STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AARON DOYLE, Complainant, vs. CITY OF QUINCY, Respondent.	CASE 23707-U-10-6048 DECISION 10999 – PECB ORDER DENYING EMPLOYER'S MOTION TO DISMISS; PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On December 27, 2010, Aaron Doyle (Doyle) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Quincy (employer) as respondent. The complaint was docketed by the Commission as Case 23707-U-10-6048. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on January 3, 2011, indicated that it was not possible to conclude that a cause of action existed at that time. Doyle was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the complaint. Doyle filed an amended complaint on January 28, 2011.

The Unfair Labor Practice Manager dismisses the defective allegations of the amended complaint for failure to state a cause of action and finds a cause of action for the allegations set forth in the preliminary ruling below. The employer must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

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[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.

DISCUSSION

The allegations of the complaint concerned employer discrimination (and if so, derivative interference) in violation of RCW 41.56.140(1), by actions toward Aaron Doyle (Doyle) in reprisal for union activities protected by Chapter 41.56 RCW.

Doyle previously filed an unfair labor practice complaint on July 28, 2010 (amended on August 27, 2010). Doyle withdrew the complaint, and the case was closed on December 10, 2010. *City of Quincy,* Decision 10936 (PECB, 2010). That decision did not contain a final judgment on any facts or law contained in the complaint or amended complaint. The deficiency notice and preliminary ruling issued in that case have no effect in the present action. The claims set forth in the present case were reviewed as new allegations.

In the original complaint to the present Case 23707-U-10-6048, Doyle alleged that the employer discriminated against him and derivatively interfered with his employee rights, when on June 29, 2010, it placed him on administrative leave with pay in reprisal for his having filed a grievance and pursued an appeal of the grievance. Filing and appealing a grievance are protected activities under Chapter 41.56 RCW. Placing an employee on administrative leave with pay may constitute discrimination and derivative interference in violation of RCW 41.56.140(1). *Seattle School District,* Decision 5542-C (PECB, 1997). The allegations stated a cause of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission.

The deficiency notice of January 3, 2011, pointed out the defects to the complaint. One, RCW 41.56.160(1) governs the time for filing unfair labor practice complaints:

> 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.

Doyle filed the complaint on December 27, 2010. The deficiency notice stated that only those allegations occurring on or after June 27, 2010, would be subject to remedial orders by the Commission. Doyle's claim was restricted to the allegation that the employer placed him on administrative leave on June 29, 2010, in reprisal for union activities. Doyle alleged that he was removed from a position with an Inter-Agency Narcotics Task Force (INET) on March 24, 2010, in reprisal for union activities. That allegation was untimely under RCW 41.56.160(1). The corresponding remedy request was also defective for the same reason.

Two, WAC 391-45-050(2) (rule) requires complaints to contain "Clear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places, and participants in occurrences." Doyle alleged that he was made the subject of an "internal affairs investigation before there were any allegations formulated against [him]." That claim appeared in paragraph 15 of the complaint as part of Doyle's legal claim against the employer. There were no other references to the claim within the complaint. The allegation regarding the internal affairs investigation, and corresponding remedy request, did not conform to the requirements of the rule.

Three, in paragraph 16 of the complaint, Doyle alleged that the employer withdrew training promised to and approved for him, but provided no other information on the training issue. The allegation did not conform to the requirements of WAC 391-45-050(2).

Four, paragraph 18 of the complaint was a legal claim and did not state a cause of action.

Five, paragraph 19 of the complaint referred to a separate claim filed by Doyle against the employer: Case 23652-U-10-6035, which has been assigned to an examiner for further unfair labor practice proceedings. That case, including its preliminary ruling, has no bearing on the facts in the present case.

Six, in paragraph 3 of the complaint, Doyle stated that he has a right to collectively bargain with the employer under RCW 41.56.040. In the request for relief, Doyle asked for a finding that the employer committed an unfair labor practice by refusing and failing to engage in negotiations over

a change in working conditions. However, only a union holding the status of exclusive bargaining representative has standing to collectively bargain with an employer, and an employer has no duty to bargain with individual employees. Further, only a union has standing to file and pursue refusal to bargain claims. *Spokane Transit Authority,* Decisions 5742 and 5743 (PECB, 1996). Doyle has no standing to file a refusal to bargain claim or request a remedy for that claim.

Amended Complaint

The amended complaint was due on January 24, 2011. Doyle filed the complaint on January 28, 2011. However, the late filing does not affect this Decision, for the reasons set forth at the preliminary ruling below. The deficiency notice stated that if a timely amended complaint was not filed:

- The following allegations will be DISMISSED: All allegations of the complaint alleging unfair labor practices occurring prior to June 27, 2010, including Doyle's removal from the INET and the corresponding remedy request; his being made the subject of an internal affairs investigation, and the corresponding remedy request; the employer's withdrawal of training; paragraphs 18 and 19 of the complaint; and paragraph 3 of the complaint, along with the remedy request concerning a refusal to bargain claim; and

- A preliminary ruling will be issued under WAC 391-45-110 for allegations concerning employer discrimination (and if so, derivative interference) in violation of RCW 41.56.140(1), by placing Doyle on paid administrative leave in reprisal for union activities protected by Chapter 41.56 RCW.

