STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHITMAN COUNTY DEPUTY SHERIFFS' ASSOCIATION, Complainant, vs. WHITMAN COUNTY, Respondent.	CASE 17332-U-03-4473 DECISION 8506 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Garrettson, Goldberg, Fenrich & Makler, by *Michael J. Hanson*, Attorney at Law, for the union.

Stamper, Rubens, Stocker & Smith, by *Brian M. Werst*, Attorney at Law, for the employer.

On March 20, 2003, the Whitman County Deputy Sheriffs' Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Whitman County (employer) as respondent. On May 2, 2003, the union amended its complaint and requested that the disputed matter be withdrawn from interest arbitration in Case 17193-I-03-396. The amended complaint was reviewed under WAC 391-45-110, and a preliminary ruling issued on June 9, 2003, found a cause of action to exist on allegations summarized as:

> Employer refusal to bargain in violation of RCW 41.56.140(4), by breach of its good faith bargaining obligations in withdrawing a tentative agreement on article 8 concerning overtime and shift differential [and, if so, a derivative interference with employee rights in violation of RCW 41.56.140(1)].

The Executive Director simultaneously suspended the interest arbitration as to "Article 8 - Overtime and Shift Differential." A hearing was held in Colfax, Washington on October 7, 2003, before Examiner Paul T. Schwendiman. The parties filed briefs.

The Examiner rules that the employer did not withdraw from a tentative agreement on Article 8, and thus did not breach its good faith obligation in violation of RCW 41.56.140(4).

BACKGROUND

The employer provides law enforcement services through its Sheriff's Department. The union represents the deputy sheriffs employed in that department. This bargaining unit of "uniformed personnel" is eligible for interest arbitration under RCW 41.56.430 - .490 and WAC 391-55-200 through -265.

The parties had a collective bargaining agreement in effect for the years 1999 through 2001, and they commenced negotiations on a successor agreement. At their first meeting on February 21, 2002, the union proposed ground rules for the negotiations, including:

> 2. Designated Spokesperson. Each team shall designate a chief spokesperson. . . .
>
> 3. Proposals. All proposals and counter-proposals shall be in writing and dated. The parties agree to confine bargaining between designated committees, and neither party shall "end run" the other.
>
> 4. Tentative Agreement. Each negotiating team possesses the authority to tentatively agree to a proposal and agrees to submit such "TA" with a "do pass" recommendation. However, all tentative agreements will be subject to final approval by the respective constituents.

Exhibit 4. The employer agreed to the ground rules quoted here, as proposed by the union.

At the February 21 meeting, the employer proposed that Section 8.01 and Section 8.05.2 of the expired contract be amended, as follows:

> 8.01 Modify language to read as follows: For purpose of calculating overtime, paid leave, shall *NOT* count as hours worked.
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> . . . .
>
> 8.05.2 Modify language to read as follows: A bargaining unit employee shall be considered not available for work if during the week in question the employee was absent due to:
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> a. Unpaid Leave of Absence
> b. Ineligible for Holiday Pay
> c. *ON PAID LEAVE*
> d. Absent without Permission

Exhibit 16 (additions to contract in *ALL-CAPS ITALICS*). The union did not propose any change of Section 8.01 or Section 8.05.2, but it proposed changes in Section 8.04 and a new Section 8.07.

At additional bargaining sessions held on April 5, April 6, and May 3, 2002, the employer's spokesperson was Gary Hunt and the union's spokesperson was Timothy Ching.[1] In a written proposal provided on April 5, the union set forth all of the provisions in Article 8 that it did not propose to change (including Section 8.01 and Section 8.05.2) on the same sheet of paper with its proposals for changes to Section 8.04 and a new Section 8.07. Additional "what if" proposals were exchanged on Section 8.01 and/or Section 8.05.2 on May 3, but the parties did not reach agreement on those sections.

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[1] Ching was an attorney with the law firm of Garrettson, Goldberg, Fenrich & Makler.

