STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| WILLIAM SANTOS, Complainant, | ) | CASE 16345-U-02-4189 |
| vs. | ) | DECISION 7959-A - PECB |
| CITY OF ORTING, Respondent. | ) | DECISION OF COMMISSION |

*William Santos* appeared *pro se*.

Maple Valley Law Group, by *Eileen M. Lawrence*, Attorney at Law, for the employer.

This case comes before the Commission on a notice of appeal filed by William Santos, seeking to overturn an Order Withdrawing Notice of Hearing and Granting Motion to Dismiss issued by Examiner Vincent M. Helm.[1] The Commission vacates the Examiner's decision.

## BACKGROUND

The City of Orting (employer) is a municipality of the state of Washington which provides law enforcement services.

William Santos was employed by the employer as a police officer, and has initiated this unfair labor practice proceeding concerning that employment.

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[1] *City of Orting*, Decision 7959 (PECB, 2003).

## The Original Complaint

The complaint filed by Santos on April 10, 2002, specifically alleged that:

- Santos was hired by the employer in 1997, as a reserve police officer working on a part-time basis.
- Santos applied for a position as a full-time police officer with the employer.
- After being passed over for two consecutive positions in two years (when he was the top eligible candidate), Santos contacted his immediate supervisor and the chief of police for an explanation. Chief of Police Emmons advised him that Mayor Colorossi hired another candidate who was "more of a small town guy" for the position.
- Santos then contacted Colorossi, who responded that "subordinates should never question their superiors decisions and he stated that if I questioned him now what would I be like if protected by a union." Complaint, at paragraph 2.[2]
- When another position became available in 2000, Colorossi stated that he would never hire Santos because of his earlier complaint about being passed over. Santos was nevertheless offered the position, and began working as a full time officer in June 2001.
- Santos reported to the Law Enforcement Training Center in September 2001, for training. He was reprimanded by a training officer on October 10, 2001, for alleged complaints from other trainees.

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[2] Santos alleged that he looked into filing a discrimination complaint after his conversation with the mayor, but he apparently did not proceed in that direction.

- On October 12, 2001, Santos was handed a termination letter during a meeting with Chief Emmons, Mayor Colorossi, and another city administrator. The employer officials refused to allow Santos to speak. After that meeting, the training officer told Santos that the "mayor mentioned what I had done previously by calling his house and he stated that I taint law enforcement."

The original complaint further alleged:

> I then attempted to appeal through both the union and civil service both stating that I was a probationary employee and they could do nothing. . . . My complaint is that if people make statements against me I should have the opportunity to see what was said and given an opportunity to defend myself. I believe the city did not do this due to the Mayor's stance on me calling him prior on the hire issue. I believe any other department employee would have been given the opportunity which I was denied. My TAC officer mentioning the phone call I made to my mayor a year prior validates this theory.

Complaint, paragraphs 9-11. Thus, the essence of the original complaint was that his employment was terminated without proper notice of the charges against him, and without giving him the opportunity to defend against those charges.

In a deficiency notice issued on June 18, 2002, the Director of Administration pointed out that the allegations of the original complaint were insufficient to state a cause of action before the Commission. Santos was given 21 days to file and serve an amended complaint, or face dismissal of the complaint.

## The Amended Complaint

On July 8, 2002, Santos filed an amended complaint in which he alleged:

> [I]n the summer of 1999, ***the complainant attempted to use the grievance procedure*** *of a collective bargaining agreement* between the city of Orting and AFSCME Local 120, WSCCCE, Council 2. [Santos] complained about not being hired into a full time position. [Santos] was told he should never question a superior's decision on such matters. . . . Eventually, [Santos] was hired into a full time position. . . . On October 10, 2001, [Santos] was called into a meeting where he was orally reprimanded for his conduct during the training. The reprimand was unjustified and was given by a TAC Officer. The reprimand was in ***retaliation for using the grievance procedure in 1999.*** . . . On October 12, 2001, Chief Emmons, Administrator Mercer and Mayor Colorossi terminated the petitioner in ***retaliation for making the grievance in 1999.*** Complainant quickly sought the aid of the union in an attempt to resolve a grievance he wanted to file over the dismissal. However, the union refused to represent him in the grievance, contending the complainant was a temporary.

Amended complaint, paragraphs 2. A - G (emphasis added). That amended complaint further alleged: "The employer has interfered, restrained and/or coerced the complainant in the exercise of his collective bargaining rights in violation of 41.56.140(1) and 41.59.140(1)(a) [*sic*]." Amended complaint, paragraph 5.

