

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

R. KEITH HOELLER,  Complainant,  vs.  GREEN RIVER COLLEGE,  Respondent.	CASE 127690-U-15  DECISION 12528 - CCOL  PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL
R. KEITH HOELLER,  Complainant,  vs.  GREEN RIVER UNITED FACULTY COALITION,  Respondent.	CASE 127691-U-15  DECISION 12529 - CCOL  ORDER OF DISMISSAL

On October 29, 2015, R. Keith Hoeller (complainant) filed two complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. The first complaint named Green River College (employer) as respondent. The second complaint named the Green River United Faculty Coalition (union) as respondent. The complaints were reviewed under WAC 391-45-110,<sup>1</sup> and a deficiency notice issued on November 17, 2015, indicated that it was not possible to conclude a cause of action existed at that time. The complainant was given a period of 21 days in which to file and serve amended complaints or face dismissal of the cases.

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

On December 8, 2015, the complainant filed amended complaints. The Unfair Labor Practice Manager reviewed the amended complaints.

### ISSUES

The allegations of the amended complaint against the employer concern:

1. Employer discrimination in violation of RCW 28B.52.073(1)(c) [and if so, derivative interference in violation of RCW 28B.52.073(1)(a)] in reprisal for union activities protected by Chapter 28B.52 RCW by:
  - a. Assigning faculty members with a history of animosity toward Hoeller to observe and evaluate his teaching since October 29, 2013.
  - b. Modifying the position description for a tenure-track position in philosophy in order to exclude Hoeller from qualifying for the position since January 2015.
  - c. Insisting on evaluating Hoeller's teaching during the fall 2015 academic quarter, while Hoeller was sick with the flu.
  - d. Failing to offer teaching assignments to Hoeller for the summer 2015 academic quarter.
  - e. Modifying the course offering schedule to deny Hoeller an opportunity to teach more than two courses during the fall 2015 academic quarter.
  - f. Changing the Humanities Division policy for post-file review of adjuncts and increasing the frequency of student evaluations and teaching observations of adjuncts, including Hoeller, on May 6, 2013.

The amended complaint against the employer states causes of action for employer discrimination and derivative interference. The discrimination allegation concerning changing the Humanities Division policy for post-file review of adjuncts and increasing the frequency of student evaluations and teaching observations of adjuncts took place more than two years before the filing of the amended complaint and is dismissed as untimely. The employer is required to file an answer to the amended complaint within 21 days of this order.

The allegations of the amended complaint against the union concern:

2. Union interference with employee rights in violation of RCW 28B.52.073(2)(a) by breaching its duty of fair representation by:
  - a. Refusing to arbitrate grievances filed by Hoeller in the two years preceding the filing of the complaint.
  - b. Allowing the employer to make changes in working conditions for adjunct employees in the Humanities Division from 2012 through May 6, 2013, in violation of the collective bargaining agreement (CBA).
  - c. Declining to allow Hoeller to meet directly with the union's attorney in the two years preceding the filing of the complaint.
  - d. Failing or refusing to provide Hoeller with union representation on May 1, 2013, when other bargaining unit employees filed complaints against him and were provided with representation.
  - e. Refusing to act on Hoeller's request to hold a "meeting of concern" with the employer about the treatment of Hoeller.

All of the allegations against the union are dismissed for failure to state a cause of action under the jurisdiction of the Commission. Several of the allegations against the union concern the union's decisions not to arbitrate grievances filed by Hoeller. The Commission does not assert jurisdiction in duty of fair representation cases arising exclusively out of the processing of grievances. The other allegations either do not describe activity prohibited by Chapter 28B.52 RCW or contain only vague generalizations without reference to specific facts and events. The allegation against the union concerning the union's failure or refusal to provide Hoeller with union representation when other bargaining unit employees filed complaints against him and were provided with representation is dismissed because it was untimely filed.