At the parties' next negotiations session, on July 11, 2002, Steven Schuback replaced Ching as the union's spokesperson. Schuback testified in this proceeding that he attended the July 11 session "as the association representative" and that Mark Makler wanted him to handle all of the tentative agreements reached by the parties.[2] Schuback reviewed notes during the session, and made handwritten revisions with regard to Section 8.04 and Section 8.07 on a copy of the union's April 5 proposal concerning ARTICLE 8. Schuback then wrote "TA SOS 7/11/02" on that document in blue ink, and handed it to Hunt. Hunt wrote "TA GAH 7/11/02" on the document in red ink. That document is replicated, as follows:

ARTICLE 8 - OVERTIME & SHIFT DIFFERENTIALS

8.01 Overtime pay shall be at the rate of one and one half (1½) times the regular hourly rate for such bargaining unit employee for hours worked in excess of a forty (40) hour workweek. For the purposes of this Agreement, paid leave shall count as hours worked.

8.02 Part-time bargaining unit employees shall not work overtime unless there is no regular employee available for said work. This clause is not to be construed to prevent the Sheriff from using part time [sic] employees to avoid overtime work nor is the intent to completely avoid overtime.

8.03 For the off duty time required to be spent in Court [sic] as a witness in connection with his/her official duties, the bargaining unit employee shall be granted overtime pay (or by mutual agreement, time off) on a time and one half (1½) basis if [sic] time worked.

8.04 Within the discretion of the sheriff, a bargaining unit employee may be granted compensatory time off for any overtime hours worked. Compensatory time shall be granted on the basis of one and one half (1½) hours off for each hour of overtime worked. *NO EMPLOYEE MAY ACCRUE MORE THAN* [handwritten insertion] *(60) SIXTY* [end insertion] [handwritten deletion] ~~*ONE HUNDRED (100)*~~ [end deletion] *HOURS OF COMPENSATORY TIME OFF IN ANY FISCAL*

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[2] Schuback and Makler, like Ching, were attorneys with the law firm of Garrettson, Goldberg, Fenrich & Makler.

YEAR IN ADDITION TO THE COMPENSATORY TIME DESCRIBED IN SECTION 9.01.

8.05.1 Overtime shall be paid only providing the bargaining unit employee had been available for work on all scheduled hours during the employee's work week; otherwise overtime will only be paid for after forty (40) hours worked during the work week.

8.05.2 A bargaining unit employee shall be considered not available for work if during the week in question the employee was absent due to:

a. Unpaid Leave of Absence
b. Ineligible for Holiday Pay
c. Absent without Permission

8.06.1 Patrol shifts shall be posted on a quarterly basis. Employees shall bid on a seniority basis provided that an employee may not bid the same shift for more than three (3) consecutive quarters. Ties in seniority shall be broken by lot.

8.06.2 Subject to supervisory approval and consistent with the Fair Labor Standards Act (FLSA), employees may trade shifts.

[Handwritten deletion] ~~*8.07 IF A MAJORITY OF AN EMPLOYEE'S SCHEDULED WORK HOURS FALL BETWEEN THE HOURS OF 4:00 PM TO 12:00 PM, THE EMPLOYEE SHALL RECEIVE A SHIFT DEFERENTIAL OF TWO AND ONE HALF PERCENT (2½%) OF THEIR CURRENT STEP PAY. IF A MAJORITY OF AN EMPLOYEE'S SCHEDULED WORK HOURS FALL BETWEEN THE HOURS OF 12:00 P.M. TO 8:00 A.M., THE EMPLOYEE SHALL RECEIVE A SHIFT DIFFERENTIAL PREMIUM OF FIVE PERCENT (5%) OF THEIR CURRENT STEP PAY.*~~ [end deletion]

Whitman County Deputy Sheriffs' Association/ CBA proposals/ 4/5/02

TA SOS 7/11/02.
TA GAH 7/11/02

Exhibit 5 (additions to contract in *ALL-CAPS ITALICS*). There is, however, no evidence in this record affirmatively establishing that the employer's proposals concerning Section 8.01 and/or Section 8.05.2 were withdrawn or expressly abandoned by the employer at any time before the document now in evidence as Exhibit 5 was initialed on July 11, 2002.

