STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 453, Complainant, vs. CITY OF WENATCHEE, Respondent.	CASE 16407-U-4212 DECISION 8028 - PECB CASE 16426-U-4217 DECISION 8029 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Summit Law Group, PLLC, by *Bruce L. Schroeder*, Attorney at Law, for the employer.

On May 21, 2002, International Association of Fire Fighters, Local 453 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Wenatchee (employer) as respondent. Case 16407-U-02-4212. The union filed an additional complaint under Chapter 391-45 WAC on June 3, 2002, and amended that complaint on June 6, 2002. Case 16426-U-02-4217. Both complaints concern the conduct of the employer during the course of contract negotiations and related mediation and interest arbitration.

An order of dismissal was issued under WAC 391-45-110 on June 10, 2002, dismissing some of the allegations as untimely and finding that the remaining allegations stated a cause of action. The employer was directed to answer the viable allegations, and related

interest arbitration proceedings were suspended with respect to the three issues that were the subject of viable unfair labor practice allegations. The unfair labor practice cases were consolidated for hearing. Examiner Kenneth J. Latsch conducted a hearing on November 5, 2002. Both parties filed briefs.

Based upon the evidence presented and the arguments advanced by the parties, the Examiner finds that the employer acted in bad faith and violated RCW 41.56.140(4) and (1), with respect to changes of previously-agreed comparables, and with respect to the three allegations of regressive bargaining.

BACKGROUND

The union represents a bargaining unit of the fire fighters employed in the Wenatchee Fire Department. The parties had a collective bargaining agreement in effect through December 31, 2000, and they commenced bargaining for a successor contract in July 2000. They agreed to ground rules for their negotiations,[1] and then proceeded to reach tentative agreements on a number of issues during the course of bargaining. In accordance with the

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[1] The ground rules agreed upon by the parties included:

> On the record proposals shall be presented in writing and signed by the lead negotiator for the presenting party. All other proposals, whether written or oral, will be considered off the record...
>
> After the third meeting, no new proposals may be introduced . . .
>
> Items that have been tentatively agreed to by both parties will be made in writing, *dated*, and initialed by both lead negotiators. . . .

ground rules, the tentative agreements were initialed and dated by the parties' lead negotiators on written documents.

Article 10.4 of the expiring agreement contained language that had first appeared in the parties' 1998 contract (when the union agreed to an employer proposal on the subject), as follows:

> The City and the Union agree that the following list of cities shall be used as a basis for comparison. *In making these comparisons, it is agreed that total economic benefits and salaries shall form the complete package (total compensation) to be considered.*
>
> | | | |
> |---|---|---|
> | Aberdeen | Mountlake Terrace | Richland |
> | Auburn | Mount Vernon | Walla Walla |
> | Kennewick | Olympia | |
> | Longview | Pullman | |

(emphasis added). One of the proposals advanced by the union during the negotiations in 2000 was to eliminate the language quoted in italics, above.[2]

The parties filed a joint request for mediation on November 6, 2000. The parties then delayed the onset of the mediation process into January 2001.[3]

On January 4, 2001, the parties tentatively agreed to retain Article 10.4 as it was set forth in the expiring agreement. Both

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[2] The employer did not propose any new language for that article at any time, but there was uncontroverted testimony at the hearing that the employer produced a different list of comparables on October 26, 2000. That list was immediately withdrawn and replaced, when the union questioned whether the employer intended to adopt a different set of comparables.

[3] Notice is taken of the Commission's docket records for Case 15473-M-00-5416.

parties initialed and dated the written tentative agreement, in apparent conformity with their ground rules agreement.

The parties proceeded with their negotiations, and referred to the comparables listed in Article 10.4 of the expiring contract with respect to the employer's proposal of altering the work schedules from a four platoon system to a three platoon system. After almost a year of negotiating and mediation, the parties had not reached an agreement by April 2001.