## ANALYSIS

### Timeliness

#### *Legal Standard*

Unlike other collective bargaining statutes administered by the Commission, Chapter 28B.52 RCW does not contain a provision limiting the processing of complaints to unfair labor practice allegations occurring more than six months before the filing of the complaint. *Bates Technical College*, Decision 5575-B (CCOL, 1996). The six-month statutes of limitations for Chapter 41.76 RCW and Chapter 41.80 RCW were adopted in 2002; those for Chapter 41.56 RCW and Chapter 41.59 RCW were adopted in 1983. Commission policy prior to the adoption of these statutes of limitations was to use a two-year limitation period provided under state law. *Municipality of Metropolitan Seattle*, Decision 1356-A (PECB, 1982). *See also, Shoreline Community College (Shoreline Community College Federation of Teachers)*, Decision 10675 (CCOL, 2010). The Commission has not given any indication that Chapter 28B.52 RCW constitutes an exception to the legal principle limiting time for actions to two years.

The original complaints were filed on October 29, 2015, and are timely for events that took place on or after October 29, 2013. The amended complaints were filed on December 8, 2015, and are timely for events that took place on or after December 8, 2013.

#### *Untimely Allegation Against the Employer*

The amended complaints allege that the employer discriminatorily changed the Humanities Division policy for post-file review of adjuncts and increased the frequency of student evaluations and teaching observations of adjuncts, including Hoeller, on May 6, 2013, in reprisal for protected union activities. This change in division policy occurred more than two years before the complaints were filed. This allegation is untimely filed and cannot be considered by the Commission.

#### *Untimely Allegations Against the Union*

The amended complaints allege that the union violated its duty of fair representation by allowing the employer to make changes in working conditions for adjunct employees in the Humanities Division from 2012 through May 6, 2013, in violation of the CBA. The amended complaints also allege that the union violated its duty of fair representation by failing or refusing to provide Hoeller with union representation on May 1, 2013, after other bargaining unit employees filed complaints

against him and were provided with representation. These allegations took place more than two years before the filing of the present unfair labor practice complaints and are dismissed as untimely.

### Duty of Fair Representation

#### *Legal Standard*

The duty of fair representation originated with decisions of the Supreme Court of the United States holding that an exclusive bargaining representative has the duty to fairly represent all of those for whom it acts, without discrimination. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a collective bargaining statute. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002), citing *City of Seattle (International Federation of Professional and Technical Engineers, Local 17)*, Decision 3199-B (PECB, 1991).

The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute and does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. *Bremerton School District*, Decision 5722-A (PECB, 1997). While the Commission does not assert jurisdiction over “breach of duty of fair representation” claims arising exclusively out of the processing of contractual grievances, the Commission does process other types of “breach of duty of fair representation” complaints against unions. *City of Port Townsend (Teamsters Local 589)*, Decision 6433-B (PECB, 2000). A union breaches its duty of fair representation when its conduct toward one of its members is arbitrary, discriminatory, or in bad faith. *City of Redmond*, Decision 886 (PECB, 1980); *Vaca v. Sipes*, 386 U.S. 171 (1967). The employee claiming a breach of the duty of fair representation has the burden of proof and must demonstrate that the union’s actions or inactions were arbitrary, discriminatory, or in bad faith. *City of Renton*, Decision 1825 (PECB, 1984).

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty:

1. The union must treat all factions and segments of its membership without hostility or discrimination.
2. The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.
3. The union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation.

#### *Analysis*

An employee claiming a breach of duty of fair representation has the burden to file a sufficient complaint and the burden of proof. Hoeller argues that the union could have done a better job of representing him.

While an exclusive bargaining representative has the obligation to provide fair representation, the courts have recognized a range of flexibility in the standard to allow for union discretion in settling disputes. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d at 375. There is no statutory requirement that a union must accomplish the goals of each bargaining unit member, and complete satisfaction of all represented employees is not expected. A union can rarely provide all things desired by all of the employees it represents, and absolute equality of treatment is not the standard for measuring a union's compliance with the duty of fair representation.

A union member's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004). For example, the complaints allege that the union violated its duty of fair representation by declining to allow Hoeller to meet directly with the union's attorney.

This allegation describes employee dissatisfaction with the style of representation provided but does not state a cause of action for a violation of duty of fair representation. Similarly, the complaints allege the union violated its duty of fair representation by refusing to act on Hoeller's request to hold a "meeting of concern" with the employer about its treatment of Hoeller. The union is not obligated to call special meetings with the employer or to make its attorney available for a meeting because a member has requested that a meeting be arranged.

