EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-005-18

(UNFAIR LABOR PRACTICE)

E.K., Complainant, v. BENTON COUNTY AND BENTON COUNTY SHERIFF'S OFFICE, and BENTON COUNTY DEPUTY SHERIFFS' ASSOCIATION, Respondents.	)	DISMISSAL ORDER

Daniel E. Thenell, Attorney at Law, Thenell Law Group, Portland, Oregon, represented Complainant.

Todd A. Lyon and Lisa M. Vickery, Attorneys at Law, Fisher & Phillips LLP, Portland, Oregon, represented Respondents Benton County and Benton County Sheriff's Office.

Katelyn S. Oldham, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Respondent Benton County Deputy Sheriffs' Association.[1]

On November 26, 2018, Complainant filed an unfair labor practice complaint against Benton County and the Benton County Sheriff's Office (BCSO) (collectively, County), and the Benton County Deputy Sheriffs' Association (Association). The complaint alleges that the County violated ORS 243.672(1)(a) and (c), and ORS 659A.330. Additionally, the complaint alleges that the Association violated ORS 243.672(2)(a) and (b).

[1]The Association was previously represented by attorney Margaret Kirschnick, then of Tedesco Law Group. The Association filed a notice of substitution of counsel on February 8, 2019.

Administrative Law Judge (ALJ) Martin Kehoe investigated the complaint to determine whether it presents an issue of fact or law that warrants a hearing. OAR 115-035-0005. The County filed a confidential informal response to the complaint on December 21, 2018, and the Association filed a confidential informal response on December 26, 2018. The ALJ obtained permission from the respondents to share their confidential informal responses with Complainant. On January 3, 2019, the ALJ shared the informal responses with Complainant, directed him to respond to the respondents' arguments for dismissal, and ordered him to show cause why the ALJ should not recommend dismissal to the Board. Complainant submitted his response to the show cause order on February 13, 2019.[2] After reviewing the complaint and the parties' submissions, ALJ Kehoe recommended to this Board that we dismiss the complaint without a hearing.

When considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume that the well-pleaded facts alleged in the complaint are true. *Kreger v. Oregon AFSCME Council 75 and City of Eugene*, Case No. FR-01-11 at 2, 24 PECBR 253, 254 (2011). However, we do not consider merely conclusory statements or allegations that lack sufficient specificity. *Melendy v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. FR-3-08 at 18, 22 PECBR 975, 992 (2009); *Teamsters Local 57 v. City of Brookings/dba Brookings Police Department*, Case No. UP-85-92 at 1-2, 13 PECBR 677, 677-78 (1992). We may also rely on undisputed facts discovered during our investigation of the complaint. *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06 at 2, 21 PECBR 867, 868 (2007).

We have considered the complaint, the attached exhibits, and the filings of the parties. For the reasons discussed below, we conclude that a hearing is not warranted and dismiss the complaint.

We summarize the alleged or undisputed facts as follows:

1. Benton County and the BCSO are public employers within the meaning of ORS 243.650(20).

2. The Association is a labor organization within the meaning of ORS 243.650(13). The Association is the exclusive bargaining representative for patrol deputies employed by the BCSO.

3. Complainant is a deputy sheriff in the BCSO and a member of the Association.

[2]Complainant neglected to serve his response to the show cause order on the respondents as required by OAR 115-010-0033(2). As a result, the respondents believed that Complainant had failed to meet the deadline set by the ALJ. On February 26, 2019, the respondents filed a joint motion to dismiss the complaint for failure to respond to the show cause order. The respondents also argued that this Board should disregard Complainant's response if it was timely filed but not served as required by OAR 115-010-0033(2). Later on February 26, 2019, Complainant provided respondents with a copy of his response and apologized for failing to serve it as required. Because we dismiss the complaint in its entirety on other grounds, we do not reach the issues raised by the motion to dismiss.

4. John Doe is a sergeant in the BCSO.[3] Sergeants are not included in the Association's bargaining unit.

5. In 2017, Complainant participated in at least two off-duty meetings regarding Doe's possible campaign for the office of sheriff. During those meetings, the participants discussed establishing a Facebook page for Doe's possible campaign, and a Facebook page for Association members.

6. In or about November 2017, two BCSO officers, Deputy Josh Gordon (then-Vice President and current President of the Association) and Corporal Al Schermerhorn (then Association member and current Association Vice-President), met with the Benton County Sheriff and complained of conduct by Complainant and other officers related to Doe's potential campaign for the office of sheriff and the related Facebook pages.

7. At the request of the County and the sheriff, Sergeant Craig Cunningham from the Marion County Sheriff's Office conducted an investigation into two officers' possible violations of BCSO policies or state law related to Doe's potential campaign. Complainant was not a subject of the investigation.

8. On or about February 1, 2018, Cunningham interviewed Complainant as a witness in the investigation. Cunningham also interviewed other BCSO officers.