At the parties' next bargaining session, held on July 18, 2002, the employer made a "Settlement Package Proposal" regarding Article 8 which included: "language shall be modified to provide that holidays and vacation shall be treated as days worked, however, comp. time and sick leave shall not when computing overtime." Exhibit 10. The union rejected that employer proposal, and asserted that the employer had already agreed to Article 8 in its entirety.

The employer and union next met on October 4, 2002, in mediation. The employer again identified Section 8.01 and/or Section 8.05.2 as an open issue, and the union again asserted that Article 8 had been agreed to by the employer earlier. The union indicated that it had no interest in any further negotiations concerning Article 8.

On December 20, 2002, the union sent the mediator a list of the issues that it desired to have certified for interest arbitration. That list omitted Article 8.

In a letter sent to the parties on January 6, 2003, the mediator cited WAC 391-55-200(a) and asked the parties for their lists of issues for interest arbitration.[3] The list of issues submitted by the employer on January 13, 2003, included Article 8.

On February 11, 2003, Executive Director Marvin L. Schurke initiated the interest arbitration process under RCW 41.56.450. "Article 8 - Overtime and Shift Differential" was among the issues

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[3] In reviewing this record, the Examiner notes that he signed the January 6 letter "for" the mediator. That ministerial act does not constitute a basis for concern, however. Commission staff members routinely sign letters to expedite case processing for fellow staff members who are out of the office. The letter was sent before this case was filed, and before the Examiner was assigned.

certified for interest arbitration. On March 20, 2003, the union filed the complaint to commence this proceeding, claiming that agreement had been reached on all of Article 8 on July 11.

DISCUSSION

Applicable Legal Standards

The Burden of Proof -
The party filing a complaint charging unfair labor practices has the burden of proof. WAC 391-45-270(1)(a).

The Good Faith Obligation -
It is an unfair labor practice for a public employer "[t]o refuse to engage in collective bargaining." RCW 41.56.140(4). Moving the target, i.e., "changing demands or proposals at an advanced stage of the bargaining . . . is subject to 'close scrutiny', and can constitute unlawful conduct." *Spokane County Fire District 1*, Decision 3447-A (PECB, 1990). "Withdrawal from tentative agreements reached in bargaining may be an indicator of bad faith." *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988). In assessing "good faith," the "totality of conduct" or circumstances surrounding the negotiations is considered. *Kennewick Public Hospital District 1*, Decision 4815-B (PECB 1996); *Federal Way School District*, Decision 232-A (EDUC, 1977). "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." *Spokane County Fire District 1*, Decision 3447-A.

The Requirement for a Written Contract -
Beyond the duty to "meet at reasonable times, to confer and negotiate in good faith" under RCW 41.56.030(4) is the obligation

of parties "to execute a written agreement" with respect to the matters agreed upon in collective bargaining. The Supreme Court of the state of Washington has ruled that written contracts are required, not just an option. *State ex rel. Bain v. Clallam County*, 77 Wn.2d 542 (1970). Once signed, collective bargaining agreements are governed by the ordinary rules of contract law. *Barclay v. Spokane*, 83 Wn.2d 698, 700 (1974). The requirement for a written and signed collective bargaining agreement does not, however, obligate parties to apply the same level of formality to tentative or partial agreements reached during negotiations. *Shelton School District*, Decision 579-B (EDUC, 1984).

Application of Standards

The union argues that Hunt's initialing of the July 11 document (Exhibit 5) constituted a tentative agreement on all of Article 8, and it would thus have the employer's proposals concerning Section 8.01 and Section 8.05.2 excluded from any further negotiations in this round of bargaining. The union has, however, failed to sustain its burden of proof as to the existence of a meeting of the minds on Section 8.01 and Section 8.05.2. It has thus failed to sustain its burden of proof that the employer failed or refused to bargain in good faith in violation of RCW 41.56.140(4).

Alleged Tentative Agreement Ambiguous -

The union relies on the paper initialed by Schuback and Hunt on July 11, where Hunt wrote "TA GAH 7/11/02" (Exhibit 5). The document is ambiguous, however, as to the scope and meaning of "TA" in this instance: The union would have "TA" interpreted as applicable to everything on the sheet of paper (Article 8 in its entirety); the employer would confine the "TA" to the two sections (8.04 and 8.07) that were the subjects of discussion that immediately preceded the affixing of dates and initials.