## The Preliminary Ruling

The Director of Administration issued a preliminary ruling on July 15, 2002, finding a cause of action to exist on allegations summarized as follows:

> Employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), by its termination of William Santos in reprisal for his union activities protected by Chapter 41.56 RCW.

The preliminary ruling letter noted the incorrect reference to RCW 41.59.140(1)(a), and explained that Chapter 41.59 RCW (which only applies to educational employees of school districts) is inapplica-

ble to Santos. The preliminary ruling letter directed the employer to file and serve an answer to the complaint.

Examiner Vincent M. Helm was assigned to conduct further proceedings in the matter under Chapter 391-45 WAC. On September 9, 2002, Examiner Vincent M. Helm issued a notice of hearing.

## The Employer's Answer

On August 2, 2002, the employer filed an answer to the amended complaint, accompanied by a copy of the collective bargaining agreement, a copy of a confidential document (concerning Santos) from the Washington State Criminal Justice Training Commission, and four declarations.[3]

## The Employer's Motion For Dismissal

On September 27, 2002, the employer filed an "Appeal of Notice of Hearing and Motion to Dismiss" with another attachment. The basis for the employer's motion was that: (a) as a probationary employee, Santos did not have grievance rights under the collective bargaining agreement; (b) Santos lacks standing to come before the Commission; (c) the allegations of the amended complaint are barred by the statute of limitations; and (d) Santos failed to state a specific unfair labor practice claim upon which relief may be granted.

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[3] Those declarations did not respond to any Commission rule or directive, had no useful purpose, and were not admissible in evidence. They were from both union and employer representatives, and concerned the employer's arguments that Santos lacked the right to file a grievance under the collective bargaining agreement, that Santos never filed a grievance, and that Santos' termination was unrelated to union activity. The employer would have needed to call the persons who signed the declarations as witnesses at a hearing, and thus subject them to cross-examination by Santos.

The Examiner directed Santos to file a response to the employer's motion for dismissal, by December 9, 2002.

Santos filed a written response to the motion for dismissal on December 9, 2002. He contended that his earlier discussions with the police hierarchy and ultimately with the mayor were in conformity with the grievance procedure of the collective bargaining agreement, while acknowledging that the negative responses he received dissuaded him from pursuing that matter further. He claimed he was covered by the collective bargaining agreement as a reserve officer, that probationary employees are covered by the discharge notice provisions of the collective bargaining agreement, and that he was discharged in retaliation for engaging in protected union activities.[4]

Order Granting Motion to Dismiss

On January 10, 2003, Examiner Helm issued his decision granting the employer's motion for dismissal. Specifically, the Examiner stated that the Commission lacks authority to enforce due process rights,[5] that the "original complaint did not allege that the employer unlawfully terminated his employment" on October 12, 2001,[6] and that the employer's motion raised a substantial question as to whether the amended complaint related back to the original complaint. With respect to the amended complaint, the Examiner

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[4] Far removed from the issues framed in the preliminary ruling, Santos also claimed he was denied "liberty and property interests without due process" under the United States Constitution and various cited cases.

[5] This apparently referred to the "liberty and property interests" claims outside of the preliminary ruling.

[6] In making this ruling, the Examiner held that the original complaint only alleged denial of an opportunity to review and rebut the allegations prior to the discharge, and failed to attack the discharge itself.

noted that Santos had alleged he was unlawfully terminated in retaliation for his attempt to file a grievance in 1999,[7] and that,

> [N]o reasonable construction of the July 8, 2002, filing can result in a conclusion other than that it is a new charge. Because the termination occurred on October 12, 2001, the complaint filed on July 8, 2002, was untimely. Under the facts provided by Santos since the issuance of the preliminary ruling, the Examiner concludes that the amended complaint must be dismissed as to the allegation that the discharge itself was unlawful.

*City of Orting,* Decision 7959. With respect to the claim of discrimination for union activity, the Examiner ruled that (although the filing of grievances is an activity protected by the statute even for a probationary employee), Santos was not deprived of any ascertainable right, status or benefit. The Examiner took Santos' response to the employer's motion for dismissal, his focus on due process arguments, and the perceived untimeliness of his claim relating to discharge, as confirming that he had no protected statutory right under Chapter 41.56 RCW.

