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-B - PSRA ORDER ON REMAND

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

Donna J. Stambaugh, Senior Counsel, Attorney General Robert W. Ferguson, for Central Washington University.[1]

On August 25, 2015, the Washington Federation of State Employees (union) filed an unfair labor practice complaint against Central Washington University (employer). The union alleged that the employer refused to bargain in violation of RCW 41.80.110(1)(e) and, if so, derivatively interfered with employee rights in violation of RCW 41.80.110(1)(a). The union alleged that the employer did so by unlawfully contracting out construction and maintenance work previously performed by bargaining unit employees—specifically, concrete work for the installation of bleachers—without providing an opportunity for bargaining. A preliminary ruling was issued on August 31, 2015, stating a cause of action existed for unilateral transfer of bargaining unit work.

I held a hearing on January 26, 2016. The parties submitted post-hearing briefs on March 18, 2016, to complete the record. On June 14, 2016, I issued a decision finding that the union waived by inaction its right to bargain over the employer's decision to contract out bargaining unit work. *Central Washington University*, Decision 12588 (PSRA, 2016).

[1] On October 13, 2016, Assistant Attorney General Laura L. Wulf filed a Notice of Withdrawal and Substitution of Counsel on behalf of the employer.

The union appealed to the Commission my conclusion that the union waived its right to bargain. The union also asserted that I failed to rule on its motion to amend its complaint to add a claim that the employer bargained in bad faith due to the employer's failure to respond to the union's May 18, 2015, e-mail.

The Commission remanded the case to me to rule on whether the union's motion to amend its complaint was timely and, if so, to rule on the merits of the motion based on the existing evidentiary record. *Central Washington University*, Decision 12588-A (PSRA, 2016).

ISSUE

Was the union's motion to amend its complaint timely and, if so, should the motion be granted?

The union's motion to amend its complaint to add the allegation of lack of good faith bargaining to conform to the evidence is denied. The motion was not pleaded with sufficient specificity and was not timely.

ANALYSIS

Applicable Legal Standards

A preliminary ruling issued under WAC 391-45-110 and a detailed complaint that conforms to WAC 391-45-050 serve to provide sufficient notice to the responding party regarding complained-of facts and issues to be heard before an examiner. *King County*, Decision 9075-A (PECB, 2007). As part of the preliminary ruling process, the Commission's unfair labor practice manager specifies the types of statutory violations that the complaining party has asserted in its complaint. Once an examiner is assigned to hold an evidentiary hearing, the examiner can rule only upon the issues framed by the preliminary ruling unless a motion to amend the complaint is properly made. *See King County*, Decision 6994-B (PECB, 2002).

After the preliminary ruling is issued by the unfair labor practice manager framing the issues to be heard at hearing, the Commission's rules allow a complaining party to attempt to change the scope

of the proceedings. First, a complainant may disagree with the causes of action identified in the preliminary ruling and may request that the unfair labor practice manager reconsider his or her ruling. WAC 391-45-110(2)(a). Second, following the appointment of an examiner, a complainant may move to amend its complaint prior to the opening of an evidentiary hearing. WAC 391-45-070(2)(b). Third (and most relevant here), a complainant may move to amend its complaint after the opening of an evidentiary hearing only to conform the pleadings to the evidence received without objection. WAC 391-45-070(2)(c). Such a motion must be made before the close of the evidentiary hearing. *Id.*

Application of Standards

The union filed its complaint in this matter on August 25, 2015, alleging the employer refused to bargain when it contracted out concrete work. On August 31, 2015, the Unfair Labor Practice Manager issued a preliminary ruling that forwarded the following issue for hearing:

> Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so derivative interference with employee rights in violation of RCW 41.80.110(1)(a)] since June 12, 2015, by unilaterally contracting out construction and maintenance work previously performed by bargaining unit employees, specifically concrete work for the installation of bleachers, without providing an opportunity for bargaining.

There was no communication from the union requesting an amendment to the preliminary ruling prior to the hearing.

