

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TECHNICAL EMPLOYEES ASSOCIATION,	)	
	)	
Complainant,	)	CASE 18277-U-04-4665
	)	
vs.	)	DECISION 9075-A - PECB
	)	
KING COUNTY,	)	DECISION OF COMMISSION
	)	
Respondent.	)	
_____	)	

Cline and Associates, by Christopher J. Casillas,  
Attorney at Law, for the union.

Trish K. Murphy, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the Technical Employees Association (union) seeking to overturn the Findings of Fact, Conclusions of Law, and Order of Dismissal issued by Examiner Starr H. Knutson.<sup>1</sup> King County (employer) supports the Examiner's decision.

ISSUES PRESENTED

Although the union's appeal presents several issues for us to decide, the threshold issue is whether the Examiner properly dismissed the union's complaint based on the union's withdrawal of the only issue framed by the preliminary ruling. Because we find that the Examiner properly dismissed the union's complaint, we need not address the other issues raised by the union's appeal.

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<sup>1</sup> King County, Decision 9075 (PECB, 2005).

ANALYSISProcedural History

In order to better explain our rationale, a brief recitation of the pertinent procedural facts is necessary. The union filed its complaint on March 3, 2004, generally alleging that the employer circumvented the union by directly negotiating salary ranges with employees in the local agency affairs administrator classification. On April 20, 2004, a preliminary ruling was issued, forwarding the following issue for hearing:

Employer interference with employees rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4), by *circumventing the union through direct dealing with employees* represented by the union in failing to negotiate the salary range for the classification of local agency affairs administrator.

(emphasis added). Thus, the Unfair Labor Practice Manager found that the union's complaint stated only a single charge of circumvention. The employer filed its answer on May 10, 2004, and the matter was forwarded to hearing.

Following the hearing, the parties filed post-hearing briefs. The second paragraph of the union's post-hearing brief states:

As an initial procedural matter, both within the preliminary ruling issued by PERC and during the hearing itself, two allegations were discussed. One dealt with alleged directly dealing between a representative of the County and TEAM bargaining unit members, and the other primary legal allegation concerned the County's alleged refusal to bargain through its unilateral action in altering the existing wage scale for a body of work already in existence. While evidence concerning both of these allegations was presented at the hearing, *TEA no longer pursues the first of these charges as an independent legal allegation, but merely presents information with*

*respect to the direct dealing for background purposes relating to its primary charge.* TEA vigorously maintains that the alleged alteration of the existing wage scale through the creation of a new job classification to perform an already existing body of work was an unfair labor practice by the County, and focuses its brief upon this allegation.

(emphasis added). Following the union's written withdrawal of the sole circumvention charge, the Examiner issued her decision dismissing the union's complaint in its entirety. The Examiner reasoned that since only a single cause of action existed, a circumvention allegation, Commission precedent did not permit her to rule on any evidence or argument beyond the scope of the preliminary ruling.

The union now argues that the Examiner erred in dismissing the entirety of its complaint following the union's voluntary withdrawal of its circumvention allegation, claiming that the preliminary ruling stated two distinct causes of action that were subject to hearing. Additionally, the union asserts that the Examiner's decision violates the union's due process rights, and that the Commission's preliminary ruling process as a whole contravenes the Commission's enabling legislation, Chapter 41.56 RCW, and the Administrative Procedure Act (APA), Chapter 34.05 RCW.

#### Commission's Rule-making Authority

RCW 41.56.160 directs this Commission to prevent unfair labor practices and to issue appropriate remedial orders when necessary. RCW 41.56.090 empowers this Commission to promulgate, revise, or rescind administrative rules and regulations it deems appropriate to administer the provisions of Chapter 41.56 RCW.<sup>2</sup> The APA

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<sup>2</sup> RCW 41.58.050 also permits this agency to adopt rules necessary to carry out its mission to prevent or minimize interruptions growing out of labor disputes.

prescribes the procedure that this Commission must utilize in adopting its rules,<sup>3</sup> as well as a basic procedural framework to be utilized in administrative hearings to ensure parties' due process rights.<sup>4</sup> Pursuant to these statutory directives, this Commission adopted Chapter 391-45 WAC to govern the processing of unfair labor practice complaints.