The mediator requested a summary of outstanding issues, and the employer responded with a document listing a number of "TA'd" items and a number of "not settled" items. The employer submitted language in that document, for the first time, pertaining to several "not settled" articles. Included among those were the three articles which are the subject of this unfair labor practice case:

- Article 12 (Vacations), where the employer then desired to limit vacations when all three officers on a shift would be absent at the same time;
- Article 15 (Overtime Pay and Compensatory Time), where the employer then desired to change the calculation of overtime to the detriment of employees (by providing overtime pay only as required by the federal Fair Labor Standards Act); and
- Article 17 (Shift Changes), where the employer then desired to impose requirements:
    - That shift trades would not result in additional cost to the employer,
    - Requiring rank-for-rank shift trades,

- Imposing a promotion list eligibility requirement for shift trades, and
- Eliminating the use of shift trades to extend leaves.

The overtime pay issue (Article 15) was raised by the employer in mediation, but discussion on the subject was abruptly halted when the union's representative expressed his opinion that further pursuit of the matter constituted regressive bargaining.

Mediation was not successful, and the Executive Director certified issues for interest arbitration on October 19, 2001. The list of issues included Articles 12, 15 and 17. Gary Axon was selected by the parties as the Neutral Chairman of the interest arbitration panel, and a hearing was scheduled for June 12-14, 2002.

On May 9, 2002, the employer's human resources director, Sandra Smeller, notified the union, for the first time, that the employer intended to use a set of comparables for the purposes of the interest arbitration different from those listed in Article 10.4 of the expired contract.[4]

On May 21, 2002, the union filed the first of the unfair labor practice complaints now before the Examiner.

On May 30, 2002, in anticipation of the scheduled interest arbitration hearing, and in conformity with WAC 391-55-220, the parties submitted specific proposals to Arbitrator Axon and to each other. The proposals submitted by the employer at that time included the subjects of the instant complaint: Article 12

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[4] The employer later withdrew its new list of comparables after the union filed the instant unfair labor practice complaint.

(vacations), Article 15 (overtime pay and compensatory time), and Article 17 (shift changes). None of the employer's language pertaining to those articles had re-appeared after being abandoned (or being left unaddressed) in mediation.

On June 3 and 6, 2002, the union filed the complaint and amended complaint in the second of the instant proceedings.

POSITIONS OF THE PARTIES

The union contends that the employer tentatively agreed to use the list of comparables set forth in the expired agreement, and that both parties proceeded with that understanding during the subsequent negotiations, so that the employer's attempt to change its comparables in anticipation of interest arbitration was an unfair labor practice. In addition, the union asserts that the employer's attempts to introduce new proposals in interest arbitration constitute bad faith regressive bargaining.

The employer argues that the union's claims with respect to any "regressive" bargaining are time-barred by the statute of limitations, because the issues were first raised more than six months prior to the filing of the complaint. As to the change of comparables, the employer contends that it communicated a desire to consider new comparables early-on in the bargaining process, and that its new list of comparables merely served to justify - not to change - the employer's bargaining position. Although it acknowledges that it agreed to withdraw a proposal pertaining to shift changes earlier in the process, it contends that it did so based on union reassurances that were nullified by the union's filing of multiple grievances regarding shift changes, so that the employer

had to re-propose negotiations on that topic. The employer further defends that it demonstrated good faith after the union filed these unfair labor practice complaints, by agreeing to compromises on some of its proposals.

DISCUSSION

The union has presented two distinct claims with respect to the employer's conduct during the course of negotiations: First, the union claims that the employer's introduction of a new set of comparables just prior to interest arbitration constitutes bad faith bargaining; second, the union claims that the employer's submission of proposals to the interest arbitrator that had not previously been proposed by the employer during bargaining and/or mediation constituted bad faith and regressive bargaining.

The Statute of Limitations Argument

An unfair labor practice complaint must be filed within six months following the alleged violation. RCW 41.56.160. The limitations period begins to run as of the date a potential complainant has actual or constructive notice of the complained-of action. *City of Seattle,* Decision 7278-A (PECB, 2001).

The employer relies on *Lakehaven Utility District*, Decision 7393 (PECB, 2001) to support its contention that the allegations concerning its pre-arbitration proposals are time-barred. That case is not controlling here, however. In *Lakehaven*, the acts complained of were on-going for long before the six-months preceding the filing of that complaint, and the Commission ruled that only acts occurring less than six months prior to the filing

of the complaint could state a cause of action. Here, the disputed employer proposals were submitted (as required by a Commission rule) only a few days before the union filed its complaints.