In my opening statement on the record after the evidentiary hearing had commenced, I told the parties that I would be limiting the scope of the hearing to the issues framed by the preliminary ruling. I asked the parties if they had any preliminary motions and neither side responded with any. The parties were then given an opportunity to make opening statements.

During its opening statement the union mentioned an amendment to its complaint. If the union intended this to be a "formal motion," that was not clearly stated. The union's counsel said,

> To the extent the complaint—those are the facts, essentially, where they make a complaint to the extent that the complainant then has an amendment to maybe the

> argument that the employer had an affirmative duty to respond to the union's letter and clarify its position. And we would move to amend our complaint to add to that allegation.

I did not respond to the union's opening statement. Throughout the rest of the hearing, there was no further discussion from either side regarding the union's statement. The union did not specify that it was trying to add a "failure to bargain in good faith" claim to its complaint. The union never stated that it was moving to amend its complaint to conform the pleadings to the evidence under WAC 391-45-070(2)(c).

Under those circumstances, I did not consider any actual motion to amend by the union to be properly before me during the hearing. I made no ruling on any motion during the hearing. The union made no reference to a motion to amend in its post-hearing brief. The union did not reference a motion to amend until it stated in its appeal before the Commission that it had "formally moved to amend its complaint to add this allegation of lack of good faith bargaining to conform to the evidence it proposed to present." This was the first time a formal motion to conform the pleadings to the evidence pursuant to WAC 391-45-070(2)(c) or bad faith bargaining was clearly mentioned.

As with any other unfair labor practice hearing and most other adjudicative hearings, a party's opening statement gives the trier of fact a preview of what the party intends to present during the hearing. Remarks made during an opening statement do not constitute evidence. It is common for a party to tell the trier of fact what the evidence "will show" or "will prove" and what that party will ask for at the conclusion of the hearing. When the union said in its opening statement that it "would" move to amend the complaint, I took this as an informative preview of what the union "would" do during the actual presentation of its case. During its opening statement the union did not clearly express that it was, at that moment, formally moving to amend its complaint, nor did the union ever clearly make such a motion at any other time during the hearing. The union never stated it was specifically seeking to add a "failure to bargain in good faith" allegation. I did not consider the union to have actually pleaded any such motion, and so I did not make any responsive ruling.

The Washington State Supreme Court stated that

> [a] judge cannot make his rulings gratuitously and out of thin air; he cannot be expected to divine the half expressed hopes of counsel nor convert their subtleties into a request for a judicial ruling. The court is not an adversary but a neutral . . . . Before a court can take responsive judicial action, it should be apprised with reasonable certainty what it is asked to do. To rule otherwise would make shambles of long-established and universally accepted procedures and arbitrarily place upon trial judges duties and standards of vigilance they cannot fulfill.
> . . .
> There is no reason why a party should not be required to state his motion, petition or application to the court with reasonable explicitness.

State v. Christensen, 75 Wn.2d 678, 683–84 (1969); *see also Orsi v. Aetna Insurance Co.*, 41 Wn. App. 233, 247 (1985) ("[E]very motion must specify the grounds and relief sought 'with particularity' . . . .").

If the union was making its motion to amend under WAC 391-45-070(2)(c) during its opening statement as it asserts, such a motion was untimely under the same rule because it was made after the opening of the evidentiary hearing but before any evidence had been received into the record. Under WAC 391-45-070(2)(a) and (b), motions to amend complaints made *prior to* the opening of evidentiary hearings are not limited to conforming the pleadings to evidence received without objection. On the other hand, the ability to amend complaints *after* the opening of a hearing is only allowed "to conform the pleadings to evidence received without objection" under WAC 391-45-070(2)(c). Thus, the motion was both too late and too early: Because the hearing had already opened, it was too late for the union to move to amend the complaint without being subject to the limitations of WAC 391-45-070(2)(c). However, because the motion was made in the union's opening statement, there was not yet any "evidence received without objection," and so the motion was not in compliance with the limitations stated in the rule.

