STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANDREW APOSTOLIS, Complainant,	)	CASE 12854-U-96-3096
vs.	)	DECISION 5852-C - PECB
CITY OF SEATTLE, Respondent.	)	DECISION OF COMMISSION

Paul H. King, Attorney at Law, and John Scannell, appeared for the complainant.

Mark H. Sidran, City Attorney, by Janet K. May, Assistant City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on a petition for review filed on behalf of Andrew Apostolis, seeking to overturn an order correcting preliminary ruling issued by Executive Director Marvin L. Schurke.[1]

BACKGROUND

Andrew Apostolis filed a complaint charging unfair labor practices on December 3, 1996, alleging:

> A. Complainant attended union meetings in April, May, June, and July of 1996. During this time the complainant advocated having the

[1] City of Seattle, Decision 5852-B (PECB, 1997).

> crew chiefs removed from the bargaining unit because of their ability to dominate the union.
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> B. Complainant sought the aid of two other union members, Robert Boling, and Richard Pedowitz, who likewise believed that the crew chiefs should be removed from the bargaining unit and attended union meetings to support the complainants efforts.
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> C. Complainant participated in informal grievance sessions and argued that crew chiefs were unfairly disciplining members of the workforce.
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> D. Complainant was terminated on September 7, 1996 for his advocacy of eliminating crew chiefs from the bargaining unit and for his complaints about disciplining the workforce unfairly.

In an amended complaint filed on February 4, 1997, Apostolis alleged:

> A. On or about December 22, 1995, complainant was denied access to a shop steward when he was questioned over a possible disciplinary action.
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> B. Complainant attended union meetings on February 20, 1996 and brought a motion to have the crew chiefs removed from the bargaining unit. He again raised the issue on March 19. On April 16, there was a brief discussion about the issue of crew chiefs in the bargaining unit. On June 18 the complainant raised the issue that the crew chiefs were working in violation of the contract when the proposed new contract was being discussed. During this time the complainant advocated having the crew chiefs removed from the bargaining unit because of their ability to dominate the union.
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> C. On May 17, 1996, and on July 13, 1996 complainant was unfairly written up over alleged unsatisfactory work performance,

because of his advocacy of eliminating crew chiefs from the bargaining unit and for his insisting on having a shop steward present during interrogations. He was denied access to a shop steward during questioning on both occasions.

D. On July 16, the complainant again attended a union meeting to raise the issue of crew chiefs being in the bargaining unit. Lenny Hull, a supervisor and crew chief at the Seattle Center, attended the meeting and gave the union leadership a letter stating his opposition to having crew chiefs removed from the bargaining unit. During the meeting, Mr. Hull attempted to intimidate the complainant by "staring him down" at the meeting.

E. Complainant sought the aid of two other union members, Robert Boling, and Richard Pedowitz, who likewise believed that the crew chiefs should be removed from the bargaining unit and attended union meetings to support the complainants efforts. At the February, March, April, and June union meetings, these were the only union members from Seattle Center that attended the meetings. At the July meeting, only the crew chief, the complainant, Boling, and Pedowitz, were from the Center.

F. On July 23rd, the claimant met with personnel officer John Cunningham over the June write-up. Mr. Cunningham refused to remove the unfair write-up from his file, again for the complainant's efforts to have the crew chief removed from the bargaining unit and for his insisting on having a shop steward present during questioning.

G. In the latter part of July, Complainant participated in informal grievance sessions and argued that crew chiefs were unfairly disciplining members of the workforce. On September 9, 1996, the complainant attended a brown bag lunch in which he complained about unfair treatment by crew chiefs. On September 10, the complainant notified Joe Singh, a supervisor, at a staff meeting about his

> unfair treatment of employees by the crew chiefs.
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> H. Complainant was terminated on September 17, 1996 for his advocacy of eliminating crew chiefs from the bargaining unit and for his complaints about disciplining the workforce unfairly and for complaining about not having a shop steward present during questioning by management.
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> I. The Seattle Center is a small plant and knowledge by all management of the protected speech activity of the complainant can be inferred.

