

(c) The parties' contractual relationship, indicating that:

- (i) The parties have never had a contract; or
- (ii) A copy of the current (or most recent) collective bargaining agreement is attached;

(e) A description of the bargaining unit involved, specifying inclusions and exclusions; and

(f) The number of employees in the bargaining unit.

(6) Indication of the sections of the Revised Code of Washington (RCW) alleged to have been violated.

The complaint alleges violations of RCW 41.06.020(5), RCW 41.06.155, RCW 41.56.150(1), and the 14th Amendment to the Constitution of the United States. Chapter 41.58 RCW sets forth the Commission's jurisdiction. The Commission has jurisdiction over violations asserted under Chapter 41.56 RCW, but has no direct jurisdiction over the provisions of state civil service law covered in Chapter 41.06 RCW. The Commission has no jurisdiction over disputes related to the Constitution of the United States.

The complaint identifies the employer as the Washington State Department of Health, and Friebel as an employee of that department. The Commission has jurisdiction concerning state agencies and employees under the provisions of Chapter 41.80 RCW. Unfair labor practices are set forth in RCW 41.80.110(1) and (2).

Complaint Against a Union

Friebel alleges that the employer violated RCW 41.56.150(1), which concerns allegations of union interference with employee rights. Friebel did not check the box on the complaint form indicating a claim for union interference with employee rights. However, because the complaint does reference RCW 41.56.150(1), a clear statement of facts alleging union interference would have been sufficient to state a cause of action for union interference with employee rights under RCW 41.80.110(2)(a). This is not the case. The complaint does not specifically denote whether Friebel is a

member of a bargaining unit nor provide the information required in WAC 395-45-050(5) concerning collective bargaining relationships. While individual employees may file unfair labor practice complaints, the Commission's jurisdiction applies only to employees belonging to labor organizations certified by the Commission as exclusive bargaining representatives.

The statement of facts attached to the complaint makes reference to a discussion between Friebel and a shop steward for the Washington Federation of State Employees. The statement of facts indicates that the shop steward gave his opinion on the meaning of the collective bargaining agreement relative to the wage issue, but does not allege facts sufficient to conclude that this opinion was a threat of reprisal or force or promise of benefit directed toward Friebel for union activities protected under Chapter 41.80 RCW.

Complaint Against the Employer

The statement of facts is substantially concerned with alleged employer violations, with only the single reference to the union noted above. The requested remedy is entirely concerned with the employer. Friebel did not check any boxes on the complaint form alleging employer violations, and does not reference any statutes related to employer violations. However, a clear statement of facts alleging employer violations under RCW 41.80.110(1) could have stated a cause of action. Again, this is not the case. The statement of facts alleges that the employer promised to pay Friebel at a certain rate prior to hiring him, and then reneged on the promise at the time of employment. The statement of facts further asserts that the employer is paying Friebel at a rate different than other employees performing the same work.

If the complaint alleges a private action for breach of contract, the Commission has no jurisdiction over such cases. The Commission

also has no jurisdiction over private actions concerning wage disputes. To the extent that the complaint might imply breach of a collective bargaining agreement, the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976). The Commission acts to interpret collective bargaining statutes and does not act in the role of arbitrator to interpret collective bargaining agreements. *Bremerton School District*, Decision 5722-A (PECB, 1997).

Second, even if the complaint had clearly stated a cause of action in compliance with WAC 391-45-050, a complaint against the employer would be untimely. The following statute applies to the filing of unfair labor practice complaints:

RCW 41.80.120 UNFAIR LABOR PRACTICE PROCEDURES--POWERS AND DUTIES OF COMMISSION. (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That 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.

The statement of facts alleges that the employer's actions took place on October 24, 2005, and that Friebel was aware of the actions at the time. In order to be timely, Friebel should have filed his complaint by April 24, 2006.

The purpose of the preliminary ruling process is to put parties on notice of a cause of action clearly set forth under statutes and rules adopted by the Commission, not to infer a complainant's intentions from submissions that fail to comply with the relevant statutes and rules. Friebel must file an amended complaint that remedies the defects pointed out above.

Terhaar's Complaint in Case 21288-U-07-5434

The allegations of the complaint concern the employer's breach of an agreement to pay Terhaar at a promised rate of pay and failure to pay Terhaar at a rate equal to other employees performing the same function.

