STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHATCOM COUNTY DEPUTY SHERIFF'S GUILD,	)	
Complainant,	)	CASE 15383-U-00-3889
vs.	)	DECISION 7244-B - PECB
WHATCOM COUNTY,	)	
Respondent.	)	DECISION OF COMMISSION

Cline and Associates, by *James M. Cline*, Attorney at Law, for the union.

Halvorson and Saunders, by *Larry E. Halvorson*, Attorney at Law, for the employer.

This case comes before the Commission on cross-appeals filed by the Whatcom County Deputy Sheriff's Guild (union) and Whatcom County (employer), each seeking to overturn portions of a decision issued by Examiner Paul T. Schwendiman on February 13, 2003.[1]

The Commission has considered the parties' arguments, and reaches the same ultimate results as the Examiner.

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[1] *Whatcom County*, Decision 7244 (PECB, 2003). The Examiner ruled that the employer violated the law by insisting to impasse on a contract proposal that would have waived the union's right to bargain changes in mandatory terms not specifically covered by the contract, and ruled that the employer did not violate the law by its explanation of its indemnification policy at an in-service training session or by proposing in bargaining that the union withdraw an unfair labor practice charge.

BACKGROUND

The union represents a bargaining unit of law enforcement officers employed in the Whatcom County Sheriff's Department. The parties' bargaining relationship is subject to the "interest arbitration" provisions in RCW 41.56.430 through .490.

The parties' first collective bargaining agreement was effective from January 1, 1997 through December 31, 1999. That contract contained the following provisions pertinent to this case:

> ARTICLE XV - RULES OF OPERATION
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> The Department shall adopt reasonable written rules of operating the Department and the conduct of employees provided, however, before such rules are posted, a copy shall be furnished to the Guild. The Guild shall be allowed not less than thirty (30) days in which to make known any objection they may have concerning such rules, except in the case of emergency.
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> . . . .
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> ARTICLE XXV - MANAGEMENT RIGHTS
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> Any and all rights concerned with the management operations of the County and its Department are exclusively that of the County unless otherwise provided by the terms of this Agreement. The County has the authority to adopt reasonable rules for the operation of a Department and the conduct of its employees; provided, such rules are not in conflict with the provisions of this Agreement, or with applicable law. The County has the right to discipline, temporarily lay off or discharge employees; to assign work and determine duties of employees; to schedule hours of work, to determine the number of employees to be assigned to duty at any time and such other rights as are normal to County government and not expressly limited in this Agreement or applicable laws.
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> ARTICLE XXVI - INDEMNITY AND HOLD HARMLESS AGREEMENT
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> The Employer agrees to hold harmless employees for all damages, including attorney fees, which they may suffer as a result of lawsuits commenced against them arising out of their activities which are within the scope of

> their employment for Whatcom County. Should the employee's actions be outside the scope of their employment, or the allegations contained in the complaint allege actions which, if proven, would be outside the scope of their employment; or be intentional torts, then the County will not pay that judgment. In addition, the employee will hire counsel. Whatcom County will compensate the employee in a timely manner for that counsel on a reservation of rights basis. This means, if the allegation contained in the complaint is proven then the County will not pay the judgment and the employee will be responsible for reimbursing the County for it's attorneys fees. However, should the allegation of intentional tort not be proven but merely negligence, then the County will pay the judgment and will not seek reimbursement for the attorneys fees.

The parties commenced negotiations for a successor agreement in the autumn of 1999. Among the issues negotiated were: (1) the employer's ability to establish rules of operation and rules concerning employee conduct; (2) the management rights clause; and (3) the indemnification of employees for civil tort claims. The parties were unable to reach an agreement, and they began meeting with a mediator on February 18, 2000.

Union official Leland Childers testified there were many discussions concerning the management rights clause, and that the union took the position that the language proposed by the employer was "too broad and just general in their waiver effect for us." The employer's representative informed the union that, under the employer's proposals, the union would not have any right "to negotiate anything that wasn't actually in the contract." When the union's attorney inquired about whether "the employer could even take away the deputies' patrol cars just with a rule [change]," the employer's attorney responded, "Yes, that's exactly what we mean. It's not covered in the contract, and the County can take that away."

The employer's indemnification policy was the subject of a presentation made by a deputy prosecuting attorney at an in-service training session held by the employer for bargaining unit employees. That in-service training occurred while the parties' contract negotiations were ongoing.

At a mediation session on July 20, 2000, the employer made a "what if" proposal for a package that included a new demand: The employer asked that the union withdraw an unfair labor practice complaint then on file with the Commission. The mediator thereafter notified the parties of his intention to recommend interest arbitration and, under WAC 391-55-200, called upon the parties to submit their lists of issues for interest arbitration.

On September 14, 2000, the union filed this unfair labor practice complaint alleging that the employer unlawfully insisted to impasse on permissive subjects of bargaining, refused to bargain in good faith over the indemnification clause, and conditioned settlement on the union's withdrawal of its unfair labor practice charges.

On September 27, 2000, the Executive Director initiated interest arbitration under RCW 41.56.450. Case 15395-I-00-347. The issues certified included: (1) Article XV, Rules of Operation; (2) Article XXV, Management Rights; and (3) Article XXVI, Indemnification.

DISCUSSION

The "Rules of Operation" and "Management Rights" Issue

The employer argues that its proposals on rules of operation and management rights are mandatory subjects of bargaining that it could lawfully pursue to impasse. The employer contends that the

Examiner's rationale would, applied broadly, deny employers the ability to bargain for flexibility. It also contends the Examiner's decision is inconsistent with the holding of the Supreme Court of the State of Washington in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997).

The union contends that a broad waiver of the right to engage in collective bargaining is a permissive subject of bargaining, and that the employer unlawfully insisted to impasse on waivers concerning changes in rules of operation and employee conduct.

Applicable Legal Principles -

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires employers to bargain collectively with the unions representing their employees. *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996). Chapter 41.56 RCW is to be liberally construed to effect its purpose. *Municipality of Metropolitan Seattle v. PERC*, 118 Wn.2d 621, 633 (1992). Exceptions are to be narrowly construed. *City of Yakima v. Fire Fighters, Local 469*, 117 Wn.2d 655, 671 (1991).

The scope of bargaining under Chapter 41.56 RCW is "grievance procedures and . . . personnel matters, including wages, hours and working conditions." RCW 41.56.030(4). Commission and judicial precedents interpreting that definition identify three broad categories: (1) mandatory subjects; (2) permissive subjects; and (3) illegal subjects. *Federal Way School District*, Decision 232-A (EDUC, 1977) and *Pasco*, 132 Wn.2d at 460-61 (each citing *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958)):[2]

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[2] The Commission and Washington courts consider, but are not bound by, federal precedents interpreting the National Labor Relations Act (NLRA). *Pasco*, 132 Wn.2d at 458.

- Employee "wages, hours and working conditions" are generally mandatory subjects over which parties must bargain in good faith. *Pasco*, 132 Wn.2d at 460 (quoting *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341 (1986)). It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse to bargain a mandatory subject. RCW 41.56.140(4) through .150(4).

- Management and union prerogatives, along with procedures for bargaining mandatory subjects, are permissive subjects over which parties may negotiate, but are not obliged to do so. *Pasco*, 132 Wn.2d at 460 (as to permissive subjects, "each party is free to bargain or not to bargain, and to agree or not to agree." *Borg-Warner*, 356 U.S. at 349. Pursuing a permissive subject to impasse (including to interest arbitration) is an unfair labor practice. *Klauder*, 107 Wn.2d at 342.

- Matters that parties may not agree upon because of statutory or constitutional prohibitions are "illegal" subjects. *Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992). Neither party has any obligation to bargain such matters.

When determining mandatory subjects, the Commission assesses whether the particular proposal directly impacts the wages, hours or working conditions of bargaining unit employees. *Lower Snoqualmie Valley School District*, Decision 1602 (PECB, 1983); *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989).[3] Thus, "scope" is a question of law and

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[3] Precedents under the NLRA are similar. Under *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), mandatory subjects concern "issues which settle an aspect of the relationship between the employer and the employees" and there is no obligation to bargain over decisions that focus on matters apart from the employment relationship, or that have only "an indirect or attenuated impact" on that relationship.

fact for the Commission to decide. WAC 391-45-550; *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

It is well settled that an employer violates the duty to bargain if it unilaterally implements a change on a mandatory subject of bargaining, without first giving notice to the exclusive bargaining representative of its employees and fulfilling its collective bargaining obligations. While collective bargaining agreements commonly fix some terms for the life of the contract, the duty to bargain continues to exist during the life of a collective bargaining agreement as to any mandatory subjects of bargaining which are not specifically addressed by the contract.

Waivers of statutory bargaining rights must be clear and unmistakable. The Commission has found broadly-worded management rights clauses insufficient to constitute a waiver of a union's right to bargain changes in mandatory subjects.[4] The Commission affirmed *City of Yakima*, Decision 3564 (PECB, 1990), which included:

> The intent of Chapter 41.56 RCW is to enable public employees the right to bargain in a meaningful way with their employer on matters concerning wages, hours, and working conditions. This obligation is not to be easily disregarded. . . . A "deal" to give up rights must be consciously delivered.

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[4] In *City of Sumner*, Decision 1839-A (PECB, 1984), language stating "[T]he prerogative of the employer to operate and manage its affairs in all respects in accordance with its responsibilities" did not avoid the bargaining obligation; in *City of Wenatchee*, Decision 2216 (PECB, 1985), a similar conclusion was reached on language stating "[A]uthority to adopt rules for the operations of the department and the conduct of its employees . . . to schedule hours of work, [determine number of personnel], and to perform all other functions not otherwise expressly limited by this agreement."

To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corporation*, 330 NLRB 1363, 1365 (2000); *Lakewood School District*, Decision 755-A (PECB, 1980)(waiver of bargaining was made knowingly and intentionally); *City of Wenatchee*, Decision 6517 (PECB, 1998).[5]

The complainant has the burden of proof in any unfair labor practice case. WAC 391-45-270(1)(a); *Bellingham Housing Authority*, Decision 2335 (PECB, 1985). In this case, the burden was on the union to set forth facts sufficient to support its allegation that the employer insisted to impasse on a proposal that was not a mandatory subject of bargaining. *Auburn School District*, Decision 3406 (PECB, 1990).

Application of Standards -

The issue here is whether the employer proposals on rules of operation and management rights were mandatory subjects of bargaining. The Examiner accepted the union's contention that the

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[5] The Commission's approach is consistent with federal labor policy that disfavors waivers of statutory rights, and requires that the intention to waive a right be clear before a waiver can succeed. *C & P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). The National Labor Relations Board (NLRB) and the federal courts have consistently held that the waiver of a statutory right, including the right to bargain over a mandatory subject, will not be inferred lightly and must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983). The NLRB succinctly stated, "Where an employer proposal seeks the union's waiver of statutory rights, . . . impasse is no substitute for consent." *Colorado-Ute Electric Association*, 295 NLRB 607 (1989)."

employer's proposals sought waivers of union bargaining rights and were not mandatory subjects of bargaining. The Examiner went beyond ruling that the proposals were permissive subjects, however, and ruled that the employer advanced illegal proposals when it asked the union to forego the statutory interest arbitration procedure.

The employer contends this is not a "waiver" case, but the plain meaning of its proposed language and the explanation given by its negotiator make it abundantly clear that the employer was asking the union to waive its statutory bargaining rights. The proposed waivers do not directly involve the employees' day-to-day responsibilities, or even the relationship between the employer and employees. Rather, they would only affect the relationship between the employer and union, by enabling the employer to change work rules without having to deal with the union. Applying the legal principles set forth above, we find the employer's proposals for Article XV and Article XXV were permissive subjects of bargaining.[6]

The statute requires employers to bargain with the unions representing their employees. RCW 41.56.080. It is an evasion of that duty for an employer to insist that the union not be involved in the consideration and adoption of changes in mandatory subjects of bargaining. While the statute does not prohibit *voluntary* waivers of statutory bargaining rights, it is simply inconsistent with the purpose of the statute to permit an employer to insist to impasse

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[6] The conclusion that the employer's proposals were permissive subjects of bargaining provides basis for finding a violation and issuing a remedial order in this case. It is unnecessary for us to rule on (and we delete) the Examiner's additional finding that the employer's proposed exclusion of the affected issues from the statutory interest arbitration procedure was an illegal subject of bargaining.

on the exclusion of the employees' statutory representative from the bargaining process. These employer proposals would have substantially altered the collective bargaining system provided for in the statute, by eliminating the role of the "representative" chosen by the employees in any matters not specifically covered by the terms of the contract.

Bargaining procedures are not, themselves, mandatory subjects. *See City of Tukwila*, Decision 1975 (PECB, 1984); *E.I. du Pont de Nemours & Co.*, 301 NLRB 155 (1991)(employee request to participate in training film not a mandatory subject, because it was outside employees' day-to-day responsibilities). By its proposals, the employer sought to establish bargaining procedures to be followed in the event it wanted to make mid-term changes: The union was to have the right to object within 30 days, and to submit the issue to arbitration for a determination limited to whether the change was "reasonable." Those waivers governed the relationship between the union and employer, and did not directly impact the employees. In *Angelus Block Co.*, 250 NLRB 868, 877 (1980), the NLRB stated:

> A zipper clause must meet the standard of any other alleged waiver. . . . [T]o establish waiver of the statutory right to bargain in regard to mandatory subjects of bargaining . . . there must be a clear and unequivocal relinquishment of such right. Even where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter. This is particularly true where, as here, an employer relies on the zipper clause to establish its freedom to unilaterally change, or institute new, terms and conditions of employment not contained in the contract.