The Parties' Practices and Ground Rules -

The union offered testimony concerning the parties' practices and ground rules, in support of its claim that the "TA" on the July 11 document should be applied to the entire sheet of paper on which it is written. The Examiner concludes that evidence is not convincing, or is discredited by other evidence, so that the parties' past practices and ground rules are not helpful to the union here.

The ground rules agreed upon and followed by parties in collective bargaining negotiations may shed some light on their actions (or lack thereof) and motivations, even though ground rules are not directly enforceable through unfair labor practice proceedings before the Commission.[4] Here, the parties agreed on a ground rule that addressed tentative agreements:

> 4. Tentative Agreement. Each negotiating team possesses the authority to tentatively agree to a proposal and agrees to submit such "TA" with a "do pass" recommendation. However, all tentative agreements will be subject to final approval by the respective constituents.

Even that ground rule leaves room for ambiguity, however: The "tentatively agree to a proposal" language is sufficiently broad to encompass anything from an agreement on a specific word or phrase (i.e., something within a section of an article) to an agreement on a complete collective bargaining agreement. The Examiner similarly reads the ground rule as sufficiently broad to refer to any proposal that might be made during negotiations, without any

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[4] Agreements made by parties on ground rules to guide their negotiations become contracts, like any other agreement they reach in collective bargaining, and any remedy for alleged violations of agreed upon ground rules must be sought through any applicable contractual procedures (e.g., grievance arbitration) or through the courts. *City of Sumner*, Decision 6210 (PECB,1998).

requirement that tentative agreements encompass entire pages, entire sections, or entire articles of the contract.

There is evidence in this record concerning the bargaining history behind the ground rules, but it is not helpful here. There is no bargaining history that gives any specific meaning to the term "proposal" as used in paragraph 4 of the ground rules. While the parties considered alternatives and negotiated about paragraphs 1 and 7 of the ground rules proposed by the union, paragraph 4 of the ground rules was agreed upon as proposed by the union.

The Examiner accepts Hunt's testimony as to what happened at the meeting when the ground rules were negotiated:

> Q: [by Mr. Werst] And was there any discussion regarding the ground rules?
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> A: [by Mr. Hunt] Yeah, there was a lot of discussion. One of the provisions that Mr. Ching had included in his ground rules was a requirement that the county would pay -- have to pay his travel costs in the event that each negotiation session didn't last a minimum of 4 hours.
>
> Q: Was the county agreeable to that provision?
>
> A: Absolutely not.
>
> Q: Okay. Was that -- were there any other provisions that were discussed by the parties under the ground rules which has been marked as Exhibit 4?
>
> A: There was some discussions also on item number seven, which was a requirement in Mr. Ching's rules that press releases had to be written and approved by the parties' negotiators.
>
> Q: Okay. Direct your attention to paragraph 4 of the ground rules, which is marked as tentative agreements.
>
> A: Uh-huh.
>
> Q: What was your understanding of paragraph 4 of the ground rules?

> A: It was my agreement that if the parties tentatively agreed to a proposal that issue would be agreed and then at that point no longer a subject of conversation.
>
> Q: Was there any discussion by the parties regarding the term proposal?
>
> A: No.

Transcript 163-164. That testimony conforms with the document that resulted from the negotiations on the ground rules.[5]

Union negotiating committeeperson Chris Chapman attended the session where the ground rules were negotiated, and he testified as to his personal understanding that, "[W]e would TA an entire article." Transcript 61. Chapman's testimony was unclear,

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[5] Exhibit 4 in this record, which demonstrates the results of those discussions, is replicated here in relevant part (with material deleted from the union's initial proposal indicated by ~~strikeout~~ and handwritten additions indicated by *ALL CAPS ITALICS*).