The employer points out that it submitted proposals on the same topics via its "Draft as of 5/31/01" document, but that does not establish that the complaint was untimely as to the proposals it submitted just prior to interest arbitration. The most that can be said is that any unfair labor practice that might have been made as to that "draft" is time-barred and cannot be remedied in this proceeding. Additionally, the "draft" document appears to have merely been an employer-prepared summary, rather than a formal proposal for discussion under the ground rules being used by these parties.

Even if the union had a basis to file unfair labor practice charges within six months after the "draft" document was issued and/or within six months after the employer raised the overtime calculation for the first time in mediation, its failure to do so is explained by the apparent abandonment of those issues by the employer.[5] The union cannot be held responsible for failing to meet the statutory time limitation where it was led to a reasonable impression that the employer had abandoned the offensive proposal. Although at least one mediation session occurred after the "draft" document was issued, the matters at issue in this proceeding were not addressed in mediation after the "draft" was presented. The union did not have reason to file charges on those topics again until it received a copy of the employer's interest arbitration proposals in May 2002, and it then filed a timely complaint.

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[5] The union made it clear that it considered any discussion on the overtime topic to constitute "regressive bargaining" and the employer ceased further discussion of the matter.

The evidence contradicts the employer's claim that the union was on notice of its proposal to change the comparables. The employer never submitted a formal proposal on this topic, it withdrew the one feeler that it did put out, and it entered into a written tentative agreement (conforming to the parties' agreed ground rules) to retain the language of the expired collective bargaining agreement. Against that background, the employer's attempt to open a debate on comparables in May 2002 is properly characterized as a new "late hit" issue. The union's complaint was filed within days (and certainly less than six months) thereafter.

<u>The Certification of Issues for Interest Arbitration</u>

The certification of issues for interest arbitration issued on October 19, 2001, does not enable or excuse the employer conduct at issue in these cases. The certification of issues for interest arbitration is an extension of the mediation process. Like a mediator who has no power of compulsion under RCW 41.56.440, the Executive Director has no power when acting under RCW 41.56.440 and .450 to compel a party to drop a proposal. Except for unit determination issues (where the Commission has exclusive authority under RCW 41.56.060 and *City of Richland*, Decision 279-A (PECB, 1978), *aff'd,* 29 Wn. App. 599 (1981), *review denied,* 96 Wn.2d 1004 (1981)), the Executive Director certifies the issues that remain in dispute after having been mediated. Parties are NOT permitted to raise issues that have not been mediated, or to raise new issues after the certification.

The duty to bargain in good faith continues throughout an interest arbitration process. *City of Bellevue v. IAFF, Local 1604*, Decision 3085-A (PECB, 1989), *aff'd*, 119 Wn.2d 373 (1992). The process for a party to challenge the issues advanced by the

opposite party to an interest arbitration proceeding is an outgrowth of the unfair labor practice provisions of the statute, and is set forth in WAC 391-55-265 by reference back to proceedings under Chapter 391-45 WAC. In these cases, the union has filed timely unfair labor practice complaints and is entitled to rulings on those complaints before proceeding with interest arbitration.

The "Comparables" Complaint

RCW 41.56.430 sets forth the criteria that the interest arbitration panel must consider in fashioning an award:

> (a) The constitutional and statutory authority of the employer;
> (b) Stipulations of the parties;
> (c) . . . (ii) For employees listed in RCW 41.56.030(6)(b), comparison of the wages, hours and conditions of employment of personnel of public fire departments of similar size on the west coast of the United States. However, when an adequate number of comparable employers exists within the state of Washington, other west coast employers shall not be considered . . .

Because interest arbitration is part of the collective bargaining process under *City of Bellevue*, parties should approach interest arbitration with their bargaining relationship in mind. The duty to bargain in good faith includes the duty to provide requested information needed by the opposite party to understand the full impact of proposals concerning wages, hours, and conditions of employment. As with collective bargaining outside of the interest arbitration setting, a late escalation of demands by either party violates the duty to bargain in good faith. In *City of Clarkston*, Decision 3246 (PECB, 1989), it was a union that was found to have acted in bad faith by failing to notify the employer that it was relying on a changed set of comparables. Even though the union's

change of comparables was in response to changes in RCW 41.56.460, the union failed to communicate its intentions to the employer.

