STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| MOUNT VERNON POLICE SERVICES GUILD,<br><br>Complainant,<br><br>vs.<br><br>CITY OF MOUNT VERNON,<br><br>Respondent. | CASE 23092-U-10-5879<br><br>DECISION 10728 - PECB<br><br>ORDER OF DISMISSAL |

On March 8, 2010, the Mount Vernon Police Services Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Mount Vernon (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on March 17, 2010, indicated that it was not possible to conclude that a cause of action existed at that time. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

On March 26, 2010, the union filed an amended complaint. The Unfair Labor Practice Manager dismisses the amended complaint for failure to state a cause of action.

DISCUSSION

The allegations of the complaint concern employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by failing or

[1] At this stage of the proceedings, all of the facts alleged in the 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.

refusing to meet and negotiate with the exclusive bargaining representative of its employees concerning a personal appearance policy, discipline rules, and rules of conduct.

The deficiency notice pointed out the defects to the complaint. The complaint is untimely.

The complaint alleges that in the summer of 2008, the employer notified the union that it wanted to revise its policy on personal appearance. The parties discussed the issue until February 2009, when the complaint alleges that the employer unilaterally implemented the revised personal appearance policy. The complaint alleges that the union unsuccessfully continued its attempts to bargain with the employer into the fall of 2009, including filing for mediation with the Commission, but states that the employer has refused to participate in mediation. The union filed this complaint on March 8, 2010. The complaint claims that "'a continued obligation to bargain' exists as to all working condition issues not resolved by the Collective Bargaining Agreement."

RCW 41.56.160(1) states:

> 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. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

The statute of limitations for filing an unfair labor practice complaint under the Chapter 41.56 RCW is six months from the date of occurrence. The six-month statute of limitations begins to run when the complainant knows, or should have known, of the violation. *City of Bremerton*, Decision 7739-A (PECB, 2003). The Commission has previously held that the only exception to the strict enforcement of the six-month statute of limitations is where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Pasco,* Decision 4197-A (PECB, 1994).

The union admits in the complaint that it had reason to believe that the employer committed a violation in February 2009. Although the complaint does not indicate the specific date of the

alleged unilateral change, even the most liberal interpretation of the six month statute of limitations shows that the union should have filed an unfair labor practice complaint by the end of August 2009. Yet, the complaint appears to claim that the employer's duty to bargain continues apart from the statute of limitations, and that the union may file an unfair labor practice complaint at any time, regardless of when it knew, or should have known, of a violation. However, strict enforcement of the statute of limitations does not provide an exception for disputes involving "all working condition issues not resolved by collective bargaining agreements." The union did not file its claim in a timely manner. The complaint does not state a cause of action.

Amended Complaint

The amended complaint states that the employer wrote the union on November 23, 2009, refusing to participate in mediation over the union's proposal to revise the personal appearance policy. The amended complaint does not allege that the employer has made additional changes to the personal appearance policy since February 2009. The union provided a letter accompanying the amended complaint, explaining that it is not alleging a unilateral change in February 2009, but a refusal to bargain in 2010. Refusal to bargain claims are made up of six subsets: refusal to meet and negotiate, refusal to provide relevant information, breach of good faith bargaining, circumvention, general unilateral change, and unilateral change by transfer of bargaining unit work. The union's present claim, if accepted, would fall under the category of "employer refusal to meet and negotiate with the exclusive bargaining representative of its employees." However, in both the complaint and amended complaint the union requests a remedy of "suspension of the employer's ability to enforce the current [personal appearance] policy" until it fulfills its obligation to bargain. The remedy for a violation of the employer's duty to meet and negotiate would be an order to bargain in good faith. The remedy for a unilateral change violation would include a return to the status quo prior to implementation of the policy. An order to suspend enforcement would not be the exact equivalent of a return to the status quo, but it would effectively negate the personal appearance policy. Thus, although the amended complaint is apparently intended as a claim alleging employer refusal to meet and negotiate, its proposed remedy is more like that of a unilateral change violation than a refusal to meet violation.

