STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, COUNCIL 2, Complainant, vs. FORT VANCOUVER REGIONAL LIBRARY, Respondent.	CASE 27248-U-15 DECISION 12484 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On May 22, 2015, Washington State Council of County and City Employees, Council 2 (WSCCCE) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Fort Vancouver Regional Library as respondent. The complaint was docketed by the Commission as 27248-U-15.

On June 9, 2015, the Unfair Labor Practice Manager issued a preliminary ruling in this case regarding allegations in the union's complaint concerning:

> 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)], since January 2015, by:
>
> 1) Unilaterally transferring the Senior Public Service Assistant job position from the Washington Public Employees Association bargaining unit into the Local 307-L Supervisory/Professional bargaining unit, without providing the union with an opportunity to bargain over the terms and conditions of employment for the position.

2) Unilaterally changing its job posting and hiring practice by failing to post the Senior Public Service Assistant position vacancy for applications from bargaining unit employees, without providing an opportunity for bargaining.

3) Unilaterally changing its internal hiring practices by hiring an employee from another bargaining unit without first considering bargaining unit applicants for the vacant Senior Public Service Assistant position, without providing an opportunity for bargaining.

On June 30, 2015, the employer filed a timely answer to the allegations in the preliminary ruling.

The union filed an amended complaint on August 3, 2015. The allegations of the amended complaint concern employer refusal to bargain, domination, interference, discrimination, and circumvention.

The amended complaint was reviewed under WAC 391-45-110,[1] and a partial deficiency notice issued on September 22, 2015, indicated that it was not possible to conclude that a cause of action existed at that time for the allegations of domination or discrimination. The allegations of the amended complaint concerning refusal to bargain, interference, and circumventing the union stated a cause of action under WAC 391-45-110(2) for further unfair labor practice proceedings before the Commission.

WSCCCE was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the complaint. WSCCCE filed a timely response on October 13, 2015, withdrawing its allegation of domination, and amending portions of its original complaint.

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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.

The Examiner dismisses the defective allegation of discrimination alleged in the amended complaint against the employer for failure to state a cause of action. The amended complaint of August 3, 2015, states a cause of action for the allegations of refusal to bargain, interference, and circumvention. The employer must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

Allegations of the Amended Complaint

The amended complaint filed on August 3, 2015, states causes of action for the following:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and derivative interference in violation of RCW 41.56.140(1)], by breach of its good faith bargaining obligations including:
>
> 1) Declaring an "impasse" at the July 9, 2015 mediated bargaining session and threatening to choose which collective bargaining agreement provisions the employer would "implement."
> 2) At the July 9, 2015 mediated bargaining session threatening to not recognize the parties' 22 tentative agreements and advising the union's bargaining committee that there would be no contract (collective bargaining agreement).
>
> Employer interference with employee rights in violation of RCW 41.56.140(1), by:
>
> 1) Sending an e-mail on July 14, 2015, by employer official Nancy Tessman to the union's bargaining unit employees which contained misinformation regarding the union's July 17, 2015 general membership meeting. Such misinformation included a contradiction of the union's agenda for the meeting and inaccurate information concerning the union's bargaining position at mediation.

2) Sending an e-mail on July 14, 2015, by employer official Nancy Tessman to the union's bargaining unit employees urging them to pressure union officers to "bring this proposal to a vote."
3) Sharing the same July 14, 2015 employer e-mail at a meeting on July 22, 2015, where bargaining unit employees were present.

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 employer official Nancy Tessman circumventing the union through direct dealing with employees represented by the union, in:

1) Distributing an e-mail on July 14, 2015, to bargaining unit employees, concerning inaccurate information concerning the union's bargaining position, sharing the employer's verbal "what if" proposal introduced during mediation, and urging bargaining unit employees to pressure their officers to "bring this proposal to a vote."
2) Sharing the same July 14, 2015 employer e-mail at a meeting on July 22, 2015, where bargaining unit employees were present.