In *Lake Washington Technical College*, Decision 4721-A (PECB, 1995), the Commission stated, "Parties should be aware that, in making general motions to amend the pleadings at the end of their case or at the end of a hearing, they should specify how the motion changes their initial unfair

labor practice complaint."[2] The Commission upheld the examiner's decision to grant the motion to amend despite the failure of the complainant to detail how the amendment was intended to change the allegations because the employer did not object to the evidence and had a fair opportunity to respond.

In this case the original complaint and the cause of action stated in the preliminary ruling concerned unilateral transfer of bargaining unit work. In its opening statement the union referenced adding an allegation that the employer had an affirmative duty to respond to the union's May 18, 2015, e-mail and clarify the employer's position. The union in its appeal stated that it had moved to amend its complaint at the hearing to add a claim of bargaining in bad faith. "Failure to bargain in good faith" and "unilateral transfer of bargaining unit work" are two different, distinct types of employer refusal to bargain. *King County*, Decision 9075-A.[3] "Each one of these allegations has its own individual elements of proof, and each claim has its own separate identity." *Id.*; *see also Western Washington University*, Decision 9309-A (PSRA, 2008) (union not allowed to amend its complaint to add allegations of circumvention, which were "separate and distinct" from earlier allegations of failure to bargain in good faith and interference). Amendments must still comply with the requirements of WAC 391-45-050. In particular, any amendment must include a clear and concise statement of the facts constituting the alleged unfair labor practice and must list the sections of the statute alleged to have been violated. *See, e.g., Lewis County*, Decision 2957 (PECB, 1988) (motion to amend denied).

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2 Until August 1, 2000, WAC 391-45-070 only provided, "Any complaint may be amended upon motion made by the complainant to the executive director or the examiner prior to the transfer of the case to the commission."

3 In *King County*, the Commission stated that there are six different types of employer refusal to bargain allegations: (1) failure to meet, (2) failure to bargain in good faith, (3) failure to provide information, (4) circumvention, (5) unilateral change, and (6) unilateral transfer of bargaining unit work. The Commission stated, "Even where a complainant generally alleges that an employer has committed a refusal to bargain violation, the preliminary ruling process will focus in on the specific type of refusal to bargain alleged, *to the exclusion of others* unless so stated." *King County*, Decision 9075-A (emphasis added). Thus, the union's argument on appeal that the cause of action for "unilateral transfer" as stated in the preliminary ruling was broad enough to encompass a charge of "failure to bargain in good faith" is not compelling.

Allowing a new claim of "failure to bargain in good faith" on the day of the hearing would have been unduly prejudicial to the employer.[4] The employer had not had an opportunity to prepare its defenses, evidence, and witnesses (or even consider possible settlement) for the additional claim when the motion to amend was made on the day of the hearing. The analysis for "failure to bargain in good faith" is different from the analysis used in "unilateral transfer of bargaining unit work" cases. The defenses to a "failure to bargain in good faith" claim would clearly be different from the waiver by inaction defense presented by the employer in response to the original charge of unilateral transfer of bargaining unit work. Thus, the allegation the union sought to add to the complaint was not germane to the issues raised by the original complaint, as required under WAC 391-45-070(1)(c). *See Community Transit*, Decision 7321 (PECB, 2001) (allegations union sought to add to its complaint were not germane to issues raised by the original complaint, where claims involved different legal analyses and defenses).

ORDER

The union's motion to amend its complaint charging unfair labor practices in this matter is denied.

ISSUED at Olympia, Washington, this 10th day of November, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kristi Aravena

KRISTI L. ARAVENA, Examiner

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.

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[4] To allow the employer to have a fair opportunity to prepare for the new allegations, the hearing may have had to be recessed and rescheduled, which would have "cause[d] undue delay of the proceedings" in contravention of WAC 391-45-070(1)(d).

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RECORD OF SERVICE - ISSUED 11/10/2016

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

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