

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LAKWOOD POLICE INDEPENDENT
GUILD,

Complainant,

vs.

CITY OF LAKEWOOD,

Respondent.

CASE 129704-U-17

DECISION 12805 - PECB

ORDER OF DISMISSAL

On September 21, 2017, the Lakewood Police Independent Guild (union) filed a complaint under Chapter 391-45 WAC against the City of Lakewood (employer). The complaint was reviewed under WAC 391-45-110,¹ and a deficiency notice issued on October 18, 2017, indicated that the complaint did not state a cause of action. The union was given 21 days in which to file and serve an amended complaint or face dismissal of the case. The deficiency notice indicated that it was mailed and e-mailed to the parties. On November 21, 2017, the union notified the Public Employment Relations Commission (PERC) that it had not received the deficiency notice from PERC. PERC was unable to find record of the deficiency notice being sent to the parties by e-mail. The union was given extended time until the end of business on December 4, 2017, to file an amended complaint.

No further information has been filed by the union. The complaint is dismissed for failure to state a cause of action.

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.

ISSUES

The complaint alleges the following:

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 March 20, 2017, by unilaterally changing the process of discipline, without providing the union an opportunity for bargaining.

Employer interference with employee rights in violation of RCW 41.56.140(1), by denying Darrell Moore's right to union representation (*Weingarten* right) in connection with a meeting on March 20, 2017.

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 Darrell Moore during a March 20, 2017, disciplinary process.

The complaint is dismissed for two reasons. One, the complaint is untimely filed. Two, the *Weingarten* right allegation lacks the information and detail necessary to find a cause of action within the Commission's jurisdiction.

BACKGROUND

The union filed the unfair labor practice complaint against the employer. The union's e-mail filing was received by PERC on September 20, 2017, at 11:53 p.m. PERC's office closes at 5:00 p.m.

According to the complaint, the union is the exclusive bargaining representative of the employer's police officers, detectives, and sergeants. Darrell Moore is a police officer in the bargaining unit.

On March 10, 2017, Moore allegedly attended a meeting where the employer published the administrative findings related to Moore's officer-involved shooting incident. Moore was found to not have violated any employer policies.

On March 11, 2017, allegedly Chief Michael Zaro asked Moore to a meeting to discuss facts and circumstances surrounding the shooting. Allegedly, Moore asked for the meeting to end and requested that his attorney be present for further inquiries. According to the complaint, Zaro agreed to reschedule the meeting.

On March 17, 2017, the complainant alleges Moore's attorney asked Zaro if Moore was being compelled to answer questions related to the officer-involved shooting incident. Zaro allegedly responded that Moore would not be compelled to answer questions. Zaro also allegedly stated he wished to address some performance concerns relating to the officer-involved shooting. The complainant alleges that Moore and his attorney were told that Zaro did not intend to issue discipline, and the meeting would be rescheduled so the city attorney could attend. Later on March 17, Zaro allegedly sent an e-mail to Moore's attorney indicating that Zaro would not engage in a meeting with Moore's attorney and the city attorney. Zaro allegedly stated he would deal directly with Moore.

On March 20, 2017, according to the complaint, Zaro contacted Moore by e-mail and provided Moore a short time to secure a union representative for a meeting scheduled that day. During the March 20 meeting, Moore was allegedly provided two letters. These letters qualified as a demotion because Moore's ability to seek and effectively secure overtime had been diminished or eradicated.

On March 20, 2017, Jeremy Vahle, the union president, was allegedly notified that Moore needed a union representative. This was the first time Vahle knew of any of the prior events involving Moore. Vahle allegedly met briefly with Moore prior to the meeting with Zaro. During the meeting between Vahle and Moore, Moore showed Vahle one letter he received from Zaro and described the second letter. Moore allegedly was not allowed to have a copy of the second letter until Moore agreed to sign it.

At some point during the March 20 meeting, Vahle allegedly asked Moore to leave the room so Vahle could speak privately with Zaro. During Vahle and Zaro's private conversation, Vahle allegedly provided Zaro with an example of how discipline had been carried out in a previous

similar instance. Zaro allegedly told Vahle that Zaro would not need to follow the same discipline procedure with Moore as in the given example.

After Vahle and Zaro's private conversation ended, Vahle allegedly invited Moore back into the room. Vahle allegedly stated he had concerns about the documents Moore was given because they were not issued as the result of a formal investigation, there was no due process, and no recourse for clearing Moore's name or explaining his actions. The documents were purported to be non-disciplinary in nature and removed from Moore's file at the next evaluation. When asked if the documents would be removed from Moore's file, Zaro allegedly said it would depend. Moore was not offered any training related to the officer safety concerns. Additionally, if Moore violated any conditions in the documents, he would be subject to an investigation and discipline based on the findings of the investigation.

During the course of the discussion on March 20, 2017, Zaro allegedly raised his voice and angrily waved the documents toward Vahle. Vahle allegedly believed that Zaro only wanted Vahle to answer Zaro's questions a certain way or stay silent. Vahle allegedly believed he was being prohibited from providing representation of Moore. Vahle then allegedly ended the meeting.

ANALYSIS

Timeliness

Applicable Legal Standard

There is a six-month statute of limitations for unfair labor practice complaints. "[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." RCW 41.56.160(1). The six-month statute of limitations period begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007), citing *City of Bremerton*, Decision 7739-A (PECB, 2003). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice" of the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. Filing by e-mail attachment is subject to limitations including, "If an electronic filing is received by the agency after office hours, the documents will be deemed filed on the next business day the office is open." WAC 391-08-120(4)(e) and (5)(iv).

Application of Standard

The complaint is untimely filed. The metadata created by the successful transmission of the e-mail or electronic filing constitutes the time of service. WAC 391-08-120(4)(e). The metadata shows the complaint was received by PERC on September 20, 2017, at 11:53 p.m. PERC's office closes at 5:00 p.m.

Timeliness is based on the date the complaint was filed. Because the complaint was filed after 5:00 p.m. on September 20, 2017, the document is deemed filed on September 21, 2017. In order to be timely, the complaint would have needed to describe triggering events that took place on or after March 21, 2017. All of the alleged events occurred on or before March 20, 2017. Thus, the complaint is untimely filed and must be dismissed.

Interference - Weingarten Rights

Applicable Legal Standard

In *NLRB v. Weingarten*, 420 U.S. 251 (1975) (*Weingarten*), the United States Supreme Court held that under the National Labor Relations Act, an employee has the right to be accompanied and assisted by his or her union representative at investigatory meetings that the employee reasonably believes may result in disciplinary action. *Seattle School District*, Decision 10732-A (PECB, 2012). In *Okanogan County*, Decision 2252-A (PECB, 1986), the Commission held that the rights announced in *Weingarten* are applicable to employees who exercise collective bargaining rights under Chapter 41.56 RCW. See also *Methow Valley School District*, Decision 8400-A (PECB, 2004).

As examiners explained in *Washington State Patrol*, Decision 4040 (PECB, 1992) and *Seattle School District*, Decision 10066-B (PECB, 2010), there are four elements necessary for *Weingarten* rights to be applicable:

1. The right to representation attaches only where the employer compels the employee to attend an investigatory meeting.
2. A significant purpose of the interview must be (or becomes) to obtain facts related to a disciplinary action.
3. The employee must reasonably believe potential discipline might result from the information obtained during the interview. *Mason County*, Decision 7048 (PECB, 2000).
4. The employee must request the presence of a union representative.

When determining whether *Weingarten* rights apply, the Commission looks at the facts to determine if the meeting was investigatory in nature. It is the nature of an investigatory interview that the employer is seeking information from the employee. A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. *City of Bellevue*, Decision 4324-A. Discipline often can and does result from investigatory meetings, and the Commission has found interviews to be investigatory where they were part of an investigation concerning improper conduct. *Snohomish County*, Decision 4995-B (PECB, 1996). If the interview is not investigatory in nature, *Weingarten* rights do not apply.

Where an employer's workforce is organized for purposes of collective bargaining, Chapter 41.56 RCW does not preclude direct communications between employers and their union-represented employees. *University of Washington*, Decision 11600-A (PSRA, 2013); *City of Seattle*, Decision 3566-A (PECB, 1991). Employers retain the right to communicate directly with employees who are represented, provided that the communication does not amount to bargaining or other unlawful activity. *City of Renton*, Decision 12563-A (PECB, 2016), citing *University of Washington*, Decision 10490-C (PSRA, 2011), *aff'd on other grounds*, *University of Washington v. Washington Federation of State Employees*, 175 Wn. App. 251 (2013).

Application of Standard

While the *Weingarten* right allegation is untimely, it also lacks specific facts necessary to constitute a *Weingarten* right violation within the Commission's jurisdiction. The complaint alleged that Zaro had a meeting on March 20, 2017, with Moore where the employer issued discipline related to an officer-involved shooting incident. There are no facts alleged to indicate that the March 20 meeting, where the employer issued Moore's discipline, was investigatory in nature. Nor do the facts alleged indicate that any questions were asked which would lead Moore to reasonably believe that discipline would result from any information obtained.

Additionally, it is unclear if Moore requested union representation during the meeting. The complaint alleged that Vahle was notified by someone that Moore needed representation. The complaint alleged that Vahle attended some portion of the meeting between Zaro and Moore. It is unclear when Vahle entered the meeting or if any portion of the meeting was held only between Zaro and Moore, thus resulting in Zaro denying Moore's request to union representation. The complaint does not state a cause of action for employer interference of *Weingarten* rights.

ORDER

The complaint charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 11th day of December, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


EMILY K. WHITNEY, Acting 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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RECORD OF SERVICE - ISSUED 12/11/2017

DECISION 12805 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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