STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE UNIVERSITY POLICE GUILD,	)	
Complainant,	)	CASE 20908-U-07-5330
vs.	)	DECISION 9614-A - PSRA
WASHINGTON STATE UNIVERSITY,	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW, AND ORDER

Garrettson Goldberg Fenrich & Makler, by *Rhonda J. Fenrich*, Attorney at Law, for the guild.

Attorney General Rob McKenna, by *Donna J. Stambaugh*, Assistant Attorney General, for the employer.

On February 5, 2007, the Washington State University Police Guild (guild) filed an unfair labor practice complaint with the Public Employment Relations Commission under Chapter 391-45 WAC. The complaint alleges that the Washington State University (employer) made a unilateral change and refused to bargain with respect to calculation of an overtime pay rate. A deficiency notice issued on February 12, 2007, informed the guild that its allegation of a single instance of change was not enough to state a cause of action for a unilateral change. The guild was informed that if it wished to pursue its claim, it needed to cure the deficiency. The guild failed to amend its complaint. On March 12, 2007, the Commission issued a preliminary ruling that *dismissed* the unilateral change allegation and found 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 breach of its good faith bargaining obligations in changing the overtime rate of pay for a single pay period while an arbitration hearing is pending on that issue.

Examiner Starr Knutson conducted a hearing in Pullman, Washington on August 31, 2007,[1] and closing briefs were filed on September 28, 2007.

ISSUES PRESENTED

1. Did the guild demand to bargain over how to include the 2.9% lump sum payment, negotiated as part of the current contract, in calculating overtime rates?

2. Did the employer refuse to bargain over that subject?

Based on all the arguments and evidence submitted by the parties, I find that because the union did not demand to bargain, the second element of the test for whether good faith bargaining occurred was not met. Therefore, it is unnecessary to proceed to the analysis of the third element, refusal to bargain.

ISSUE 1: REQUEST TO BARGAIN

Applicable Law

The Public Service Reform Act, Chapter 41.80 RCW, governs the relationship between the guild and the employer. RCW 41.80.005(2) defines collective bargaining and requires parties to engage in good faith negotiations over mandatory subjects of bargaining:

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[1] The parties requested this hearing be held after the related grievance arbitration hearing. The arbitrator issued his decision on August 30, 2007. The guild submitted a copy with its closing brief.

> Collective bargaining means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. The obligation to bargain does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter.

The Commission enforces the duty to negotiate in good faith through the unfair labor practice provisions in RCW 41.80.110 and Chapter 391-45 WAC. The provisions of RCW 41.80.110 parallel the provisions of RCW 41.56.140, and the Commission routinely applies case precedent established under that statute to interpret RCW 41.80.110.

The complaining party alleging an unfair labor practice has the burden of proof that the responding party committed the unfair practice. WAC 391-45-270(1)(a).

There are multiple types of employer refusal to bargain allegations. Each type of refusal to bargain allegation 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. *King County,* Decision 9075-A (PECB, 2007).

The statutory obligation to bargain in good faith includes a duty to engage in full and frank discussion of disputed issues, and to explore possible alternatives, if any, that may be mutually acceptable. *South Kitsap School District,* Decision 472 (PECB, 1978); *Mansfield School District,* Decision 4552-B (EDUC, 1995).

ANALYSIS

This dispute concerns the first contract bargained by the guild and employer under Chapter 41.80 RCW. That contract was effective July 1, 2005, through June 30, 2007. It included a second year wage increase of 2.9%, effective July 1, 2006. During bargaining, the employer told the guild the second year increase would not be included in the base wage scale, and would expire on June 30, 2007. The employer gave the guild the choice of having employees receive the increase as a lump sum payment in August 2006 or receiving it evenly distributed over every pay period in the fiscal year. The guild decided on the lump sum payment. The record indicates that the parties did not have a meeting of the minds concerning the effects of the lump sum payment on overtime rates of pay. The guild believed that because the lump sum was wages, it would raise the overtime hourly rate 2.9% over the previous year's rate. The employer initially believed the lump sum would not affect the overtime hourly rate at all.

The Dispute

When Guild President Darren Jones received his pay check in August 2006, he noticed that the 2.9% increase was not reflected in his overtime rate of pay. He filed a grievance alleging violation of the contract. The parties attempted to resolve the grievance themselves, however were unable to do so and sought the assistance of a Commission mediator. The mediator met with the parties in November 2006. The parties were unable to resolve their differences in mediation. During the mediation, the employer told the guild face to face that the employer erred in excluding the lump sum payment from the overtime rate and intended to look into the federal law.[2] The employer said it would pay whatever overtime

[2] The Fair Labor Standards Act (FLSA).

rate was mandated by that law. The guild responded that if the employer did that, it would file an unfair labor practice complaint. Jones testified that he did not demand to bargain about the recalculation because the guild had already filed a grievance. The grievance proceeded to arbitration and the arbitrator issued an award on August 30, 2007, finding in favor of the guild.[3]

The employer followed through on its statement in mediation and determined it would pay certain employees on January 25, 2007, for the difference between the hourly overtime rate they had been paid on August 10, 2006,[4] and what the employer now believed was the correct overtime hourly rate of pay. On January 24, 2007, Guild President Jones received the following letter (dated January 23, 2007), from Human Resources Director Stevan DeSoer.