### Complaints

Under the APA, an agency may commence an adjudicative proceeding at any time with respect to any matter within the agency's jurisdiction. RCW 34.05.413(1). RCW 34.05.413(2) permits this Commission, by rule, to create procedures governing how applications under RCW 34.05.413(1) are made. Thus, under the APA as well as the Commission's rule-making authority, all complaints received by this agency are governed by WAC 391-45-050. That rule outlines basic information needed about the party filing the complaint as well as information about the responding party. WAC 391-45-050(2) requires the charging party to provide a clear and concise statement of facts that constitute the alleged unfair labor practices, including times, dates, places, and participants. Finally, WAC 391-45-050(3) requires the charging party to provide a statement of the remedy sought should they prevail on their complaint.

### The Preliminary Ruling Process

Once a properly-filed complaint charging unfair labor practices is received by the agency, it goes through the preliminary ruling process. RCW 34.05.419 governs agency action following receipt of a complaint, and Chapter 391-45 WAC further clarifies agency procedure. As part of the preliminary ruling process, this agency

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<sup>3</sup> RCW 34.05.310 - .395.

<sup>4</sup> RCW 34.05.410 - .494.

adopted rules consistent with RCW 34.05.419(2) to screen complaints for any obvious errors or admissions.

As codified at WAC 391-45-110, the Unfair Labor Practice Manager<sup>5</sup> determines whether the facts of a particular complaint state a cause of action that can be redressed by the statutes that this Commission administers. When reviewing a complaint under WAC 391-45-110, the Unfair Labor Practice Manager assumes that the alleged facts in the complaint are true and provable. If one or more allegations in the complaint state a cause of action, a preliminary ruling is issued summarizing the issue or issues that will go forward to hearing. WAC 391-45-110(2). If all or part of the alleged facts do not state a cause of action that constitutes a violation of the law, a deficiency notice is issued identifying the defects in the complaint. WAC 391-45-110(1).

When the Unfair Labor Practice Manager issues a deficiency notice, the complainant has an opportunity to "cure" its complaint by providing additional information as outlined in the deficiency notice.<sup>6</sup> If the complaining party fails to cure the noted defects, WAC 391-45-110(1) provides that the Unfair Labor Practice Manager shall dismiss the complaint or any defective allegations for failing to state a cause of action. If the charging party cures its complaint, then a preliminary ruling is issued, and the case is forwarded to an examiner for hearing.

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<sup>5</sup> The Executive Director has assigned the Unfair Labor Practice Manager primary responsibility for the issuance of preliminary rulings and deficiency notices, and we will refer to the Unfair Labor Practice Manager as the individual who exercises authority under WAC 391-45-110.

<sup>6</sup> Although the deficiency notice provides a complainant with an opportunity to "amend" its complaint, this type of amendment occurs under WAC 391-45-110, and not WAC 391-45-070.

The Preliminary Ruling Frames Issues at Hearing

Unlike the National Labor Relations Board, this Commission does not prosecute unfair labor practice complaints on behalf of a complainant. Additionally, agency practices do not permit formal discovery of evidence like the superior courts. Rather, the preliminary ruling issued by the Unfair Labor Practice Manager frames the issues that are to be heard at hearing. Thus, the preliminary ruling under WAC 391-45-110 and the sufficiently-detailed complaint that conforms with 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.

As part of the preliminary ruling process, the Unfair Labor Practice Manager specifies the type of statutory violation that the complaining party asserts in its complaint. For example, if the facts of the complaint state a cause of action for a discrimination violation, then the preliminary ruling reads:

Employer discrimination in violation of RCW 41.56.140(3) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by retaliatory actions against Jane Doe for filing an unfair labor practice charge.

Once an examiner is assigned to hold an evidentiary hearing, the examiner can rule only upon the issues framed by the preliminary ruling.<sup>7</sup> See *King County*, Decision 6994-B (PECB, 2002).

