STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF LYNNWOOD, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1984, Respondent.	)	CASE 15558-U-01-3940 DECISION 7637 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Ogden, Murphy, and Wallace, by *Greg Rubstello*, Attorney at Law, for the employer.

Cogdill, Nichols, and Rein, by *W. Mitchell Cogdill*, Attorney at Law, for the union.

On March 29, 2001, the City of Lynnwood (employer) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-35 WAC, naming International Association of Fire Fighters, Local 1984 (union) as the respondent. A preliminary ruling was issued on June 29, 2001, finding a cause of action to exist on allegations of:

> Union refusal to bargain in violation of RCW 41.56.150(4), [and derivative "interference" in violation of RCW 41.56.150(1)], by breach of its good faith bargaining obligations in escalating its bargaining demands to the employer in January and April 2001.

The union answered the complaint. A hearing was held on August 22, 2001, and September 5, 2001, before Examiner Rex L. Lacy.

On October 22, 2001, the employer filed both its post-hearing brief and a motion asking the Examiner to reconsider certain evidentiary rulings made at the hearing.

On November 8, 2001, the union filed its response to the employer's motion for reconsideration, agreeing with the rulings made by the Examiner at the hearing.

The Examiner rules that the union did not escalate its demands in the collective bargaining process. The complaint charging unfair labor practices is DISMISSED.

BACKGROUND

The employer provides the customary range of public services, including the operation of a fire department.

The union is the exclusive representative of a bargaining unit of fire fighters employed by the employer.

The bargaining relationship between these parties is subject to the "interest arbitration" procedure set forth in RCW 41.56.430 through 41.56.490. The parties have had a series of collective bargaining agreements, the latest of which was effective from January 1, 1998, to December 31, 2000. During the relevant period, the employer was represented in collective bargaining negotiations by Cabot Dow, a labor relations consultant, while the union was represented by Lieutenant Glen Webster, a member of the bargaining unit.

In early July 2000, the employer and the union exchanged written proposals to commence negotiations for a successor contract. The union made proposals concerning increased wages and concerning

hours of work, along with changes in working conditions. The employer initially did not make any proposals on economic items, but it supplied its economic proposal at a later date.

In October 2000, the union submitted another written proposal which contained new proposals on several remaining issues. While the union's October proposal reduced the cost of wages and educational incentive, it contained new approaches to longevity, paramedic compensation, and the new fire marshal position.

A mediation request was filed with the Commission on November 14, 2000, and a member of the Commission staff provided mediation assistance to the parties thereafter.[1]

On January 3, 2001, the employer filed a complaint charging unfair labor practices, alleging that the union had escalated its bargaining demands between its July and October proposals. The parties continued to negotiate, however, and they set April 18, 2001, as the date for a negotiations session.

On April 17, 2001, the employer filed a second unfair labor practice case which restated the previous allegation along with alleging that the union was insisting upon a permissive subject of bargaining (staff safety) after the parties reached impasse.

The parties had not reached agreement on a successor agreement at the time of the hearing in this matter. The mediator implemented the process for certifying issues for interest arbitration, under WAC 391-55-215, and the union initially requested interest arbitration on at least 14 unresolved issues.

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[1] Case 15475-M-00-5418.

On June 11, 2001, the union notified the Executive Director that it was only seeking interest arbitration on six issues. Those were: the work week, holidays, vacations, wages, educational incentive, and longevity.

The Executive Director certified issues for interest arbitration under WAC 391-55-215, but then simultaneously suspended the interest arbitration proceedings under WAC 391-55-265.[2]

DISCUSSION

Employer's Motion to Strike the Union's Answer

The original complaint in this matter was filed on January 3, 2001. The employer alleged that the union had refused to bargain in good faith, by escalating its demands. A preliminary ruling was issued under WAC 391-45-110 on March 15, 2001, finding a cause of action to exist and giving the union a period of 21 days in which to file an answer to the complaint. On March 29, 2001, the union filed a timely response, authored by two local union officials.

The employer filed an amended complaint on April 17, 2001, this time alleging that the union had refused to bargain in good faith by escalating its bargaining demands in January and April 2001. A second preliminary ruling was issued on June 29, 2001, finding a cause of action to exist and giving the union 21 days to answer the amended complaint. The union filed a timely response on July 10,

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[2] Case 15807-I-01-363. WAC 391-55-265 codifies long-standing Commission precedents by delaying the risks and expense of interest arbitration before an independent arbitrator until statutory issues concerning the legitimacy of the issues being advanced can be resolved in statutory proceedings before the Commission.

2001, in the form of a letter from a third union official, denying all of the employer's allegations.

A notice was issued on July 24, 2001, setting a hearing for August 22, 2001. Counsel for the union filed another answer on August 17, 2001, and served that document on the employer the same day. That answer also denied all of the employer's allegations.

At the outset of the hearing on August 22, 2001, the employer sought a default judgement against the union, citing the answer filed on August 17, 2001, as a late answer to the amended complaint. The Examiner denied the employer's motion at that time, and re-affirms that ruling here.

Apart from the fact that the union actually filed timely responses denying the employer's allegations (albeit in documents that lacked the form of an answer traditional in civil proceedings), acceptance of the more formal answer filed on August 17, 2001, would also be appropriate in this case under WAC 391-08-003. That rule allows an examiner to waive requirements of the rules, absent a showing of prejudice by the respondent:

> WAC 391-08-003 POLICY — CONSTRUCTION — WAIVER. The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency and nothing in any rules shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirements of these rules unless a party shows that it would be prejudiced by such a waiver.

In *Port of Tacoma*, Decision 4627-A (1995), the Commission reiterated that its staff members presiding at hearings have authority to waive any requirement of the rules under WAC 391-08-003, in the absence a showing of prejudice. In *City of Seattle*, Decision 2735 (PECB, 1987), the Commission rejected a request for a "default" judgement, stating:

> We scarcely can conceive of any circumstance under which a default or a broad suppression order would be warranted.

In this case, the union's timely responses show that it acknowledged the jurisdiction of the Commission and was prepared to assert defenses, which distinguishes this case from situations such as *City of Benton City*, Decision 436-A (PECB, 1978), where a respondent totally disregarded the Commission proceedings.

The union's responses to the preliminary rulings also put the employer on notice that the union was contesting the employer's allegations. Review of the record discloses that the original complaint and amended complaint both involve alleged escalation of demands made in collective bargaining. The same is true of the union's responses, which are general denials of the employer's allegations. There is nothing in the record that would support a finding of prejudice to either party. The additional answer filed by the union's attorney was merely a confirmation of the union's previous denials.

Employers Attempt to Amend its Complaint at Hearing

During the second day of the hearing in this matter, the employer sought to amend its complaint. The union objected to any amendment after the hearing was opened. WAC 391-45-070(2) includes:

> (2) Motions to amend complaints shall be subject to the following limitations:
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> . . . .
>
> (c) After the opening of an evidentiary hearing, amendment may only be allowed to conform the pleadings to evidence received without objection, upon motion made prior to the close of evidentiary hearing.

Thus, the employer's motion for amendment to add new allegations was clearly untimely when it was made during the hearing. The ruling denying that amendment is thus re-confirmed here.

Evidentiary Rulings on Mediator Confidentiality

The employer seeks reversal of rulings by which the Examiner excluded testimony about conversations between the mediator and employer officials, when the union was not present. The Examiner hereby reaffirms the rulings made at the hearing.

The confidentiality of the mediation process is addressed in WAC 391-08-810, which reads in part:

> In order to respect the confidential nature of mediation, the agency shall not permit the disclosure of notes and memoranda made by any member of the commission or its staff as a recording of communications made or received while acting in the capacity of a mediator between the parties to a labor dispute.