> 1. Meeting Schedules. Bargaining sessions shall be scheduled by mutual agreement of the parties. ~~Sessions shall be scheduled for a minimum of four (4) hours, but may be waived by mutual agreement of the parties.~~"
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> . . .
>
> 7. News Releases and Confidentiality. All negotiations shall be closed to the public and press. Specific proposals shall not be released to the media until ~~either~~ party*IES* ~~has~~ *HAVE* declared an impasse. ~~All press releases must be written and approved by the party's negotiations chairperson, with a copy to the other party's chairperson at least twenty-four (24) hours prior to release to the press.~~ *PRESS RELEASES PREPARED BY NEGOTIATING TEAM WILL BE COPIED TO THE OTHER TEAMS CHAIRPERSON. IT IS GENERALLY AGREED THAT BOTH PARTIES WILL ATTEMPT TO PROVIDE ADVANCED NOTICE.*

however, as to whether his understanding was based on discussions between the employer and union officials at the February 21 meeting or on discussions among union officials when the employer may not have been present.

Union negotiating committeeperson John Giudace was present at the meeting when the ground rules were negotiated, and testified of his understanding based on "[t]he discussion . . . as we had in the past, where we would address an article as an entire article not piecemeal." Transcript 19. When questioned further as to his understanding of the parties' past practices, he testified:

> Q: [by Mr. Hansen] Okay. And so it would be reduced to a written form when you had agreed on all of the terms of that article?
>
> A: [by Mr. Giudace] Okay.
>
> Q: Okay. Make sure we're on the same program. Did you have an expectation that when you were finished with negotiations -- that the articles as they were agreed to would be dealt with by, let's say your association or the county commissioners one by one?
>
> A: No.
>
> Q: What did you expect would happen?
>
> A: Again, as we had in the past, once negotiations were finished we would take that package back to the association for a vote.

Transcript 19-20. Giudace had been a participant in the negotiations for the parties' previous collective bargaining agreement, but his testimony must be discredited at two levels:

First, his understanding of paragraph 4 of the ground rules is based on his claimed recall of past practices, rather than on any direct communication between the individuals designated as the parties' chief spokespersons in this round of bargaining.

Guidace's focus on past events reinforces an inference that little or nothing relevant to paragraph 4 occurred on February 21, 2002.

Second, Guidace's testimony about past practice is contradicted by the documents remaining from the parties' negotiations for their 1999-2001 collective bargaining agreement. It is clear from Exhibit 2 in this record that the parties initialed separate tentative agreements on Section 8.01 and Section 8.05, rather than signing off on Article 8 in its entirety.

Finally, Exhibit 17 and Exhibit 18 in this record clearly indicate that both parties made written proposals affecting less than entire articles during the negotiations that occurred prior to July 11. Thus, actual application of the ground rules supports an interpretation of the term "TA" that is inconsistent with Schuback's claim that the "TA" on Exhibit 5 encompassed Article 8 in its entirety.

Taken as a whole, the evidence concerning the ground rules neither supports the "entire article" interpretation preferred by the union nor resolves the ambiguity inherent in paragraph 4.[6] The Examiner thus relies on a method of contract interpretation often used by arbitrators and the courts to resolve ambiguity when resort to

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[6] An alternate interpretation is that paragraph 4 describes a two-stage process, each with separate parameters:

A first stage relating to preliminary agreements, rooted in the first sentence stating, "Each negotiating team possesses the authority to tentatively agree to a proposal and agrees to submit such 'TA' with a 'do pass' recommendation." That would apply to any "TA" on any proposal, without regard to whether the "TA" concerned a word, a section, an article, or any combination thereof.

A second stage relating to a "TA" on all issues, rooted in the second sentence stating: "[A]ll [of the prior individual] tentative agreements [which] will be subject to final approval by the respective constituents."

extrinsic evidence fails: Under *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827 (1966), "[C]ontract language subject to interpretation is construed most strongly against the party who drafted it, or whose attorney prepared it." Because the union drafted paragraph 4 of the ground rules and it is ambiguous, it must be given an interpretation favoring the section-by-section approach that the employer claims appropriate, rather than the article-by-article approach urged by the union. Thus, Schuback's intended meaning of "TA" on Exhibit 5 is inconsistent with the meaning of the term "TA" in the parties' ground rules.[7]

The Subjective Meaning of "TA"

Accepting that Schuback meant the "TA" he wrote on July 11 to apply to all of Article 8 (rather than only to Section 8.04 and Section 8.07 where he inserted handwritten changes), the inclusion of language from the expired contract is not conclusive here.