The deficiency notice pointed out the defects to the complaint. First, Chapter 391-45 WAC governs the filing of unfair labor practice complaints and appeals. Complaints must conform to WAC 391-45-050.

WAC 391-45-050 CONTENTS OF COMPLAINT

Each complaint charging unfair labor practices shall contain, in separate numbered paragraphs:

. . . .
(2) Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

. . . .
(5) Information concerning the parties' relationships, including:

. . . .
(c) The parties' contractual relationship, indicating that:

(i) The parties have never had a contract; or

(ii) A copy of the current (or most recent) collective bargaining agreement is attached;

. . . .
(e) A description of the bargaining unit involved, specifying inclusions and exclusions; and

(f) The number of employees in the bargaining unit.

(6) Indication of the sections of the Revised Code of Washington (RCW) alleged to have been violated.

The complaint alleges violations of RCW 41.06.020(5), RCW 41.06.155, RCW 41.56.150(1), and the 14th Amendment to the Constitution of the United States. Chapter 41.58 RCW sets forth the Commission's jurisdiction. The Commission has jurisdiction over violations asserted under Chapter 41.56 RCW, but has no direct

jurisdiction over the provisions of state civil service law covered in Chapter 41.06 RCW. The Commission has no jurisdiction over disputes related to the Constitution of the United States.

The complaint identifies the employer as the Washington State Department of Health, and Terhaar as an employee of that department. The Commission has jurisdiction concerning state agencies and employees under the provisions of Chapter 41.80 RCW. Unfair labor practices are set forth in RCW 41.80.110(1) and (2).

Complaint Against a Union

Terhaar alleges that the employer violated RCW 41.56.150(1), which concerns allegations of union interference with employee rights. Terhaar did not check the box on the complaint form indicating a claim for union interference with employee rights. However, because the complaint does reference RCW 41.56.150(1), a clear statement of facts alleging union interference would have been sufficient to state a cause of action for union interference with employee rights under RCW 41.80.110(2)(a). This is not the case. The complaint does not specifically denote whether Terhaar is a member of a bargaining unit nor provide the information required in WAC 395-45-050(5) concerning collective bargaining relationships. While individual employees may file unfair labor practice complaints, the Commission's jurisdiction applies only to employees belonging to labor organizations certified by the Commission as exclusive bargaining representatives.

The statement of facts attached to the complaint makes reference to a discussion between Terhaar and a shop steward for the Washington Federation of State Employees. The statement of facts indicates that the shop steward gave his opinion on the meaning of the collective bargaining agreement relative to the wage issue, but does not allege facts sufficient to conclude that this opinion was

a threat of reprisal or force or promise of benefit directed toward Terhaar for union activities protected under Chapter 41.80 RCW.

Complaint Against the Employer

The statement of facts is substantially concerned with alleged employer violations, with only the single reference to the union noted above. The requested remedy is entirely concerned with the employer. Terhaar did not check any boxes on the complaint form alleging employer violations, and does not reference any statutes related to employer violations. However, a clear statement of facts alleging employer violations under RCW 41.80.110(1) could have stated a cause of action. Again, this is not the case. The statement of facts alleges that the employer promised to pay Terhaar at a certain rate prior to hiring him, and then reneged on the promise at the time of employment. The statement of facts further asserts that the employer is paying Terhaar at a rate different than other employees performing the same work.

If the complaint alleges a private action for breach of contract, the Commission has no jurisdiction over such cases. The Commission also has no jurisdiction over private actions concerning wage disputes. To the extent that the complaint might imply breach of a collective bargaining agreement, the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976). The Commission acts to interpret collective bargaining statutes and does not act in the role of arbitrator to interpret collective bargaining agreements. *Bremerton School District*, Decision 5722-A (PECB, 1997).

Second, even if the complaint had clearly stated a cause of action in compliance with WAC 391-45-050, a complaint against the employer

would be untimely. The following statute applies to the filing of unfair labor practice complaints:

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The statement of facts alleges that the employer's actions took place on October 24, 2005, and that Terhaar was aware of the actions at the time. In order to be timely, Terhaar should have filed his complaint by April 24, 2006.

The purpose of the preliminary ruling process is to put parties on notice of a cause of action clearly set forth under statutes and rules adopted by the Commission, not to infer a complainant's intentions from submissions that fail to comply with the relevant statutes and rules. Terhaar must file an amended complaint that remedies the defects pointed out above.