Amendments After Issuance of a Preliminary Ruling

Although the preliminary ruling issued by the Unfair Labor Practice Manager initially frames the issues that may be heard at hearing,

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<sup>7</sup> In instances where a complainant makes a motion to conform the pleadings to the evidence presented at hearing under WAC 391-45-070(2)(c), the evidence that is subject to the motion must still be germane to the issues framed within the preliminary ruling.

this is not final. Generally, two instances arise following the issuance of a preliminary ruling where a complaining party may attempt to change the scope of the proceedings before an examiner. In the first instance, a complainant may disagree with the causes of action that the Unfair Labor Practice Manager identifies in the preliminary ruling, and may request the Unfair Labor Practice Manager to reconsider his or her ruling. Although no rule currently exists codifying this practice, it has always been available to parties.

In the second and more widely used instance, a party may wish to amend its complaint after the issuance of a preliminary ruling in an attempt to assert new causes of action or to allege facts supporting additional instances of the same legal claim initially plead. WAC 391-45-070(1) regulates the timing and content of an amended complaint and requires any amendment to involve the same parties, requires the amended facts to be timely, requires the amended facts to be germane to the subject matter of the original complaint, and provides that an amendment must not cause undue delay to the proceedings. WAC 391-45-070(2) limits the timing and acceptance of amendments and limits them depending on the circumstances. Under WAC 391-45-070-(2)(a), the Unfair Labor Practice Manager freely accepts amendments prior to the appointment of an examiner.

Under WAC 391-45-070(2)(b), following the appointment of an examiner, amendments should be accepted subject to due process requirements. If, after the appointment of an examiner, a charging party wishes to file an amended complaint, the examiner will determine whether the newly alleged facts are germane to the proceedings before the examiner, and rule upon the appropriateness of the proposed amended complaint. The examiner will issue an

amended preliminary ruling if the examiner accepts an amended complaint under WAC 391-45-070. Where an examiner denies an amendment, the proposed amendment is docketed as a separate case under WAC 391-45-070(3), and the preliminary ruling process begins as if a new case was filed.

#### Application of Standard

We disagree with the union's assertions that the Examiner committed reversible error in dismissing the complaint following the union's voluntary withdrawal of the only issue framed by the preliminary ruling. Additionally we find no merit in the union's assertion that it has been denied its due process rights either by the Examiner's decision or through the preliminary ruling process.

#### The Examiner's Decision

The Examiner dismissed the union's complaint in its entirety following the union's withdrawal of the single charge of circumvention framed by the preliminary ruling. Relying upon *King County*, Decision 6994-B, the Examiner held that the preliminary ruling frames the issues set forth for hearing, and that examiners are confined to processing the causes of action found to exist. The Examiner applied established Commission precedent to the proceedings before her, and declined to stray from the protocol set forth in *King County*, Decision 6994-B.

With respect to the preliminary ruling issued in this case, the complained-of facts from the union's complaint readily identify circumvention of the exclusive bargaining representative through direct dealing, but do not allege any other causes of action. Generally, there are six different types of employer refusal to bargain allegations that this commission hears: (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. Each one of these allegations has its own individual elements of proof, and each claim has its own separate identity. 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. If a complaint states causes of action for both circumvention and unilateral change, it would state:

Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by (1) its unilateral change in employee co-payments for health insurance benefits, without providing an opportunity for bargaining, and (2) circumventing the union through direct dealing with employees represented by the union, in distributing a letter to employees concerning the change in benefits, before notifying the union.

If the charging party attempted to introduce evidence without objection regarding an employer's failure to provide necessary and relevant collective bargaining information, an examiner assigned to hear such case is not permitted to issue a remedial order based upon such evidence.

