STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHATCOM COUNTY DEPUTY SHERIFF'S GUILD,	)	
Complainant,	)	CASE 15383-U-00-3889
vs.	)	DECISION 7244-A - PECB
WHATCOM COUNTY,	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW, AND ORDER

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

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

On September 14, 2000, the Whatcom County Deputy Sheriff's Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Whatcom County (employer) as respondent. The complaint was reviewed under WAC 391-45-110, and a deficiency notice was issued on October 11, 2000. The union filed an amended complaint on October 27, 2000. A preliminary ruling and order of partial dismissal was issued in response on December 19, 2000,[1] finding a cause of action to exist on certain allegations, as follows:

The Viable Allegations

Paragraphs 7 through 11 of the original complaint describe the positions of the parties on an indemnifica-

[1] *Whatcom County*, Decision 7244 (PECB, 2000).

> tion clause discussed by the parties in their current round of negotiations, as well as statements made on that subject by the employer official to bargaining unit employees at meetings held on and after March 14, 2000, where attendance by bargaining unit employees was mandatory. These allegations state a cause of action for failure or refusal of the employer to bargain with the exclusive bargaining representative (circumvention of the union) in violation of RCW 41.56.140(4), and derivative interference with employee rights in violation of RCW 41.56.140(1).
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> Paragraph 13 was characterized in the deficiency notice as untimely. It concerns the employer's position on a procedure manual during a bargaining session held on March 6, 2000. The amended complaint alleges that the employer continued to insist upon a waiver of union bargaining rights throughout the subsequent negotiations and into interest arbitration. These allegations now state a cause of action for failure or refusal of the employer to bargain with the exclusive bargaining representative after April 27, 2000, in violation of RCW 41.56.140(4), and derivative interference with employee rights in violation of RCW 41.56.140(1).
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> Paragraphs 21 and 22 allege that the employer made a "late hit" proposal on July 20 with regard to the Standard Operating Procedures Manual, by insisting, as a condition of settlement, upon withdrawal of unfair labor practice charges previously filed by the union. Although additional details have not been forthcoming in response to a suggestion contained in the letter of October 11, 2000, the "withdraw ULP" allegation provides the minimum necessary to state a cause of action for employer refusal to bargain in violation of RCW 41.56.140(4), and derivative interference with employee rights in violation of RCW 41.56.140(1).

Thus, paragraphs 7 through 11, 13, 21 and 22 of the complaint, as amended, were forwarded for further proceedings under Chapter 391-45 WAC. A hearing was held before Examiner Paul T. Schwendiman at Bellingham, Washington. Both parties submitted briefs.

The Examiner concludes the employer did not fail or refuse to bargain with the union by the statements made to bargaining unit

employees concerning "indemnification," or by insisting to impasse on the withdrawal of unfair labor practice charges previously filed by the union. The Examiner concludes that the employer did fail or refused to bargain with the union, in violation of RCW 41.56.140(4) and (1), by proposing and insisting to impasse on contract provisions that waived bargaining and impasse resolution obligations regarding rules during the term of the collective bargaining agreement. A remedial order is entered on the latter subject.

BACKGROUND

Negotiations, Mediation and Certification

The union represents a bargaining unit of law enforcement officers through the rank of sergeant in the Whatcom County Sheriff's Department. A collective bargaining agreement in effect between the parties from January 1, 1997, through December 31, 1999, covered hours, wages, and other working conditions, including:

> 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.
>
> . . . .
>
> ARTICLE XXV - MANAGEMENT RIGHTS
>
> 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 the duties of employees; to schedule hours of work, to determine duties of employees; 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.
>
> ARTICLE XXVI - INDEMNITY AND HOLD HARMLESS AGREEMENT
>
> 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 its attorneys fees. However, should the allegation of the intentional tort not be proven merely negligence, then the County will pay the judgment and will not seek reimbursement for the attorneys fees.

Exhibit 1.

On September 10, 1999, the union proposed changes to the agreement, including modifying Article XXVI to read:

> The employer agrees to defend and 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.

Exhibit 2.

The employer proposed on October 26, 1999, to open Article XV for discussion, but proposed no specific language at that time.

The parties held several negotiating sessions prior to mediation. Testifying as a witness for the union, Leland Childers described the discussion during one of those sessions, as follows:

> There was quite a discussion between the two attorneys, the Guild's attorney and the employer's attorney. It was about what the management rights meant and what the employer could do. There was some talk about court cases and so on. It was the Guild's position that these rights were too broad and just general in their waiver effect for us. Basically the employer's reading of these rights meant that we didn't have any rights to negotiate anything that wasn't actually in the contract.

Transcript 39. At one point in the exchange, the union's attorney asked specifically regarding the existing management rights Article, "Do you mean to say that the employer could even take away the deputies' patrol cars just with a rule?" The employer's attorney replied, "Yes, that's exactly what we mean. It's not covered in the contract, and the County can take that away." Transcript 40.

The employer and the union were unable to reach an agreement, and they began meeting on February 18, 2000, with a mediator from the Commission staff. From that date, the parties had no face-to-face meetings until July 20, 2000. Several written "what if" proposals were presented through the mediator.

The union received two written "what if" proposals through the mediator on March 6, 2000 (Exhibits 4 and 5). In both of those, the employer proposed amending the Rules of Operation language by adding the following new section to article XV:

> 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 [sic] reasonable. If the arbitrator decides that the rules is [sic] not reasonable, he/she may as an exclusive remedy order the County to rescinded the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the department's rules.

Mediation efforts continued, and, on July 19, 2000, the mediator presented the employer with a written "what if" proposal from the union that included the union's originally proposed Rules of Operation language (Exhibit 7).

In a face-to-face meeting on July 20, 2000, the union presented a revised comprehensive proposal (Exhibit 8). The parties' representatives discussed that proposal, but then returned to meeting separately with the mediator.

Later on July 20, the mediator gave the union another written "what if" proposal from the employer (Exhibit 9). That proposal suggested continuing "existing contract language" in Article XV, "provided the Guild recognizes the current Rules and Regulations Manual and withdraws the pending Unfair Labor Practice complaint." That proposal also suggested language for Article XXVI, the indemnity and hold harmless clause, as follows:

> The County will provide a defense to an action for damages brought against a deputy if the Whatcom County Council finds that the acts or omissions of the deputy were, or in good faith purported to be, within the scope

> of his or her official duties. A monetary judgment against the deputy for nonpunitive damages will be paid as provided in chapter 2.56 of the Whatcom County Code, as amended.

The proposals exchanged directly and in mediation on July 20 did not, however, result in an agreement.

On July 27, 2000, the employer requested that Article XV, Article XXV, and Article XXVI be certified for interest arbitration. The employer's written request included the language on rules of operation that it had proposed on March 6, 2000. Exhibit 15.

By letter dated September 27, 2000, the Executive Director of the Public Employment Relations Commission initiated the interest arbitration process under RCW 41.56.450, and listed "Rules of Operation," "Management Rights," and "Indemnification" among the issues certified for interest arbitration.

Statements made by Civil Deputy Prosecutor Watts -

The employer provides annual in-service training for its employees, and Lieutenant Jeff Parks began planning the three-day training program early in 2000. Parks expressed one of his concerns as "several instances where lawsuits were filed regarding department members; deputies were party to some type of a lawsuit." Transcript 137. Parks had a discussion with Civil Deputy Prosecutor Randy Watts concerning the feasibility of generally explaining what Watts did in reference to civil suits. Parks asked Watts:

> Could you please come and talk about how it is you do that? That is basically all I asked him to do, and I left it up to the him. I didn't tell him what to talk about or what to be sure to cover. I told him that employees have questions in this area. And I anticipated that it might even be a question-and-answer, you know, an informal day of give-and-take presentation.

Transcript 150. Watts agreed to make such presentations at each of the three in-service training sessions scheduled in 2000.

Watts provided 15 to 30 minutes of training at each of the sessions. At one session, Watts stated that the deputies were covered and that historically, "The County has covered everybody. And my recollection of it is 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. Watts "[made] the point that they would cover us and that they always have covered us." Transcript 99. Watts told a training session, "That [deputies] didn't have to worry about [punitive damages]." Transcript 50. Deputy Cliff Langley also recalled Watts' saying,

> [Watts] was basically saying, you know, what we [the union] wanted in our proposal. . . . And I was looking at it kind of from more a hopeful thing, that it's like, well, the County actually feels that they're doing what it is we wanted to do or that they want to do what it is we wanted to do. So we just need to come up to terms on some language.

Transcript 51. Langley also indicated, "I believe that the issue [of punitive damages] came up in the form of a question. Somebody asked a question about it." Transcript 109.

POSITIONS OF THE PARTIES

The position of the union is that Civil Deputy Prosecutor Watts presented misleading information about defense and indemnification arrangements during the training sessions, and so committed both a circumvention (in violation of RCW 41.56.140(4)) and an independent interference (in violation of RCW 41.56.140(1)), by communicating with bargaining unit members on that subject. The union next

alleges that the employer insistence to impasse that the union drop a pending unfair labor practice complaint concerned a permissive subject of bargaining presented for the first time late in negotiations, so that the employer refused to bargain (in violation of RCW 41.56.140(4)) and derivatively interfered with employee rights (in violation of RCW 41.56.140(1)). Finally, the union contends the employer refused to bargain (in violation of RCW 41.56.140(4)) and derivatively interfered with employee rights (in violation of RCW 41.56.140(1)), by insisting to impasse on a broad waiver of bargaining rights regarding changes of rules in its procedure manual during the term of the collective bargaining agreement.