The amended complaint appears to withdraw the allegations concerning training, and omits paragraph 19 of the original complaint, which referred to Case 23652-U-10-6035, a separate unfair labor practice proceeding. The amended complaint also omits paragraph 3, which alleged that Doyle had a right to bargain with the employer. The amended complaint further omits the remedies related to the INET and refusal to bargain claims. However, paragraph 18 remains, renumbered as paragraph 25 in the amended complaint. Paragraph 25 alleges that the employer

has historically retaliated against employees on the basis of their union activities. That is a legal claim, does not state a cause of action, and is dismissed. Paragraphs 1 through 9 of the amended complaint may be considered as background information for events occurring prior to the end of June 2010, but to the extent Doyle may be alleging violations in March or prior to June 25, 2010, they are dismissed as untimely.

The amended complaint provides new information regarding the date of the alleged violation, now stating that the occurrence was on June 25, 2010, rather than June 29, 2010, and adding information about the internal investigation, stating that it began on June 25. In addition, the amended complaint provides information concerning allegations of misconduct brought against Doyle on September 8, 2010. The amended complaint does not indicate that the employer has imposed discipline or other adverse action as a result of the internal investigations or the September 8 allegations of misconduct, but Doyle does allege that the employer committed independent interference violations by its actions. The September 8 allegations constitute a new claim not pled in the original complaint. However, under WAC 391-45-070, the allegations involve the same parties, are germane, timely, and will not delay the proceedings. Those allegations are incorporated into the amended complaint. The claims concerning the internal investigations and allegations of misconduct state a cause of action for independent interference under RCW 41.56.140(1).

Motion to Dismiss

On January 24, 2011, the employer filed a motion to dismiss for lack of jurisdiction. The employer's motion is denied, and a preliminary ruling and partial order of dismissal is issued.

The employer' motion is based upon the correlation between the filing date of December 27, 2010, and the now established violation date of June 25, 2010. The deficiency notice of January 3, 2011, stated that violations occurring prior to June 27, 2010, were untimely. The employer's motion was thus made in good faith based upon the provisions of RCW 41.56.160(1) and the statements made in the deficiency notice: Based solely upon that information, Doyle's complaint would have been timely only if filed on or before December 25, 2010. However, as will be

discussed more fully below, Doyle made a good faith effort to file his original complaint in a timely manner, when he electronically filed the complaint on December 23, 2010, albeit after the close of business. The filing would have been timely but for a three day holiday weekend. The issue before the Unfair Labor Practice Manager is whether Doyle's complaint was timely, even though stamped as received by the Commission on December 27, 2010.

The filing and service of papers with the Commission is governed by WAC 391-08-120. Sections 1 and 2 concern the filing of papers with the agency; section 3 concerns the service of papers on other parties. For the purposes of this letter, only sections 1 and 2 apply and are set forth below.

WAC 391-08-120 Filing and service of papers.

Filing of papers with the agency

(1) Papers to be filed with the agency shall be filed at the commission's Olympia office. The executive director shall post, and from time to time revise as appropriate, a list containing the street and mailing addresses for filing by actual delivery of papers, the telephone number for filing by electronic telefacsimile transmission (fax), and the electronic mail (e-mail) address and software supported by the agency for filing by e-mail attachment.

(2) Papers may be filed by any of the following methods:

(a) FILING BY ACTUAL DELIVERY of papers to the agency (including filings delivered by United States mail) shall be subject to the following limitations:

(i) Only the original paper(s) shall be filed. No additional copies of papers are required.

(ii) The case number(s) shall be indicated on the front page of each document filed, except for petitions and complaints being filed to initiate proceedings before the agency.

(iii) Filing shall occur only upon actual receipt of the original paper by the agency during office hours.

(iv) Papers delivered to or left at the agency office after the close of business will be deemed to be filed on the next business day the office is open.

(b) FILING BY FAX shall be subject to the following limitations:

(i) Parties shall only transmit one copy of the paper, accompanied by a cover sheet or form identifying the party filing the paper, the total number of pages in the fax transmission, and the name, address, telephone number and fax number of the person sending the fax.

(ii) The original paper filed by fax shall be mailed to the commission's Olympia office on the same day the fax is transmitted.

(iii) The case number(s) shall be indicated on the front page of each document filed by fax, except for petitions and complaints being filed to initiate proceedings before the agency.