## POSITIONS OF THE PARTIES

Santos filed a notice of appeal on January 30, 2003, asserting that his original complaint concerned the termination of his employment and also raised a claim of retaliation through his references to the mayor's expressed animus toward employees who exercise union rights. He further contends that his amended complaint merely formalized the allegations contained in the original complaint. Therefore, he contends that the Examiner's decision based on his

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[7] Some of the factual references are confusing. Santos also ascribed the withholding of such opportunities as reprisal for his conversation with the mayor in 2000.

purported failure to allege that his termination was in retaliation for the exercise of union rights, was contrary to the clear meaning and intent of the original complaint.

The employer filed an appeal brief on February 11, 2003. It again asserts that Santos was not entitled to the protections of the collective bargaining agreement due to his status as a reserve police officer and/or as a probationary employee. It claims Santos has "failed to prove" that he ever attempted to avail himself of the grievance procedure contained in the collective bargaining agreement in effect between the employer and the union representing the employer's law enforcement officers. It further contends that the amended complaint, which was filed nine months after Santos was discharged, contained new allegations regarding both statutory violations and alleged retaliation for exercising grievance rights. Thus, the employer contends the complaint is barred by the statute of limitations. Moreover, the employer argues that the Commission should adopt the Examiner's reasoning that the discrimination claim fails once the allegations regarding the discharge are dismissed from the complaint.

## DISCUSSION

### The Preliminary Ruling Process

No provision of RCW 41.56.160, which was written in 1969 and last amended in 1994, expressly provides for preliminary rulings, for appeals from adverse preliminary rulings, or for processing motions for dismissal after the issuance of a preliminary ruling in which a cause of action is found to exist. Our preliminary ruling process was created in 1976, but now fulfills a requirement of the new Administrative Procedure Act (APA) adopted in 1988:

> RCW 34.05.419 AGENCY ACTION ON APPLICATIONS FOR ADJUDICATION. After receipt of an application for an adjudicative proceeding, . . . an agency shall proceed as follows:
>
> . . .
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> (2) Within thirty days after receipt of the application, the agency shall examine the application, notify the applicant of any obvious errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, . . .

As an agency covered by the APA, the Commission must give claimants their day in court before ruling against their factual claims. The mainstream process for adjudicative proceedings under the APA is clearly to issue a notice of hearing and conduct a full evidentiary hearing. RCW 34.05.413; 34.05.449; 34.05.452; 34.05.461(4). Thus, an "assuming all of the facts alleged to be true and provable" test is thus used in our preliminary ruling process under WAC 391-45-110,[8] recognizing that some complainants will not be able to actually prove their factual claims at a hearing.

Taken together, WAC 391-08-640, 391-45-110, and 391-45-350 provide for appeals of orders of dismissal issued in the preliminary ruling stage of unfair labor practice proceedings. Notably absent from that framework is any right of any party to appeal a preliminary ruling finding a cause of action to exist. In cases where the Commission or examiners have entertained motions for dismissal filed after a preliminary ruling has been issued, the criteria applied have been those used in deciding summary judgment motions under WAC 391-45-330. *City of Tacoma,* Decision 5049 (PECB, 1995). As we recently stated in *Port of Seattle,* Decision 7603-A (PECB, 2003):

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[8] Even if the "declarations" filed by the employer with its answer had been filed prior to the issuance of the preliminary ruling, they could not have been considered.

> In adjudicative proceedings under the Administrative Procedure Act, Chapter 34.05 RCW, including this unfair labor practice case under Chapter 391-45 WAC, the Commission considers summary judgment motions under a model rule adopted by the Chief Administrative Law Judge of the State of Washington. That rule states:
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> > WAC 10-08-135 SUMMARY JUDGMENT. A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> A motion for summary judgment calls upon the Examiner to make final determinations on a number of critical issues without the benefit of a full evidentiary hearing and record. The granting of such a motion cannot be taken lightly. *Port of Seattle,* Decision 7000 (PECB, 2000).
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> *WAC 10-08-135 does not give respondents a "second bite at the apple" or an opportunity to re-litigate the preliminary rulings issued in unfair labor practice cases by the Executive Director or designee under WAC 391-45-110.* In responding to a motion for summary judgment, *an Examiner must operate within the context of a preliminary ruling that has been issued by higher authority, and is confined to ruling on admissions or defects which have become evident since the issue of the preliminary ruling.*

(emphasis added). Thus, a summary judgment in this case would have to have been based upon admissions against interest or other statements made by the complainant independent of the complaint itself. In short, allowing appeal of preliminary rulings finding a cause of action to exist would be an affront to the APA provisions implemented by the preliminary ruling process.