Even when interpreting written collective bargaining agreements to determine the existence of a waiver by contract,[8] the Commission conforms to the approach set forth in *Lynott v. National Union Fire Insurance Company*, 123 Wn.2d 678 (1994). The Commission has said:

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[7] Schuback's limited understanding of the ground rules is not surprising. Schuback did not negotiate the ground rules, and was "basically thrown into the fire" (Transcript 83) without much notice on July 11, 2002, to replace the former union spokesman who had left the firm.

[8] Exhibit 5 does not purport to be a final document integrating the parties' agreements on all issues, and was clearly no more than a temporary record of an agreement on limited issues at a particular point in time. Such a tentative agreement was not enforceable until included in a final contract. Thus, the rules of contract law applicable to final written collective bargaining agreements are not fully applicable here.

> The Supreme Court of the State of Washington has long adhered to an "objective manifestation" theory of contracts, and imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts. *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514 (1965). In *Lynott* . . . , the Supreme Court wrote, "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions." . . .

City of Wenatchee, Decision 6517-A (PECB, 1999). The situation before the Examiner could have been quite different if there was substantial evidence that Schuback actually *told* Hunt on July 11 that the "TA" was meant to encompass all of Article 8, or that the union was offering to trade the handwritten modifications on Section 8.04 and Section 8.07 for withdrawal of the employer's proposals on Section 8.01 and Section 8.05.2. No such evidence exists, however, as this record indicates Schuback remained silent. Hunt responded with the same "TA" term used by Schuback, but with a different meaning that did not encompass abandonment of the employer's proposals on Section 8.01 and Section 8.05.2. Exhibit 5 will not bear the weight the union would have put upon it, and does not evidence an agreement on all of Article 8.

Schuback's later-expressed subjective intention regarding the meaning of "TA" on the document is of no help to the union. Lacking proof of mental telepathy between Hunt and Schuback, there was no meeting of the minds on Schuback's unexpressed intentions.

The Totality of Circumstances -

Considering all the circumstances surrounding the making of a contract to interpret the meaning of "TA" on the document is similar to the Examiner's task when assessing the totality of circumstances surrounding the negotiations to determine whether the employer bargained in good faith.

The record is clear that the employer made proposals on Section 8.01 and Section 8.05.2 at the outset of the parties' negotiations. Those proposals were actively negotiated as late as May 2002, and there is no evidence that the employer withdrew or abandoned its proposals on those sections prior to the negotiating session held on July 11.

The union then took the inevitably risky step of changing its chief spokesperson in the middle of the negotiations, and it certainly assumed the risk if there was any breakdown of communications between Ching and Schuback. It is not clear that Schuback was even aware of the employer proposals concerning Section 8.01 and Section 8.05.2 when he undertook to represent the union on July 11.[9]

As to the meeting held on July 11, the evidence is only clear that there was discussion of the union's proposals concerning Section 8.04 and Section 8.07. The parties seem to have had a meeting of the minds on those sections. Hunt testified, "we had discussed an exchange of two provisions. . . . comp time . . . [a]nd their provision . . . regarding shift differential." Transcript 186. Guidace gave testimony on direct examination that was consistent with Hunt's recollection of the discussions on July 11:

> Q: [by Mr. Hansen] Okay. . . . What conclusion do you draw when you say it's TA'd, what does that mean to you?
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> A: [by Mr. Guidace] As presented, what's lined out, what's changed, handwritten, that's what was TA'd.

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[9] The Examiner gives Schuback the benefit of the doubt. If the evidence supported an inference that Schuback knew of the employer's proposals concerning Section 8.01 and Section 8.05.2 on July 11, that would give rise to a concern as to his good faith if he tried to slip one by the employer when he modified and offered the document now in evidence as Exhibit 5.

Q: That's what was TA'd?

A: Yes.

Transcript 51.[10] The Examiner thus concludes that Section 8.04 and Section 8.07 were the only sections agreed to on July 11.