In *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993), the employer had insisted on incorporat-

ing into the collective-bargaining agreement an employee handbook that granted the employer absolute discretion to change its policies affecting basic terms and conditions of employment. The NLRB concluded that proposal (together with a proposed zipper clause), would have effectively given that employer a "perpetual reopener clause." 307 NLRB 94 at 95. In view of the union's statutory right to bargain over changes in any term or condition of employment, the NLRB concluded that the proposal indicated bad faith on the part of the employer, and that the union "could do just as well with no contract at all."

We are not persuaded that *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), requires a different result. In *American National*, the Supreme Court of the United States held that an employer's insistence upon a broad management rights clause is not a *per se* violation of Section 8(a)(5) of the NLRA. The union in that case had submitted a proposal that, in effect, called for unlimited arbitration and the employer had responded with a management rights clause in which all matters pertaining to promotions, discipline, and work scheduling were to be within management's exclusive control and not subject to arbitration. The NLRB found that employer's insistence upon the management rights clause to constitute a *per se* violation of Section 8(a)(5), without regard to considerations of good faith. Disagreeing with the *per se* approach, the Supreme Court held the NLRB should decide whether the good faith requirement has been satisfied even though it may not pass judgment upon the desirability of substantive terms of an agreement. Applying that concept here, we find it is clear that this employer regards the disputed proposals as "flexibility" alternatives to bargaining with the union, but we nonetheless find the specific waiver sought in this case is so broad that it "substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the 'represen-

tative' chosen by the employees." *NLRB v. Borg-Warner*, 356 U.S. at 350.

Taking Waiver to Impasse -

Although employers may lawfully make proposals for broad waivers of union bargaining rights, they can neither implement nor insist to impasse upon such waivers. "A license for the employer to go to impasse over whether it has to deal with [a statutory bargaining agent]. . . is the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union's role in the process." *Toledo Typographical Union v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990). By insisting to impasse on the union's waiver of bargaining over any change of mandatory subjects, the employer has effectively placed the employees in a worse position than they would have been with no contract whatsoever. *See Carbonex Coal Co.*, 248 NLRB 779, 799 (1980), *enforced* 679 F.2d 200 (10th Cir. 1982)(proposed management-rights clause would have required union "to waive practically all its rights"); *East Texas Steel Castings Co.*, 154 NLRB 1080 (1965)(employer not bargaining in good faith when it insisted that the union waive most of its rights under the NLRA).

Our conclusion here is in harmony with *Pasco Police Officers Association v. City of Pasco*, 132 Wn.2d 450 (1997). In that case, the Commission ruled that contract clauses concerning management rights and hours of work were mandatory subjects of bargaining directly related to terms and conditions of employment. The Supreme Court of the State of Washington affirmed those general characterizations, but nonetheless recognized that management rights clauses, "[C]an go only so far. . . . [S]uch clauses cannot invade a union's statutory right and duty to be the exclusive representative of the relevant employees." 132 Wn.2d 450 at 466. Indeed, the court in *Pasco* acknowledged that the employer's

obligation to bargain in good faith "insures that management rights proposals do not overreach and are enforceable under the statute." 132 Wn.2d 450 at 467. We thus reject any suggestion that *Pasco* gives employers an absolute right to insist to impasse (and obtain interest arbitration) on waivers of bargaining rights.

We also reject the employer's contention that finding a violation here will prevent employers from seeking flexibility at the bargaining table. An employer is free to ask for, and a union is free to accept, any permissive proposal waiving statutory bargaining rights. As the employer notes, collective bargaining agreements often incorporate terms that are designed to give either the management or the union a degree of freedom to act within a particular area. See employer's brief at 13. All we are saying here is that an employer cannot insist to impasse on a broad waiver of statutory rights.

Enforcement of Contractual Waiver -

In a previous decision involving these same parties, *Whatcom County*, Decision 7643-A, (PECB, 2002), the Commission ruled that the union had voluntarily waived its bargaining rights by agreeing to the management rights clause that was contained in the parties' first collective bargaining agreement. It is safe to presume that the employer proposed those waivers together with sufficient improvements of wages, benefits, and other mandatory subjects to induce the union to voluntarily accept them. In the context of clear contractual language reflecting the union's knowing waiver of its statutory bargaining rights, the Commission found the employer did not commit an unfair labor practice when it made a unilateral change within the terms of those waivers. Thus, the parties' first collective bargaining agreement controlled their destiny while it remained in effect. That contract has now expired.

