STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. CENTRAL WASHINGTON UNIVERSITY, Respondent.	CASE 127564-U-15 DECISION 12588-C - PSRA DECISION OF COMMISSION

Edward Earl Younglove III, Attorney at Law, Younglove & Coker, P.L.L.C., for the Washington Federation of State Employees.

Laura L. Wulf, Assistant Attorney General, Attorney General Robert W. Ferguson, for Central Washington University.

The Washington Federation of State Employees (union) filed an unfair labor practice complaint alleging that Central Washington University (employer) refused to bargain by contracting out bargaining unit work. Examiner Kristi Aravena conducted a hearing. During his opening statement, the union's attorney moved to amend the complaint. After the hearing, the Examiner concluded that the union waived by inaction its right to bargain the employer's decision to contract out bargaining unit work.[1] The union appealed the Examiner's decision that the union waived its right to bargain and the Examiner's failure to rule on the union's motion to amend its complaint. The Commission remanded the case to the Examiner to rule on the union's motion and reserved its determination on the appeal until after the Examiner issued her decision on remand.[2]

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1 *Central Washington University*, Decision 12588 (PSRA, 2016).

2 *Central Washington University*, Decision 12588-A (PSRA, 2016).

On remand, the Examiner denied the union's motion.[3] The Examiner ruled that the motion was not in compliance with the limitations stated in WAC 391-45-070(2)(c) because it was made during the union's opening statement and evidence had not been received. The union appealed.

There are two issues before the Commission. First, did the Examiner err when she denied the union's motion to amend its complaint? We affirm the Examiner's denial of the union's motion to amend its complaint. A motion to amend the pleadings to conform to the evidence received without objection must be made after evidence is received. The union's motion was not properly plead.

Second, did the union waive by inaction its right to bargain the employer's decision to contract out bargaining unit work? We affirm the Examiner's conclusion that the union waived its right to bargain. The employer provided notice of its intent to contract out bargaining unit work. As required by the parties' collective bargaining agreement, the union did not request to bargain within 21 days after the employer notified the union that the employer wanted to change a mandatory subject of bargaining.

ISSUE 1: Did the Examiner err when she denied the union's motion to amend its complaint?

Applicable Legal Standards

Complaints filed under Chapter 391-45 WAC provide respondents with notice of the claims against them and assists in proper decision-making. *Snohomish County Public Utility District*, Decision 8727-A (PECB, 2006). A complainant may move to amend a complaint at any time, and amendment is freely allowed, until an examiner is appointed. WAC 391-45-070(2)(a). After an examiner is appointed, motions to amend are limited by WAC 391-45-070(2):

> . . .
>
> (b) After the appointment of an examiner but prior to the opening of an evidentiary hearing, amendment may be allowed upon motion to the examiner and subject to due process requirements;

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3 *Central Washington University*, Decision 12588-B (PSRA, 2016).

> (c) After the opening of an evidentiary hearing, amendment may only be allowed to conform the pleadings to evidence received without objection, upon motion made prior to the close of the evidentiary hearing.

Once a hearing has been opened, WAC 391-45-070 permits amendment of a complaint if the non-moving party has not objected to the evidence offered that forms the basis of the amendment. *Snohomish County Public Utility District*, Decision 8727-A; WAC 391-45-070(2)(c). A complainant may not, for the first time, raise amendment in its post-hearing brief. *Skagit County*, Decision 8886-A (PECB, 2007); *Lower Columbia College*, Decision 9171-A (PSRA, 2007). A party that fails to either properly plead a specific allegation or to properly amend its complaint to add that allegation effectively waives its right to adjudicate that particular claim. *Grays Harbor County*, Decision 8043-A (PECB, 2004).

Application of Standards

WAC 391-45-070(2)(c) applies because the Examiner had opened the hearing. Thus, the union could only move "to conform the pleadings to evidence received without objection." WAC 391-45-070(2)(c). Conform means "to shape after" or "to bring into agreement or correspondence." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 297 (1994). A motion to conform the pleadings to the evidence must necessarily be made after evidence is received.

In this case, the Examiner had not received evidence when the union made its motion. In his opening statement, the union's attorney explained the evidence he intended to present, but evidence had not yet been offered. The Examiner could not know whether evidence would be offered or objected to until the evidence was presented.

Conclusion

We affirm the Examiner's decision that the union's motion to amend its complaint was not timely. A motion to amend a complaint to conform to the evidence received without objection is timely when made after evidence is received and before the close of the hearing. In this case, the union did not move to amend its complaint after evidence was received without objection; rather, the union outlined in its opening statement what it thought the evidence would prove.

ISSUE 2: Did the union waive by inaction its right to bargain the employer's decision to contract out bargaining unit work?

Applicable Legal Standards

The threshold question in a contracting out case is whether the work that was contracted out was bargaining unit work. If the work was not bargaining unit work, then the analysis stops and the employer would not have had an obligation to bargain its decision to contract out the work. If the work was bargaining unit work, then the *City of Richland* balancing test is applied to determine whether the decision to contract out bargaining unit work is a mandatory subject of bargaining. *Central Washington University*, Decision 12305-A (PSRA, 2016).