In this case, the employer attempted to submit a change of comparables almost two years after the initiation of the bargaining process. Different from the situation in *City of Clarkston*, the change was not justified on the basis of a change of statutory language or any other external circumstance. Compounding the disruption inherent in any "late hit," the employer had proposed and obtained the union's agreement to the comparables set forth in the parties' expired contract, it backed off earlier from a change of comparables, and it executed a tentative agreement in conformity with the ground rules agreed upon by the parties. Under the reasoning in *City of Clarkston*, the change of position announced by the employer less than a month prior to the commencement of the interest arbitration hearing was in breach of its good faith obligation, and was an unfair labor practice.

The Submission of New Proposals For Interest Arbitration

The obligations of "collective bargaining" are defined in RCW 41.56.030(4), as follows:

> [T]he 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.

The Commission has examined the good faith obligation in a number of unfair labor practice cases. The Examiner's task in this case is to determine whether the employer's conduct fell below the standard of "good faith" that is imposed on both sides of the bargaining table.

The Commission looks to the "totality of the circumstances" in determining whether a party has engaged in unlawful bargaining tactics. *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988). The burden is on the complaining party to prove that the respondent's total bargaining conduct demonstrated a failure or refusal to bargain in good faith, or the intention to frustrate or avoid an agreement. *City of Puyallup,* Decision 6674 (1999); *City of Clarkston,* Decision 3246 (PECB, 1989).

In several cases, parties have been found to have engaged in unlawful conduct by altering their proposals in a manner that frustrated negotiations. In *Entiat School District*, Decision 1361 (PECB, 1982), an employer that escalated its demands in an attempt to avoid a final agreement after reaching a tentative agreement was found to have committed an unfair labor practice. Widening the gap between the parties's positions, introducing new issues late in the bargaining process, and re-raising issues abandoned earlier in negotiations are among the types of tactics that have been found to unlawfully disrupt the prospect of settlement and to be evidence of bad faith. *Snohomish County,* Decision 1868 (PECB, 1984); *Columbia County*, Decision 2322 (PECB, 1985).

In this case, the employer did not submit the proposals which are the subject of these proceedings for discussion at any time during the parties' bilateral negotiations, and gave them only a passing glance in mediation. Its contention that its "Draft as of May 31,

2001" document was sufficient, without discussion, to constitute bargaining is untenable. Moreover, its submission of its own view of outstanding issues to the mediator (in anticipation of interest arbitration) cannot rise to the level of communications required by the "good faith bargaining" obligation of the statute. The employer's conduct in submitting these "late hit" proposals just prior to interest arbitration clearly constituted an unlawful disruption of the bargaining process, constituted regressive bargaining, and constituted bad faith. Because interest arbitration is an "impasse" substitute, backing off later could not excuse the employer or absolve it from its unlawful conduct.

FINDINGS OF FACT

1. The City of Wenatchee is a municipal corporation of the State of Washington, and is a public employer within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 453, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of fire fighters employed by the City of Wenatchee.

3. The employees involved in this proceeding are "uniformed personnel" within the meaning of RCW 41.56.030(7), and the parties' bargaining relationship is subject to the interest arbitration procedure set forth in RCW 41.56.430 - .490.

4. The employer and union were parties to a collective bargaining agreement that expired on December 31, 2000.

5. The employer and union began negotiations for a successor collective bargaining agreement in July 2000, and agreed upon

a set of ground rules which included procedures for formalizing tentative agreements.

6. In November 2000, the parties jointly requested mediation under RCW 41.56.440.

7. In January 2001, the parties formalized a tentative agreement to retain the language of their expired contract concerning the comparable jurisdictions to be used by the parties in contract negotiations and interest arbitration.

8. After a mediation session held on May 31, 2001, the employer submitted a purported list of outstanding issues which included three topics that had never been discussed at the bargaining table in the current round of negotiations. Those proposals concerned Article 12 (vacations), Article 15 (overtime pay and compensatory time), and Article 17 (shift changes).

9. The union promptly objected to the new issues described in paragraph 8 of these findings of fact, after which the employer ceased to pursue them, and appeared to abandon them.

10. Certain issues remaining unresolved between the parties in their negotiations for a successor collective bargaining agreement were certified for interest arbitration on October 19, 2001. The parties selected Gary Axon as the Neutral Chairman of the interest arbitration panel, and a hearing was scheduled for dates in June 2002.

11. On May 9, 2002, the employer notified the union, for the first time, that it intended to use a set of comparables in interest arbitration different from those previously agreed upon by the

parties in their expired collective bargaining agreement and in their tentative agreement reached in January 2001.

12. The union promptly objected to the new comparables described in paragraph 11 of these findings of fact. The employer refused to recede from its changed position, and the union timely filed unfair labor practice charges within six months following the change of position described in paragraph 11 of these findings of fact.

13. On May 30, 2002, the employer submitted its proposals for interest arbitration. Those proposals included changes of position as described in paragraph 8 of these findings of fact.

14. The union promptly objected to the new issues described in paragraph 13 of these findings of fact. The employer refused to recede from its changed position, and the union timely filed unfair labor practice charges within six months following the change of position described in paragraph 13 of these findings of fact.

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 conduct of these parties throughout bilateral negotiations, mediation, and interest arbitration is subject to the "good faith bargaining" obligations imposed by Chapter 41.56 RCW, and the Commission has jurisdiction under RCW 41.56.160 to hear and determine unfair labor practice allegations

relating to the conduct of parties in interest arbitration proceedings under RCW 41.56.430 - .490.

3. By its untimely change of position regarding previously-agreed comparable jurisdictions in anticipation of interest arbitration as described in paragraph 11 of the foregoing findings of fact, the City of Wenatchee failed and refused to bargain in good faith and committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

4. By its untimely change of position in advancing proposals relating to vacation, overtime and compensatory time, and shift changes in anticipation of interest arbitration as described in paragraph 13 of the foregoing findings of fact, the City of Wenatchee failed and refused to bargain in good faith and committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

ORDER

The City of Wenatchee, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Advancing untimely changes of position regarding comparable jurisdictions in anticipation of interest arbitration proceedings;

   b. Advancing untimely changes of position regarding vacations, overtime and compensatory time, and shift changes in anticipation of interest arbitration proceedings;

c. Failing and refusing to bargain in good faith with International Association of Fire Fighters, Local 453, as the exclusive bargaining representative of its fire fighter personnel.

d. In any other manner, interfering with, restraining or coercing employees in the exercise of their rights under Chapter 41.56 RCW.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Withdraw the changed set of comparables from any and all arguments advanced or to be advanced in collective bargaining between the parties in connection with or during the life of the collective bargaining agreement that is the subject of the interest arbitration proceedings initiated on October 19, 2001.

b. Withdraw its proposals on vacation, overtime and compensatory time, and shift changes, from any and all arguments advanced or to be advanced in collective bargaining between the parties in connection with or during the life of the collective bargaining agreement that is the subject of the interest arbitration proceedings initiated on October 19, 2001.

c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the respondent, and shall remain posted

for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced or covered by other material.

d. Read the notice attached to this order into the record at a regular meeting of the City Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

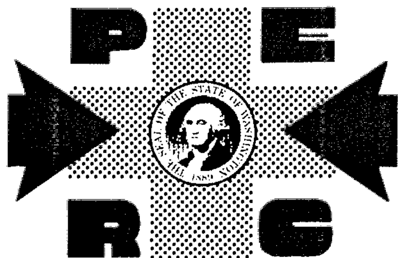
f. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 11th day of April, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENNETH J. LATSCH, 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.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE WILL withdraw the changed set of comparables from the current round of negotiations.

WE WILL withdraw the City's proposals on vacation, overtime and compensatory time, and shift changes, from the current round of negotiations.

WE WILL CEASE AND DESIST FROM advancing untimely changes of position regarding comparable jurisdictions, vacations, overtime and compensatory time, and shift changes in anticipation of interest arbitration proceedings;

WE WILL CEASE AND DESIST FROM failing and refusing to bargain in good faith with International Association of Fire Fighters, Local 453, as the exclusive bargaining representative of fire fighter personnel.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL read this notice into the record at a regular public meeting of the Wenatchee City Council, and permanently append a copy of this notice to the official minutes of the meeting where the notice is read.

DATED: ______________

CITY OF WENATCHEE

BY: ________________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, PO Box 40919, Olympia, Washington 98504-0919. Telephone (360) 570-7300.