The union represents an interest arbitration eligible group to which the provisions of RCW 41.56.440 apply:

> Negotiations between a public employer and the bargaining representative in a unit of uniformed personnel shall be commenced at least five months prior to the submission of the budget to the legislative body of the public employer. If no agreement has been reached sixty days after the commencement of such negotiations then, at any time thereafter, either party may declare that an impasse exists and may submit the dispute to the commission for mediation, with or without the concurrence of the other party. The commission shall appoint a mediator, who shall forthwith meet with the representatives of the parties, either jointly or separately, and shall take such other steps as he or she may deem appropriate in order to persuade the parties to resolve their differences and effect an agreement: PROVIDED, That a mediator does not have a power of compulsion.

WAC 391-45-110(3), adopted in 2000, is also applicable to this case:

> (3) The agency may defer the processing of allegations which state a cause of action under subsection (2) of this section, pending the outcome of related contractual dispute resolution procedures, but shall retain jurisdiction over those allegations.
>
> (a) Deferral to arbitration may be ordered where:
>
> (i) Employer conduct alleged to constitute an unlawful unilateral change of employee wages, hours or working conditions is arguably protected or prohibited by a collective bargaining agreement in effect between the parties at the time of the alleged unilateral change;
>
> (ii) The parties' collective bargaining agreement provides for final and binding arbitration of grievances concerning its interpretation or application; and
>
> (iii) There are no procedural impediments to a determination on the merits of the contractual issue through proceedings under the contractual dispute resolution procedure.
>
> (b) Processing of the unfair labor practice allegation under this chapter shall be resumed following issuance of an arbitration award or resolution of the grievance, and the contract interpretation made in the contractual proceedings shall be considered binding, except where:
>
> (i) The contractual procedures were not conducted in a fair and orderly manner; or
>
> (ii) The contractual procedures have reached a result which is repugnant to the purposes and policies of the applicable collective bargaining statute.

The union's implied position is that its decision not to file an unfair labor practice complaint in February 2009 does not affect its right to demand to bargain the personal appearance policy at any time, because the employer has a continuing duty to bargain working condition issues not resolved by the collective bargaining agreement, and that this applies to mid-contract term (mid-term) issues. The employer's position is that by not filing an unfair labor practice complaint within the six month statute of limitations, the union has no right to demand continued bargaining on the subject at issue. The union cites in support of its position an earlier Commission case, *City of Seattle*, Decision 1667-A (PECB, 1984). The employer argues that case is distinguishable from the present case.

In the *City of Seattle,* Decision 1667-A, the Commission upheld an examiner's decision finding an unfair labor practice by the employer. *City of Seattle*, Decision 1667 (PECB, 1983). In the former case, the union had filed a timely unfair labor practice complaint alleging that the employer had unilaterally changed the standby duty schedule for bargaining unit members. The employer asserted defenses of waiver by contract, citing its management rights clause, and waiver by inaction, contending that the union had the opportunity to challenge the standby duty schedule two years earlier. The examiner found a violation, ruling against the employer's waiver defenses. The examiner ordered the employer to bargain over the schedule. The order included not only an obligation for negotiation, but also, if necessary, mediation and interest arbitration. The employer appealed both the ruling and the order concerning interest arbitration, citing RCW 41.56.440, which as noted, provides for negotiations to commence at least five months prior to the submission of the budget to the employer's legislative body. The employer's position was that the statute did not allow mid-term interest arbitration.

The Commission upheld the examiner's decision, agreeing that the union had neither waived its rights under the contract nor waived them by inaction, and held that RCW 41.56.440 does not limit interest arbitration to bargaining over successor agreements, but that the continuing duty to bargain implies that the process of negotiation and mediation in interest arbitration settings may result in mid-term arbitration. The Commission stated that the Washington legislature provided interest arbitration for uniformed personnel as an alternative to the right to strike, and held that this

policy allowed for a liberal use of interest arbitration. The Commission cited RCW 41.56.430 in support of its position:

> The intent and purpose of chapter 131, Laws of 1973 is to recognize that there exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.