By an "Order of Partial Dismissal" issued on February 27, 1997,[2] the Executive Director referred the allegation in Paragraph C of the amended complaint to Examiner Pamela G. Bradburn for further proceedings, and dismissed all other allegations as failing to state a cause of action.

The complainant petitioned for review on March 19, 1997. By a decision issued May 6, 1997, the Commission dismissed that petition for review for insufficiency of service.[3] The order issued by the Executive Director thus remained in effect at that time.

On November 20, 1997, the Executive Director issued an "Order Correcting Preliminary Ruling",[4] which (1) dismissed Paragraph C of the amended complaint as untimely filed; (2) dismissed Paragraph H of the amended complaint to the extent that it alleged Apostolis was discharged for his advocacy of removing crew chiefs from the bargaining unit and/or his complaints about unfair discipline of

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[2] City of Seattle, Decision 5852 (PECB, 1997).

[3] City of Seattle, Decision 5852-A (PECB, 1997).

[4] City of Seattle, Decision 5852-B (PECB, 1997).

employees; and (3) confirmed dismissal of a "Paragraph J". The Executive Director referred the case back to Examiner Bradburn for further proceedings on Paragraph H of the amended complaint, to the extent it alleged Apostolis was discharged for complaining about the lack of union representation in an investigatory interview.

On December 10, 1997, the complainant filed a petition for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The complainant seeks review of the dismissal of Paragraph C of the amended complaint, claiming that discrimination was ongoing and continuing, so the statute of limitations should not begin to run until the discrimination stopped and Apostolis was discharged. In the alternative, the complainant argues that if the original filing cannot relate back to the original filing as a separate unfair labor practice, the allegations should be allowed as background to prove the violation that occurred at the time of Apostolis's discharge. The complainant seeks review of the dismissal of that portion of Paragraph H of the amended complaint that involved allegations about retaliation for advocacy of removing crew chiefs from the bargaining unit and retaliation for complaints about unfair employee discipline. Finally, the complainant argues that if the dismissal of Paragraph J was meant to apply to Paragraph I, he objects for the same reasons as to the dismissal of the allegations of Paragraph H.

The employer requests the Executive Director's order be affirmed with a correction of "Paragraph J" to "Paragraph I". It notes that the original complaint contained nothing regarding any alleged

violations of Weingarten rights,[5] so that the allegations in the amended complaint regarding events of May 17, 1996 and July 13, 1996, do not relate back to the original complaint. The employer argues that the dismissal of the pertinent portions of Paragraph H should be affirmed for the following reasons: (1) under the doctrine of claim preclusion, because that issue has already been decided by the Commission; (2) because of "the absence of alleged facts from which it could be concluded that the employer was aware of the statements made by Apostolis at union meetings; (3) because the small plant doctrine should not be applied to a bargaining unit that is not small; and (4) because the complainant misinterprets the Commission's pleading requirements. The employer argues that the disputed allegations were properly dismissed.

DISCUSSION

Paragraph "C" of the Amended Complaint

RCW 41.56.160(1) both authorizes and limits the Commission's processing of unfair labor practice complaints, stating in part:

> [A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

In interpreting RCW 41.56.160(1), the Commission has held that charges in an amended complaint must either relate to the specific charges set forth in the original complaint or they will be considered new items which carry their own six-month time limit

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[5] See, National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975).

from the time of filing. Fort Vancouver Regional Library, Decision 2396-A (PECB, 1986).[6]

In the case at hand, Paragraph C of the amended complaint filed on February 4, 1997 states:

> On May 17, 1996, and on July 13, 1996, complainant was unfairly written up over alleged unsatisfactory work performance, because of his advocacy of eliminating crew chiefs from the bargaining unit and for his insisting on having a shop steward present during interrogations. He was denied access to a shop steward during questioning on both occasions.

The allegation as to May 17, 1996 would even have been untimely under the original complaint, which was filed December 3, 1996.