The employer responds that Civil Deputy Prosecutor Watts made no false statements or misrepresentations when speaking directly to employees during regular training sessions, and that he did not engage in direct dealing so as to circumvent the union. The employer contends it did not insist to impasse regarding dropping a pending unfair labor practice complaint. Finally, the employer responds that its proposal concerning adoption and amendment of work rules is a mandatory subject of bargaining.

DISCUSSION

General Legal Standards

These parties bargain under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. RCW 41.56.140 enumerates unfair labor practices by a public employer, as follows:

> It shall be an unfair labor practice for a public employer:

> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
> (2) To control, dominate or interfere with a bargaining representative;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

Under RCW 41.56.160, aggrieved parties may bring complaints to the Commission if they believe their rights have been violated. *Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983). Because Chapter 41.56 RCW is remedial in nature, its provisions are to be liberally construed to effect its purpose. RCW 41.56.905; *Public Utility District 1 of Clark County v. Public Employment Relations Commission*, 110 Wn.2d 114 (1988).

The Alleged Circumvention of the Union

There are multiple reasons for the Examiner's conclusion that Watts' discussion of the employer's indemnity policy at training sessions did not constitute an unfair labor practice in violation of RCW 41.56.140(4) or (1).

Training Unrelated to Collective Bargaining -
Watts provided the disputed training in a context that is both much broader than and separate from whatever was going on between the employer and union at the bargaining table. The broader context for that training included the actual terms and conditions of employment and a collective bargaining agreement between the parties that included:

> LETTER OF UNDERSTANDING
>
> Confirm that ARTICLE XXVI, entitled Indemnity and Hold Harmless Agreement, will be interpreted such that the only circumstances in which the County will not pay a

> judgement against an employee and the employee will be responsible for reimbursing the County for attorney's fees paid to a reservation of rights is where it is actually found that the employee acted outside the scope of his or her employment or committed an actual tort.

Exhibit 1. Additionally, state law addresses this subject matter at RCW 4.96.041(4), as follows:

> (4) When an . . . employee . . . has been represented at the expense of the local governmental entity . . . and the court hearing the action has found that the . . . employee . . . was acting within the scope of his or her official duties, and a judgment has been entered against the . . . employee . . . under chapter 4.96 RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the judgment creditor shall seek satisfaction for nonpunitive damages only from the local governmental entity . . . . The legislative authority of a local governmental entity may . . . agree to pay an award for punitive damages.

Prior to the union making any proposal on this subject, the Whatcom County Code addressed this subject matter at Chapter 2.56.

Absence of Negotiation -

Under *City of Yakima*, Decision 1124-A (PECB, 1981), RCW 41.56.140(4) prohibits employers from *bargaining* directly or indirectly with employees regarding wages, hours or working conditions, but those are not the facts here. There was no negotiation (e.g., offer and acceptance) between Watts and the bargaining unit members in the audiences at the training sessions. The union has not proved the employer violated RCW 41.56.140(4).

No Requirement for Isolation -

Numerous Commission precedents have addressed direct contacts between employers and their employees without the presence or knowledge of the exclusive bargaining representative, but no case

is cited or found that suggests a *per se* rule under which any meeting or communication between an employer and its union-represented employees will violate the statute. To the contrary, past decisions have focused on the purpose of the meeting, whether the meeting was mandatory in nature, whether the meeting related to a mandatory subject of collective bargaining, and/or whether the meeting was coercive in nature (involving threats of reprisal or force or promises of benefit). *See Centralia School District*, Decision 2757 (PECB, 1987); *Lyle School District*, Decision 2736-A (PECB, 1987); *City of Raymond*, Decision 2475 (PECB, 1986). Employers retain some free speech rights and, despite the existence of a bargaining relationship, retain the right to communicate directly with their represented employees so long as there is no threat of reprisal or force, or promise of benefit, that would constitute a basis for finding an "interference" violation under RCW 41.56.140(1). *METRO*, Decision 3218-A (PECB, 1990); *City of Seattle*, Decision 3066-A (PECB, 1989).

Many communications directly from the employer to bargaining unit members do not approach the level of an unfair labor practice. In *METRO*, Decision 2197 (PECB, 1985), a meeting held to convey information to employees was held to be non-coercive. Factors to be considered in assessing whether employer communications constitute interference with employee rights were listed in *Lake Washington School District*, Decision 2483 (EDUC, 1986), such as:

- Does the communication have a tendency to disparage, discredit, ridicule or undermine the union? Are the statements argumentative?
- Were the statements made by the employer substantially factual or are they misleading in any material way?
- Have new benefits been made available in its communication?

- Is the communication, in tone, coercive as a whole?
- Is there direct dealing or attempts to bargain with the employees?
- Did the union object to such communications during prior negotiations? Did the communication appear to have placed the employer in a position from which it could not retreat?

Applying those criteria, the main thrust of the union's arguments is that Watts' statements:

> [U]ndermines, indeed belittles, the Guild and the Guild's counsel when a deputy prosecutor goes to a training session and advises the deputy sheriffs that they need not worry because they will be covered. The message sent to the deputy sheriffs is that the Guild and the Guild's attorney are either incompetent or are forwarding proposals which are unnecessary perhaps simply to protract the bargaining process. The creation of this type of impression is precisely what is meant by the term "interference."

Union Brief 9-10. A specific concern regarding Watts' statement about damages was noted by the union's attorney in his opening statement:

> Mr. Watts . . . message was: Don't worry. You're covered. . . . Now, the problem with what Mr. Watts said was Washington State common-law tort law does not allow punitive damages. . . . [but] USC Section 1983, . . . permits punitive damages.

Transcript 22-23. However, the testimony of employees as to what they heard from Watts concerning punitive damages was:

> A. [By Mr. Langley] I believe that the [punitive damages] issue came up in the form of a question.

Q. [By Mr. Cline] Somebody had asked a question about it?

A. I believe that there was some question.

Transcript 108.[2]

Q. [By Mr. Cline] Okay. Do you recall him saying why you didn't have to worry about punitive damages?

A. [By Mr. Childers] I'm sorry. I don't recall a lot of specifics about what he said, but --

Q. Sure.

A. My impression was that we didn't have to worry about punitive damages because there were no punitive damages in the state of Washington.

Transcript 50.

Q. [By Mr. Cline] Do you have any recollection of Mr. Watts talking about the possibility of punitive damages under the Civil Rights Act, Section 1983?

A. [By Childers] No.

Q. Is it possible that he might have talked about punitive damages under 1983 and you just don't remember?

A. I'm fairly certain that he didn't.

Transcript 118-119. Thus, even taking the testimony in the light most favorable to the union, the evidence about what Watts told employees about punitive damages is no better than unclear. At the same time, that employees "do not have to worry about punitive damages . . ." is consistent with the ability of the employer to pay punitive damages under state law. *See* RCW 4.96.041(4).

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[2] At a minimum, that necessarily implies that any statement made by Watts was spontaneous, rather than some pre-planned effort to circumvent the union.

The language of the parties' collective bargaining agreement did *not* expressly prohibit the payment of punitive damages. The general rule stated in that contract requires the employer to indemnify and hold harmless employees for *all damages*. The exception stated in the contract is limited to "alleged actions which, if proven, would . . . be intentional torts, . . . not be proven merely negligence . . . then the County will not pay that judgment . . ." Exhibit 1. In regard to the intentional tort language, the union argues that:

> Regardless of the intent or practice of the County Risk Manager or Deputy Prosecutor Watts, it is clear that the explicit terms of the existing CBA exclude intentional torts. Such an exclusion tends to include excess force and false arrest claims. Perhaps that is not how the County intends the language to be interpreted or how it has carried it out in practice, but the explicit exclusion is nonetheless there.

Union Brief 9-10. The Examiner does not find this argument persuasive for two reasons:

First, the union's argument is entirely theoretical in the fact of intent and actual practice, which are relevant in construing the contract language in the context of an ongoing collective bargaining relationship. *See Lynott v. National Union Fire Insurance Company*, 123 Wn.2d 678 (1994) and *Berg v. Hudesman*, 115 Wn.2d 657 (1990).[3]

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[3] The rule of *Lynott* and *Berg* is that an *objective* manifestation of a party's intent *must* be used to interpret even seemingly clear, unambiguous language. The context in which the language was negotiated, including the prior application of the language imparts meaning to language, and is to be used to determine what contract language means, whether or not the meaning of the writing is integrated into the writing itself because "meaning can almost never be plain except in a context." *Berg*, 115 Wn.2d at 667.