Discrimination

The union alleges that the employer has retaliated against the union for filing the unfair labor practice complaint. It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.56.140(3). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Seattle School District*, Decision 10732-A (PECB, 2012), *citing Educational Service District 114*, Decision 4361-A (PECB, 1994); *Community College District 13 (Lower Columbia),* Decision 9171-A (PSRA, 2007). The employee maintains the burden of proof in such discrimination cases. To prove discrimination, the employee must first set forth a prima facie case establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer the intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and,
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Clark County,* Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which, according to common experience, gives rise to a reasonable inference of the truth of the fact sought to be proved. *City of Yakima*, Decision 10270-A (PECB, 2011).

In response to an employee's prima facie case of discrimination, the employer need only articulate its nondiscriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma,* Decision 4626-A.

The union identifies the protected union activity of filing the underlying unfair labor practice complaint, but does not identify how the employer deprived the union's bargaining unit employees of any specific right, benefit, or status. Similarly, the union does not identify a causal connection as required in the third prong of the prima facie case. This allegation is dismissed for failing to state a cause of action under Chapter 41.56 RCW.

CONCLUSION

The amended complaint filed on August 3, 2015, states causes of action for refusal to bargain, interference, and circumventing the union. These allegations, combined with those in the preliminary ruling issued on June 9, 2015, will be further processed under Chapter 391-45 WAC. The defective allegation of discrimination is dismissed for failure to state a cause of action.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the refusal to bargain allegations of the amended complaint filed on August 3, 2015, in Case 27248-U-15 state a cause of action, summarized as follows:

   Employer refusal to bargain in violation of RCW 41.56.140(4) [and derivative interference in violation of RCW 41.56.140(1)], by breach of its good faith bargaining obligations including:

   1. Declaring an "impasse" at the July 9, 2015 mediated bargaining session and threatening to choose which collective bargaining agreement provisions the employer would "implement."
   2. At the July 9, 2015 mediated bargaining session threatening to not recognize the parties' twenty two (22) tentative agreements and advising the union's bargaining committee that there would be no contract (collective bargaining agreement).

   The refusal to bargain allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. Assuming all of the facts alleged to be true and provable, the interference allegations of the amended complaint filed on August 3, 2015, in Case 27248-U-15 state a cause of action, summarized as follows:

   Employer interference with employee rights in violation of RCW 41.56.140(1), by:

   1. Sending an e-mail on July 14, 2015, by employer official Nancy Tessman to the union's bargaining unit employees which contained misinformation regarding the union's July 17, 2015, general membership meeting. Such misinformation included a contradiction of the union's agenda for the meeting and inaccurate information concerning the union's bargaining position at mediation.

2. Sending an e-mail on July 14, 2015, by employer official Nancy Tessman to the union's bargaining unit employees urging them to pressure union officers to "bring this proposal to a vote."
3. Sharing the same July 14, 2015 employer e-mail at a meeting on July 22, 2015, where bargaining unit employees were present.

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

3. Assuming all of the facts alleged to be true and provable, the circumvention allegations of the amended complaint filed on August 3, 2015, in Case 27248-U-15 state a cause of action, summarized as follows:

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 employer official Nancy Tessman circumventing the union through direct dealing with employees represented by the union, in:

1. Distributing an e-mail on July 14, 2015, to bargaining unit employees, concerning inaccurate information concerning the union's bargaining position, sharing the employer's verbal "what if" proposal introduced during mediation, and urging bargaining unit employees to pressure their officers to "bring this proposal to a vote."
2. Sharing the same July 14, 2015 employer e-mail at a meeting on July 22, 2015, where bargaining unit employees were present.

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

4. The Employer shall file and serve its answers to the allegations listed in paragraphs 1, 2, and 3 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 paragraphs 1, 2, and 3 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.

5. The allegation of the amended complaint filed on August 3, 2015, in Case 27248-U-15 concerning discrimination in violation of RCW 41.56.140(3) is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 24th day of November, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Page A Garcia

PAGE A. GARCIA, Examiner

Paragraph 5 of this order will be
the final order of the agency on
any defective allegations, unless
a notice of appeal is filed with
the Commission under WAC 391-45-350.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 11/24/2015

DECISION 12484 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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