WAC 391-55-090 provides that:

> Mediation meetings shall not be open to the public. Confidential information acquired by a mediator shall not be disclosed to others outside the mediation process for any purpose, and a mediator shall not give testimony about

> the mediation in any legal or administrative procedure.

WAC 391-08-310(2) expressly limits the power of subpoena to prevent parties from calling a mediator as a witness:

> . . . except no subpoena shall be issued or given effect to require the attendance of any member of the commission or any member of the agency staff in any proceeding before the agency.

Thus, the Commission's rules provide no basis for a party to ever believe it could obtain the testimony of a mediator.

The confidentiality of the mediation process is similarly protected by statutes outside of the collective bargaining arena. RCW 5.60.070 states:

> If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then the communications made or the materials submitted in, or in connection with the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding.

Again, the employer has not shown any basis for it to have believed it could rely on its ex parte conversations with the mediator.

Just as RCW 5.60.030 prevents testimony about conversations with somebody that cannot be called as a witness, it is appropriate to exclude testimony concerning statements made by or to a mediator who cannot be called as a witness. The union interposed a timely

objection each and every time the employer attempted to introduce testimony about the private conversations between the mediator and the employer's representatives. That testimony was properly excluded from the record in this proceeding.

Documents Created After Filing of Amended Complaint

The amended complaint alleges that the union escalated its bargaining demands at a mediation session held on April 5, 2001. The employer sought admission in evidence of certain documents that were created after that mediation session, but the Examiner rejected those documents as immaterial to what transpired on April 5, 2001. The best evidence supporting or contradicting finding an escalation of bargaining demands is the documents the parties had before them at the time of the alleged escalation. The ruling excluding the later-created documents is thus re-affirmed here.

Standards for Determining Merits of Case

This proceeding is conducted under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which requires public employers and unions representing public employees to bargain in good faith on a variety of topics. RCW 41.56.030 defines the bargaining obligation, as follows:

> RCW 41.56.030 DEFINITIONS. As used in this chapter:
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> . . . .
>
> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to *grievance procedures and collective negotiations on personnel matters, including wages,*

> *hours and working conditions,* which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

(emphasis added).

The Commission has examined the good faith of parties in numerous cases, and has stated that the "totality of circumstances" must be analyzed in order to decide whether an unfair labor practice has been committed. *City of Puyallup*, Decision 6674 (PECB, 1999).

Application of the Standard

Applying the totality of circumstances approach to this case leads to a conclusion that there was no escalation from the demands made by the union in its October proposal. Indeed, the union significantly reduced its demands. Thus, the complaint fails.

The employer alleges that the union escalated its demands on Article 11.9, on three issues within Article 12.3, on Article 13.1, and on the salary schedule. The Examiner addresses those issues separately.

Article 11.9 -

In its July proposal, the union proposed that paramedics be paid at a rate 110% of the base fire fighter rate of pay. That proposal was made in the context of rumors that the local provider of paramedic services was ceasing operations, and that the fire department would begin providing paramedic services. After some discourse on the topic, the parties agreed to table discussion of the issue, and to revisit the topic if the rumored change became a reality.

In October, after the parties' agreed cut-off date for new demands, the employer proposed to pay paramedics 110% of the base fire fighter rate. The employer's proposal was made in the context of a planned assumption of paramedic services by the fire department. Thus, it was the employer that re-initiated discussion about this issue, based on changed circumstances.

In October, the union proposed that paramedics be paid 110% of the base fire fighter rate, and that a new classification (to be titled firefighter/paramedic) be paid 115% of the base fire fighter rate. The union envisioned the new classification as requiring employees to perform dual functions of fire suppression and medical services. Based upon the change of circumstances that accompanied the employer's assumption of paramedic operations, the union was entitled to make proposals relevant to a reality which had not existed when its original proposal was discussed and shelved. No violation of the good faith obligation was committed.