Although the complaint and amended complaint filed in this case may not be artfully pled, this complainant has alleged that the employer has retaliated against him because of his *attempt* to exercise collective bargaining rights protected by Chapter 41.56 RCW. Notwithstanding the possibility that he may be unable to prove his claims at a hearing, or that the employer may prove some

affirmative defense, a hearing was warranted under the preliminary ruling absent a challenge meeting the summary judgment criteria.

Timeliness of This Complaint

RCW 41.56.160(1) limits the processing of unfair labor practice cases to complaints filed within six months following the alleged unlawful action. The amended complaint in this case was filed more than six months after Santos was discharged, and so could be of no help to Santos for matters raised for the first time in that amended complaint. On the other hand, the date the amendment was filed will be irrelevant if the allegations in the amended complaint relate back to allegations in the original complaint.

The Examiner read the original complaint in this case as failing to allege that the discharge of Santos was itself unlawful. Instead, the Examiner read the original complaint as merely raising due process claims outside of the collective bargaining process (i.e., as taking issue with a denial of opportunities to review and respond to allegations prior to the discharge). Additionally, the Examiner read the original complaint as failing to refer to union activity or processing of a grievance under a collective bargaining agreement. The Commission disagrees with the Examiner's reading of the original complaint.

First, union animus on the part of the mayor was clearly alleged in the original complaint, by the statement that Colorossi responded, "Subordinates should never question their superiors decisions and he stated that if I questioned him now what would I be like if protected by a union." Complaint, at paragraph 2.

Second, union animus on the part of the mayor was further alleged in the original complaint by the claim that Colorossi

stated that he would never hire Santos because of his earlier complaint about being passed over.

Third, the discharge was put at issue in the original complaint, by the two-step process consisting of allegations concerning the reprimand from the training officer on October 10, 2001, and then the discharge at the meeting on October 12, 2001.

Fourth, a causal connection between protected activity and the discharge was alleged in the original complaint, by the statement that the training officer told Santos that the "mayor mentioned what I had done previously by calling his house . . . ."

Thus, although the original complaint filed by Santos could have been clearer, it made specific reference to the termination of his employment and then connected that discharge to activity for which he claims the protection of Chapter 41.56 RCW. Inasmuch as the claimed illegitimacy of the discharge was discernable on the face of the original complaint, the amended complaint related back to the original complaint for purposes of RCW 41.56.160(1).

The employer's motion to dismiss failed to point out any undisputed admission against interest or procedural defect discovered since the issuance of the preliminary ruling. The Commission has long had a policy of generous, liberal construction of complaints to promote the state's policy of "peace in labor relations . . . and nothing in any rule shall be construed to prevent the Commission and its authorized agents from using their best efforts to adjust any labor dispute." WAC 391-08-003; *City of Seattle,* Decision 4057-A (PECB, 1993); *Fort Vancouver Regional Library,* Decision 2396-A (PECB, 1986). We do not agree with the Examiner's assessment that "facts and circumstances . . . may have been unavailable to (or at least unclear to) the Director of Administration when the preliminary ruling was issued." Under these circumstances, the

Examiner's determination that the amended complaint failed to "relate back" to the original complaint must be reversed.

Discrimination Claim

After he excluded the allegation concerning the discharge from consideration, the Examiner concluded that Santos failed to provide sufficient facts to establish a *prima facie* case for a "discrimination" violation under RCW 41.56.140(1). For the reasons stated above, this ruling also fails. Santos is entitled to an evidentiary hearing on his "discrimination" allegation under the "substantial motivating factor" test enunciated by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

Constitutional Due Process Claims

The Examiner correctly noted that some claims asserted by Santos are outside of the scope of the preliminary ruling:

> There is no question that the federal constitution guarantees "due process" rights, and the Commission's procedures must provide due process of law to the parties that appear before it, but that does not give the Commission authority to enforce due process rights. Instead, the enforcement of constitutional rights must be sought through state or federal courts. The Commission is not a court of general jurisdiction, and its decisions declining to enforce rights under *Loudermill* recognize that public employees have some constitutional rights that are above and beyond the reach of this state agency.

*City of Orting*, Decision 7959 [citing *City of Tacoma,* Decision 3346 (PECB, 1990)]. Because constitutional claims were not a subject of the preliminary ruling, they are not to be addressed in the further proceedings conducted under this order.

NOW, THEREFORE, it is

ORDERED

1. The order of dismissal issued in the above-captioned matter by Examiner Vincent M. Helm is VACATED.

2. The matter is remanded to the Director of Administration for reassignment and further proceedings under Chapter 391-45 WAC, under the preliminary ruling issued on July 15, 2002.

Issued at Olympia, Washington, the 14th day of July, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner