STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION, Complainant, vs. CLARK COLLEGE, Respondent.	CASE 133401-U-21 DECISION 13340 - PSRA PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

Frank Prochaska, Staff Representative, for the Washington Public Employees Association.

Darcey J. Elliott, Assistant Attorney General, Attorney General Robert W. Ferguson for Clark College.

On March 19, 2021, the Washington Public Employees Association (union) filed an unfair labor practice complaint against Clark College (employer). The complaint alleged the employer unilaterally changed a mandatory subject of bargaining, failed to bargain in good faith, circumvented the exclusive bargaining representative, and interfered with protected employee rights. The complaint was reviewed under WAC 391-45-110.[1] A deficiency notice issued on April 6, 2021, notified the union that a cause of action could not be found at that time for the interference, circumvention, and good faith allegations. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the deficient allegations.

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

No further information has been filed by the union. The independent interference, circumvention, and good faith allegations are dismissed and a preliminary ruling is issued for the unilateral change allegation.

BACKGROUND

The union represents a bargaining unit of nonsupervisory classified employees at Clark College. The Washington State Office of Financial Management's Labor Relations Section negotiates on behalf of the employer.

The union asserts that on February 5, 2021, the employer unilaterally altered Aleksandr Anisimov's wages, conditions of employment, and other benefits without providing the union notice and an opportunity for bargaining. The union filed a grievance over the matter.

On March 12, 2021, the parties held a step one grievance meeting. According to the complaint, the employer asserted that the meeting was not valid because the grievant was not present at the meeting. The complaint also asserts that the employer claimed there was no duty to provide the union notice because there was an extensive email string between the employer and Anisimov concerning the change.

The employer allegedly asserted at this same meeting that it had inquired about the interpretation of collective bargaining agreement with the Labor Relations Section and the employer's position was consistent with the Labor Relations Section's direction. When the union suggested skipping unidentified grievance steps and moving to the next step in the process which involved the Labor Relations Section, the employer allegedly refused and insisted that the parties follow all steps of the grievance process.

ANALYSIS

Interference with Protected Rights

Generally, the burden of proving unlawful interference with the exercise of rights protected by chapter 41.80 RCW rests with the complaining party or individual. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

The union's complaint failed to allege an independent interference violation because it lacked facts demonstrating that a specific employee or more employees reasonably perceived the employer's actions to be a threat of reprisal or force, or promise of benefit. The complaint also failed to articulate how the employer's statement was associated with activity protected by an applicable bargaining law. Absent facts alleging such conduct, the independent interference allegation must be dismissed.

Refusal to Bargain in Good Faith

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.80.005(2). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *University of Washington*, Decision 11414-A (PSRA, 2013).

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). A party that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.80.110(1)(e) and (a) and RCW 41.80.110(2)(d) and (a). A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). What may be reasonable conduct in one case may not be reasonable in another. *City of Clarkston*, Decision 3246 (PECB, 1989).

The union asserts that the employer refused to bargain in good faith at the March 12, 2021, grievance meeting by relying upon the Labor Relations Sections interpretation of the relevant sections of the collective bargaining agreement while at the same time failing to have someone from that office present at the meeting. This union's allegation was written generally and did not include the names of persons involved or descriptions of specific statements and events as required by WAC 391-45-050(2).

Additionally, the facts do not suggest the employer failed to bargain in good faith by failing to have someone with authority to make decisions at the bargaining table. Rather, the facts simply allege the employer's interpretation of the collective bargaining agreement was consistent with the Labor Relations Section's interpretation and that the employer wanted to follow the contractual grievance process. Absent facts demonstrating how the employer's conduct was designed to frustrate the bargaining process, this allegation must be dismissed.

Circumvention/Direct Dealing

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations

with one or more employees concerning a mandatory subject of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

The union's complaint alleges that the employer circumvented the union when it directly negotiated with Anisimov about wages, hours, and working conditions. This allegation was also written generally and did not include names of persons involved or descriptions of specific statements and events as required by WAC 391-45-050(2). Absent such facts, the circumvention allegation must be dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, the unilateral change allegation of the complaint states a cause of action, summarized as follows:

> Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed, by unilaterally changing employee wages without providing the union an opportunity for bargaining.

This allegation will be the subject of further proceedings under chapter 391-45 WAC.

2. The respondent shall file and serve an answer to the allegation listed in paragraph 1 of this Order within 21 days following the date of this Order. The answer shall

   (a) specifically admit, deny, or explain each fact alleged in the complaint, except if the respondent states it is without knowledge of the fact, that statement will operate as a denial;

   (b) assert any affirmative defenses that are claimed to exist in the matter; and

   (c) specify whether deferral to arbitration is requested and, if so,

      i. indicate whether a collective bargaining agreement was in effect between the parties at the time of the alleged unilateral change;

ii. identify the contract language requiring final and binding arbitration of grievances;

iii. identify the contract language that is claimed to protect the employer conduct alleged to be an unlawful unilateral change;

iv. provide information (and copies of documents) concerning any grievance being processed on the matter at issue in this unfair labor practice case; and

v. state whether the employer is willing to waive any procedural defenses to arbitration.

The answer shall be filed and served in accordance with WAC 391-08-120. Except for good cause shown, if the respondent fails to file a timely answer or to file an answer that specifically denies or explains facts alleged in the complaint, the respondent will be deemed to have admitted and waived its right to a hearing on those facts. WAC 391-45-210.

An examiner will be designated to conduct further proceedings in this matter pursuant to chapter 391-45 WAC. Until an examiner is assigned, all correspondence and motions should be directed to the Unfair Labor Practice Administrator.

3. The allegations of the complaint concerning independent interference, circumvention, and good faith allegations are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 4th day of May, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DARIO DE LA ROSA, Unfair Labor Practice Administrator

Paragraph 3 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 05/04/2021

DECISION 13340 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 133401-U-21

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