Second, Watts' explanation was consistent with maintaining an *existing* working condition irrespective of language in the expired contract (which had obligated the employer to maintain *existing* conditions of employment), and consistent with the requirement in RCW 41.56.470 that "existing wages, hours and other conditions of employment shall not be changed . . ." for this bargaining unit of "uniformed personnel" eligible for interest arbitration.[4]

On the record made in this case, the union has not proven that Watts' statements were substantially false or misleading. Nothing in the record establishes that the employer's actual policy and practice regarding indemnification was inconsistent with Watts' statements. There was no effort to disparage, discredit, ridicule or undermine the union. Watts' statements were neither coercive nor argumentative. No new benefits were offered; no assent (acceptance) was solicited from the employees.

Origin and Purpose of Training Session -

Watts spoke at a routine training program held in March 2000. Other topics included defensive tactics, hazardous materials, blood-borne pathogens, sexual harassment, cultural diversity, basic SWAT orientation, and CPR. It is undisputed that union members had previously expressed concerns about indemnification for torts. The prosecutor's office was scheduled for a block of two hours.

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[4] Where there is no collective bargaining agreement in a "uniformed personnel" bargaining unit, the maintenance of the status quo ante is required by RCW 41.56.470. *Cowlitz County*, Decision 7007 (PECB, 2000). The RCW 41.56.470 requirement is unique to "uniformed personnel." For other bargaining units covered by Chapter 41.56 RCW (excepting units covered by Chapters 53.18 and 54.04 RCW), RCW 41.56.123(1) provides: "After the termination date of a collective bargaining agreement, all of the terms and conditions specified in the collective bargaining agreement shall remain in effect . . ."

Exhibit 20. Watts' discussion of the employer's defense and indemnity policy actually occupied only 15 to 30 minutes out of the 40-hour agenda. Like the rest of the agenda, Watts' presentation was developed separate and apart from any collective bargaining issues, to answer questions of concern to employees. Watts' purpose was merely to explain existing policy, not to announce or negotiate any change of policy.

Employee Perceptions -

A violation of RCW 41.56.140(1) will only occur if the employee(s) *reasonably perceive* employer statements or conduct as a threat of reprisal or force or promise of benefit associated with their exercise of rights under Chapter 41.56 RCW. Union President Childers testified as to the union's feeling about language in the collective bargaining agreement:

> We felt that the current language didn't indicate that the County would cover the Guild members for many lawsuits. I believe civil torts was the issue, although I'm not sure I understand exactly what that is.

Transcript 42. Childers also testified as to how he perceived Watts' communication:

> Q. [By Mr. Cline] Did you have any difficulty squaring up what the Guild was proposing with what he was saying in his class?
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> A. [By Mr. Childers] . . . And at that time I didn't understand, you know, really the significance of this, that this was a problem.
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> Q. Did you have any difficulty squaring up what the Guild was proposing with what he was saying in his class?
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> A. And I was looking at it kind of from more of a hopeful thing, that it's like, well, the County actually feels that they're doing what it is we want them to do or that they want to do what it is

> we want them to do. So we just need to come to terms on some language.

Transcript 51. Testifying on cross-examination, union negotiating committee member Langley described his perception of Watts' presentation:

> Q. [By Mr. Halvorson] Did he [Watts] say or do anything in the training session that you attended that you felt undermined the Guild or the Guild's representatives?
>
> A. [By Mr. Langley] I don't believe that that was my impression.

Transcript 118. Thus, both Childers and Langley are on record as having perceived Watts' presentation as consistent with the union proposal, including a possible need to clarify language. Even they did not believe Watts' said anything that undermined the union or its representatives. The Examiner finds that the perceptions expressed by Childers and Langley typify those that would reasonably be perceived by other employees.

Other Factors -

The record in this case lacks any evidence suggesting or implying that Watts' presentation placed the employer in a position from which it could not retreat.

The union has not proven the employer violated RCW 41.56.140(4) or (1) by Watts' presentation to bargaining unit employees.

The Alleged Impasse on Withdrawal of Charges

The Examiner finds that no violation of RCW 41.56.140(4) (and hence no "derivative" interference in violation of RCW 41.56.140(1)) occurred in this case in regard to this employer's "what if"

proposal that included withdrawal of one or more unfair labor practice complaints previously filed by this union.

The Legal Standard -

The union asserts that the employer demanded withdrawal of unfair labor practice charges in bargaining, and that its demand was a "late hit" in the parties' negotiations.

Demands for withdrawal of unfair labor practice charges are not mandatory subjects of collective bargaining, and a party violates RCW 41.56.140(4) and (1) by insisting to impasse on a nonmandatory subject of bargaining. Withdrawal of a pending unfair labor practice complaint is a permissive subject of bargaining. *Public Utility District 1 of Clark County*, Decision 2045-B (PECB 1989). Insisting on a nonmandatory subject of bargaining to impasse violates RCW 41.56.140(4). *Klauder v. Deputy Sheriffs' Guild*, 107 Wn.2d 338 (1986).

A major change of position that frustrates progress late in the collective bargaining agreement can be indicative of a lack of good faith, and a party can violate RCW 41.56.140(4) and (1) by engaging in such tactics. A "practice of . . . adding new demands assuredly hinders achievement of a complete agreement, and one must be suspect of the good faith of a party." *Sunnyside Irrigation District*, Decision 314 (PECB, 1977). "Such behavior is subject to 'close scrutiny', and can constitute unlawful conduct." *Spokane County Fire District 1*, Decision 3447-A (PECB, 1990).

"What if" proposal can be a lawful means to explore alternatives under a Commission policy that encourages free and open exchange of proposals on *all* matters coming into dispute between parties, including permissive subjects of bargaining. WAC 391-45-550. A mediator may be called upon to assist parties who have been unable

to reach agreement, and then, "The mediator shall meet with the parties or their representatives, or both, either jointly or separately, and shall take any steps that the mediator deems appropriate to assist the parties in voluntarily resolving their differences and effecting an agreement." WAC 391-55-070.[5] A mediator may deem appropriate to solicit "what if" proposals to assist the parties. *See Asotin County*, Decision 4568-C (PECB, 1996). "If a conditional offer, *e.g.*, one made in response to a 'what if' inquiry from the mediator, does not produce agreement during mediation, . . . the party making that offer retains the right to change its position." *Spokane County Fire District*, Decision 3447-A (PECB, 1990). The party making the "what if" *inquiry* through a mediator retains its firmly proposed position at the time of inquiry by a mediator. Such "what if" *question* is just that, a *question*, not a firm proposal. Unlike formal proposals, such inquiries and questions are subject to neither impasse nor acceptance.[6]

Application of Standards -

On July 20, 2000, the employer made a "what if" proposal that included, for the first time, the concept of the union withdrawing pending unfair labor practice charges. Exhibit 9. When subjected to close scrutiny, the employer's proposal could be suspect for the nature of the request as well as for adding a new demand late in bargaining. However, both the "what if" nature of the proposal and

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[5] In the case of a bargaining unit of uniformed personnel, such as the unit here, a mediator's participation is mandatory prior to certification of unresolved issues to interest arbitration. RCW 41.56.450, WAC 391-55-200.

[6] Asking a question does not change the party's existent proposal. If the answer to the question is no, nothing changes. If the answer is yes, no agreement is formed until both parties confirm an agreement.

the lack of insistence to impasse shield the employer from any liability in this case.

The "proposal" presented to the union through the mediator was clearly identified as a "COUNTY 'WHAT IF' PROPOSAL" and also stated, "The County reserves the right to add to, delete or modify this 'what if' proposal." 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) or (1). If the injection of a new concept late in the bargaining process had led to movement on other issues or an agreement, some good could have been done.

Important to the decision in this case, no harm was done. The union was not obligated to accept the employer's "what if" proposal, and it did not do so. The employer did not pursue the issue in interest arbitration. The union has pursued this and several other unfair labor practice complaints.

Alleged Insistence on Waiver of Bargaining Rights

The Examiner concludes that the employer unlawfully insisted upon a proposal regarding revision of its rules which constituted an overly broad waiver of the employer's statutory obligation to bargain with the union during the term of the collective bargaining agreement, and was substantially at variance with the statutory procedure for resolving bargaining impasses involving "uniformed personnel" contained in RCW 41.56.440 - .492, so that the employer's proposal constituted an illegal subject of bargaining. The employer thus violated RCW 41.56.140(4) (and derivatively violated RCW 41.56.140(1)) by proposing and insisting to impasse on this proposal.

Both of the "what if" proposals advanced by the employer on March 6, 2000, contained the following language:

> ARTICLE XV RULES OF OPERATION
>
> Add new section to provide that any unresolved objection regarding any new or revised rule that involves a material change in a mandatory subject to bargaining may be submitted to arbitration by the Guild pursuant to article 23 of this Agreement. Limit the arbitrator's jurisdiction and authority in such cases to determining whether the County has made a material change in a mandatory subject of bargaining and, if so, whether the new rules is reasonable. If the arbitrator finds that the rules is not reasonable, he/she may as an exclusive remedy order the County to rescinded the rule and restore the status quo ante.

Exhibit 15. Thus, the employer was demanding that the union waive its statutory bargaining rights and its statutory interest arbitration rights with regard to the adoption of work rules.