Friebel's Amended Complaint in Case 21287-U-07-5433

Friebel's amended complaint alleges employer interference with employee rights in violation of RCW 41.80.110(1)(a); union interference with employee rights in violation of RCW 41.80.110(2)(a); union inducing an employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b); and violations of the 14th Amendment to the Constitution of the United States, as well as provisions of Chapter 41.06 RCW and Chapter 41.56 RCW.

The amended complaint identifies Friebel as a union member and contends the amended complaint is timely. The amended complaint alleges an unfair labor practice by the union and employer entering into a collective bargaining agreement containing a provision

allowing the employer to pay Friebel at a different rate than other bargaining unit employees performing the same work. The employer has allegedly interfered with Friebel's collective bargaining rights by agreeing to the provision allowing different pay. The union has allegedly interfered with Friebel's collective bargaining rights by proposing and ratifying this provision. The union has allegedly violated its duty of fair representation by refusing to file a grievance over the provision. The union has allegedly induced the employer to commit a violation by the employer's agreement to the provision. The amended complaint continues to assert violations of statutes other than Chapter 41.80 RCW.

Timeliness

Friebel asserts that his amended complaint is timely. Friebel states that he could not have known of the alleged violation until the union explained the disputed contract provision to him in July, 2007 and informed him it would not provide a remedy regarding the provision. However, the amended complaint alleges that the unfair practice concerning pay disparity occurred when he began his job with the employer on October 24, 2005, and that Friebel was aware of the alleged disparity. Friebel had until April 24, 2006, to file an unfair labor practice complaint. The amended complaint is untimely.

Contract dispute

This case concerns the interpretation of a collective bargaining agreement. There is no requirement in Chapter 41.80 RCW that a collective bargaining agreement must provide similar wages, hours, and other terms and conditions of employment for employees performing similar duties. Employers and unions are free to negotiate different contractual provisions for different employees. The Commission does not act as an arbitrator to interpret collective bargaining agreements and does not assert jurisdiction in such cases absent allegations of interference with employee rights and discrimination in violation of collective bargaining statutes.

City of Walla Walla, Decision 104 (PECB, 1976); *Bremerton School District*, Decision 5722-A (PECB, 1997).

Interference

It is an unfair labor practice for either an employer or union to interfere with an employee's collective bargaining rights by threats of reprisal or force or promises of benefit related to the employee's exercise of those rights. The amended complaint does not allege that either the employer or union singled Friebel out for threats of reprisal or force or promises of benefit because of his union activities. Friebel has not stated causes of action for employer interference with employee rights in violation of RCW 41.80.110(1)(a), or union interference with employee rights in violation of RCW 41.80.110(2)(a).

Duty of Fair Representation

Friebel alleges an unfair labor practice against the union by its refusal to file a grievance on his behalf regarding the pay disparity. The Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982). While a union does owe a duty of fair representation to bargaining unit employees with respect to the processing of grievances, such claims must be pursued before a court which can assert jurisdiction to determine (and remedy, if appropriate) any underlying contract violation. The Commission has no authority allowing it to compel a union to file a grievance over a contractual dispute.

Union Inducing Employer to Commit Violation

Regarding an alleged violation of RCW 41.80.110(2)(b), Friebel asserts no facts sufficient to conclude that the union induced the employer to commit a violation of his collective bargaining rights.

Other Violations

The union alleges "other" employer and union violations concerning the 14th Amendment to the Constitution of the United States and provisions of Chapter 41.06 RCW and Chapter 41.56 RCW. These allegations fail for lack of Commission jurisdiction.

Terhaar's Amended Complaint in Case 21288-U-07-5434

Terhaar's amended complaint is substantially identical to Friebel's. The defects detailed regarding Friebel's amended complaint apply equally to Terhaar's. Terhaar's complaint is untimely. Terhaar has not stated causes of action for an employer violation of RCW 41.80.110(1)(a), or union violations of RCW 41.80.110(2)(a) and (b). The Commission has no jurisdiction over "other" violations asserted against the employer or union.

NOW, THEREFORE, it is

ORDERED

The amended complaints charging unfair labor practices in Cases 21287-U-07-5433 and 21288-U-07-5434 are DISMISSED for failures to state causes of action.

ISSUED at Olympia, Washington, this 16th day of November, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DAVID I. GEDROSE, Unfair Labor Practice Manager

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.