The situation in the case at hand is very different from the situation that was before us in *Whatcom County*, Decision 7643-A. The union has not agreed to the waiver language proposed by the employer in negotiations for a successor contract and, in fact, has steadfastly resisted the employer's proposal in negotiations. Under no circumstances has the union indicated a clear and unmistakable intent to waive its statutory rights.

Conclusion on Waiver Proposals -

Because the waiver at issue here is a permissive subject, and was never voluntarily consented to, we affirm the Examiner's ruling that the employer unlawfully insisted to impasse on the waiver proposal in violation of RCW 41.56.030(4) and (1).[7]

Proposal to Withdraw Unfair Labor Practice Charges

In its appeal, the union maintains that the employer insisted to impasse on the withdrawal of an unfair labor practice complaint.

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[7] We reject the employer's contention that the Commission is without jurisdiction to consider its management rights proposal, because the Executive Director rejected the union's request for suspension of interest arbitration on that issue. Separate and apart from any authority vested in the Executive Director by RCW 41.56.450 in regard to interest arbitration, RCW 41.56.160 vests this Commission with authority to determine unfair labor practices. The employer's appeal brief notes that the union "had sought to delete the existing management rights clause found in Article XXV" of the contract from the onset of negotiations. This was clearly an issue that led to the impasse in negotiations. Although the union did not specifically refer to Article XXV in its amended complaint, it did allege that the language contained in that article constituted an unlawful waiver of the union's statutory rights. Moreover, we find that the management rights clause contained in Article XXV is closely related to the timely-filed unfair labor practice complaint alleging an unlawful insistence to impasse on a non-mandatory subject of bargaining.

The employer contends the Examiner properly dismissed the union's allegations concerning an employer proposal that briefly included withdrawal of an unfair labor practice complaint.

Applicable Legal Principles -

Demands for withdrawal of pending unfair labor practice complaints are permissive subjects of bargaining, and a party violates RCW 41.56.140(4) and (1) by insisting to impasse on such a proposal. *Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989).

Formal proposals made in collective bargaining are subject to scrutiny under the "good faith" obligation. A major change of position that frustrates progress late in negotiations can be indicative of bad faith bargaining, and is closely scrutinized. *Sunnyside Irrigation District*, Decision 314 (PECB, 1977). It has long been the policy of this Commission, however, to encourage free and open exchange of ideas in collective bargaining. See WAC 391-45-550. A "what if" inquiry can be a lawful means to explore alternatives without committing the party to the contents of the proposal. The party making a "what if" inquiry retains the right to change its position and, unlike formal proposals, such inquiries are subject to neither acceptance nor impasse.

Application of Standards -

It is clear that one proposal advanced by the employer during this prolonged course of bargaining asked that the union withdraw an unfair labor practice complaint then pending before the Commission. That occurred during a mediation session on July 20, 2000, in a proposal that also stated: "The County reserves the right to add to, delete or modify this 'what if' proposal." It is also clear that the union did not accept that "what if" proposal.

An impasse arguably existed later on the same day that "what if" proposal was advanced and rejected, when the mediator asked the parties to submit their lists of issues for interest arbitration under WAC 391-55-200. The analysis cannot end there, however.

It is also clear that the employer did not seek interest arbitration on its "what if" proposal calling for withdrawal of the pending unfair labor practice complaint. Thus, the facts do not support the union's claim that the employer unlawfully insisted to impasse on that permissive subject of bargaining.

The union nevertheless contends that the disputed proposal was a regressive "late hit" that evidences bad faith bargaining. Again, however, the evidence does not support the union's claim. As the Examiner explained, "The simple act of asking the question through a mediator, 'What if the employer were to propose withdrawing the union's pending unfair labor practice complaint?' is insufficient to find a violation of RCW 41.56.140(4) and (1)." The Examiner further noted that no harm was done by the proposal. Under these circumstances, we find that the employer's exploration of alternatives did not constitute bad faith.

Conclusion on Withdrawal of Unfair Labor Practice -
The Examiner properly dismissed the union's allegation that the employer violated RCW 41.56.140(4) and (1) by making and then withdrawing that proposal.

