STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD, Complainant,	)	CASE 15932-U-01-4058
vs.	)	DECISION 8313-B - PECB
CITY OF SEATTLE, Respondent.	)	DECISION OF COMMISSION

Aitchison and Vick, by *Hillary McClure*, Attorney at Law, for the union.

Jeffery M. Slayton, Assistant City Attorney, for the employer.

This case comes before the Commission on an appeal filed by the Seattle Police Officers Guild (SPOG), seeking remedies in addition to those ordered by Examiner David I. Gedrose upon finding that the employer engaged in unlawful skimming of bargaining unit work.[1] We affirm the Examiner's decision.

BACKGROUND

The overall facts of this controversy are detailed in the Examiner's decision, and are only restated here as to the remedy issue pertinent to this appeal.

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[1] *City of Seattle*, Decision 8313-A (PECB, 2004).

In its complaint filed on July 31, 2001, the union alleged that the issuance of a dispatching protocol on April 9, 2001, had caused or could cause a transfer of work historically performed by employees in the bargaining unit represented by SPOG to fire fighters in a bargaining unit represented by another union. SPOG presented evidence at the hearing concerning several examples of alleged skimming that occurred after the complaint was filed, but it did not move to amend its complaint or even to conform the pleadings to the proof.

On January 12, 2004, the Examiner ruled the bargaining unit represented by SPOG has and retains exclusive work jurisdiction over water-related rescue activities in the freshwater areas of Seattle, and that the employer unlawfully issued the dispatching protocol challenged in the complaint without first fulfilling its collective bargaining obligations under Chapter 41.56 RCW, and thus committed unfair labor practices under RCW 41.56.140(4) and (1). The Examiner ordered the employer to cease and desist from unilaterally transferring water-related rescue work away from the bargaining unit represented by SPOG, to rescind any dispatching protocols that did not comply with the collective bargaining agreement in effect between the employer and SPOG, and to give notice and bargain in good faith concerning any future changes in procedure for dispatching personnel to water-related incidents.

The Examiner specifically declined to order any remedy for four specific instances which were mentioned in the evidence, but had occurred after the filing of the complaint. The employer objected to the introduction of evidence that would prove SPOG's case after the fact. The Examiner sustained the employer's objection insofar as it goes to the remedy in this case, and also ruled that two of the four incidents did not warrant any remedy.

DISCUSSION

The only issue on appeal is whether the Commission should award a financial remedy to bargaining unit members, based on any or all of the four examples brought forth by SPOG as examples of dispatches affected by the unilateral change in procedure found unlawful in this case. The employer has not challenged the Examiner's ruling that it committed an unfair labor practice when its agent issued the disputed protocol in April 2001 unilaterally changing the procedure for water-related emergency operations.[2]

Applicable Legal Standards

The authority of this Commission to prevent and remedy unfair labor practices is set forth in RCW 41.56.160, as follows:

> RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS AND CEASE AND DESIST ORDERS. (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: . . .
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> (2) If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice and, to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages.

Thus, the fashioning of remedies is a discretionary action of the Commission. When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of

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[2] The employer initially appealed the Examiner's decision to this body. However, on January 29, 2004, the employer notified the Commission that it wished to drop its appeal.

Washington approved a liberal construction of the statute to accomplish its purpose. *METRO v. PERC*, 118 Wn.2d 621 (1992). With that purpose in mind, the Supreme Court interpreted the statutory phrase "appropriate remedial orders" be those necessary to effectuate the purposes of the collective bargaining statute to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d at 633. The Commission's expertise in resolving labor-management disputes was also recognized and accorded deference. *METRO*, 118 Wn.2d at 634 (citing *Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983)).

In unfair labor practice proceedings, the ultimate burdens of pleading, prosecution, and proof all lie with the party that files the complaint. The Commission and its staff maintain an impartial posture as quasi-judicial decision makers in unfair labor practice proceedings:

- WAC 391-45-050(2) requires that an unfair labor practice complaint must contain, in separate numbered paragraphs, a clear and concise statement of the facts constituting the alleged unfair labor practices, including the time, place, date and participants in occurrence. WAC 391-45-050; *City of Seattle*, Decision 5852-C (PECB, 1998).

- The agency does not "investigate" charges or draft complaints in the manner familiar to those who practice before the National Labor Relations Board. The complainant must file and serve a complaint that is sufficiently detailed to be the basis of a formal adjudicative proceeding under the Administrative Procedure Act, Chapter 34.05 RCW. The facts set forth in the complaint also must be sufficient to make intelligible findings of fact in a "default" situation. WAC 391-45-110; *Apostolis v. City of Seattle*, 101 Wn. App. 300 (2000).

- Amendments to complaints are not allowed after the start of a hearing, except to conform the pleadings to evidence that is received without objection. WAC 391-45-070(2)(c).