*City of Seattle*, Decision 1667-A.

The *City of Seattle* decisions involved a timely-filed unfair labor practice complaint. The timeline did not pertain to the statute of limitations, but to the five-month period set for negotiations on a successor agreement. The continuing duty to bargain concerned whether interest arbitration could be ordered where an unfair labor practice was found mid-term in a contract. None of those factors applies to the present case. The issue here is whether the union forfeited the right to demand bargaining on the personal appearance policy by failing to file a timely complaint after the employer implemented the policy.

The issue as stated above must be qualified by the fact that the collective bargaining agreement between the union and employer expires on December 31, 2010. Thus, at least five months before the 2011 budget is submitted to the city council, the union may include the personal appearance policy in its list of contract proposals, beginning again the process of negotiation over the policy, to include possibly advancing the issue to mediation and interest arbitration. Under Chapter 41.56 RCW, the concept of impasse is basically inapplicable to interest arbitration eligible units, because impasse would not serve the public policy interest set forth in RCW 41.56.430. In an interest arbitration setting, an employer who makes a unilateral change does so at its peril and should prepare to defend its decision before an arbitrator. In the end, an arbitrator will determine which party prevails. This process is statutory and ineluctable. Thus, more specifically, the issue at hand in the present case is whether the union may bring an action for employer refusal to meet, and possibly force the employer into negotiations, mediation, and arbitration mid-term in the

current contract, or whether it is precluded from doing so because it failed to file a timely complaint. In sum, the question is whether the employer must negotiate over the personal appearance policy mid-term, or sometime in the latter part of 2010.

At least since the adoption of WAC 391-45-110(3), the fact pattern in the present case has not come before the agency for formal determination. Currently, if a union alleges mid-term that an employer has unilaterally and unlawfully made a change to a mandatory subject of bargaining, the union can file a complaint within the six month period provided for in RCW 41.56.160(1). If the complaint is deemed invalid and/or untimely, the case is dismissed. If it is deemed valid and timely, it is subject to deferral to arbitration, and depending upon the employer's election, the case either proceeds to grievance arbitration or to an unfair labor practice hearing. WAC 391-45-110(3).

In the present case, the union implicitly contends that in unilateral change situations it may or may not elect to file a complaint, but that if it does not, it may at any time in the future demand mid-term bargaining over the issue by the employer and file a refusal to bargain claim if the employer refuses to meet, giving *City of Seattle*, Decision 1667-A as its authority. In the twenty-six years since that case was decided, it has been cited in numerous Commission decisions, but it has never been used as precedent for overriding the statute of limitations. The statute of limitations does not serve as an alternative course of action for a complainant in a unilateral change case (or any type of case for that matter), allowing it to either file a claim within the six month time limit, or wait until a time of its own choosing and bring the respondent before an examiner over the same issue, albeit (here) as a refusal to meet allegation.

The union did not file a timely unfair labor practice complaint alleging that the employer made an unlawful unilateral change to the personal policy. The union is now proposing a "second bite of the apple" rule that would render the statute of limitations meaningless. There is no Commission precedent for the union's claim. The amended complaint does not cure the defective complaint.

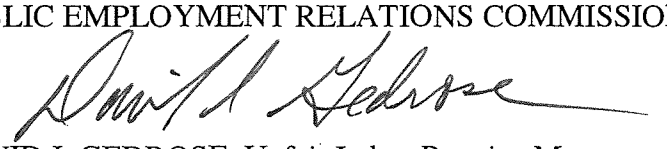
NOW, THEREFORE, it is

ORDERED

The amended complaint charging unfair labor practices in Case 23092-U-10-5879 is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 6th day of April, 2010.

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.

# PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

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| CASE NUMBER: | 23092-U-10-05879 | FILED: | 03/08/2010 | FILED BY: | PARTY 2 |
| DISPUTE: | ER GOOD FAITH | | | | |
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