Indemnification Policy

The union appeals the Examiner's ruling that the employer lawfully informed employees about its indemnification policy at an in-service training session. Pointing out that the union had a proposal for new indemnification language on the bargaining table

at the time of the training session, the union contends the employer committed an unfair labor practice "by forcing a captive audience to hear misleading information which had the effect of undermining the union's bargaining position." The union maintains that the employer dealt directly with employees over the indemnification clause. The employer supports the Examiner's decision.

Applicable Legal Standards -

The "refusal to bargain" prohibition found in RCW 41.56.140(4) enforces the concept of "exclusive" representation, whereby an employer may not negotiate wages, hours or working conditions directly with employees who are represented by a union. *City of Yakima*, Decision 1124-A (PECB, 1981). The "interference" prohibitions found in RCW 41.56.140(1) circumscribes an employer's right to address its employees, but only insofar as the statements made contain threats of reprisal or force, or promises of benefit. *Municipality of Metropolitan Seattle*, Decision 3218-A (PECB, 1990).

Contrary to what the union might prefer, RCW 41.56.140(4) and Commission precedents do not completely preclude direct communications between employers and their union-represented employees. No case is cited or found where the Commission has held an employer's communication to employees at a mandatory meeting (without the knowledge or presence of the exclusive bargaining representative) to constitute a *per se* violation of the statute.

Application of Standards -

The starting point for bargaining is always the *status quo*. *Shelton School District*, Decision 589-A (EDUC, 1978). When this case arose, the employer had an indemnification policy in effect and the indemnification clause of the parties' collective bargaining agreement (Article XXVI) contained the following language:

> The employer agrees to hold harmless employees for all damages, including attorney fees, which they may suffer as a result of lawsuits commenced against them arising out of their activities which are within the scope of their employment for Whatcom County. Should the employee's actions be outside the scope of their employment, or the allegations contained in the complaint allege actions which if proven, would be outside the scope of their employment; or be intentional torts, then the County will not pay that judgment.

The employer was entitled to explain and reiterate its existing policy. *Kitsap County Fire District 7*, Decision 2872 (PECB, 1988).

This employer provides annual in-service training for bargaining unit employees. Civil Deputy Prosecuting Attorney Randy Watts was invited to speak to the employees about civil lawsuits. Lieutenant Jeff Parks testified that some of the employees had voiced concerns about being sued for their on-the-job conduct, and one employee was the subject of a pending lawsuit. Deputy Leland Childers testified that Watts assured the employees that the employer would "cover everybody" and that "I'd just about have to be doing something like running a criminal activity or a theft or something like that before I wouldn't be covered." Transcript 50. That explanation of existing policy did not constitute negotiations with the bargaining unit employees in the audience.

Although there was a coincidence of timing, the record shows that Watts did not refer in the in-service training to the collective bargaining negotiations then ongoing between the employer and union. Watts did not discredit the union or its leaders, and he offered no new or changed benefits to the employees. Indeed, Watts merely presented information and answered questions. His statements were consistent with the employer's past practice, as well as with the expired collective bargaining agreement. Contrary to the union's contention, there is no evidence to indicate that Watts'

statements were false or misleading. Nor did they include any threats of reprisal or force, or any promise of benefit.

Having thoroughly reviewed the record on appeal, we find there is substantial evidence in the record to support the Examiner's findings and conclusions on the indemnity issue. *See World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991); *PERC v. City of Vancouver*, 107 Wn. App. 694 (2001); *Cowlitz County*, Decision 7007-A (PECB, 2000). Under these circumstances, we affirm the Examiner's ruling that the employer did not interfere with employee rights or refuse to bargain in violation of RCW 41.56.140(1) or (4).

NOW, THEREFORE, the Commission makes and issues the following:

AMENDED FINDINGS OF FACT

1. Whatcom County (employer) is a "public employer" within the meaning of RCW 41.56.030(1).

2. The Whatcom County Deputy Sheriff's Guild (union), a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of non-supervisory law enforcement officers who are employed by Whatcom County and are "uniformed personnel" within the meaning of RCW 41.56.030(7).

3. The parties had a collective bargaining agreement in effect from January 1, 1997 through December 31, 1999. The parties opened negotiations for a successor contract in 1999.

4. The parties' 1997-1999 agreement contained provisions concerning indemnity and holding employees harmless for damages

arising out of activities within the scope of their employment. In September 1999, the union proposed changes on those subjects.

5. The parties' 1997-1999 agreement had provisions concerning rules of operation and management rights. In October 1999, the employer opened those articles for discussion, but proposed no specific language.