Unlike the "what if proposal" concerning the union's unfair labor practice charges, the employer continued to pursue its position on the rules of operation after March 6, 2000, and into interest arbitration:

- The essence of the employer's March 6, 2000 "what if" proposal regarding adopting rules was included in the employer's "LIST OF ISSUES TO BE SUBMITTED TO INTEREST ARBITRATION BY WHATCOM COUNTY" (Exhibit 15) as required by WAC 391-55-200(1)(b);[7]

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[7] WAC 391-55-200(1)(b) provides:

> Within seven days after being notified by the mediator, each party shall submit to the mediator and serve on the other party a written list (including article and section references to parties' latest collective bargaining agreement, if any) of the issues that the party believes should be advanced to interest arbitration.

- The "Rules of Operation" issue was among the issues certified for interest arbitration on September 27, 2000, based upon the list the employer submitted under WAC 391-55-200(1)(b); and

- Interest arbitration on the "Rules of Operation" issue was suspended only after the union filed the instant unfair labor practice complaint. *See* WAC 391-55-265.

Thus, it is irrelevant that the March 6 proposal included, "The County reserves the right to add to, delete or modify this 'what if' proposal." Exhibit 5. It is the employer's actions subsequent to March 6 that are of concern here. Given the employer's stated position on the issues at impasse, the Examiner finds that the employer's proposal on rules of operation was and continued to be more than a mere question or trial balloon.

Applicable Legal Standard

The potential subjects for bargaining between an employer and union are commonly divided into "mandatory," "permissive" and "illegal" categories:

- Matters affecting the employee "wages, hours, and working conditions" mentioned in RCW 41.56.030(4) are the mandatory subjects of bargaining. *See Federal Way School District*, Decision 232-A (EDUC, 1977) (citing *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958)), *aff'd, Federal Way Education Association v. Public Employment Relations Commission*, WPERR CD-57 (King County Superior Court, 1978).

- Permissive subjects are matters considered to be remote from employee wages, hours and working conditions, including matters which are regarded as prerogatives of employers or of unions. *See Federal Way School District; Renton School District*, Decision 706 (EDUC, 1979).

- Illegal subjects are matters where an agreement between a union and employer would contravene other statutes or court decisions. *See King County Fire District 11*, Decision 4538-A (PECB, 1994); *City of Richland*, Decision 2486-A (PECB, 1986).

In determining "scope of bargaining" questions, the Commission initially determines whether the proposal directly impacts the wages, hours or working conditions of bargaining unit employees. *Lower Snoqualmie Valley School District*, Decision 1602 (PECB, 1983). When the proposal does not directly involve wages or hours, the Commission must balance the employer's need for entrepreneurial judgment against the employees' interest in their terms and conditions of employment. *Edmonds School District*, Decision 207 (EDUC, 1977).

The Supreme Court of the State of Washington endorsed the use of a balancing approach in *Fire Fighters Local 1052 (City of Richland) v. PERC*, 113 Wn.2d 197 (1989), while observing that the duty to bargain does not extend to all matters that might come into dispute between an employer and a union:

> The scope of mandatory bargaining thus is limited to matters of direct concern to employees. Managerial decisions that only remotely affect "personnel matters", and decisions that are predominantly "managerial prerogatives", are classified as nonmandatory subjects.

Richland, 113 Wn.2d at 200 (citations omitted), and:

> On one side of the balance is the relationship the subject bears to "wages, hours and working conditions". On the other side is the extent to which the subject lies "'at the core of entrepreneurial control'" or is a management prerogative. *Spokane Education Association v. Barnes*, 83 Wn.2d at 376 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222-23.) Where a

> subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates.

Richland, 113 Wn.2d at 203.

In *Klauder, et al. v. San Juan County Sheriff's Guild*, 107 Wn.2d 338 (1986), the Court held that a collective bargaining agreement provision on a permissive subject cannot be carried forward in a successor agreement without the approval of both parties. Citing *NLRB v. Sheet Metal Workers, Local 38*, 575 F.2d 394 (2d Cir. 1978), the Court wrote:

> A party violates the duty to bargain collectively if it insists, as a precondition to reaching an agreement, on inclusion of a provision concerning a non-mandatory subject for bargaining, that is, a subject other than the mandatory issues of wages, hours, and other terms and conditions of employment.

Klauder, 107 Wn.2d at 341. Thus, the ultimate effect of a scope of bargaining determination is on what the parties may lawfully do with their proposals:

- A party may lawfully advance proposals and bargain to impasse on any "mandatory" subject of bargaining.
- A party may lawfully advance proposals on permissive subjects, but it is unlawful for a party to insist upon such a proposal once the point of "impasse" has been reached.
- A party may not advance proposals on illegal subjects at any time.

See NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); *City of Seattle*, Decision 4163 (PECB, 1992).

Application of Standards

The employer argues that its proposal regarding adopting rules is a mandatory subject of bargaining. The employer relies on *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997), but the Examiner is not persuaded by that citation. Indeed, as noted by the Supreme Court in that case:

> Under Washington law, a public sector employer cannot unilaterally impose the management rights or hours of work clauses on uniformed personnel: it may only insist on them until impasse, at which point they become the subject of interest arbitration. When an employer has insisted upon such clauses, it procedurally cannot defend itself by saying the union waived its rights on those subjects because the employer has, by insisting to impasse, already bargained with the union. This makes this case an "impasse" case and not a "waiver" case. Procedurally, the Association cannot claim in this case that the proposal waives its collective bargaining rights because it has already exercised these rights. The Association has fulfilled its statutory duties and rights to collectively bargain with the City by bargaining to impasse on the issue and then going to interest arbitration. "[P]arties subject to interest arbitration fulfill their respective obligations and responsibilities by preparing for interest arbitration." *City of Bellevue v. International Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 384, 831 P.2d 738 (1992).
>
> We therefore conclude that the management rights and hours of work proposals in this case did not waive the Association's statutory right to collectively bargain.

Pasco, 132 Wn.2d at 464. In holding that the management rights clause at issue in the *Pasco* case was a mandatory subject of bargaining, neither the Commission nor the Supreme Court actually determined whether impasse on a demand for a broad waiver of collective bargaining of unspecified mandatory subjects of bargaining during the *proposed future* collective bargaining agreement is a mandatory subject of bargaining. The Court wrote:

> We need not determine whether a waiver of collective bargaining rights is a mandatory or permissive subject of bargaining, however, because this is not a waiver case despite the fact that throughout all of its argument, the Association classified the management rights and hours of work clauses as "waivers." . . .
>
> However, in this case PERC concluded, as did the . . . Examiner, *the issue of waiver was not present*. PERC was clearly correct in its analysis. *The management rights and hours of work proposals at issue here are not defenses* to a union claim of unfair labor practice on the basis of the employer's unilateral action *under an existing contract*.

Pasco, 132 Wn.2d at 463-464 (emphasis added). In the case now before the Examiner, the question is whether the future collective bargaining agreement *will waive* the duties and obligations imposed by Chapter 41.56 RCW during the term of that contract. There is no existing contract and, different from *Pasco*, there is no issue here as to whether the union *has waived* bargaining rights by agreeing to the language proposed by the employer.

Any particular provision within a management rights clause may be subjected to analysis under the balancing test *required* by *Richland*, in determining whether the particular paragraph is mandatory or permissive. *That is not to say that individual components of a "mandatory" management rights clause under the rationale of Pasco are automatically mandatory subjects of bargaining*. In fact, the Examiner observes that subjecting the *Pasco* management rights clause to the balancing test may disclose an anomaly.

Application of the balancing test and consideration of other precedents suggests that some components of the management rights clause in *Pasco* are not "mandatory" subjects of bargaining:

- The management rights clause in *Pasco* included, "The right to determine the police department's mission, policies, and all standards of service offered to the public." However, the level or quality of service to be provided has consistently been found a nonmandatory subject of bargaining under the balancing test. See, for example, *City of Yakima*, Decision 1130 (PECB, 1981); *Pierce County*, Decision 1710 (PECB, 1983).

- The management rights clause in *Pasco* included the right, "To determine the means, methods and number of personnel needed to carry out the departmental operations and services." Again, those are subjects that have consistently been found to be permissive subjects of bargaining. See, for example, *City of Wenatchee*, Decision 780 (PECB, 1980); *City of Yakima*, Decision 1130.

- The management rights clause in *Pasco* included the right, "To determine the budget." However, it is abundantly clear that public employer budgets are nonmandatory subjects of bargaining under *Spokane Education Association v. Barnes*, 83 Wn.2d 366 (1974).[8]

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[8] In one of its earliest decisions on the scope of bargaining, the Commission explained *Barnes* as follows:

> [T]he making of a budget is a nondelegable statutory duty imposed upon the [governing body of the public employer]. . . . The Court thus held that budget was a permissive subject of bargaining, and that a union had no right to demand that it be negotiated under the law then in effect. Other labor boards have generally found that the question of budget is a nonmandatory subject of bargaining.

Federal Way School District, Decision 232-A, (EDUC,1977).

Although the Supreme Court nominally found the entire 12-paragraph management rights clause at issue in *Pasco* to be a mandatory subject of bargaining, the foregoing examples from the *Pasco* clause suggest that applying the balancing test to individual components of a management rights clause may actually disclose that some individual components are *not* mandatory subjects of bargaining.[9] The Examiner concludes that the existence of this anomaly provides reason to conclude that the *Pasco* decision is not entitled to the controlling weight that the employer would put upon it here.

The Examiner instead considers only that portion of the management rights clause concerning adopting rules, and subjects it to the balancing of interests required by *Richland*. Although a more extensive management rights clause (article XXV) was at issue in the bargaining between these parties, the *only* sentence that is a basis for adopting and amending rules during the term of the collective bargaining agreement is: "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." That single sentence in the management rights clause is, however, *necessarily* considered in conjunction with the employer's proposal on Rules of Operation. The remainder of the management rights clause was not included in the preliminary ruling in this case and

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[9] To hold that the "budget" is a mandatory subject because it is mentioned in a mandatory management rights clause would produce a ludicrous result: A union could lawfully demand and seek interest arbitration on a management rights clause component providing, "The employer has the right to determine the budget, but only in such manner that allocates 100% of the employer's revenues to the Police Department operating fund." Such a holding would ignore *Barnes* and nullify the basic management rights protected by the balancing test required by *Richland*.

is not at issue as a "management rights" issue. Conversely, the March 6, 2000, proposal concerning Article XV, Rules of Operation, modified that sentence in the management rights clause.

Demand to Waive Bargaining and Interest Arbitration -
The issue here is whether the employer's demand regarding adopting rules during the term of the parties' collective bargaining agreement was overly broad, so as to constitute a demand for either or both: (1) a waiver of the union's statutory bargaining rights; or (2) a waiver of the statutory impasse procedure for "uniformed personnel" contained in RCW 41.56.440 - .492 for the life of the proposed agreement.

The basic formula prescribed by precedent is: (1) The party contemplating a change of a mandatory subject of bargaining is obligated to give notice to the other party and provide opportunity for collective bargaining in advance of making a decision; (2) the party receiving such a notice must make a timely request for bargaining if it desires to influence the decision; and (3) the parties must negotiate the matter in good faith if bargaining is requested. For bargaining units covered by the interest arbitration process, unilateral implementation after bargaining to impasse is precluded by Commission precedent that requires submission of the dispute to interest arbitration. *City of Seattle*, Decision 1667-A (PECB, 1984).

Justice Talmadge expressed concerns in his concurring opinion in *Pasco*, that "[G]eneralized management rights clauses strip a union of its ability to represent its members and adequately address issues of wages, hours and conditions." and, "Conversely, accepting the [union's] argument . . . that management rights clauses must be narrowly construed . . . would swallow up management rights." *Pasco*, 132 Wn.2d at 471.

The Examiner concludes that use of the balancing approach required in *Richland*, provides the most adequate safeguard against swallowing up management rights: "PERC's own well-settled practice [is] of determining scope-of-bargaining questions only 'after being fully apprized of the facts of each case.' *City of Wenatchee*, Decision 780 (PECB, 1980); *see* WAC 391-45-550." *Richland*, 132 Wn.2d at 202. Being fully apprized of the facts requires full consideration of any language, and its interpretation in context of a party's objective manifestation of its intended meaning of the language. *See Lynott v. National Union Fire Insurance Company*, 123 Wn.2d 678 (1994). To make that determination without being fully apprized is "inappropriate under the law of public employment collective bargaining." *Richland*, 132 Wn.2d at 202.

Under Commission precedent, *management rights clauses are narrowly construed in unilateral change cases*, when determining whether a union and employer have agreed to waive the statutory obligation to bargain in good faith on a particular wage, hour, or working condition during the term of a collective bargaining agreement.[10] *See Washington Public Power Supply System*, Decision 6058-A (PECB, 1998); *City of Kelso*, Decision 2633-A (PECB, 1988); *Yakima County*, Decision 6594-C (PECB, 1999); *City of Wenatchee*, Decision 6517-A (PECB, 1999); *City of Pasco*, Decision 4197-A (PECB, 1994); *City of Yakima*, Decision 3564-A (PECB, 1991); and *Lake Chelan School District*, Decision 4940-A (EDUC, 1995).

The employer proposal regarding amending rules must necessarily be viewed from the perspective of how it would operate if it had been accepted by the union:

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[10] To interpret broad language otherwise would be contrary to the intent and purpose of RCW 41.56.440, .450, .470, .480, .490 *See* RCW 41.56.430, .905.

- It would be part of the parties' collective bargaining agreement for some future period;[11]
- It would be interpreted and applied during the life of that contract primarily by arbitrators, under the grievance and arbitration procedure contained within the contract; and
- As a possible waiver of statutory rights during the term of that proposed agreement, it would only be interpreted under Commission precedent in a forum such as this unfair labor practice proceeding.

The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976). The Commission does interpret collective bargaining agreements to the extent necessary to decide unfair labor practice cases. *City of Yakima*, Decision 3564-A (PECB, 1991).

As stated by the Commission in *Yakima County*, Decision 6594-C (PECB, 1999):

> The principal outcome of the collective bargaining process under Chapter 41.56 RCW is for an employer and the exclusive bargaining representative of its employees to sign a written collective bargaining agreement controlling wages, hours and working conditions of bargaining unit employees for a period of up to three years. RCW 41.56.030(4); 41.56.070. . . . Such contracts are enforceable according to their terms, including by means of arbitration. RCW 41.56.122(2); 41.58.020(4).

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[11] During the term of the proposed collective bargaining agreement, the question of whether the language was a mandatory subject of bargaining when proposed would be irrelevant. Once the employer proposal was accepted and a contract formed, the contract language would control whether a unilateral change in a particular working condition was permitted.

> Thus, there is no duty to bargain for the life of the contract on the matters set forth in a collective bargaining agreement, and an employer action in conformity with that contract will not be an unlawful unilateral change. . . .

See also City of Wenatchee, Decision 6517-A (PECB, 1999); and *North Franklin School District*, Decision 5945-A (PECB, 1998).

Broad and unspecific language will not create a waiver under Commission precedent. *Spokane County*, Decision 5698 (PECB, 1996).[12] Thus, the general management rights clauses often asserted by employers as waivers of union bargaining rights, are generally found inadequate under the high standards for finding a waiver. *Chelan County*, Decision 5469 (PECB, 1996), *aff'd* Decision 5469-A (PECB 1996).

From a thorough review of Commission decisions, the Examiner notes that the Commission has rejected waiver findings even as to general contract language which appears clear and unambiguous on its face. For example:

- In *City of Kelso*, Decision 2633-A (PECB, 1988), the contract included, "The employer retains the exclusive right to manage

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[12] A review of Commission decisions by the Examiner found no case in which the Commission found a waiver by contract in broad clauses. *See Washington Public Power Supply System*, Decision 6058-A (PECB, 1998); *City of Kelso*, Decision 2633-A (PECB, 1988); *Yakima County*, Decision 6594-C (PECB (1999); *City of Wenatchee*, Decision 6517-A (PECB, 1999); *City of Pasco*, Decision 4197-A (PECB, 1994); *City of Yakima*, Decision 3564-A (PECB, 1991); *Lake Chelan School District 129*, Decision 4940-A (EDUC, 1995); and *City of Seattle*, Decision 1667-A (PECB, 1984). Such a narrow reading of language is necessary to preserve the obligation to bargain on mandatory subjects not clearly specified in a collective bargaining agreement.

the fire department. Therefore, all powers, authorities, functions and rights not specifically and expressly restricted by this Agreement are subject to exclusive management control." The Commission found the clause too general to give rise to a specific waiver of a decision to lay off employees.

- In *City of Pasco*, Decision 4197-A (PECB, 1994), the contract included the following language:

> Any and all rights concerned with the management and operation of the department are exclusively that of the Employer, unless otherwise specifically provided by the terms of this Agreement.
>
> . . . .
>
> The parties acknowledge that each has had the unlimited right and opportunity to make proposals with respect to any matter being the proper subject of collective bargaining. The results of the exercise of that right are set forth in this Agreement. Therefore, except as otherwise provided in this Agreement, each voluntarily and unqualifiedly agree to waive the right to oblige the other party to bargain with respect to any subject or matter not specifically referred to or covered by this Agreement.

Again, however, the Commission found no waiver by contract in that language.

- In *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998), the contract being interpreted contained:

> The Supply System retains the exclusive right to manage and operate its business, subject only to the express terms of this Agreement. All management functions, rights and responsibilities which the Supply System has not modified or restricted by this Agreement are retained and vested exclusively in the Supply system.

The Commission wrote, "In the absence of a specific written waiver, no waiver by contract can be found . . . ."

- In *City of Wenatchee*, Decision 6517-A (PECB, 1999), the contract contained the following language:

> Article 4.1 Any and all rights concerned with the management and operation of the City are exclusively that of the City unless other wise provided by the terms of this Agreement. The City has the authority to adopt rules for the operation of the City and conduct of its officers, provided such rules are not in conflict with the provisions of this Agreement or with applicable law. . . . and to perform all other functions not otherwise expressly limited by this Agreement.

Again, the Commission rejected the employer's claim of a waiver of statutory bargaining rights.

Such interpretations are consistent with Commission precedent holding that waivers must be clear and unambiguous as to the *specific* condition of employment at issue in the case.

Clear and unambiguous waiver is required under applicable precedents defining waiver narrowly as an "intentional relinquishment of a known right." *Spokane County*, Decision 2377 (PECB, 1986). *See also Chelan County*, Decision 5469 (PECB, 1996); *Spokane County*, Decision 5698 (PECB, 1996). Likewise,

> Courts will not "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708, 103 S. Ct. 1467, 1477, 75 L. Ed. 2d 387 (1983). *A waiver of bargaining rights must be knowingly made and must specifically address the subject upon which the waiver is claimed. Spokane County*, PECB Dec. 2167 at 18 (Dec. 3, 1985). . . . Courts will not infer a waiver "unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *N.L.R.B. v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991).

Pasco, 132 Wn.2d at 462 (emphasis added). Examples of clearly and unambiguously specified waivers have included an employer's right to assign employees to work locations and shifts,[13] to release employees from duties because of lack of work, to implement either one of two "normal" work schedules,[14] to assign school-related functions during periods which were before and after normal class hours but still within the employees' normal work day,[15] to use a particular standard of reasonable suspicion before a drug screening test,[16] to reduce employee insurance premium costs and raise dental insurance benefits,[17] and to establish shift starting times. *Seattle School District*, Decision 2079-B (PECB, 1986), *aff'd*, Decision 2079-C (PECB, 1986).

Demands for waivers as a mandatory subject of bargaining has been a subject of discussion in Commission precedents. In *Seattle School District*, Decision 2079-B (PECB, 1986), the Examiner found that the following language in a collective bargaining agreement, during its term,[18] established a waiver by contract:

> Work shifts shall be designated a first, second, or third work shifts according to the scheduled starting time.

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[13] *Yakima County*, Decision 6594-C (PECB, 1999).

[14] *Chelan County*, Decision 5469-A (PECB, 1996).

[15] *Lake Chelan School District 129*, Decision 4940 (EDUC, 1994).

[16] *City of Tacoma*, Decision 5284 (PECB, 1995).

[17] *Island County*, Decision 5388 (PECB, 1995).

[18] Waivers of bargaining rights on mandatory subjects of bargaining expire with the collective bargaining agreement. *Seattle School District*, Decision 2079-C (PECB, 1986).

First shift between 5:00 am and 9:59 am
Second shift between 10:00 am and 5:59 am
Third shift between 6:00 pm and 4:59 am

Shift starting time is clearly a mandatory subject of bargaining, within the "wages, hours and working conditions" terminology used to define collective bargaining.[19] The Examiner would not seriously question that there would be a duty to bargain on a hypothetical demand for the clear and unambiguous language that: "Work shifts shall begin at 5:00 am, 10:00 am, and 6:00 pm."[20] Theoretically, language controlling shift starting times might specify one shift schedule, three discrete times such as in the hypothetical described above, or employer flexibility within a limited number of time zones, as in *Seattle School District*. However, either a demand for a myriad of specified shift starting times or for unlimited employer flexibility contradicts the concept of an agreement and constitutes a demand for waiver of bargaining obligations during the term of the agreement. Language demanding waiver of bargaining during the term of a proposed collective bargaining agreement is neither more nor less than the discrete three starting times of the original hypothetical, increased to an unlimited number of starting times. As such, *it is still the same mandatory subject of bargaining, dissimilar from specifying the three starting times only as to the number of starting times allowed*. Being no more than a demand for an additional number of

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[19] "'Collective bargaining' means the performance of the mutual obligations of the public employer and the exclusive bargaining representative . . . to confer and negotiate in good faith . . . with respect to . . . personnel matters, including *wages, hours and working conditions*, . . ." RCW 41.56.030(4) (emphasis added).

[20] The hypothetical is a variation of a clause in *Seattle School District*, Decision 2079-B (PECB, 1986), *aff'd*, Decision 2079-C (PECB, 1986).

starting times, albeit an infinite number, the demanded waiver of bargaining as to shift starting time remains a mandatory subject of bargaining. Importantly, however, the language in both the hypothetical and the *Seattle School District* contract clearly and unambiguously specifies the particular working condition addressed. An employer might similarly demand a contractual waiver of bargaining of any other *particular* working condition, as long as the demanded language is clear and unambiguous as to the *particular* working condition.

A demand to waive bargaining on working conditions *not* clearly and unambiguously specified by contract language is not a mandatory subject of bargaining by virtue of the proposed language alone.[21] Under Commission precedent, contract language that appears on its face to clearly and unambiguously grant a broad general waiver, does *not* to waive the duty to bargain.

Narrow interpretation is necessary to effectuate legislative intent and the purposes of RCW 41.56.440 - .492. In *Spokane v. Spokane Police Guild*, 87 Wn.2d 457 (1976), the Supreme Court rejected an

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[21] The demand that a union waive the bargaining during the term of a proposed contract as to a more generalized category of working conditions may be a mandatory, permissive, or even an illegal subject of bargaining given negotiation and historic interpretation of the proposed language. Such is the context in which the language *must* be interpreted. *Lynott*. A party's objectively manifest intended meaning of broader clauses may make a proposed clause illegal if the intended meaning of the language goes beyond the narrow reading necessary to preserve the parties' joint obligation to bargain prior to impasse and to utilize the RCW 41.56.440 - .492 impasse resolution procedure legislatively required for uniformed personnel. Such determination is by the Commission, on a case by case basis. *See* WAC 391-55-265, WAC 391-45-550.

employer argument that would have constricted or nullified the interest arbitration process by making the time limits in the interest arbitration process mandatory, rather than directive.[22] The Court noted,

> Spokane argues the legislature's use of the word "shall" in connection with each timetable deadline requires the deadlines to be mandatory. This is not always so. The word "shall" in a statute may be construed as directory rather than mandatory depending upon legislative intent. *Seattle v. Reed*, 6 Wn.2d 186, 188, 107 P.2d 239 (1940); *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940).

Spokane, 87 Wn.2d at 465. In disposing of the employer's argument regarding the time deadlines, the Court wrote,

> [T]he familiar rule of statutory construction [is] that legislation should be construed to make it purposeful and effective. *Mason v. Bitton,* 85 Wn.2d 321, 326, 534 P.2d 1360 (1975). The mandatory deadline construction . . . adopted by the trial court would severely hamper the effectiveness of the statute. If the complex mediation, fact-finding and arbitration procedure must be abandoned once begun because of unavoidable delay during one step of the process, it will rarely if ever serve its purpose. Certain delays are inevitable in this procedure and must be allowed.

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[22] RCW 41.56.440 included: "Negotiations . . . *shall* be commenced at least five months prior to the submission of the budget to the legislative body of the public employer . . . ." (emphasis added.) RCW 41.56.450 included: "Within seven days . . . each party *shall* name one person to serve as its arbitrator on the arbitration panel. The two members so appointed *shall* meet within seven days . . . The hearing conducted by the arbitration panel *shall* be concluded within twenty-five days following the selection or designation of the neutral chairman . . ." RCW 41.56.450. (emphasis added.)

Spokane, 87 Wn.2d at 464. Another familiar rule of statutory construction addressed in that decision is that words in a statute are to be given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. Normally, the word "shall" in a statute presumptively has a mandatory rather than a directory meaning. *State v. Mollichi*, 132 Wn.2d 80 (1997); *Erection Co. v. Labor & Industries*, 121 Wn.2d 513 (1993); *Singleton v. Frost*, 108 Wn.2d 723 (1987). Thus, *Spokane v. Spokane Police Guild* also implies that the use of the word "shall" in RCW 41.56.440 - .492 remains presumptively mandatory, except where application of time deadlines would "hamper the effectiveness of the statute."

The Examiner finds multiple support for finding the word "shall" in the interest arbitration provisions of the statute signifies a mandatory obligation except as to the time limits:

- The legislature has used both "may" and "shall" in RCW 41.56.440 - .492, other than as to the directive time lines.[23] The careful use of those words indicates the Legislature considered them to have different force. *PUD of Lewis County v. WPPSS*, 104 Wn.2d 353 (1985); *Scannell v. Seattle*, 97 Wn.2d 701, 704 (1982).

- In the absence of clear legislative intent elsewhere in the statute, permissible alternatives to the interest arbitration procedure cannot be implied. Where the legislature intended variances in mandatory procedures and arbitration standards,

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[23] For example, in RCW 41.56.450, "either party *may* apply to the commission, the federal mediation and conciliation service, or the American Arbitration Association to provide a list of five qualified arbitrators from which the neutral chairman *shall* be chosen." (emphasis added).

it clearly specified those variances in RCW 41.56.440 - .492,[24] or clearly provided optional alternatives to employers and bargaining representatives.[25]

- The mandatory nature of the interest arbitration procedure is established by RCW 41.56.480, as follows:

> *If the representative of either or both the uniformed personnel and the public employer refuse to submit to the procedures set forth in RCW 41.56.440 and 41.56.450,* the parties, or *the commission on its own motion, may invoke the jurisdiction of the superior court* for the county in which the labor dispute exists and such court shall have jurisdic-

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[24] For example, in relation to arbitration standards, "For employees listed in RCW 41.56.030(7)(a) through (d), comparison of the wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of like personnel of like employers of similar size on the west coast of the United States"; *but "For those employees listed in RCW 41.56.030(7)(a) who are employed by the governing body of a city or town with a population of less than fifteen thousand, or a county with a population of less than seventy thousand, consideration must also be given to regional differences in the cost of living; and "For employees listed in RCW 41.56.030(7)(e) through (h)," the comparison is "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 may not be considered."* (emphasis added).

[25] For example, RCW 41.56.440 requires that if impasse exists, the employer and union "may submit the dispute [only] to the commission for mediation . . .," but RCW 41.56.492 applying RCW 41.56.440 to employees of public passenger transportation systems, clearly specifies in RCW 41.56.492(1) "nothing in this section or RCW 41.56.440 shall be construed to prohibit the public employer and the bargaining representative from agreeing to substitute at their own expense some other mediator or mediation procedure . . ."

> tion to issue an appropriate order. A failure to obey such order may be punished by the court as a contempt thereof. *A decision of the arbitration panel* shall be final and binding on the parties, and *may be enforced at the instance of* either party, the arbitration panel or *the commission* in the superior court for the county where the dispute arose. . . .

(emphasis added). Vesting the Commission and courts with such independent authority to compel interest arbitration contradicts any suggestion that the legislature contemplated that employers and unions could agree to use any alternative procedure. The Examiner thus concludes that, but for the directory time lines within the process, the interest arbitration procedure set forth in RCW 41.56.440 - .492 is mandatory for these parties.

Interest arbitration applies to *any* impasse on a mandatory subject of collective bargaining. Both the duty to bargain imposed on the union and employer by RCW 41.56.030(4), and the provisions of RCW 41.56.440 - .492, dictate a conclusion that the legislature has deprived employers and unions of their usual rights in collective bargaining, including the right to strike, the right to lock out, the right to say "no," and the right to waive the process itself. Like the duty to bargain which continues in effect during interest arbitration, the legislated interest arbitration process continues in effect between parties during the term of a collective bargaining agreement as to matters which are mandatory subjects of bargaining that are not covered by the specific terms and conditions set forth in their collective bargaining agreement. *City of Seattle*, Decision 1667-A (PECB, 1984). The essence of the mandatory impasse procedure is:

> If an agreement has not been reached following a reasonable period of negotiations and mediation, . . . an

> interest arbitration panel *shall* be created to resolve the dispute. . . . The neutral chairman . . . *shall* make written findings of fact and a written determination of the issues in dispute . . . . That determination *shall* be final and binding upon both parties . . .

RCW 41.56.450 (emphasis added). Furthermore, the statute cuts off the normal ability of parties to implement unilateral changes upon reaching an impasse in bargaining:

> During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment *shall not* be changed by action of either party without the consent of the other . . .

RCW 41.56.470 (emphasis added). In this case, however, the employer's proposal amounted to a demand for a contractual waiver of the statute.

Proof of Waiver -

Under Commission precedent, waiver by contract is an affirmative defense and the party asserting waiver has the burden of proof. *Lakewood School District*, Decision 755-A (PECB, 1980). "The statute which authorizes counties of the state to enter into collective bargaining agreements requires that the agreements be in writing." *State ex rel Bain v. Clallam Cy. Bd.*, 77 Wn.2d 542, 547 (1970). "In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably 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).

The Commission's approach conforms with the approach set forth by the Supreme Court in *Lynott v. National Union Fire Insurance*

Company, 123 Wn.2d 678, 684 (1994).[26] As the Commission said in *City of Wenatchee*, Decision 6517-A (PECB, 1999):

> 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 v. National Union Fire Insurance Company*, 123 Wn.2d 678, 684 (1994), 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". . . .

(footnotes omitted). In *Lynott*, the Court stated "ambiguity in the meaning of contract language need not exist before [objective] evidence of the circumstances surrounding the making of the contract could be admissible." 123 Wn.2d at 683.[27] In *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 7-9 (1997) the appeals court explained the underlying principle of *Lynott*:

> The goal of construing a contract is to determine and effectuate the parties' mutual intent. . . .
>
> When analyzing the parties' intent, *a court must examine* not only the four corners of any writing the parties may have signed, but also *the circumstances leading up to and*

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[26] *See Washington Public Power Supply System*, Decision 6058-A (PECB, 1998); *North Franklin School District*, Decision 5945-A (PECB, 1998); *Yakima County*, Decision 6594-C (PECB, 1999).

[27] Justice Guy dissented in *Lynott* at 123 Wn.2d 697-698 stating, "If . . . [a] contract is clear and unambiguous, it must be enforced as written. This court should not modify clear and unambiguous language or revise an insurance contract under the theory of construing it. *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874 . . . (1993); *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 528 . . . (1985)."

> *surrounding the writing.* As the Supreme Court said in *Berg* [*Berg v. Hudesman*, 115 Wn.2d 657 (1990)]:
>
> > [E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent. We adopt the RESTATEMENT (SECOND) OF CONTRACTS SSSS 212, 214(c) (1981). Section 212 provides:
> >
> > (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.
> >
> > . . . .
> >
> > As explained in comment b to this section:
> >
> > > *It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning* or ambiguity *should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.*
>
> *In short, "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing" must be considered when determining "the meaning of the writing, whether or not integrated."*

(emphasis added, footnotes omitted). The Court went on to cite *Berg v. Hudesman*, 115 Wn.2d 657, 663 (1990) for the propositions that, "The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties" and

"Any objective manifestation of a party's intent during negotiations must be used to interpret all contract language, even seemingly clear, unambiguous language."

In evaluating the employer proposal at issue in this case, the Examiner considers the employer's objective manifestation of its intended meaning of its written proposal during negotiation of the collective bargaining agreement. The written proposal included:

> ARTICLE XXV - MANAGEMENT RIGHTS
>
> [T]he 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. . . .

and:

> 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.

Exhibit 1. The employer wrote in separate, but consistent, documents:

> 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 rescinded the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the department's rules.

Exhibits 4, 5. Thus, the documents clearly indicate an effort by the employer to avoid both bargaining and interest arbitration.

Regardless of whether the employer may have had an unexpressed *subjective* intent as to its intended meaning of its proposed language early on in the negotiations, *any subjective intent as to the employer's intended meaning became objectively manifest to the union* when an employer representative explained the employer's proposal to the union negotiating committee. The employer explained that, if its proposal was accepted, the union wouldn't "have any rights to negotiate anything that wasn't actually in the contract" during the term of the contract being negotiated. Transcript 39. In answering the union's question, the employer further objectively clarified its intended meaning:

> Q. [By Mr. Cline] Do you recall the Guild at any point . . . raising a hypothetical about how broad the County's right to make changes might be?
>
> A. [By Mr. Childers] Yes. Our attorney asked specifically, Do you mean to say that the County could even take away the deputies' patrol cars just with a rule? And the County's attorney said, Yes, that's exactly what we mean. It's not covered in the contract, and the County can take that away.
>
> Q. What was your understanding of how they would be able to take that away? I mean what was the mechanism for doing that?
>
> A. Simply by implementing a Rule of Operation.

Transcript 40. That exchange would have met the test stated in *City of Yakima*, Decision 3564-A (PECB, 1991), where the Commission

wrote, "In order to show a waiver, the employer would have to demonstrate that the union also understood . . . what was intended when it accepted the language relied upon by the employer." The employer would have clearly explained its intended meaning to the union;[28] if the proposal had been accepted by the union, the employer could clearly have demonstrated that "the union also understood . . . what was intended by the language." The proposed language is reasonably interpreted in the manner intended by the employer; the intended meaning is consistent with the plain and ordinary meaning of the words used in the proposed language.[29]

Having heard the objective manifestation of the employer's intent, the union was entitled to accept and act upon the proposed language as it was intended by the employer: The union acted by initiating this unfair labor practice proceeding. Similarly, the Examiner accepts and acts on the meaning of the proposed language per the intent explained by the employer's representatives in bargaining: The employer's proposal means, "If [any working condition is] not covered in the contract," the employer may unilaterally implement any change it wants during the term of the contract by simply adopting or amending a rule to that effect.

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[28] Applying the balancing test, the Commission has held the use of police cars for commuting is a mandatory subject of bargaining. *Pierce County*, Decision 1710 (PECB, 1983); *City of Brier*, Decision 5089-A (PECB, 1995).

[29] Absent such manifest intent, the Commission might not interpret such broad, nonspecific language as a waiver. *See Yakima County*, Decision 6594-C (PECB, 1999); *King County Fire District 11*, Decision 4538-A (PECB, 1994). However, in *Community Transit*, Decision 6375 (PECB, 1998), an Examiner found the history of negotiations and application of similar language sufficient to conclude the union had waived the employer's obligation to bargain concerning rule adoption.

The only qualifier on the employer's proposed right to adopt rules was that the rules be "reasonable" in the eyes of an arbitrator acting under the grievance arbitration provisions of the contract. Irrespective of Commission precedents on "waiver" of bargaining rights, it is likely that the question would never get before the Commission because of the Commission's deferral policy set forth in WAC 391-45-110(3). An arbitrator processing a grievance might reasonably interpret the employer's language broadly even without the objective evidence of the employer's intent as,

> Frequently, the claim of privilege is predicated, at least in part, on the presence of a generalized management prerogative clause . . . Many arbitrators . . . consider it improper for arbitrators to apply the statutory principles developed by the Board [and Commission]. . . . Some arbitrators apply the so called "residual rights" theory where management takes unilateral action, holding that management is free to act unless the collective bargaining agreement expressly prohibits the challenged conduct.

