STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FISH AND WILDLIFE PROFESSIONALS, Complainant, vs. STATE – FISH AND WILDLIFE, Respondent.	CASE 23529-U-10-5998 DECISION 10923 - PSRA AMENDED PRELIMINARY RULING AND ORDER MAKING COMPLAINT MORE DEFINITE AND DETAILED

On September 24, 2010, the Washington Association of Fish and Wildlife Professionals (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington State Department of Fish and Wildlife (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on September 30, 2010, indicated that it was not possible to conclude that a cause of action existed at that time. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

The allegations of the complaint concerned employer violations of Chapter 41.80 RCW, by the employer's breach of its good faith bargaining obligations, circumvention of the union, and skimming of bargaining unit work performed by three bargaining unit members (Pat Michaels, Mitch Dennis, and Charmane Ashbrook), by transferring the work to three non-bargaining unit members (Bob Leland, John Anderson, and Pat Frasier). The complaint stated that the allegations

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[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.

were not [necessarily] limited to those employees. In addition, the complaint made reference to allegations of employer domination or assistance of a union.

The deficiency notice found no basis for the claims related to breach of good faith, circumvention of the union, or employer domination or assistance of a union. Regarding the skimming claims, the deficiency notice rejected the union's "not limited to" language and stated that any skimming claims would be in fact limited to the work of the three named bargaining unit members. The deficiency notice did not direct the union to identify the specific duties allegedly transferred, the specific dates of the transfer, or who transferred the work.

The union filed its first amended complaint on October 14, 2010, alleging only employer refusal to bargain (skimming), and adding the claim that bargaining unit duties of unidentified bargaining unit members had been transferred to a fourth non-bargaining unit member (Jan Anderson). The union retained the language asserting that allegations of the amended complaint were not limited to the specific allegations set forth in the amended complaint. A preliminary ruling and deferral inquiry was issued on October 19, 2010, finding a cause of action for skimming of bargaining unit work.

Employer Motions

On November 1, 2010, the employer filed motions to make the amended complaint more definite and detailed and for partial dismissal of the complaint. On November 4, 2010, the Unfair Labor Practice Manager issued a ruling granting in part the motion to make more definite and detailed, and the union was directed to file a second amended complaint. The motion for partial dismissal was denied, although the union was directed to delete the "not limited to" language when filing the second amended complaint.

Employer's Motion to Make More Definite and Detailed

Under the provisions of WAC 391-45-250, the employer asked for an order to make the union's first amended complaint more definite and detailed by identifying specific duties allegedly transferred, the specific dates of the transfer, and who transferred the work. That aspect of the

motion was denied. The purpose of the complaint and answer is to inform the parties of the issues that will be contested at the hearing, not to set forth each and every piece of evidence that would be presented at the hearing. *See Bates Technical College*, Decision 5575-A (CCOL, 1996); *Grays Harbor College*, Decision 6946 (CCOL, 2000). The union alleged that during a grievance meeting on April 13, 2010, it informed the employer, through Deputy Director Joe Stohr, of its objections to the alleged transfer of work. The union limited its claim to the involvement of seven employees and one employer official, and the work at issue is limited to Biologist 3 and 4 positions. The employer's own investigation, knowledge of its operations, and records, including the results of the April 13 grievance meeting, all provide sufficient information in this relatively narrow context to allow the employer to determine what the union is alleging in its amended complaint, including the bargaining work in dispute, the dates of the alleged transfers of work, and the employer officials allegedly involved.

However, the employer also requested that the union identify the bargaining unit members whose work was allegedly transferred to WMS band employee Jan Anderson. Although the union specifically identified the bargaining unit members whose work the employer allegedly transferred to the three WMS1 employees, the union inexplicably failed to identify any bargaining unit member in the claim involving Jan Anderson. That aspect of the motion was granted. The union was directed in its second amended complaint to identify the Biologist(s) 3 and/or 4 whose work the employer allegedly transferred to Jan Anderson. (However, the second amended complaint identifies the "WMS band employee" as "Jon Anderson.")