(iv) Filing by fax shall occur only when a complete legible copy of the paper is received by the agency. If a fax is not received in legible form, it will be treated as if it had never been filed. A party attempting to file a paper by fax bears the risk that the paper will not be timely or legibly received, regardless of the cause.

(v) If receipt of a fax transmission commences after office hours, the paper will be deemed filed on the next business day the office is open.

(vi) Fax shall not be used to submit or revoke authorization cards for purposes of a showing of interest or cross-check under chapter 391-25 WAC.

(c) FILING BY E-MAIL ATTACHMENT shall be subject to the following limitations:

(i) Parties shall only transmit one copy of the paper, as an attachment to an e-mail message identifying the party filing the paper, the total number of pages in the attachment, the software used to prepare the attachment, and the name, address, telephone number and e-mail address of the person sending the e-mail message.

(ii) The original paper filed by e-mail attachment shall be mailed to the commission's Olympia office on the same day the e-mail message and attachment are transmitted.

(iii) The case number(s) shall be indicated on the front page of each document filed by e-mail attachment, except for petitions and complaints being filed to initiate proceedings before the agency.

(iv) Filing by e-mail attachment shall occur only when a complete legible copy of the paper is received by the agency. If an e-mail attachment is not received in legible form, or cannot be opened with software on the list promulgated by the executive director under this section, it will be treated as if it had never been filed. A party attempting to file a paper by e-mail attachment bears the risk that the paper will not be timely or legibly received, regardless of the cause.

(v) If an e-mail transmission is received by the agency after office hours, the paper will be deemed filed on the next business day the office is open.

(vi) E-mail shall not be used to submit or revoke authorization cards for purposes of a showing of interest or cross-check under chapter 391-25 WAC.

WAC 391-08-100 addresses the issues of filing dates that fall during non-business days.

WAC 391-08-100 Computation of time

In computing any period of time prescribed or allowed by any applicable statute or rule, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

There are numerous Commission decisions on the computation of time for filing appeals or petitions. *See, e.g., City of Richland*, Decision 6120-B (PECB, 1998). However, there are apparently no precedent cases involving the relation between the computation of time and the six month statute of limitations under RCW 41.56.160(1) or other statutes administered by the Commission. Commission case precedent is not definitive as to whether the six month statute of limitations applies strictly to the six month period between specific dates, e.g., June 25 to December 25, and is unaffected by whether the final date falls on a non-business day, or whether the computation of time rule applies; that is, whether the six-month statute is inclusive of non-business days or exclusive at the end of the sixth month.

If the six month limitation period is interpreted narrowly, then complainants should file unfair labor practice complaints prior to the six-month cutoff if the final day falls on non-business day or series of non-business days (usually weekends or holiday weekends). This would of course effectively shorten the six month time period as determined by number of days the agency office is closed. However, no Commission case has ruled on this matter or issued a warning to complainants about a shortened filing period related to non-business days. Commission cases involving statute of limitation issues referring to dates do so to establish the six month time frame, but typically do not reflect the days of the week on which the dates fell. *See, e.g., Port of Seattle*, Decision 9216 (PECB, 2006); *King Fire District 16,* Decision 9659-A (2007); *South Whidbey School District,* Decision 10880-A (EDUC, 2011). Commission cases ruling on timeliness have clearly defined when a violation occurs and the six month period begins to run. *City of Bremerton,* Decision 7739-A (PECB, 2003); *City of Bellevue,* Decision 9343-A (PECB, 2007); *South Whidbey School District*, Decision 10880-A (the statute begins to run when the complainant knows, or should have known, of the violation). Complaints have been dismissed when evidence shows that the date of occurrence was actually earlier than the one pled, pushing the filing date beyond the six month limit. *King Fire District 16,* Decision 9659-A; *City of Bellingham*, Decision 10907 (PECB, 2010). However, none of the cases discuss the effect of non-business days on the end of the period relative to filing complaints. The Unfair Labor Practice Complaint form, U-1, does not warn complainants of the need to file prior to non-business days. The

Commission website gives information on filing unfair labor practice complaints, but indicates only that complaints must be filed within six months after the unfair labor practice.

In the present case, Commission records show that Doyle filed his complaint electronically at 6:10 P.M. on December 23, 2010, and mailed it the same day. (The arrival date of the complaint by U.S. Mail is not at issue here.) The agency's office hours are 8 A.M. to 5:00 P.M., Monday through Friday. Thus, WAC 391-08-120(2)(c)(v) applies: "If an e-mail transmission is received by the agency after office hours, the paper will be deemed filed on the next business day the office is open." The office was closed for the Christmas holiday on Friday, December 24, and over the weekend on December 25 and 26. The case was recorded as filed at 8:24 A.M. on the next business day, Monday, December 27, 2010.