9. In March 2018, Cunningham issued a report based on his investigation. In that report, Cunningham concluded that the subjects of the investigation did not commit the alleged violations. Although Complainant was not a subject of the investigation, Cunningham noted in his report that he found that Complainant had been dishonest during the interview regarding his involvement in setting up the Facebook page for Association members.

10. In March 2018, the County sent a copy of Cunningham's report to Benton County District Attorney John Haroldson, so that he could determine whether disclosure of Cunningham's findings was required under *Brady v. Maryland*, 373 US 83 (1963). If the district attorney determines that findings about a particular individual must be disclosed, the district attorney places that individual on a *Brady* notification list.

11. Based on Cunningham's March 2018 report, BCSO Captain Don Rogers provided Complainant with a Notification of Investigation for alleged violations of BCSO General Order 7.1 Rules of Conduct, section 2.9 Truthfulness. The Notification of Investigation informed Complainant that the district attorney would be notified of the outcome of the investigation for consideration of *Brady* notifications.

12. The County placed Complainant on paid administrative leave on or about March 13, 2018, pending the outcome of the investigation.

13. In or about March and April 2018, Gordon corresponded with Complainant regarding the investigation and acted as his Association representative. Complainant was dissatisfied with Gordon's representation, and he believed that Gordon had a conflict of interest

[3]John Doe is a pseudonym.

based on his role as a witness in the earlier investigation related to Doe's potential campaign. Complainant requested that Gordon have no further involvement in his investigation, and he requested that a different Association representative, Kim Lovik, replace Gordon.

14. Rogers conducted an investigatory interview of Complainant on March 29, 2018.

15. Complainant's paid administrative leave ended and he returned to work on or about April 17, 2018.

16. Rogers issued a report regarding his investigation of Complainant on or about June 7, 2018. Rogers found that there was insufficient evidence that Complainant was untruthful in violation of BCSO General Orders. The County did not issue any discipline against Complainant as a result of this investigation.

17. On or about June 19, 2018, District Attorney Haroldson notified Complainant's attorney, Daniel Thenell, that Haroldson had decided that "Detective Sergeant Cunningham's findings that [Complainant] was untruthful constitutes *Brady* material that must be disclosed in every instance where he is called as a witness." Although Rogers found that there was insufficient evidence that Complainant was untruthful, Haroldson has kept Complainant on the *Brady* notification list, but has not disqualified him as a witness.

DISCUSSION

Claims against the County

The complaint alleges that the County violated various provisions of ORS 659A.330, which relates to "employee social media account privacy." Complainant does not cite any statute that grants this Board jurisdiction over ORS 659A.330 claims, and we are not aware of any. Accordingly, we dismiss all of the ORS 659A.330 claims because we lack jurisdiction over that statute.

The complaint also claims that the County violated the Public Employee Collective Bargaining Act (PECBA), ORS 243.672(1)(a) and (c). For the reasons discussed below, we conclude that the majority of claims against the County are untimely, and we dismiss the remaining allegations because they fail to state a valid claim for relief under PECBA.

Under ORS 243.672(3), "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." This statute of limitations incorporates a "discovery rule," which means that the 180-day limitation period begins to run when the allegedly injured party "knows or reasonably should know" that an unfair labor practice has occurred. *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 190, 260 P3d 619, 624 (2011).

Complainant filed his complaint on November 26, 2018. Accordingly, his claims are untimely if they are based on alleged conduct that he knew or reasonably should have known occurred before May 30, 2018.

Complainant alleges that the County violated sections (1)(a) and (1)(c) by the following acts: interviewing him in February 2018 in the course of Cunningham's investigation of other officers' alleged misconduct; asking him about the Facebook page for Association members during the February 2018 interview; placing him on paid administrative leave from March 13 to April 17, 2018; and reporting him to District Attorney Haroldson for possible *Brady* listing in March 2018. However, all of those alleged acts occurred well before May 30, 2018. And, because Complainant was directly involved or affected, he either knew or reasonably should have known of those acts when they occurred. Therefore, we dismiss all of the claims that are based on those alleged acts as untimely.

There are only two events that, according to the complaint's allegations, occurred on or after May 30, 2018: (1) on or about June 7, 2018, Rogers issued a report in which he concluded that there was insufficient evidence that Complainant was untruthful, and (2) the district attorney "has kept [Complainant] on the *Brady* notification list" despite Rogers's June 2018 report. However, even assuming that those timely allegations are true, Complainant has failed to state a valid claim for relief under PECBA.

ORS 243.672(1)(a) prohibits a public employer or its designated representative from interfering with, restraining, or coercing public employees in or because of the exercise of protected rights. ORS 243.672(1)(c) prohibits a public employer or its designated representative from discriminating in regard to hiring, tenure, or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. Here, Rogers's report essentially exonerated Complainant. Neither the allegations in the complaint nor the undisputed facts discovered during our investigation present a factual or legal basis for concluding that Rogers's report adversely affected or otherwise impacted Complainant in a way that interfered with, restrained, or coerced him in or because of the exercise of protected rights, or discriminated against him for the purpose of encouraging or discouraging membership in an employee organization. Even after considering the untimely allegations as context, the complaint does not allege sufficient facts that, if true, would establish that Rogers's report constituted a proscribed action under ORS 243.672(1)(a) or (c).

Additionally, the County is not liable for the district attorney's decision to keep Complainant on the *Brady* list. Under PECBA, the County is liable only for its own conduct or the conduct of "its designated representative." ORS 243.672(1). A designated representative includes an individual "specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues." ORS 243.650(21). Additionally, "when employees of a public employer would reasonably believe that a given individual acted on behalf of the public employer in committing an unfair labor practice, that individual is a 'public employer representative' under ORS 243.650(21), and the public employer may be held liable for the conduct of that individual under ORS 243.672(1)." *AFSCME Council 75 v. City of Lebanon*, 360 Or 809, 832, 388 P3d 1028 (2017). Complainant does not allege facts establishing that Haroldson was a designated representative of the County within the meaning of PECBA when he decided to keep Complainant on the *Brady* list despite Rogers's report.

Consequently, even assuming that the facts alleged in the complaint are true, Complainant has not established that there is an issue of fact or law warranting a hearing regarding his claims against the County. Therefore, we dismiss those claims.

Claims against the Association

As discussed above, Complainant's claims are untimely if they are based on conduct that he knew or reasonably should have known occurred *before* May 30, 2018.

Complainant claims that the Association violated its duty of fair representation under ORS 243.672(1)(a) by reporting information about his activities to the County, and by failing to fairly represent him during the two internal investigations. However, the complaint and his submissions in response to the show cause order (including his declaration) establish that the Association's alleged conduct occurred before May 30, 2018, and that he either knew or reasonably should have known of that conduct before May 30, 2018.

Specifically, Gordon and Schermerhorn allegedly reported information about Complainant in November 2017. The first internal investigation was initiated in late 2017, and Cunningham issued his report in March 2018. The County initiated an investigation of Complainant and placed him on paid administrative leave pending investigation on or about March 13, 2018. The County returned Complainant to work on or about April 17, 2018. And, in or before April 2018, Complainant was dissatisfied with his Association representation; he believed that Gordon had a conflict of interest; and Gordon declined his request that "Gordon have no further involvement in the investigation." Because Complainant knew, before May 30, 2018, of the alleged facts that give rise to his duty of fair representation claim, we dismiss that portion of the complaint as untimely.[4]

Complainant also claims that the Association violated its duty of fair representation by declining to file an unfair labor practice complaint on his behalf. However, the complaint fails to specify when he asked the Association to file a complaint, or when the Association declined that request. Further, even though the Association contended that the complaint should be dismissed as untimely and the ALJ issued an order to show cause, Complainant did not specify when that conduct occurred in his response to the show cause order, and he did not amend his complaint accordingly. Thus, even assuming (without deciding) that the Association had a duty to file an unfair labor practice complaint on Complainant's behalf, we dismiss that portion of the complaint for lack of specificity. *Brookings Police Department*, UP-85-92 at 1-2, 13 PECBR at 677-78 (dismissing section of complaint that lacked specificity).[5]

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[4]Complainant's counsel asserts that "the first time [Complainant] had knowledge of many of the facts that form the basis of the complaint" was when Rogers published memos regarding the internal investigations in June 2018. However, Complainant does not (in his complaint or his declaration) specifically identify which facts he discovered in June 2018, or allege facts sufficient to establish that it was reasonable for him to be unaware of those facts before that date. The conclusory assertion alone is not sufficient to establish that the complaint is timely by operation of the discovery rule.

[5]Although we do not decide whether the Association had a duty to file an unfair labor practice complaint, this Board has repeatedly noted that the duty of fair representation exists primarily when employees have "relinquish[ed] the right to act on their own," *i.e.*, in the areas of contract negotiation and grievance processing. *Melendy*, FR-3-08 at 16, 22 PECBR at 990. *See also, e.g.*, *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-02-09 at 26, 24 PECBR 1, 26 (2011) (holding union did not breach duty of fair representation by declining to represent employee at unemployment hearing).

Finally, Complainant claims that the Association violated ORS 243.672(2)(b) by refusing to file a grievance on his behalf. However, he does not allege that the County violated the Association's collective bargaining agreement or that he asked the Association to pursue a grievance on his behalf, and he fails to specify when the Association declined to file a grievance. Therefore, he failed to plead facts sufficient to establish this claim. And, in any event, "[a] represented employee's right to seek relief against a union is limited to claims under ORS 243.672(2)(a)." *Teeter and Keepers v. Service Employees International Union, Local 503, and State of Oregon, Oregon Health Licensing Agency*, Case No. FR-04-09 at 21, 23 PECBR 831, 851 (2010) (dismissing employee's section (2)(d) claim against union). Accordingly, we dismiss the (2)(b) claim for lack of specificity and failure to state a valid claim for relief under PECBA.

For the reasons stated above, we find that there is no issue of fact or law that merits a hearing, and we dismiss the complaint in its entirety. *See* ORS 243.676(1)(b).

ORDER

The complaint is dismissed.

DATED: April 1, 2019.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.