- The agency does not "prosecute" complaints in the manner familiar to those who practice before the National Labor Relations Board. The party who files a complaint has the burden of proof. WAC 391-45-270(1).

An Examiner must then decide the case within the issues framed by the preliminary ruling issued under WAC 391-45-110.

In deciding appeals from decisions issued by Examiners, the Commission looks to see if there is substantial evidence in the record to support the challenged findings. Substantial evidence exists if, in light of the record as a whole, the evidence is of sufficient quantity to persuade a fair-minded, rational person of the truth of the declare premise. *World Wide Video Inc. V. Tukwila*, 117 Wn.2d 382 (1991). Additionally, the Commission attaches considerable weight to the factual findings and inferences made by its examiners. *City of Bellingham*, Decision 7322-A (PECB, 2002). It will not generally overrule an Examiner's findings of fact, unless it finds there is no substantial evidence to support the Examiner's findings.

Application of Standards

The Examiner correctly declined to treat any of the four examples brought forth by SPOG at the hearing as a basis for a financial remedy in this case. SPOG's complaint is broken down for analysis, as follows:

> II. CAUSE OF ACTION REFUSAL TO BARGAIN A TRANSFER OF WORK OUT OF THE BARGAINING UNIT

> 2.1 For a number of years, the Guild enjoyed exclusive work jurisdiction over all public safety rescue and recovery underwater diving duties performed for the City of Seattle. However, in the interest of public safety, the Guild agreed to share only the emergency water rescue aspect of the dive work with members of the bargaining unit represented by IAFF Local 27 ("Local 27") of the City of Seattle Fire Department. A Settlement Agreement Regarding Dive Work and Elliott Bay Patrols (the "Settlement Agreement") was executed by all parties including the Guild, the City and Local 27 on or about September 22, 2000. A true and correct copy of that agreement is attached as Exhibit B.
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> 2.2 On or about April 9, 2001, the Guild became aware that the Department issued an internal memorandum informing Department personnel of a new procedure for water related emergencies. A true and correct copy of that memorandum is attached as Exhibit C. Under this new procedure, the Seattle Fire Department would be allowed to respond to calls regarding water related emergencies that are historically within the exclusive work jurisdiction of Guild bargaining unit members and outside the scope of the Settlement Agreement. Some examples of water related emergencies described in the memorandum include any incident involving a person in the water (including drowning, suicide attempts, rescue, fall, distress and needs assistance); any incident involving a fire or smoke situation (including pier, boat, plane, house boat, or area adjacent to the shoreline); any incident involving a distressed vehicle or rescue (including a boat or house boat taking on water, over turned water crafts, planes in the water, cars in the water, searches for people or vehicles lost in the water, requests for assistance); any medical emergency on the water; any large spill; and all of the above in areas adjacent to the shoreline. Historically, the Seattle Police Department has been the exclusive agency responding and the Seattle Fire Department has not responded to the majority of the water related emergencies included among those listed in the internal memorandum.

Thus, SPOG's focus was on the April 9 memorandum and the examples of situations described in that memorandum. Nothing in those paragraphs put the employer on notice that would be facing remedy claims arising from any specific incidents.

The breakdown of SPOG's complaint for analysis continues, as follows:

> 2.3 On or about April 23, 2001, Guild president Mike Edwards wrote City Labor Relations Director Mike Schoeppach a letter formally demanding to bargain this procedure which constitutes an intentional erosion of the Guild's exclusive bargaining unit work. A true and correct copy of that letter is attached as Exhibit D.
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> 2.4 On April 30, 2001, City Labor Negotiator Fred Treadwell wrote to President Mike Edwards and informed him that the City would not bargain this matter. A true and correct copy of that letter is attached as Exhibit E.

Thus, SPOG's focus was on the demand for bargaining and the employer's refusal to bargain. Again, nothing in those paragraphs put the employer on notice that would be facing remedy claims arising from any specific incidents.

The breakdown of SPOG's complaint for analysis then concludes, as follows:

> 2.5 By adopting the above referenced water response procedures without discharging its obligation to bargain, the City has adopted a procedure that expands the scope of the Settlement Agreement and assigns work to the Seattle Fire Department that was within the historical and exclusive jurisdiction of the Guild.
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> 2.6 By unilaterally expanding the scope of the Settlement Agreement and assigning work outside of the Guild's bargaining unit, the City has violated and continues to violate RCW 41.56.140(4).

Thus, the only fact mentioned by SPOG was the issuance of the April 9 memorandum. Once more, nothing in those paragraphs put the employer on notice that would be facing remedy claims arising from any specific incidents. The Examiner ruled that the remedy available to SPOG is limited to the original complaint.