> In accordance with Article 17.7 . . . a mediation session was held . . . to discuss the computation of overtime. At this time it was brought to WSU's attention that the negotiated 2.9% lump sum payment based on the non-discretionary bonus definition of the Fair Labor Standards Act (FLSA) section . . . . As a result, the employees below will be paid the difference between the overtime amount previously received on the August 10, 2006 paycheck and the amount earned at the recalculated rate of pay for this pay date. This payment processed on the January 25, 2007 payroll. (sic)

The guild subsequently filed this complaint.

Elements of Good Faith

The three basic elements in testing whether an employer committed a refusal to bargain violation are: 1) the employee organization

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[3] The arbitrator awarded two of the three remedies requested by the guild in this case.

[4] The pay period was the last two weeks of July 2006.

must be the exclusive representative of an appropriate bargaining unit; 2) that employee organization must request to bargain with the employer concerning a mandatory subject of bargaining; and then 3) the employer must conduct itself during bargaining in a manner that frustrates bargaining or avoids agreement.

Element 1:
The Commission certified the guild to represent a bargaining unit of campus police officers employed at Washington State University (WSU). Therefore, the first element of the test has been met.

Element 2:
Guild President Jones and guild bargaining team member Dawn Daniels both testified at the hearing that no request to bargain concerning the lump sum payment and overtime calculation was ever made. Bargaining in good faith concerning a particular subject starts with a request to bargain. It is impossible to have a *full and frank discussion* with the other party if that party does not ask to talk to you. Here as in *Lake Washington Technical College,* Decision 4721-A (PECB, 1995), the union focused on its asserted violation of the contract. Jones testified he had filed a grievance to alert the employer to the fact that the union disagreed with the employer's application of the contract language. When the employer advised the union during the failed mediation in November 2006, that it intended to re-think its overtime calculation the union did not request to bargain. The parties met in mediation and *negotiated* in an attempt to reconcile their differences regarding the calculation of overtime rates of pay. They were not able to resolve their differences and proceeded to arbitration. I find that the guild has not met its burden in proving the second element of the test.

Element 3:
I do not need to proceed to an analysis of the third element because the union did not prove it had requested bargaining.

The Dismissed Allegation of Unilateral Change

Most, if not all, of the evidence and testimony put forth by the guild concerned the employer's alleged unilateral change in calculating overtime, by its failure to include the lump sum payment of the second year increase into the overtime rate of pay. That evidence and testimony connects to the dismissed charge of unilateral change.

The Commission recently affirmed that the preliminary ruling issued by the Unfair Labor Practice Manager frames the issues that are to be heard at hearing. *King County*, Decision 9075-A (PECB, 2007). Thus, the preliminary ruling under WAC 391-45-110 and a 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.

King County, Decision 9075-A.

The examiner assigned to hold an evidentiary hearing can rule only upon the issues framed by the preliminary ruling or a properly amended complaint or motion. *See King County*, Decision 6994-B (PECB, 2002).

Had the guild amended its charge in such a manner as to show the effect of the employer's action extended to employee's wages for the entire year, the charges before me might be different, as might my ruling.

CONCLUSION

The guild did not request bargaining with the employer concerning the method of calculating overtime during the year in which a wage increase was paid in a lump sum. Without that element, I cannot find the employer breached its good faith obligation to bargain.

FINDINGS OF FACT

1. Washington State University is an institution of higher education under the provisions of RCW 41.80.005(10).

2. The Washington State University Police Guild is an employee organization under the provisions of RCW 41.80.005(7). The guild represents an appropriate bargaining unit of police officers through the rank of Sergeant employed by Washington State University.

3. The guild and the employer were parties to a collective bargaining agreement that covered the time period from July 1, 2005, to June 30, 2007. One part of that agreement provided bargaining unit employees with a lump sum payment on or before

August 10, 2006. The lump sum payment was equal to 2.9% of the base salary for 2005.

4. Guild President Darren Jones filed a grievance concerning his hourly pay rate for overtime which was paid on his August 10, 2006, pay check.

5. The parties attempted to resolve the grievance at mediation in November 2006, but were unsuccessful. During the mediation, the employer told Jones it would be reviewing its decision concerning the effect of the lump sum payment on the overtime hourly rate of pay, and would pay any difference to the affected employees.

6. Jones told the employer the guild would file an unfair labor practice if the employer followed through with that change in overtime payment. Jones testified that he did not demand to bargain the effects of that possible pay difference as the guild had filed a grievance.

7. On January 24, 2007, Jones received a letter from the employer stating it had erred in calculating overtime and that he and three other employees would be paid the difference between the overtime amount received in August 2006 and the revised overtime rate. Jones received the amount owed to him on his January 25 paycheck.

8. The grievance proceeded to arbitration and the award was issued on August 30, 2007.

9. The guild did not request bargaining with the employer over the calculation and/or recalculation of the overtime rate of pay.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

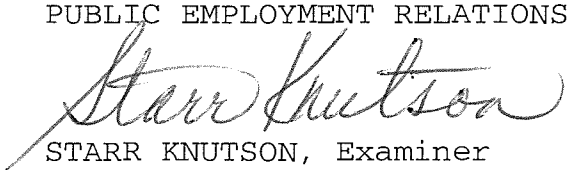
2. Washington State University did not commit an unfair labor practice and did not violate RCW 41.80.110(1)(a) and (e) when it changed the calculation of the overtime rate of pay for a single pay period.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 26th day of December, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



STARR KNUTSON, 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.