The allegation as to July 13, 1996 would be timely only if the amended complaint related back to allegations within the original complaint. The original complaint does not make any reference to the complainant having been "unfairly written up" on July 13, 1996. The allegations in the amended complaint about being unfairly written up were entirely new and did not clarify or otherwise relate back to any allegation found in the original complaint. No remedy could be available as to those events.

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[6] See, also, Mansfield School District, Decision 4552-A (EDUC, 1994). In that case, allegations in an amended complaint were considered to have related back to the original complaint because the amendments neither enumerated new events, nor raised subjects substantially different from those documented in the original complaint, and they consisted of statements added to the original complaint, detailing specific examples of what had been described in more general terms in the original complaint.

While a cause of action cannot exist as to these events occurring outside the statute of limitations period, that does not preclude their use as background information to support the charge that the complainant was unfairly discharged.[7]

Paragraph H of the Amended Complaint

Prior Orders Claimed to be Res Judicata -

The employer argues that the issues of paragraph H that relate to the alleged advocacy of removing crew chiefs from the bargaining unit and/or complaints about unfair discipline should be barred by the doctrine of res judicata. The Supreme Court of the State of Washington defined res judicata in Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759 (1995), as referring:

> [T]o 'the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.' ... It is designed to 'prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts.' ... For the doctrine to apply, a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.

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[7] For instance, precedent allows the use of prior union activity to show the motivation of employer officials in the incident for which a cause of action exists. See, e.g., Seattle School District, Decision 4534 (EDUC, 1993), where the Executive Director stated in a footnote that such incidents as an employee being suspended for refusal to leave payroll office when pursuing wage claim, and employer reprimanding employee for attending a grievance meeting involving his employment may be admissible as background.

The employer cites Public Utility District of Clark County, Decision 4563 (PECB, 1993) in support of its position. That decision, and the underlying Commission decisions,[8] only stand for the proposition that the Commission will apply res judicata principles where the issues have been fully litigated. This approach conforms with the application of res judicata principles by the Supreme Court.

The Supreme Court also stated, in Stevedoring Services v. Eggert, 129 Wn.2d 17 (1996):

> **Res judicata applies** in the administrative setting **only where the administrative agency 'resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'** ... In Washington, **other considerations are** also relevant when the prior adjudication took place in an administrative setting including '(1) **whether the agency acting within its competence made a factual decision;** (2) agency and court procedural differences; and (3) policy considerations. ...
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> [Emphasis by **bold** supplied.]

The Supreme Court went on to state, in Stevedoring Services, that a dismissal for lack of jurisdiction is not res judicata, and it also considered the fact that the petitioner in that case had no opportunity to litigate its claims. Here, the Commission's previous decision to affirm the dismissal was based on a technicality. The disputed claims and issues have not been

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[8] Public Utility District 1 of Clark County (Clark PUD III), Decision 3815-A (PECB, 1992), and Public Utility District 1 of Clark County, (Clark PUD II), Decision 2045-B (PECB, 1989).

litigated on their merits. Therefore, application of res judicata is not appropriate in this case.

Retaliation Allegation Insufficient -

The complainant objects to the dismissal of the allegations regarding retaliation for advocacy of removing crew chiefs from the bargaining unit, and to the dismissal of the allegations of retaliation for complaints about unfair employee discipline dismissed. The complainant argues that the Executive Director ruled the amended complaint does not contain facts sufficient to base a conclusion that the employer was aware of statements made by the complainant at a union meeting, but that Paragraph D of the amended complaint clearly states that a supervisor, Lenny Hull, attended the union meeting and attempted to intimidate the complainant. The complainant argues that the supervisor's knowledge should be imputed to the employer, that a public employer can be held responsible for a supervisor's actions.