In preparing a written document memorializing an agreement, the preparer of the document is obliged to make certain that the writing conforms to the *actual* agreement of the parties, rather than making assumptions as to what was agreed in negotiations. *South and East Columbia Basin Irrigation District*, Decision 1404 (PECB, 1982), *aff'd*, Decision 1404-A (PECB, 1982). In this case, it appears that the union's negotiator(s) made assumptions and failed this obligation when preparing the document. It is easy to understand how Schuback could have been attempting to expedite the process by pulling out a copy of the union's previous proposal document for modification, instead of creating a new document.

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[10] The union's attempt to rehabilitate its own witness was far from convincing:

> Q: (by Mr. Hansen) So in article 8.01 you have the language that is consistent with the current contract, that's the language you agreed to?
>
> A: (by Mr. Guidace) That's correct.
>
> Q: Okay. So on July 11, 2002 it's your assertion that the association agreed to this and the county agreed to this?
>
> A: That's our understanding, yes.
>
> Q: Okay. So what happens to all the proposals that came before that?
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> . . . .
>
> Q: Okay. So at this point there's a TA here saying article eight is agreed to between the association and the county?
>
> A Yes.

Schuback made a handwritten modification on Section 8.04 and crossed out the new Section 8.07 that had been proposed by the union earlier, but he did not make any marks on Section 8.01 or Section 8.05.2. Schuback's actions were thus consistent with Hunt's testimony, and render the union-prepared document even more ambiguous as to the meaning of "TA" on that document.

Schuback then wrote "TA" on the already-ambiguous document and handed it to Hunt, without making his intended "entire article" meaning clear to Hunt.[11] One ordinary rule of contract law is, as indicated in *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 389 (1993), that a party who signs a contract without reading it cannot successfully argue that mutual assent was lacking as long as said party was not deprived of an opportunity to read the contract, the contract was plain and unambiguous, the party was capable of understanding the contract, and no fraud, deceit, or coercion occurred. It is clear that Hunt was not deprived of the opportunity to read the document before initialing it, and that the term "TA" was understood to mean "tentative agreement" by both parties, but that does not resolve the ambiguity as to whether the "TA" written on the document in evidence as Exhibit 5 applied to Section 8.04 and Section 8.07 (which were the immediate subjects of discussion on July 11) or to the entirety of Article 8 (as now argued by the union).

In the collective bargaining context, documents relating to negotiations are among the evidence of the totality of

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[11] Schuback testified that, "[S]ignatures are everything in bargaining." Transcript 116. While that testimony is consistent with his belief that the employer should be bound by Hunt's initials (even if Hunt did not read and fully understand the document), the Examiner disagrees. Signatures are *not* everything in bargaining, where the precedents concerning totality of circumstances require evaluation of more than just the documentary record.

circumstances assessed in determining whether a party has bargained in good faith, so that the document initialed by Hunt and Schuback on July 11 is only part of the evidence concerning the parties' negotiations.[12] The "TA" and the initials on the document do not overcome the ambiguity as to the meaning and scope of the "TA" terminology, and that ambiguity is sufficient for the Examiner to reject the document as compelling evidence that the employer agreed to drop its proposals on Section 8.01 and/or Section 8.05.2.

"Waiver by Contract" Analysis -

Collective bargaining agreements generally satisfy and waive the parties' statutory obligation to bargain on the matters contained in the agreement for a limited time, usually corresponding to the duration of the agreement. Because these parties seem to have operated on an assumption that a valid tentative agreement would waive their respective bargaining obligations for at least some period of time,[13] the Examiner has considered Commission precedents on "waiver by contract" and concludes that they also weigh against the union in this case.

In a case where the employer asserted waivers of union bargaining rights based on the contents of a written collective bargaining agreement, the Commission wrote: "[T]he employer would have to demonstrate that the union also understood, or could reasonably

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[12] Possibly more important here, the document is evidence of a critical circumstance assessed in determining the employer's good faith in later proposing a change to section 8.01 and 8.05.2.