Employer's Motion for Partial Dismissal

The employer moved to dismiss an introductory statement that alleges, "Specific examples of the Agency's unlawful conduct include, but are not limited to," after which follow the specific allegations referred to above. The motion was deemed unnecessary at that time. Examiners are aware that they may not consider allegations not set forth in a complaint, and that a complainant may not add claims at hearing without amending its complaint. The deficiency notice made clear that the introductory statement was unacceptable, and that any other allegations would need to be made through an amended or separate complaint. Nevertheless, the first amended complaint retained the introductory statement. Based upon the deficiency notice, and trust in the ability of

examiners to rule on the relevant issues, the statement's retention was ignored as perhaps inadvertent, albeit superfluous. However, the employer raised an objection to the statement, and the objection could conceivably impact the processing of the complaint after assignment to an examiner. The examiner and parties could be distracted by a discussion over the scope of preliminary rulings, rather than focusing on the merits of the dispute.

In order to provide clarity as this case moves forward, the union was directed to remove the following sentence from the second amended complaint: "Specific examples of the Agency's unlawful conduct include, but are not limited to."

The preliminary ruling and deferral inquiry issued on October 19, 2010, were to remain in effect pending the union's second amended complaint. The union was directed to file a second amended complaint within 14 days, with the employer having an additional 14 days to file its answer following the filing and service of the union's second amended complaint. The employer was directed to refer to the preliminary ruling and deferral inquiry of October 19 regarding the filing of an answer.

The Union's Second Amended Complaint

The union filed its second amended complaint on November 18, 2010. The statement of facts used the introductory statement, "Specific examples of the employer's unlawful conduct include." Apparently, retention of the full introductory statement in the first amended complaint was not inadvertent. Although the words "but are not limited to" are absent, the implication remains that there are additional, unrevealed instances of alleged skimming which the union may decide to bring forth at the hearing; thus, the potential for distraction is unresolved.

Amended Preliminary Ruling and Order Making the Complaint More Definite and Detailed

After reviewing the second amended complaint, the Unfair Labor Practice Manager notified the parties that an amended ruling would be issued, that the employer's time to answer was extended, and that the employer should not file an answer until it received the amended ruling. Under WAC

391-45-250, the Unfair Labor Practice Manager, upon his own motion to make the complaint more definite and detailed, strikes the following words from the second amended complaint: "Specific examples of the employer's unlawful conduct include." The statement will not be considered at a hearing. The amended preliminary ruling set forth below limits the cause of action for skimming to only those employees named in the amended preliminary ruling.

Deferral to Arbitration

Under WAC 391-45-110(3), the employer has the option of requesting that this case be deferred to arbitration, since the cause of action solely involves an alleged unilateral change by transfer of bargaining unit work. The complaint and amended complaints have consistently referred to a grievance meeting between the union and employer on April 13, 2010, where the union informed the employer of its objections to the alleged skimming. However, the union has indicated on each of the complaint forms that no grievance has been filed. The amended preliminary ruling and deferral inquiry asks the employer to submit any grievance being processed on the matter at issue. If in fact a grievance is being processed, the employer should submit any documents it has concerning the grievance meeting of April 13. The employer should file its answer to the second amended complaint within 14 days following the date of this Decision.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the allegations of the second amended complaint state a cause of action 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)], by skimming of:
>
> (a) Biologist 4 work previously performed by Pat Michaels to WMS1 Bob Leland;

(b) Biologist 3 work previously performed by Mitch Dennis to WMS1 Jon Anderson;

(c) Biologist 4 work previously performed by Charmane Ashbrook to WMS1 Pat Frasier; and

(d) Biologist 4 work previously performed by Amilee Wilson and Biologist 3 work previously performed by Mitch Dennis to WMS band employee Jon Anderson.

Those allegations of the second amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

State – Fish and Wildlife shall:

File and serve its answer to the allegations listed in paragraph 1 of this Order, within 14 days following the date of this Order.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the amended complaint. Service shall be completed no later than the day of filing. An answer shall:

1. Specifically admit, deny or explain each fact alleged in the amended complaint, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial.

2. Specify whether "deferral to arbitration" is requested and, if so:

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

   b. Identify the contract language requiring final and binding arbitration of grievances;

c. Identify the contract language which is claimed to protect the employer conduct alleged to be an unlawful unilateral change;

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

e. State whether the employer is willing to waive any procedural defenses to arbitration.

3. Assert any other affirmative defenses that are claimed to exist in the matter.

Except for good cause shown, a failure to file an answer within the time specified, or the failure of an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. 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 undersigned.

2. The statement in the second amended complaint alleging that "Specific examples of the agency's unlawful conduct include" should be disregarded and considered stricken from the pleadings.

ISSUED at Olympia, Washington, this 29th day of November, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, 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.