Paragraph D of the amended complaint does not allege employer knowledge. It only describes Hull as a "supervisor and crew chief". Remaining portions of the amended complaint refer to the complainant's advocacy of eliminating crew chiefs from the bargaining unit.[9] Item 4.E. of the amended complaint states that a more accurate bargaining unit description would be provided later, but no such material was ever provided. We have only the complaint and amended complaint, and the context of both provide alleged facts on which we can infer that crew chiefs were part of

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[9] A check of the Commission's docket records has not disclosed a certification for the bargaining unit, so we are unable to verify that crew chiefs are part of the bargaining unit. The complainant did not provide a copy of the collective bargaining agreement, which might contain a description of the bargaining unit.

the bargaining unit. Therefore, the fact that somebody described in the complaint as a "crew chief" [Hull] attended a meeting of the union which represents him does not suffice to allege employer knowledge.[10]

The Small Plant Doctrine -

The complainant claims that the Executive Director erred in his interpretation of the "small plant" doctrine, that the NLRB precedent came out of a case involving 59 employees, and that the Executive Director improperly jumped to a conclusion that there are 800 employees at the Seattle Center. The complainant contends that such a conclusion is premature, however, since he would contend that nearly all of the employees in the bargaining unit are located at other plants. Again, however, the Executive Director (and the Commission) must act on the basis of what is alleged in a complaint. Paragraph I only alleges, "The Seattle Center is a small plant and knowledge by all management of the protected speech activity of the complainant can be inferred." We have no basis on which to infer from that broad and general statement that the Seattle Center would qualify for application of the small plant doctrine. There is nothing specific in the complaint to indicate that the size of the employer's workforce is such that it would be difficult to maintain secrecy, or that union activities were carried out in such a manner or at such times that it can be presumed the employer must have noticed them. See, City of

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[10] The complainant argues that the Executive Director's ruling in this case is inconsistent with Commission precedent putting supervisors in bargaining units separate and apart from the units containing their subordinates. In essence, the complainant is contending that crew chiefs should not be in this bargaining unit. Such questions are normally resolved through representation or unit clarification proceedings initiated by the employer or union.

Winlock, Decision 4784-A (PECB, 1995). We thus agree with the Executive Director that there is nothing within the four corners of the complaint to support a claim of employer knowledge of the alleged statements about crew chiefs.

Standards of Pleading -

The complaint argues that there have been enough factual details on which to base a conclusion that the employer was upset by the employee's actions, and to infer a retaliatory motive. The complainant asserts that the Executive Director's decision to require extensive pleading runs counter to the historical trend in the use of pleadings, and that there is enough in the complaint to allow a hearing to proceed. We agree with the Executive Director that the allegations are insufficient. The Commission and its staff maintain an impartial posture as quasi-judicial decision makers in unfair labor practice proceedings, and the agency does not "investigate" or "prosecute" 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 a basis for a formal adjudicative proceeding under the Administrative Procedure Act, Chapter 34.05 RCW. The Commission has long been sensitive to whether a dismissal prior to hearing is appropriate, but the facts as alleged in a complaint may be so insufficient as to indicate that no hearing is warranted. See, e.g., City of Bellevue, Decision 3343-A (PECB, 1990), and King County, Decision 4893-A (PECB, 1995). This is such a case.

Paragraph I of the Amended Complaint

The "Order Correcting Preliminary Ruling" issued on November 20, 1997, used the term "Paragraph J", but there never was a paragraph

identified as "J" in the complaint or amended complaint. We infer this was simply a typographical error. Both parties responded as if the reference applied to the paragraph identified as "I", which was dismissed in the earlier order. We deem the error harmless, and correct the typographical error.

The complainant objects to the dismissal on the same grounds it asserted with regard to other paragraphs, above, and the employer requests the Commission to affirm the dismissal on the same basis as referenced in the section above. The dismissal is affirmed, for the reasons set forth in discussion of Paragraph H, above.

NOW, THEREFORE, it is

ORDERED

Paragraphs 1, 2 and 3 of the order issued by Executive Director Marvin L. Schurke in the above-captioned matter on November 20, 1997, are AFFIRMED and adopted by Order of the Commission.

Issued at Olympia, Washington, on the 12th day of June, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner