City of Wenatchee, Decision 8898 (PECB, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WENATCHEE POLICE GUILD,	)	
	)	
Complainant,	)	CASE 16840-U-02-4396
	)	
vs.	)	DECISION 8898 - PECB
	)	
CITY OF WENATCHEE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

Cline & Associates, by *George E. Merker,* Attorney at Law, for the union.

Summit Law Group, by *Denise L. Ashbaugh,* Attorney at Law, for the employer.

On October 28, 2002, the Wenatchee Police Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union's complaint named the City of Wenatchee (employer) as respondent. The union is the exclusive bargaining representative for police officers through the rank of sergeant employed by the City of Wenatchee. Agency staff issued a preliminary ruling that the union's complaint stated a cause of action under RCW 41.56.140(1) and (4). The employer filed an answer. Examiner Joel Greene conducted a hearing on August 18, August 19, and September 15, 2004. Each party filed a post-hearing brief.

ISSUES PRESENTED

1. Did the employer unlawfully withhold civil service documents (concerning police officer recruitment) requested by the union

when the union was preparing its case for interest arbitration?

2. Did the employer engage in unlawful regressive bargaining when, prior to the certification of issues for interest arbitration, it changed its position regarding the duration of the collective bargaining agreement from two years to three years?

I hold the employer did not commit an unfair labor practice and did not violate RCW 41.56.140. The employer made a reasonable, thorough, and good faith response to the union's request for civil service documents. The employer's change in position from a two year agreement to a three year agreement, prior to the certification of the issues for interest arbitration, was not unlawful; the employer's change in position was neither bad faith nor regressive bargaining.

ANALYSIS

Issue 1: Production of civil service documents

Legal principles

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs the relationship between the union and the employer. RCW 41.56.030(4) defines "collective bargaining" and requires the parties to "to meet at reasonable times, to confer and negotiate in good faith."

The Commission has repeatedly held that the parties' duty to bargain in good faith "includes a duty to provide relevant,

necessary information requested by the opposite party to a collective bargaining relationship for the proper performance of its duties in the collective bargaining process. . . . The duty to provide information turns on the circumstances of a particular case." *King County*, Decision 6994-B (PECB, 2002) (numerous citations omitted).

The Commission has also held that the good faith bargaining obligation requires each party to negotiate and attempt to find a resolution when disagreements arise over the production of information:

> The party receiving an information request has a duty to explain any confusion about, or objection to, the request and then negotiate with the other party toward a resolution satisfactory to both. . . . This is consistent with viewing the duty to provide information as part of an ongoing and continuous obligation to bargain.

King County (citations omitted).

In analyzing a claim that a party committed an unfair labor practice, "[t]he Examiner's task . . . is to determine whether the employer's conduct fell below the standard of 'good faith' that is imposed on both sides of the bargaining table. The Commission looks to the 'totality of the circumstances' in determining whether a party has engaged in unlawful bargaining tactics." *City of Wenatchee*, Decision 8028 (PECB, 2003) (citing *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988)).

The duty to bargain in good faith and to provide information needed by the opposite party to properly perform its responsibilities in the collective bargaining process continues during the interest

arbitration process. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, 119 Wn.2d 373 (1992).

"The Commission has ruled that even though an employer claims that supplying requested information would be difficult, it must explain its concerns to the union and make a good faith effort to reach a resolution that would satisfy its concerns and yet provide maximum information to the union." *Spokane County*, Decision 8154 (PECB, 2003) (citing *State of Washington*, Decision 4710 (PECB, 1994)).

Conversely, an employer that agreed to "provide relevant information" and "continued to provide both requested information and explanation of its concerns and/or inability to supply some information in the form requested" acted in good faith and met its obligation under the collective bargaining laws. *City of Anacortes*, Decision 7768 (PECB, 2002).

Last, the complaining party carries the burden of proof by a preponderance of the evidence that an unfair labor practice was committed. *Whatcom County*, Decision 7244-B (PECB, 2004); *City of Tacoma*, Decision 6793-A (PECB, 2000); WAC 391-45-270(1)(a).

Analysis

Facts. The union and the employer were parties to a collective bargaining agreement that covered the time period from January 1, 2000, through December 31, 2000. In the fall of 2000, just prior to expiration of the contract, the parties began negotiations for a successor agreement. After almost two years of negotiations, the parties were unable to reach an agreement. In March 2002, the agency certified the unresolved issues for interest arbitration. The arbitrator scheduled the interest arbitration hearing for September 17-19, 2002.

The union's first unfair labor practice charge in this case derives from an information request the union made to the employer as the union prepared for the arbitration hearing. Attorney James Cline represented the union. Cline's office faxed the union's information request to the employer in the afternoon of Friday, April 9, 2002 - just under five and a half weeks before the arbitration hearing was scheduled to begin. The union's request was extensive and contained twenty-six separate categories of documents.

One of the union's twenty-six requests, Request 15, sought twenty years of historical civil service records (bracketed date added):

> 15. For both police officers and firefighters from the period of 1982 to the present [2002], all civil service records indicating for entry level testing the number of application packets requested, the number of applicants sitting for the test, the number of applicants passing the test, and the civil service register as a result of the test, and in the event that there were multiple test parts for a given testing cycle, please provide the breakouts for the number of applicants at each testing level;

The union wanted the documents in Request 15 to attempt to prove to the arbitrator that the employer had difficulty recruiting and retaining qualified police officers because the employer did not pay its police officers competitive benefits and wages.

Sandra Smeller, the employer's Human Resource Director, was responsible for organizing the employer's response to the union's document production request. Smeller wrote Cline on the first business day following the employer's receipt of the union's request. Smeller confirmed the employer would produce documents in response to the information request on the date Cline requested, August 29, 2002 - approximately two and a half weeks before the arbitration hearing was scheduled to begin.

On August 29, 2002, the employer produced thousands of pages of documents for Cline and union president Robert Smet to review and copy. The union left the document production meeting with approximately 3,000 pages of documents. The employer apparently produced only a few documents in response to Request 15 for civil service documents.

At the August 29, 2002, document production meeting, Smeller advised Cline and Smet that the employer did not have control over or access to documents maintained by the Civil Service Commission. To facilitate the union's obtaining the documents it wanted, Smeller provided Cline and Smet with contact information for Bill Huffman, the Civil Service Examiner who was responsible for maintaining the civil service records. Smeller suggested the union contact Huffman while Cline was in Wenatchee and make arrangements to review the civil service documents that same day.

The union representatives were disturbed and angry that the employer did not produce the civil service documents the union requested. This dispute over the employer's production of civil service documents forms the basis for the union's unfair labor practice charge in this case.

At the hearing, the following facts about the Civil Service Commission and its documents were elicited through Smeller's testimony:

- the Civil Service Commission maintains its records in four locked filing cabinets in a closet in the city council chamber;
- no one in the city, except Huffman and the three Civil Service Commissioners, has a key to the filing cabinets or access to the Commission's records;

- Huffman works for the Commission, not for the city;
- the employer does not have possession, maintenance, or control over Commission documents;
- absent a court order, Smeller could not access the Commission's documents; and
- the reason Smeller suggested the union contact Huffman was because he was the document source and only he could ensure the union would obtain the complete and accurate information it needed.

The employer repeatedly and consistently did everything it could to respond to the union's lawful, but problematic, information request. For example, Smeller:

- arranged for herself and the employer's Finance Director to be available to answer questions when Cline and Smet were inspecting the documents the employer produced;
- when questions arose regarding Request 15, gave Huffman's contact information to the union and suggested the union contact Huffman the same day the union was inspecting the documents the employer produced;
- contacted Huffman directly, by leaving two voice mail messages and sending one e-mail message, alerting him the union would be contacting him and asking him to assemble the documents;
- provided Huffman with the exact wording of Request 15 so he would know precisely what the union was seeking;
- contacted Huffman's supervisor, the chair of the Civil Service Commission;
- asked Huffman if she could examine and review the Commission's documents - Huffman refused;

- forwarded information from Huffman to the union the same day Huffman provided it;
- called, sent e-mails, and spoke with the record keepers (the administrative assistants) in the police and fire departments in an attempt to locate any civil service documents in the city's possession that were responsive to the union's request;
- provided the administrative assistants with the exact wording of Request 15 so they would know precisely what the union was seeking; and
- forwarded information to the union the same day the police department administrative assistant provided it.

As the party receiving the information request, the employer explained the difficulties it encountered in responding the request. In response, the union simply asserted, and continues to assert, the employer was responsible for producing the civil service documents. The union did not contact Huffman until December 2002, over two months after the arbitration hearing. At no time did the union negotiate with the employer regarding alternative ways the disagreement might be resolved.

Application of the law to the facts. The union did not sustain its burden of proving the employer's response to Request 15 for civil service documents was anything other than good faith conduct. As described in *King County*, the employer's actions acknowledged the union had a right to the civil service information to enable the union to perform its duties in the collective bargaining process; the employer never asserted the union did not have a right to the information.

As described in *Spokane County* and *City of Anacortes*, the City of Wenatchee explained its concerns, provided the maximum information

it could, and made a good faith effort to provide the requested information. Smeller displayed an admirable effort and a continuing course of conduct to try to resolve the disagreement and to respond to the union's lawful, but problematic, information request.

Civil service commissions have a unique relationship to cities and are qualitatively different than divisions within city government. Chapter 41.12 RCW requires the creation of civil service commissions for city police officers in cities that meet statutorily specified criteria. The purpose of civil service commissions is to replace spoil systems with merit systems for hiring, promoting, disciplining, and discharging police officers. *City of Yakima v. International Ass'n of Fire Fighters*, 117 Wn.2d 655 (1991). Through Chapter 41.12 RCW, the legislature established a system where civil service commissions are independent from cities where they operate. Because civil service commissions are independent legislatively created bodies, cities can not abolish them, override their decisions, tell them what to do, or invade their documents. Unlike a division within city government, the employer in this case did not have control over Commission documents and had no authority to compel the Commission to produce the documents requested by the union.

When the employer informed the union it could not produce civil service documents, the union was incredulous. The union characterized the employer's conduct in extremely harsh terms. For example, the union has stated its belief that the employer: lied, withheld documents, edited the documents it gave the union, stonewalled, misrepresented its actions, played games, flip flopped, sought to manipulate documents to win an advantage, acted cavalierly, and refused to furnish documents. While I understand the union's frustration and disappointment it did not receive the information it considered necessary to present part of its case in the interest

arbitration hearing, the evidence does not support the union's characterization of the employer's conduct.

The primary evidence the union presented to support the union's belief that the employer lied and refused to furnish documents was testimony about three separate incidents where the employer belatedly discovered and produced additional documents.

The first incident occurred when the new police chief first learned of the information request at the arbitration hearing. The chief remembered seeing some prior year's civil service eligibility lists left in his desk by the previous police chief. The documents were misfiled because they should have been filed in the police department's central filing system. When the police department administrative assistant responded to the information request, she looked in central files and in several boxes left by her predecessor; she did not look in the chief's desk. The employer immediately disclosed the documents and gave them to the union.

The second incident occurred after the arbitration hearing when the administrative assistant to the chief of police was looking for documents in an unrelated matter. The administrative assistant found some old civil service rosters in a box that had been labeled budget information. The employer immediately gave the documents to the union.

The third incident occurred when the employer discovered two bankers boxes of civil service personnel records in a locked closet in the old police parking garage under city hall. The finance department stored its payroll and accounting documents in the closet. When an electrical repair necessitated moving the contents of the closet, the city's Assistant Finance Director noticed two boxes labeled as civil service personnel files. The employer immediately notified Huffman, and Smeller again asked to examine

the documents. Huffman again denied the employer's request to examine the documents. The employer again provided Huffman with the exact wording of Request 15 so he would know precisely what the union was seeking. It appears these personnel files were not ultimately responsive to the union's request.

The union produced no evidence that any of these three incidents represent anything other than a good faith mistake. The record contains no evidence that the employer's late production of these documents prejudiced the union or that any of the documents belatedly discovered turned out to be important to the union's case.

The three incidents were bizarre, unusual, unfortunate, and regrettable. Regarding the first incident, the administrative assistant testified that she believed all the relevant documents were in central files or in several boxes left by her predecessor. With hindsight, she should have been more thorough and should have looked in the chief's office. The evidence indicates she made a good faith mistake - she did not lie or refuse to furnish documents. The second and third incidents illustrate sloppy document filing and labeling practices, not lying or refusing to furnish documents.

Although the union was justifiably upset by these three incidents, they also provide further evidence of the employer's good faith efforts to respond to the union's information request. In each situation, the employer immediately disclosed the documents and produced them to the union. If the employer was playing games or refusing to furnish documents, as the union alleges, the employer would have kept the documents secret. The employer's pattern of immediately disclosing and producing belatedly discovered documents further illustrates the employer was making a good faith effort to respond to the union's request.

Conclusion

In light of all the evidence, and judged by the totality of the circumstances, I find the employer acted in good faith. The employer did not have possession, maintenance, or control over the civil service documents sought by the union in Request 15.

Even though the employer had absolutely no control over the documents, Smeller did virtually everything she could to force Huffman to respond to the union's request, to find any responsive documents in the city's possession, and to respond to the union's request. When new documents were belatedly discovered, the employer immediately disclosed and provided the documents to the union. The employer's response to the union's request for documents was lawful, reasonable, and thorough.

On the other hand, the union simply demanded the employer produce the documents. The union declined to negotiate an alternative resolution to the problem. The union declined to contact Huffman, the person responsible for maintenance of the documents, until over two months after the arbitration hearing. The union's intransigent position, not the employer's bad faith, triggered the dispute that led the union to file this unfair labor practice charge.

Issue 2: Regressive bargaining regarding duration of the agreement

Legal principles

As described above, RCW 41.56.030(4) obligates public employers and unions to meet at reasonable times and to negotiate in "good faith." A party who negotiates in bad faith commits an unfair labor practice. RCW 41.56.140; RCW 41.56.150.

"In determining whether a party has engaged in unlawful bargaining tactics, the 'totality of circumstances' must be analyzed. . . . In other words, the complaining party must prove the respondent's total bargaining conduct demonstrated a failure or refusal to bargain in good faith." *City of Puyallup*, Decision 6674 (PECB, 1999).

Regressive bargaining constitutes a type of unlawful bad faith bargaining. Regressive bargaining occurs when one party attempts to take "punitive measures" and evidences an "intent to frustrate and disrupt the collective bargaining process." *Columbia County*, Decision 2322 (PECB, 1985).

A party who makes an unconditional offer can not diminish that offer unless "intervening circumstances . . . justify the change in position." *Asotin County*, Decision 4568-C (PECB 1996). Conversely, absent intervening circumstances, a change in an unconditional offer is regressive bargaining.

Analysis

Facts. As described above, the union and the employer were parties to a one-year collective bargaining agreement that expired December 31, 2000. In the fall of 2000, the parties began negotiating a successor agreement. The employer's initial proposals were for a two year agreement. The union's initial proposals were for a one year agreement. Smet testified the employer proposed a two year agreement until the case reached interest arbitration.

Attorney Annette Sandberg represented the employer during the negotiations prior to the interest arbitration proceedings. Sandberg testified that she had several conversations in January 2002 with Cline, the attorney who represented the union. These conversations took place several months before the issues were

certified for interest arbitration and nine months before the arbitration hearing.

Sandberg testified the employer changed its position from a two year contract to a three year contract. The employer was concerned that by the time the arbitrator issued her decision, a two year contract would have expired and the parties would be back in negotiations. The employer wanted a three year contract to obtain a break from continuous negotiations. The union did not agree to a three year contract.

Absent rebuttal evidence, I find Sandberg's testimony more credible than Smet's. As lead negotiator for the employer, Sandberg was closer to the negotiations and in a better position to know the details of each party's offers and counter-offers.

In March 2002, several months after Sandberg discussed a three year contract with the Cline, the parties submitted and the agency certified issues for interest arbitration. The agency certified the term of the agreement as one of the open issues. The arbitrator held the hearing in September 2002.

The arbitrator issued her decision in January 2003 and awarded a three year contract. The arbitrator agreed with the employer's request for a break from continuous negotiations. The arbitrator stated that even a three year agreement allowed the parties to have only a few months respite before returning to start negotiating a new contract that would commence as of January 1, 2004.

Application of the law to the facts. The union did not sustain its burden of proving the employer's change in position regarding the duration of the contract was anything other than good faith bargaining. Neither the union nor the employer presented any evidence about other issues that were unresolved at the time the

employer changed its position on one issue, contract duration. The union did not present any evidence regarding whether the employer's change of position was detrimental to the negotiations or affected the negotiations in any way. The employer did not present any evidence regarding whether the employer's change of position enhanced the negotiations. In sum, the parties discussed and negotiated the employer's change of position regarding the duration of the contract but presented no evidence about how the employer's change of position affected the bargain.

Depending on the totality of the circumstances, a change in position regarding contract duration may evidence either good faith or bad faith conduct. The only evidence in the record is repeated testimony the employer changed its position regarding duration of the contract for one reason only: to obtain a break from continuous negotiations after the parties received the final decision in the interest arbitration case. As described in *City of Puyallup,* the union did not prove the employer's "total bargaining conduct demonstrated a failure or refusal to bargain in good faith."

The union did not prove the employer engaged in regressive bargaining. As described in *Columbia County*, the union provided no evidence that the employer changed its position as a "punitive measure" or to "frustrate and disrupt the collective bargaining process."

Conclusion

In light of the lack of evidence, and judged by the totality of the specific circumstances in this case, I find the employer did not engage in bad faith or regressive bargaining. Intervening circumstances - the length of time the parties spent negotiating after the one year contract expired and the anticipated length of time for the interest arbitration process to be commenced and

completed - justify the employer's change in position from a two year contract to a three year contract. The employer's request for a break from continuous negotiations further justifies the employer's change in position.

FINDINGS OF FACT

1. The City of Wenatchee is a public employer within the meaning of RCW 41.56.030(1).

2. The Wenatchee Police Guild is a bargaining representative within the meaning of RCW 41.56.030(3). The union represents police officers through the rank of sergeant employed by the City of Wenatchee.

3. The union and the employer were parties to a collective bargaining agreement that covered the time period from January 1, 2000, through December 31, 2000. In the fall of 2000, just prior to expiration of the contract, the parties began negotiations for a successor agreement.

4. After almost two years of negotiations, the partes were unable to reach an agreement. The case proceeded to interest arbitration.

5. In preparation for the interest arbitration hearing, the union made an extensive information request to the employer. One of the union's twenty-six requests, Request 15, sought twenty years of historical civil service records. The union wanted the documents in Request 15 to attempt to prove to the arbitrator that the employer had difficulty recruiting and retaining qualified police officers because the employer did not pay its police officers competitive benefits and wages.

6. At the August 29, 2002, document production meeting, a dispute arose regarding the employer's response to Request 15 and the employer's production of the civil service documents.

7. Civil service commissions are independent legislatively created bodies. The City of Wenatchee did not have control over Commission documents and had no authority to compel the Commission to produce the documents requested by the union.

8. The employer advised the union that the employer did not have control over or access to documents maintained by the Civil Service Commission. To facilitate the union's obtaining the documents it wanted, the employer provided the union with contact information for the Civil Service Examiner, who was responsible for maintaining the civil service records. The employer suggested the union contact the Civil Service Examiner while the union's attorney was in Wenatchee and make arrangements to review the civil service documents that same day.

9. The Civil Service Commission maintains its records in four locked filing cabinets in a closet in the city council chamber. No one in the city, except the Civil Service Examiner and the three Civil Service Commissioners, has a key to the filing cabinets or access to the Commission's records. The Civil Service Examiner works for the Commission, not for the city. Absent a court order, the employer could not access the Commission's documents.

10. The union did not contact the Civil Service Examiner until December 2002, over two months after the arbitration hearing. At no time did the union negotiate with the employer regarding alternative ways the union might obtain the requested information.

11. The employer did not have possession, maintenance, or control over the civil service documents sought by the union in Request 15. Even though the employer had absolutely no control over the documents, the employer did virtually everything it could to force the Civil Service Examiner to respond to the union's request, to find any responsive documents in the city's possession, and to respond to the union's request. The employer displayed an admirable effort and a continuing course of conduct to try to resolve the disagreement and to respond to the union's request for documents.

12. During the negotiations for a successor contract, the employer's initial proposals were for a two year contract. The union's initial proposals were for a one year contract.

13. Annette Sandberg, an attorney, was the lead negotiator for the employer during negotiations prior to the interest arbitration proceedings. I credit Sandberg's testimony that she had several conversations with the attorney who was the lead negotiator for the union. These conversations took place in January 2002, several months before the issues were certified for interest arbitration and nine months before the arbitration hearing. In these conversations, the employer changed its position and discussed a three year contract with the union.

14. Neither the union nor the employer presented any evidence about other issues that were unresolved at the time the employer changed its position on one issue, contract duration. The union did not present any evidence regarding whether the employer's change of position was detrimental to the negotiations or affected the negotiations in any way. The parties discussed and negotiated the employer's change of position

regarding the duration of the contract. No evidence was presented about how the employer's change of position affected the bargain.

15. The employer changed its position regarding duration of the contract for one reason only: to obtain a break from continuous negotiations after the parties received the final decision in the interest arbitration case. Intervening circumstances - the length of time the parties spent negotiating after the one year contract expired and the anticipated length of time for the interest arbitration process to be commenced and completed - justify the employer's change in position from a two year contract to a three year contract. The employer's request for a break from continuous negotiations further justifies the employer's change in position.

16. The union did not prove the employer's total bargaining conduct demonstrated a failure or refusal to bargain in good faith.

17. The union did not prove the employer engaged in regressive bargaining.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this case pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The City of Wenatchee did not commit an unfair labor practice and did not violate RCW 41.56.140(1) and (4) when it responded to the union's request for civil service documents.

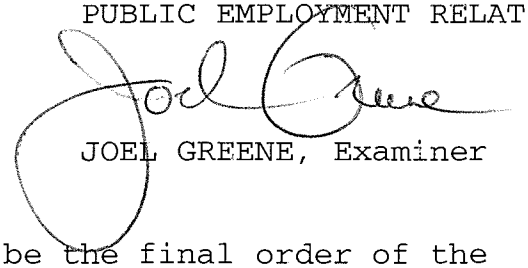
3. The City of Wenatchee did not commit an unfair labor practice and did not violate RCW 41.56.140(1) and (4) when it changed its position regarding the duration of the collective bargaining agreement from two years to three years.

ORDER

I DISMISS the Wenatchee Police Guild's complaint charging the City of Wenatchee committed unfair labor practices in this case.

Issued at Olympia, Washington, on the 28th day of March, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JOEL GREENE, 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.