The Remedy Requested in the Original Complaint -

SPOG argues that its complaint sufficiently set forth allegation of skimming that would allow the granting of a remedy in this case. It points to the remedy request, which included:

> 3. An Order requiring the City, as a remedial measure, to compensate those divers who should lawfully have been fully assigned the diving duties and the response to water related emergencies not covered by the Settlement Agreement, time and one half of their regular rate of pay for all hours that Fire Department personnel spend unlawfully performing bargaining unit work until such time as the City has discharged its duty to bargain[.]

SPOG argues that there were no new allegations of skimming, and therefore an amended complaint was not necessary. SPOG's Brief, 6. The Commission disagrees.

On its face, SPOG's complainant and the cause of action framed from that complaint specifically refer only to the issuance of the April 9 memorandum concerning the procedure for responding to water-related incidents. No specific instances of "skimming" were alleged by detailed facts, including times, places, dates, and participants involved, as required by WAC 391-45-090(2). SPOG's first and only reference to "skimming" in its remedy request was not sufficient to put the employer or the Examiner on notice of any allegations regarding specific instances of skimming.

Absence of Timely Amendment -

SPOG filed the complaint to initiate this proceeding on July 31, 2001. The four specific examples of skimming cited by SPOG at the hearing and in this appeal occurred between October 31, 2001, and June 21, 2002. Our rules provide a vehicle for parties to amend their unfair labor practice complaints:

> WAC 391-45-070 AMENDMENT. (1) A complaint may be amended upon motion made by the complainant, if:
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> (a) The proposed amendment only involves the same parties as the original complaint;
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> (b) The proposed amendment is timely under any statutory limitation as to new facts;
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> (c) The subject matter of the proposed amendment is germane to the subject matter of the complaint as originally filed or previously amended; and
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> (d) Granting the amendment will not cause undue delay of the proceedings.
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> (2) Motions to amend complaints shall be subject to the following limitations:
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> (a) Prior to the appointment of an examiner, amendment shall be freely allowed upon motion to the agency official responsible for making preliminary rulings under WAC 391-45-110;
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> (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*;
>
> (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.
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> (3) Where a motion for amendment is denied, the proposed amendment shall be processed as a separate case.

(emphasis added). SPOG did not amend its complaint prior to the opening of the hearing, on July 23, 2003.

Furthermore, SPOG had ample time to amend its complaint if it wanted to seek remedies for the specific instances of "skimming" provided at the hearing, but would have needed to do so within six months after the individual incidents. Thus, the time for filing an amendment to include the incident alleged to have occurred in October 2001 would have run out in April 2002; the time for filing an amendment on the June 2002 incident would have run out in December 2002. If timely amendments had been denied by the Examiner, they still could have been filed and processed as separate cases. See WAC 391-45-070(c).

No Violation Found as to Some Incidents -

The Examiner found that two of the four instances presented by SPOG as evidence of skimming were not the fault of the employer. SPOG did not challenge the findings of fact as to either of those incidents in its notice of appeal, and the Examiner's decision stands as to them.

No Remedy Due as to Remaining Incidents -

We are not convinced that a monetary remedy would be appropriate as to the two remaining incidents, even if SPOG had properly amended its complaint:

> The record supports a finding that police officers in the bargaining unit represented by the complainant SPOG responded to the scene of the incident on October 31, 2001 (involving a submerged vehicle at a city park), and entered the water; and
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> The record supports a finding that police officers in the bargaining unit represented by the complainant SPOG responded to the scene of the incident on November 30, 2001 (involving a stalled jet ski), and entered the water.

The conventional remedy for a unilateral change violation is to order the restoration of the status quo ante. Back pay can be awarded to make the *affected employees whole for losses they suffered* as a result of the unlawful action. *Spokane County*, Decision 5698 (PECB, 1996). SPOG's request in this case amounts to a request for "damages" that goes beyond the "remedial" purpose of unfair labor practice remedies: It asks for money based on the number of hours other city employees who responded under the challenged dispatch protocol without regard to whether the responses by those employees deprived this bargaining unit of any

work opportunities (or served any useful purpose at all).[3] The Commission has rejected requests for punitive orders. *City of Anacortes*, Decision 1493-C (PECB, 1983). Although employees outside of the bargaining unit also responded to these incidents, they ceased their efforts when the police officers arrived.[4] SPOG offered no convincing proof of any (or how many) hours of work lost by bargaining unit employees in those incidents.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued in the above-captioned matter by Examiner David I. Gedrose are affirmed and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, on the 14th day of July, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

PAMELA G. BRADBURN, Commissioner

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[3] The Seattle Fire Department responded with 13 vehicles and one boat on November 30, 2001, only to watch while police officers dealt with the situation.

[4] See Exhibits 12, 13.