[13] The duration of a tentative agreement is less certain than the duration of a final, written, and signed contract. A "TA" may only remain in effect until some contingency occurs, until circumstances change, or until either negotiations or interest arbitration results in a complete and final collective bargaining agreement.

have been presumed to have known, what was intended when it accepted the language relied upon by the employer." *City of Yakima*, Decision 3564-A (PECB, 1991). In this case where the union asserts a waiver of employer bargaining rights, the union would need to demonstrate, at a minimum, that the employer understood, or could reasonably have been presumed to have known, the union's intended meaning of "TA" on Exhibit 5 to constitute agreement on Article 8 in its entirety. The union has utterly failed to satisfy its burden of proof as to this subject matter, however.

Conclusions

The Examiner concludes the union has failed to prove that a meeting of the minds occurred on July 11 with regard to Section 8.01 and/or Section 8.05.2. It follows that the employer's proposals on those sections on and after July 18 did not constitute a failure or refusal to bargain in good faith in violation of RCW 41.56.140(4).

FINDINGS OF FACT

1. Whitman County is a political subdivision of the state of Washington and is a "public employer" within the meaning of RCW 41.56.030(1).

2. The Whitman County Deputy Sheriffs' Guild, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory law enforcement officers employed by Whitman County.

3. The employees represented by the union are "uniformed personnel" within the meaning of RCW 41.56.030(7), and the

parties' bargaining relationship is subject to the dispute resolution procedures (including interest arbitration) set forth in RCW 41.56.430 through .490.

4. The parties had a collective bargaining agreement for a 1999-2001 period, and commenced negotiations for a successor contract in February 2002. Gary Hunt was the chief spokesperson for the employer; Timothy Ching was initially the chief spokesperson for the union. The parties negotiated ground rules which are ambiguous as to whether tentative agreements must encompass entire articles of their contract.

5. The employer and union met for negotiations on several dates from February 2002 through May 2002. Throughout those negotiations, the employer made and continued to assert proposals for changes to Section 8.01 and Section 8.05.2 of the parties' previous contract. The union proposed retention of the previous contract language on Section 8.01 and Section 8.05.2, but made and continued to assert proposals for changes in Section 8.04 and addition of a new Section 8.07.

6. On or shortly before July 11, 2002, Stephen Schuback replaced Ching as chief spokesperson for the union.

7. During negotiations on July 11, 2002, the parties discussed the union's proposals concerning Section 8.04 and Section 8.07. There appeared to be some meeting of the minds and Schuback made handwritten modifications to show a new union proposal concerning Section 8.04 and abandonment of Section 8.07 on a copy of a previous union proposal document. The document modified by Schuback included the language of Section 8.01 and Section 8.05.2 as set forth in the parties' previous

contract, but the evidence does not establish there was any discussion of Section 8.01 or Section 8.05.2 on that occasion.

8. Without stating his intention that the document constitute a tentative agreement on Article 8 in its entirety, Schuback marked and initialed the document described in paragraph 7 of these findings of fact presented it to Hunt as a tentative agreement.

9. There was no meeting of the minds on July 11, 2002, concerning withdrawal or abandonment of the employer's proposals concerning Section 8.01 and/or Section 8.05.2, so that Hunt initialed the document described in paragraph 7 of these findings of fact without intent to withdraw those proposals.

10. On and after July 18, 2002, the employer continued to assert proposals for changes to Section 8.01 and/or Section 8.05.2 of the parties' previous contract.

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. In the context of the parties ambiguous ground rules, as described in paragraph 4 of the foregoing findings of fact, and the totality of circumstances, as described in paragraphs 6 through 9 of the foregoing findings of fact, the employer did not waive or surrender its bargaining rights under RCW 41.56.030(4) with regard to its proposals concerning Section 8.01 and/or Section 8.05.2 of the parties' contract, so that

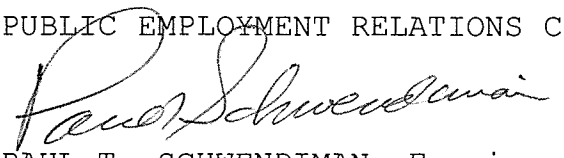
the employer's ongoing pursuit of its proposals on those sections, as described in paragraph 10 of the foregoing findings of fact, did not constitute a failure or refusal to bargain in good faith in violation of RCW 41.56.140(4).

ORDER

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

Issued at Olympia, Washington, on this 12th day of April, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



PAUL T. SCHWENDIMAN, 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.