The Commission applies the *City of Richland* balancing test to determine whether a topic is a mandatory subject of bargaining. The balancing test weighs the competing interests of the employees in wages, hours, and working conditions against "the extent to which the subject lies 'at the core of [the employer's] entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). Recognizing that public sector employers are not "entrepreneurs" in the same sense as private sector employers, when weighing entrepreneurial control the balancing test should consider the right of a public sector employer, as an elected representative of the people, to control management and direction of government. *See Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission*, 81 Wis.2d 89, 95 (1977).

If the decision is a mandatory subject of bargaining, then the next question is whether the employer provided notice and an opportunity to bargain the decision. If the employer did not, then the union will have met its burden of proving that the employer refused to bargain by contracting out bargaining unit work.

Application of Legal Standards

In 2015, the employer purchased a set of bleachers. On April 24, 2015, in preparation for the purchase, the employer sent the union a Notice of Project Work. The employer intended to contract out the preparation of the site, the placement of the concrete slab, and the assembly and installation

of the bleachers. The notice stated that the work needed to be performed within a certain time frame.

The parties agreed that the work in question was bargaining unit work and that the employer had a duty to bargain its decision to contract out the concrete work. The employer defended the complaint and pled waiver by inaction. The Examiner found that the employer notified the union that the employer intended to contract out bargaining unit work, that the parties discussed the issue at a Union Management Communication Committee (UMCC) meeting, and that the union did not demand to bargain the project. Therefore, the union waived by inaction its right to bargain. The issue is whether the employer provided notice of its decision and an opportunity to bargain.

The parties' collective bargaining agreement contained two applicable provisions: Article 37 – Mandatory Subjects and Article 38 – Union-Management Communication Committee.

ARTICLE 37
MANDATORY SUBJECTS

37.1 The Employer will satisfy its collective bargaining obligation before changing a matter that is a mandatory subject. . . . The Union will notify the Employer's Chief Human Resources Officer or designee of any demands to bargain. The Union's request for bargaining will include known identified impacts for bargaining. In the event the Union does not request discussions and/or negotiations within twenty-one (21) calendar days, the Employer may implement the changes without further discussions and/or negotiations. The timeframe for filing a demand to bargain will begin after the Employer has provided written notice to the Union. . . .

. . .

ARTICLE 38
UNION-MANAGEMENT COMMUNICATION COMMITTEE

38.1 Purpose
. . . The purpose of the committee(s) is to provide communication between the parties, to share information, to address concerns and to promote constructive union-management relations.

38.2 Committees
. . .
D. Scope of Authority
Committee meetings will be used for communications between the parties, to share information and to address concerns. The committee will have no authority to conduct any negotiations or modify any provision of this Agreement.

On April 24, 2015, the employer provided the union notice of its intent to contract out bargaining unit work. On April 28, 2015, the employer and union had a UMCC meeting. The parties discussed the bleacher project. The union requested that bargaining unit employees perform as much of the work as possible. Michael Moon, Executive Director for the Facilities Management Department, told the union that the employer would keep as much work as it could in-house. Phedra Quincey, Council Representative for the union, reiterated that the union wanted bargaining unit employees to perform the concrete work. Quincey's contemporaneous meeting notes indicate that Moon responded "ok." Moon testified that this meant he understood the union's concern, not that he agreed to have bargaining unit employees perform the concrete work.[4] Moon expected the union to request bargaining.

At the UMCC meeting, the parties reached some agreements about the bleacher project. They agreed that bargaining unit employees would perform the irrigation work. They agreed that the assembly and installation of the bleachers would be done by an outside contractor. They did not agree who would perform the concrete work.

The union's practice has been to formally demand to bargain in writing or, if an issue was discussed informally at a UMCC meeting, to memorialize the discussion in writing. In response to the employer's April 24 notice, the union did not submit a written demand to bargain or follow up on the April 28 meeting discussion with either a formal demand to bargain or memorialize the discussion in writing.

The language of Article 37.1 required the union to request negotiations within 21 days of receiving notice of the employer's intent to contract out the work. Accordingly, the union would have had to request negotiations by May 15, 2015. The discussion of the issue at the UMCC meeting could have been sufficient to require the employer to engage in further bargaining if it were not for Article 38.2 limiting the authority of the UMCC and prohibiting the parties from conducting negotiations at UMCC meetings. We cannot disregard the parties' contractual language requiring the union to request negotiations within 21 days and limiting the authority of the UMCC.

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[4] The Examiner made credibility determinations. We do not disturb those credibility determinations.

On May 18, 2015, Desiree Desselle, Labor Advocate for the union, e-mailed the employer's labor relations consultant, Eric Galbraith, about the bleacher project. Desselle wrote that she understood the parties had worked out an agreement to have bargaining unit employees prepare the site and do the concrete work. Desselle indicated that based on this agreement, the union would not submit a demand to bargain. Desselle's summary of events did not accurately capture what occurred at the April 28, 2015, UMCC meeting. The parties had not reached an agreement about who would perform the concrete work. Further, contrary to its practice, the union did not memorialize the discussion in writing.

Conclusion

The union did not respond to the employer's April 24, 2015, notice until May 18, 2015. This response was not made within the 21 calendar days provided by the collective bargaining agreement. The union did not submit a demand to bargain as required by Article 37.1.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Kristi Aravena are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 7th day of February, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DECISION 12588-C - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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