Article 12.3 - Educational Incentive -

The first of three contested issues in this article concerns educational incentive. In July, the union proposed (subject to approval by its membership), to replace an existing educational incentive with a $110.00 bi-weekly increase of the employees' base pay. The union's negotiating team later discussed that proposal with the union membership, and ascertained that the membership did not approve of the position taken by the negotiating team in the July proposal.

The union thereafter informed the employer that it was considering a fixed percentage for the educational incentive provision, because a fixed percentage was more appealing to the membership. In October, the union withdrew the proposal for the $110.00 bi-weekly pay increase, and proposed conversion of the educational incentive

formula to a fixed percentage of the base pay. The total cost to the employer for the fixed percentage educational incentive was less than the cost of the pay increase proposed by the union in July. No violation of the good faith obligation was committed.

Article 12.3 - Fire Inspector -

The second of three topics addressed in this article concerns the rate of pay for a fire inspector classification that did not appear in the parties' expiring contract. The fire inspector function actually existed, and employees performing that function were paid the same premium received by other positions for specialized duty.

At the outset of the negotiations, neither the union nor the employer proposed any change in the pay or selection of personnel to perform the fire inspector duties. During the course of the negotiations, the employer ascertained that it was proving difficult to get employees to serve as fire inspector. In September of 2000, the employer proposed to solve its recruitment problem by creating a new "fire marshal" position to be paid $100.00 per month above the base fire fighter rate of pay. It was thus the employer that raised this subject matter.

In response to the employer's proposal, the union proposed that the pay premium for the new fire marshal position be established as a percentage of the base fire fighter rate of pay. The union's response did not constitute an unlawful escalation. Rather, it was a legitimate counter-proposal on a new issue raised by the employer after the agreed cut-off date to raise new issues. No violation of the good faith obligation was committed.

Article 12.3 - Degree Requirement -

The last of the three topics addressed in this article concerns the types of majors for which a premium was paid to employees who held

a "bachelor" degree. The parties' expiring contract limited that benefit to employees holding degrees in public administration.

From the outset of the negotiations, and throughout the negotiations, the union proposed to have any "bachelor" degree qualify for the premium pay, but the employer did not agree with that proposal. Nothing precluded the union from seeking to enlarge the class of employees eligible for this pay premium. No violation of the good faith obligation has been established.

Article 13.1 -

The union sought to amend the longevity provision of the contract to provide a fixed percentage of the employees rate of pay. The union's July proposal requested that the contract longevity rates be amended to provide employees from 2% to 13% additional wages based upon their years of service to be paid bi-weekly. The union's proposal started at 4 years of service and ended at 28 or more years of service. The union's October proposal eliminated the first four years of service rate and ended with 24 or more years of service. Additionally, the unions demands were reduced from 13% to 12%. No violation of the good faith obligation has been established.

Article 31 -

The employer accuses the union of bargaining to impasse about a permissive subject of bargaining. The allegation is premature.

In its July 2000 and October 2000 proposals, the union sought to have staffing and safety addressed in a new Article 31 in the parties' collective bargaining agreement. The parties discussed the proposal during their negotiations, without reaching any compromise. The employer sees the union's proposal as a permissive subject of bargaining. Parallel to the negotiations, it became

apparent to the union that most of the union's concerns were being addressed by the fire department internally.

Although Article 31 is included in the issues certified for interest arbitration on May 10, 2001, the union decided to not pursue Article 31 any further. On June 11, 2001, the union gave the Executive Director notice of the only issues that the union desired to pursue in interest arbitration, and Article 31 was omitted from that list. A party is entitled to propose and pursue "permissive" subjects of bargaining during bilateral negotiations and mediation, and only commits a refusal to bargain violation by pursuing a permissive subject in interest arbitration. Thus, regardless of whether Article 31 is permissive or mandatory, the union clearly has not pursued that topic in interest arbitration. No breach of the good faith obligation has been established.