6. The parties did not reach agreement on a successor contract, and entered into mediation with assistance from a member of the Commission staff. The union also filed an unfair labor practice complaint, naming the employer as respondent.

7. The employer provided the union with two written proposals during a mediation session held on March 6, 2000. Those proposals included the following language:

> ARTICLE XV - RULES OF OPERATION
>
> The Department shall adopt reasonable written rules of operating the Department and the conduct of employees provided, however, before such rules are posted, a copy shall be furnished to the Guild. The Guild shall be allowed not less than thirty (30) days in which to make known any objection they may have concerning such rules, except in the case of emergency.
>
> Any unresolved objection regarding the reasonableness of any new or revised rule that involves a material change on bargaining unit employees in a mandatory subject to bargaining within the meaning of RCW 41.56, i.e., "wages, hours or working conditions", may be submitted to arbitration by the Guild pursuant to Article 23 of this Agreement. The arbitrator's jurisdiction and authority in such cases shall be limited to deciding whether the Department has made a material change in a mandatory subject of bargaining and, if so, whether the new or revised rules is reasonable. If the arbi-

> trator decides that the rules is not reasonable, he/she may as an exclusive remedy order the County to rescind the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the Department's rules.
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> ARTICLE XXV - MANAGEMENT RIGHTS
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> [T]he County has the right to discipline, temporarily lay off or discharge employees; to assign work and work locations; to determine duties of employees; to schedule hours of work, to determine the number of employees to be assigned to duty at any time; to determine the number, locations and operations of Headquarters and satellite offices; to relocate the Department's operations or any part thereof; and such other rights as are normal to County government and not expressly limited in this Agreement or applicable laws.

As explained by the employer's negotiator in face-to-face discussions between the parties, the employer's intention was that the proposed language would permit the employer to unilaterally implement any change it desired during the term of the proposed agreement on any matter not covered in the parties' contract, by adopting or amending a rule. The union did not agree to those employer proposals.

8. The employer gave the union a "what if" proposal during a mediation session held on July 20, 2000. That proposal asked that the union withdraw a pending unfair labor practice complaint. The union did not accept that proposal. Other issues remained in dispute between the parties at that time.

9. After the mediator requested lists of issues from the parties under WAC 391-55-200, the employer ceased to pursue the proposal described in paragraph 9 of these findings of fact, but continued to pursue its proposals as described in paragraph 7 of these findings of fact.

10. On September 27, 2000, the Executive Director of the Commission invoked interest arbitration under RCW 41.56.430 through .492 for the parties' negotiations on a successor collective bargaining agreement. The issues certified for arbitration included the union's indemnification proposal described in paragraph 4 of these findings of fact, and the employer's management rights and rules of operation proposals described in paragraph 7 of these findings of fact.

11. The employer routinely provides 40 hours of in-service training annually for employees in the bargaining unit represented by the union, at which a variety of topics are addressed. Unrelated to the collective bargaining between the employer and union, arrangements were made for Deputy Prosecuting Attorney Randy Watts to discuss the employer's indemnification policy in a 15- to 30-minute segment of that agenda.

12. At in-service training sessions held on March 7, 8, 15, and 22, 2001, Watts explained the existing employer policy and practice concerning handling of civil suits filed against deputies. Watts stated that the employer had historically responded on behalf of all employees named in civil suits, that there was no need for concern unless employees had engaged in some criminal activity, and that the employer had always defended and indemnified employees so long as they were doing things within the scope of their employment. Watts made no reference to the ongoing collective bargaining between the employer and union, he made no offer of new or changed benefits, and he solicited no agreement from the bargaining unit employees attending the in-service training sessions. Watts' explanations were consistent with the employer's actual policy and practice and with a reasonable interpretation of the parties' expired collective bargaining agreement.

Watts' presentations neither included any substantial misrepresentation, nor discredited the union.

13. Employees did not reasonably perceive the statements of Watts as described in paragraph 13 of these findings of fact as threats of reprisal or force or promises of benefit, or as belittling, ridiculing, or undermining the union.

AMENDED 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. By providing truthful and non-coercive in-service training to its law enforcement officers concerning existing laws and/or policies concerning defense and indemnification of its employees in civil proceedings, Whatcom County has not circumvented the exclusive bargaining representative of its employees, and has not interfered with employee rights conferred by RCW 41.56.040, so that no unfair labor practice has been established under RCW 41.56.140(4) or (1).