The Commission does not assert jurisdiction in duty of fair representation cases arising exclusively out of the processing of grievances. *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982). That policy is closely related to the Commission's lack of jurisdiction to remedy underlying contract violations which are generally the primary focus of the employees in such situations.

In the case before us, the complainant seeks redress against the union for failing to take grievances to arbitration. A union owes a duty of fair representation to the employees it represents in a manner that is not arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171. An employee who has been denied access to arbitration due to a union's breach of its duty of fair representation may have a cause of action in the courts, as a third-party beneficiary to the collective bargaining agreement, and the courts are equipped to rule on fair representation and exhaustion of contract remedies issues, as well as to remedy any underlying contract violation. *Bremerton School District*, Decision 5722-A; citing *Seattle School District (Seattle Education Association)*, Decision 4917-A (EDUC, 1995).

The allegation that the union would not provide Hoeller with union representation when other bargaining unit employees filed complaints against him is the only allegation against the union that describes specific arbitrary, discriminatory, or bad faith conduct by the union. However, this allegation is dismissed as untimely because it took place more than two years before the present unfair labor practice complaints were filed.

#### Vague Allegations Against the Union

The amended complaints allege:

We will be able to prove that the union did act in an arbitrary, discriminatory, and bad faith manner in its dealings with Dr. Hoeller. In effect, the union has singled him out for disparate treatment and either engaged in outright reprisals and/or withheld all union services against him as punishment.

WAC 391-45-050(2) requires the complainant to include “[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.” Complaints must contain specific descriptions and dates of occurrences so that the respondents can look into the allegations and respond. The Commission cannot address vague allegations or generalizations that lack required details including times, dates, places, and participants in occurrences.

### CONCLUSION

The amended complaint against the employer states causes of action for employer discrimination and derivative interference. The discrimination allegation concerning changing the Humanities Division policy for post-file review of adjuncts and increasing the frequency of student evaluations and teaching observations of adjuncts is dismissed because it was untimely filed. The employer is required to file an answer to the amended complaint within 21 days of this order.

All of the allegations against the union are being dismissed for failure to state a cause of action under the jurisdiction of the Commission. The allegation concerning the union’s failure or refusal to provide Hoeller with union representation when other bargaining unit employees filed complaints against him was not timely filed. The Commission does not assert jurisdiction in duty of fair representation cases arising exclusively out of the processing of grievances. The remaining allegations against the union either do not describe activity prohibited by Chapter 28B.52 RCW or contain only vague generalizations without reference to specific facts and events.

### ORDER



1. Assuming all of the facts alleged to be true and provable, the allegations of the amended complaint in Case 127690-U-15 state causes of action, summarized as follows:

Employer discrimination in violation of RCW 28B.52.073(1)(c) [and if so, derivative interference in violation of RCW 28B.52.073(1)(a)] in reprisal for union activities protected by Chapter 28B.52 RCW by:

- a. Assigning faculty members with a history of animosity toward Hoeller to observe and evaluate his teaching, since October 29, 2013.
- b. Modifying the position description for a tenure-track position in philosophy in order to exclude Hoeller from qualifying for the position since January 2015.
- c. Insisting on evaluating Hoeller's teaching during the fall 2015 academic quarter, while Hoeller was sick with the flu.
- d. Failing to offer teaching assignments to Hoeller for the summer 2015 academic quarter.
- e. Modifying the course offering schedule to deny Hoeller an opportunity to teach more than two courses during the fall 2015 academic quarter.

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

2. The employer shall:

File and serve its answers to the allegations of the amended complaint 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 allegation of the amended complaint in Case 127690-U-15 concerning employer discrimination in violation of RCW 28B.52.073(1)(c) by changing the Humanities Division policy for post-file review of adjuncts and increasing the frequency of student evaluations and teaching observations of adjuncts, including Hoeller, on May 6, 2013, is DISMISSED for failure to state a cause of action.
4. The amended complaint in Case 127691-U-15 charging unfair labor practices by the union is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 6th day of January, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JESSICA J. BRADLEY, Unfair Labor Practice Manager

Paragraphs 3 and 4 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.