Salary Schedule -
The total cost of the union's July proposal was reasonably computed as approximately 10.84 per cent. The union reduced its demands in its October proposal, which was reasonably computed as costing 5.9 per cent. No breach of the good faith obligation has been established.

FINDINGS OF FACT

1. The City of Lynnwood is a "public employer" within the meaning of RCW 41.56.030. Among other services, the employer maintains and operates a fire department.

2. International Association of Fire Fighters, Local 1984, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of fire fighters employed by the employer.

3. The employer and union have been parties to a series of collective bargaining agreements, the latest of which was effective for 1998 through 2000. The parties commenced negotiations for a successor contract in July of 2000. The employees represented by the union are "uniformed personnel" under RCW 41.56.030(7), and the parties' negotiations are subject to the interest arbitration procedures established in RCW 41.56.430 through .490.

4. The union's initial proposal in July of 2000 included pay for a paramedic classification which then did not exist in the bargaining unit. That proposal was based upon a rumored accretion, and was tabled following a discussion between the parties. After the parties' agreed cut off date for new proposals, the employer re-introduced the topic based upon greater certainty that the employer would begin providing paramedic services through the fire department. The union thereupon proposed creation of a new firefighter/paramedic classification with a pay rate higher than previously proposed by the union for employees who would only work as paramedics.

5. The union's initial proposal in July of 2000 included replacement of an existing educational incentive provision with a general pay increase for bargaining unit employees. The union later notified the employer that it would withdraw that proposal. In October of 2000, the union proposed conversion of the formula for computing the existing educational incentive to a percentage of the base pay, at a cost to the employer less than the general increase previously proposed.

6. The union's initial proposal in July of 2000 did not mention a premium that was actually being paid to employees who performed fire inspection functions. After the parties'

agreed cut off date for new proposals, and after encountering recruitment difficulties, the employer proposed creation of a new fire marshal classification with a pay premium at a fixed dollar amount. The union responded that the pay premium should be at a percentage of the base pay.

7. The union's proposal in July of 2000 included a broadening of the types of majors for which a premium would be paid to employees who held a "bachelor" degree. The union did not escalate its demand in any subsequent proposal.

8. The union's initial proposal in July of 2000 would have increased the total compensation for a five-year fire fighter by approximately 10.84 per cent. In October of 2000, the union submitted a written proposal in which it reduced its demands in several respects, so that the total cost of compensation for a five year fire fighter would increase by approximately 5.9 per cent.

9. The union's initial proposal in July of 2000 would have provided that longevity would be paid at a fixed percentage of 2% to 13% of the employees rate of pay. In October of 2000, the union reduced the fixed percentage to 4% to 12% of the employee rate of pay.

10. The admissible testimony and documentary evidence in this proceeding does not establish that the union escalated its demands during mediation in January of 2001 and/or April of 2001.

11. Although the union initially advanced a proposal concerning staffing safety, and although it pursued that proposal during bilateral negotiations between the parties and in mediation, the union promptly withdrew that proposal upon the certifica-

tion of the parties' dispute for interest arbitration under RCW 41.56.450.

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. The City of Lynnwood has failed to establish that International Association of Fire Fighters, Local 1984, escalated its bargaining demands in breach of its good faith obligations under RCW 41.56.030(4), so that no unfair labor practice has been established under RCW 41.56.150(4).

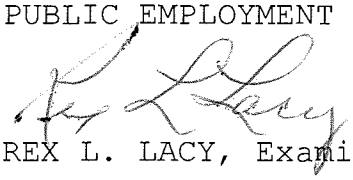
3. The City of Lynnwood has failed to establish that International Association of Fire Fighters, Local 1984, pursued its staffing safety proposal in interest arbitration, so that no unfair labor practice has been established under RCW 41.56.150(4).

ORDER

Based upon the foregoing findings of fact and the evidence as a whole, the complaint charging unfair labor practices filed by the City of Lynnwood in this case is hereby DISMISSED.

ISSUED at Olympia, Washington, on this 19th day of February, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



REX L. LACY, 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.