3. By making a "what if" proposal in mediation which included withdrawal of an unfair labor practice charge filed by the union, but then withdrawing or abandoning that proposal prior to the certification of issues for interest arbitration, Whatcom County has not breached its good faith obligation under RCW 41.56.030(4), and has not committed any unfair labor practice under RCW 41.56.140(4) or (1).

4. The employer proposals concerning management rights and rules of operation, as described in paragraph 7 of the foregoing

findings of fact, demanded waivers of the union's statutory rights, and were not a mandatory subject of bargaining under RCW 41.56.030(4).

5. By proposing and insisting to impasse on its proposals concerning management rights and rules of operation, as described in paragraphs 8 and 10 of the foregoing findings of fact, Whatcom County has failed and refused to bargain in good faith and has committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

AMENDED ORDER

1. The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED as to the allegations concerning the in-service training provided by Randy Watts.

2. The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED as to the allegations concerning the employer's request that the union withdraw a pending unfair labor practice complaint.

3. Whatcom County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   A. CEASE AND DESIST from:

      (1) Refusing to bargain in good faith with the Whatcom County Deputy Sheriff's Guild regarding wages, hours and other working conditions of non-supervisory uniformed personnel, by proposing and insist-

ing to impasse on waiver of the union's statutory bargaining rights under RCW 41.56.030(4).

(2) In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

(1) Withdraw its proposals advanced on and after March 6, 2000, concerning management rights and rules of operation from its collective bargaining negotiations with the union.

(2) Give notice to and, upon request, negotiate in good faith with the Whatcom County Deputy Sheriff's Guild, regarding any changes in the departmental rules manual.

(3) 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.

(4) Read the notice attached to this order into the record at a regular public meeting of the Board of County Commissioners of Whatcom County, 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.

(5) 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.

(6) 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, the 11th day of February, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

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 OUR EMPLOYEES:

WE WILL remove the following language (or similar language) from our proposals for a collective bargaining agreement with the Whatcom County Deputy Sheriff's Guild (union):

> [Regarding rules of operating the department]: Any unresolved objection regarding the reasonableness of any new or revised rule that involves a material change on bargaining unit employees in a mandatory subject to bargaining within the meaning of RCW 41.56, i.e., "wages, hours or working conditions", may be submitted to arbitration by the Guild pursuant to Article 23 of this Agreement. The arbitrator's jurisdiction and authority in such cases shall be limited to deciding whether the Department has made a material change in a mandatory subject of bargaining and, if so, whether the new or revised rules is reasonable. If the arbitrator decides that the rules is not reasonable, he/she may as an exclusive remedy order the County to rescind the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the Department's rules.
>
> [Regarding management rights]: [T]he County has the right to discipline, temporarily lay off or discharge employees; to assign work and work locations; to determine duties of employees; to schedule hours of work, to determine the number of employees to be assigned to duty at any time; to determine the number, locations and operations of Headquarters and satellite offices; to relocate the Department's operations or any part thereof; and such other rights as are normal to County government and not expressly limited in this Agreement or applicable laws.

WE WILL bargain in good faith with the Whatcom County Deputy Sheriff's Guild concerning the wages, hours and working conditions of the employees represented by that union.

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.

WHATCOM COUNTY

DATED: _____ 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, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 EVERGREEN PLAZA BUILDING
P. O. BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 02/11/2004

The attached document identified as: DECISION 7244-B has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ LORALEE PERKINS

CASE NUMBER:	15383-U-00-03889	FILED:	09/14/2000	FILED BY:	PARTY 2
DISPUTE:	ER GOOD FAITH				
DETAILS:	-				
COMMENTS:					

EMPLOYER: WHATCOM COUNTY
ATTN: PETE KREMEN
311 GRAND AVE STE 107
BELLINGHAM, WA 98225-4038
Ph1: 360-676-6717

REP BY: WENDY WEFER CLINTON
WHATCOM COUNTY
311 GRAND AVE STE 107
BELLINGHAM, WA 98225-4038
Ph1: 360-676-6802 Ph2: 360-676-6717

REP BY: LARRY E HALVORSON
HALVORSON AND SAUNDERS
800 5TH AVE STE 4100
SEATTLE, WA 98104
Ph1: 206-386-7788

PARTY 2: WHATCOM CO DEP SHERIFFS GLD
ATTN: MARK JOSEPH
311 GRAND AVE
PO BOX 1304
BELLINGHAM, WA 98227
Ph1: 360-676-6707

REP BY: JAMES M CLINE
CLINE AND ASSOCIATES
999 3RD AVE STE 3800
SEATTLE, WA 98104
Ph1: 206-505-5820