Former NLRB General Counsel Arnold Ordman quoted in *Elkouri, How Arbitration Works*, Fifth Edition (BNA Books, 1997) at 674. Such a sequence of events would constitute a major variance from the process of bilateral negotiation, mediation, and interest arbitration that is contemplated by the statute.[30]

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[30] During the term of a collective bargaining agreement, a "unilateral change" unfair labor practice would often be deferred by the Commission to allow a grievance arbitrator to interpret the agreement as possibly permitting a particular act. In such case, "the contract interpretation made in the contractual proceedings shall be considered binding, *except* where . . . The contractual procedures have reached a result which is repugnant to the purposes and policies of the applicable collective bargaining statute" as might be the case in the sequence of events illustrated in part by former NLRB General Counsel Ordman. WAC 391-45-110(3) (emphasis added).

Illegal Subject of Bargaining -

RCW 41.56.470 provides, "During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other . . ." Under the employer's proposal, however, it would be able to change existing wages, hours, and working condition not covered by the parties' collective bargaining agreement. Rather than entitlement to notice and good faith bargaining before a decision was made, "The Guild [would then] . . . be allowed not less than thirty (30) days in which to make known any objection they may have concerning such rules . . ." Rather than submitting any differences to mediation and to an impartial interest arbitration process, the employer could implement any change by the adoption of a rule. As intended by the employer and clearly explained to the union, the employer's proposed contract language means that the employer could unilaterally change *every* working condition not specified elsewhere in its proposed collective bargaining agreement. The potential for changes would have had few limits.[31]

The circumvention of RCW 41.56.440 - .492 proposed by the employer would have nullified the "effective and adequate . . . means of settling disputes" specified by the legislature to promote "the uninterrupted and dedicated service" of the uniformed personnel in the bargaining unit represented by the union. The resulting risk to "the welfare and public safety of the state of Washington" was contrary to public policy, just as would have been a union proposal

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[31] The expired collective bargaining agreement contains only 27 pages and does not specify many conditions of employment, including the use of patrol cars referenced in testimony. Any unspecified working condition might be changed multiple times during the term of the agreement.

to evade the strictures of the interest arbitration process and/or to open the door to a strike.

Illegal subjects of bargaining are matters which neither the employer nor the union have the authority to negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes or court decisions. *City of Seattle*, Decision 4687-B (PECB, 1997). Illegal subjects may not be proposed at any time. *See King County Fire District*, Decision 4538-A (PECB, 1994); *City of Richland*, Decision 2486-A (PECB, 1986).

Because of the virtually limitless unilateral changes in working conditions it would permit during the term of the parties' collective bargaining agreement, the Examiner concludes that the employer's proposal regarding rules of operation was overly broad and in conflict with the interest arbitration process set forth in RCW 41.56.440 - .492.[32] If the union had made or agreed to the same proposal, that agreement would also have contravened RCW 41.56.440 - .492. The proposal was, therefore, an illegal subject of bargaining. The employer thus violated RCW 41.56.140(4) and, derivatively, RCW 41.56.140(1) by proposing and insisting to impasse an illegal subject of bargaining.

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[32] Even if applied prior to imposing a change of working conditions, the proposed procedure is at substantial variance from that required by RCW 41.56.440 - .490. Variances include (1) divesting the arbitrator of his/her statutory authority to impose an appropriate condition of employment, after considering the statutory factors included in RCW 41.56.465, and (2) divesting the Commission of its legislated duty to provide mediation of any impasse and pre-arbitral adjudication of whether any proposal is a mandatory subject of bargaining if requested by a party prior to interest arbitration. *See* RCW 41.56.440, .450 and WAC 391-45-550, 391-55-265.

REMEDY

The customary remedy for a refusal to engage in collective bargaining and derivative interference violation is to require the posting of notice to employees, and public reading of that notice. The Examiner so orders.

The interest arbitration on the employer's proposal was suspended under WAC 391-55-265(2)(a), which provides:

> If it is concluded that the suspended issue or issues was/were unlawfully advanced or affected by unlawful conduct, the issue or issues shall be stricken from the certification under WAC 391-55-200, and the party advancing the proposal shall only be permitted to advance such modified proposals as are in compliance with the remedial order in the unfair labor practice proceedings.

The employer will thus be required to withdraw the proposals that it unlawfully advanced in interest arbitration, including both Article 15, Rules of Operation, and the sentence in Article 25 Management Rights, which reads, "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."[33]

Under WAC 391-55-265(2)(b), a party that successfully defends its proposal in an unfair labor practice proceeding is entitled to pursue that proposal in interest arbitration. The rule provides,

> If it is concluded that the suspended issue or issues was/were lawfully advanced, the suspension under this

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[33] The parties voluntarily suspended the "management rights" issue from their interest arbitration in Case 15395-I-00-00347, and it was not addressed in the decision issued by Arbitrator Sandra Smith Gangle in 2001.

> section shall be terminated and the issue or issues shall be remanded to the interest arbitration panel for ruling on the merits.

Under the foregoing analysis, this employer lawfully advanced its proposal on Article 26, Indemnification, to interest arbitration, and there is no further impediment to submission of that issue to interest arbitration.

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. A collective bargaining agreement between the union and the employer was in effect from January 1, 1997, through December 31, 1999, covering wages, hours, and working conditions of bargaining unit employees. The parties opened negotiations for a successor contract in 1999.

4. The agreement described in paragraph 3 of these findings of fact had included, as Article XXVI, provisions concerning indemnity and holding employees harmless for damages arising out of their activities within the scope of their employment. On September 10, 1999, the union proposed changes to Article XXVI.

5. The agreement described in paragraph 3 of these findings of fact had included, as Article XV, provisions concerning rules of operation. On October 26, 1999, the employer proposed opening that article 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 had initiated unfair labor practice proceedings before the Commission, naming the employer as respondent.

7. In a mediation session held on March 6, 2000, the employer provided the union with two written proposals. In both of those proposals, the employer proposed that the contract language concerning rules of operation be changed to read as follows:

> 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 rescinded the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the department's rules.
>
> . . . .
>
> ARTICLE XXV - MANAGEMENT RIGHTS
>
> [T]he 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 employer's intended meaning of that proposed language was manifested by face-to-face discussions between the parties, and was that if any condition of employment was not covered in the proposed contract, the employer could unilaterally implement any change it desired during the term of the proposed agreement by adopting or amending a rule to that effect. The union did not agree to the employer's proposal.

8. Although the proposals advanced by the employer on March 6, 2000, as described in paragraph 7 of these findings of fact were labeled at that time as "what if" proposals, the employer continued to pursue those proposals thereafter.

9. In a mediation session held on July 20, 2000, the employer gave the union a written "what if" proposal that included the union's withdrawal of a pending unfair labor practice complaint. Although the union did not accept that proposal, other issues remained in dispute between the parties at that time.

10. The parties reached an impasse in mediation, and the mediator requested lists of issues from the parties under WAC 391-55-200. Responding to the mediator's request, the employer

pursued its proposals as described in paragraph 7 of these findings of fact but did not pursue the "what if" proposal described in paragraph 9 of these findings of fact.

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

12. The employer routinely provides an annual in-service training program for employees in the bargaining unit represented by the union, at which a variety of topics are addressed. Unrelated to the collective bargaining process which was ongoing between the employer and union, the employee planning the in-service training program for 2001 arranged for Deputy Prosecutor Randy Watts to provide 15 to 30 minutes of training out of an agenda covering approximately 40 hours.

13. 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 denigrated the union.

14. 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.

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 proposal concerning rules of operation, as described in paragraph 7 the forgoing findings of fact, is in contravention of the interest arbitration procedure set forth in RCW 41.56.430 - .492, and is an illegal subject of bargaining under RCW 41.56.030(4) and Commission and judicial precedents interpreting that statute.

5. By proposing and insisting to impasse on its proposal concerning rules of operation, as described in paragraphs 7, 8, 10, and 11 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).

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 insisting to impasse on any demand that the union agree to any alternative to the statutory impasse procedure for uniformed personnel contained in RCW 41.56.440 - .492.

(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 the language regarding adopting rules proposed on and after March 6, 2000, from employer proposals for a collective bargaining agreement 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, on this 13th day of February, 2003.

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.

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 Article XV of our proposed collective bargaining agreement with the union:

> 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 arbitrator decides that the rules is not reasonable, he/she may as an exclusive remedy order the employer to rescinded the rule and restore the status quo ante. The arbitrator shall have no authority to otherwise alter or modify the department's rules.

WE WILL remove the following language from Article XXV of the contract:

> 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. . . .

WE WILL NOT refuse to bargain in good faith with the Whatcom County Deputy Sheriff's Guild by demanding any alternative procedure for impasse resolution for uniformed personnel mandated by RCW 41.56.440 - .492.

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.