Here, not only did the preliminary ruling not state a unilateral change cause of action, the facts contained within the union's complaint failed to raise that sort of issue. Most, if not all, of the union's factual allegations concern the employer's direct negotiations with bargaining unit employees. The union's complaint in this case only provided the Unfair Labor Practice Manager with a statement of facts and a statement of the remedy requested, but did not provide a clear statement of how the complained-of facts

constituted an unfair labor practice under RCW 41.56.140.<sup>8</sup> Because the preliminary ruling found the union's complaint to state only a single cause of action, a circumvention violation, when the union affirmatively withdrew that cause of action, there was nothing left for the Examiner to rule upon.

Examining the union's complaint, the preliminary ruling, and the union's unambiguous withdrawal of its circumvention violation within its post-hearing brief, we find no error in the Examiner's ruling.

#### Union's Challenge to Commission Preliminary Ruling Process

In addition to challenging the Examiner's decision, the union is also challenging the preliminary ruling process as a whole. The union claims that the preliminary ruling process violates this Commission's role as an impartial decision-maker, violates the APA, and violates the union's due process rights to a full evidentiary hearing on the factual claims made in its complaint. We disagree.

RCW 34.05.413(1) provides that administrative agencies may commence an adjudicative proceeding within the scope of its authority at any time, and RCW 34.05.413(2) requires this agency to commence adjudicative proceedings when required by law. However, nothing in Chapter 34.05 RCW prohibits this Commission from adopting rules to facilitate the processing of unfair labor practice complaints such

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<sup>8</sup> Although a statement explaining how the complained-of facts constitute an unfair labor practice is not technically required, it is good practice for complainants to identify what kind of unfair labor practice violation(s) the facts support.

as WAC 391-45-110.<sup>9</sup> RCW 41.56.090 and RCW 41.58.050 grant this Commission the authority to adopt rules to further carry out the Commission's mission, and we can find no statute or decision that precludes adoption of a provision such as WAC 391-45-110, provided due process is ensured.

This Commission created the preliminary ruling process as a procedural safeguard to not only ensure that the due process rights of the responding party are protected in unfair labor practice proceedings before the agency, but also to provide agency staff with a method to dismiss complaints that fail to state a cause of action. Furthermore, providing notice to the responding party of the causes of action it faces is important because, as previously stated, Commission practices do not provide for formal discovery.

Finally, the union has failed to show how the preliminary ruling process violates its due process rights, particularly in light of the two methods identified that permit a complaining party to ask for reconsideration of the preliminary ruling or to amend its complaint. Following the issuance of the preliminary ruling, the union had ample opportunity to either ask the Unfair Labor Practice Manager for reconsideration of his preliminary ruling, or file an amended complaint. The union chose to do neither.

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<sup>9</sup> In fact, as part of the preliminary ruling process, the Unfair Labor Practice Manager issues deficiency notices under WAC 391-45-110(1). This process is entirely consistent with RCW 34.05.419(2), which provides that within thirty days after receipt of an application for an adjudicative proceeding, an agency shall notify the applicant of any deficiencies and provide a reasonable opportunity to cure the defects.

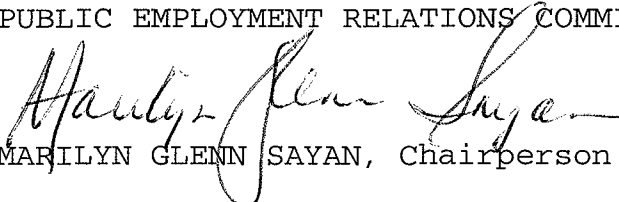
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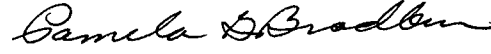
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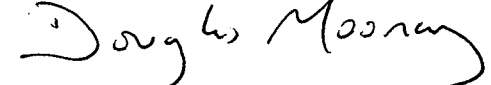
The Findings of Fact, Conclusions of Law, and Order of Dismissal issued by Examiner Starr H. Knutson are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of Dismissal of the Commission.

Issued at Olympia, Washington, the 12th day of September, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARILYN GLENN SAYAN, Chairperson

  
PAMELA G. BRADBURN, Commissioner

  
DOUGLAS G. MOONEY, Commissioner