This case appears to be one of first impression. The employer's motion, Doyle's admitting that the date of occurrence was June 25, the timing of Doyle's filing on December 23, and one of the few non-business Fridays for the Commission in 2010, have combined to create a perfect storm of facts requiring a review of the relation of WAC 391-08-100 to RCW 41.56.160(1). If RCW 41.56.160(1) is read to exclude consideration of non-business days, then Doyle's electronically filed complaint on December 23 was one hour and ten minutes too late and therefore untimely. However, if WAC 391-08-100 applies, then Doyle's complaint was timely when it was recorded as received shortly after the office opened on December 27.

The employer argues that the Commission historically has interpreted the six-month statute restrictively, and that the point of reference in Commission cases is from the filing date, looking back six months. However, as Commission cases show, there are two points of reference–the filing date, and the date of occurrence, which requires looking forward six months. Doyle's original complaint alleged that the employer placed him on administrative leave on June 29, 2010, in reprisal for his protected union activities. That was the only allegation of the complaint that stated a cause of action and was timely on its face, even if the complaint had been filed on December 28, or even by the end of business on December 29. The point of reference for the

complaint's one cause of action was the initially alleged June 29 date of occurrence, and the six months was counted forward from that date.

However, the complaint also alleged violations occurring in prior to June 2010. The deficiency notice counted six months back from the December 27 filing date only to address the allegations of the complaint occurring prior to June 2010, indicating that the allegations of the complaint prior to June were untimely. Thus, the June 27-December 27 time period was not intended to apply to the cause of action regarding Doyle's placement on administrative leave, and the deficiency notice did not discuss the effect of the holiday weekend on the date of filing, because it was not apparently necessary to do so.

Conclusion

There is no information in Chapter 391-08 WAC, Chapter 391-45 WAC, Chapter 41.56 RCW, on the Commission website or complaint forms, or in Commission decisions clearly warning that if the six month date of occurrence falls on a non-business day or series of non-business days, that the statute of limitations under RCW 41.56.160(1) is shortened by one or more days (this applies, of course, to all other Commission administered statutes). The Unfair Labor Practice Manager rules that WAC 391-08-100 applies to filings of unfair labor practice complaints. The existence of that rule shows the intent to provide the full period of allotted time for filing, and unfair labor practice complaints should not be exceptions to the rule. The alleged date of occurrence was June 25, 2010. Doyle's filing on December 27, 2010, was timely as to the required filing date of December 25, 2010. The Commission has jurisdiction in this case, and the employer's motion to dismiss is denied.

Preliminary Ruling and late filing of Amended Complaint

The 21 day period for filing amended complaints is not a rule under Chapter 391-45 WAC, Chapter 34.05 RCW, or Chapter 41.56 RCW. It is a Commission policy, and late filings will be dismissed if the untimely filing would be prejudicial to the unfair labor practice proceedings, for example, by affecting a respondent's due process rights in filing an answer or by unduly delaying a

hearing. Here, the employer will have sufficient time to file an answer. No hearing date has been set. In addition, the late filing does not affect those portions of the original complaint that were withdrawn or will be dismissed. It does not affect the allegations concerning the events of September 8, since those allegations are timely through March 8, 2011. The remaining question is whether the late filing affects the events of June 25. The January 3 deficiency notice recognized a cause of action regarding the administrative leave allegations. The claim regarding the internal investigations was deficient because it did not provide a date for the occurrence. The amended complaint alleges that the investigation began on June 25. Because the original complaint was timely filed regarding the events of June 25, the amended complaint's late filing does not affect the allegations of violations on that date concerning both the placement on administrative leave and the internal investigation.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference allegations of the amended complaint in Case 23707-U-10-6048 state a cause of action, summarized as follows:

> [1] Employer discrimination (and if so, derivative interference) in violation of RCW 41.56.140(1), by placing Aaron Doyle on paid administrative leave on June 25, 2010, in reprisal for union activities protected by Chapter 41.56 RCW; and
>
> [2] Employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to Aaron Doyle in connection with his union activities, through (a) initiating an internal affairs investigation

against him without cause on June 25, 2010, and (b) accusing him of misconduct without cause on September 8, 2010.

Those allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. The City of Quincy shall:

File and serve its answer to the allegations listed in paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

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

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

The 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 amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

3. The following allegations of the amended complaint in Case 23707-U-10-6048 are DISMISSED for failure to state a cause of action: Paragraph 25 of the amended

complaint, alleging that the employer has historically retaliated against employees for union activities; allegations contained in paragraphs 1 through 9 of the amended complaint concerning events of March 2010 or prior to June 25, 2010, other than as background information not subject to remedial action by the Commission

ISSUED at Olympia, Washington, this 9th day of February, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Unfair Labor Practice Manager

The ruling on the employer's motion to dismiss, and Paragraph 3 of this order, will be the final orders 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

CASE NUMBER:	23707-U-10-06048	FILED:	12/27/2010	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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