STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WENATCHEE POLICE GUILD, Complainant,	)	CASE 16840-U-02-4396
vs.	)	DECISION 8898-A -PECB
CITY OF WENATCHEE, Respondent.	)	DECISION OF COMMISSION

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.

This case comes before the Commission on an appeal filed by the Wenatchee Police Guild (union), seeking to overturn certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene.[1] The City of Wenatchee (employer) supports the Examiner's decision.

The union filed its complaint on October 28, 2002, alleging that the employer unlawfully withheld civil service documents requested by the union in preparation for interest arbitration, and regressively bargained when it changed its position on contract duration just prior to certification for interest arbitration. The complaint was reviewed under WAC 391-45-110, and a preliminary ruling forwarded interference and refusal to bargain causes of action under RCW 41.56.140(1) and (4) for hearing. The Examiner

[1] *City of Wenatchee,* Decision 8898 (PECB, 2005)

held a hearing on August 18, 19 and September 15, 2004, and dismissed the union's complaint on March 28, 2004. The union filed a timely appeal.

ISSUES PRESENTED

1. Did the employer have the authority, absent a court order, to compel the Civil Service Commission to produce the documents requested by the union?

2. Failing that, was the employer obligated under the collective bargaining statute to ask the Civil Service Commission directly for the documents?

3. Did the employer engage in regressive bargaining when it changed its position on the duration of the agreement?

We affirm the Examiner's determination that the employer did not unlawfully withhold civil service documents requested by the union to prepare for interest arbitration. We also affirm the Examiner's determination that the employer did not engage in regressive bargaining when it changed its position regarding the duration of the collective bargaining agreement from two years to three years.

Standard of Review

This commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings under Chapter 391-45 WAC. Rather, we review the findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and order. *Cowlitz County,* Decision 7007-A (PECB, 2000). Substantial evidence exists if the record contains competent, relevant, and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged

findings. *Ballinger v. Department of Social and Health Services,* 104 Wn. 2d 323 (1985). The Commission attaches considerable weight to the factual findings and inferences made by its examiners. *Brinnon School District,* Decision 7210-A (PECB, 2001).

ISSUE 1 and 2 - Did the Employer Properly Disclose Information?

Applicable Legal Standard

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs the relationship between these parties. RCW 41.56.030(4) defines "collective bargaining" as follows:

> [T]he performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit . . . .

Under both federal and state law, the duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967); *City of Bellevue,* Decision 3085-A (PECB, 1989), *aff'd, City of Bellevue v. International Association of Fire Fighters, Local 1604,* 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information necessary to the administration of the collective bargaining agreement. *King County,* Decision 6772-A (PECB, 1999).

This Commission embraced the court's and the National Labor Relations Board's "discovery-type" standard to determine whether

the requested information is relevant to the collective bargaining process. *See King County*, Decision 6772-A. However, we have yet to fully answer the question of what steps a party must take to procure important and relevant collective bargaining information that may or may not be in its own control, but nevertheless has been requested.

The Information Must be Relevant

In cases that present this question, the first step is to determine whether or not the requested information is important and relevant to the collective bargaining process under the standards set forth in *King County*, Decision 6772. If the information requested is not relevant, then the analysis ends. If the requested information is relevant, the analysis continues.

Duty to Procure Information

Commission precedents firmly establish that a party must turn over important and relevant collective bargaining information that is in control of that entity. *City of Bellevue*, Decision 3085-A; *King County*, Decision 6772. Any important and relevant information that is solely in the possession of a party must be turned over, upon request, and failure to do so is an unfair labor practice. Situations may arise, however, where the requested information is not the type of information ordinarily kept in the possession of the party participating in the collective bargaining process.

A party who receives such request for information that is not solely within its control, and is otherwise reasonably available to the requesting party, may direct the requesting party to the party holding that information. If the requesting party does not have the legal ability to get the information from the third party, or is being rebuffed by the third party in its efforts to procure the

information, the party upon which the request is made may have a duty to assist the requesting party in the procurement of the information.[2]

Application of Standard

Neither party disputes the fact that the requested information was important and relevant to the collective bargaining process, and this record supports the Examiner's determination that the Civil Service Commission established under Chapter 41.12 RCW is a separate entity from the City of Wenatchee. We therefore are only called upon to answer the question of the employer's duty to collect the information requested by the union.

It is undisputed that Civil Service Examiner Bill Huffman was the custodian for the majority of the civil service documents requested by the union, and upon receipt of the union's information request the employer directed the union to the Civil Service Examiner. While the employer may not have directly controlled the Civil Service Commission in this case, "the Legislature did not intend the procedures of Chapter 41.14 RCW[3] to supplant Chapter 41.56 RCW, and that the latter statute should prevail." *City of Yakima*, Decision 3503-A (PECB, 1990). The Human Resource Director acknowledged that she had no direct involvement in the civil service process.

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[2] The duty to provide information under state collective bargaining laws differs from the obligation to provide information under the Public Records Act, Chapter 42.56 RCW, and a party's collective bargaining obligations may require disclosure of some information that would otherwise be protected under Chapter 42.56 RCW.

[3] Chapter 41.14 RCW establishes a civil service system for county sheriff employees. That statute is similar to applicable chapter in this case, Chapter 41.12 RCW, which established a civil service system for city police.

Human Resources Director Sandra Smeller correctly assumed her collective bargaining duty to provide information was fulfilled if she referred the union to the Civil Service Examiner for those documents not created or ordinarily maintained by the employer. Thus, if the union made a direct request to the Civil Service Examiner for the civil service documents as instructed by the employer, this *may* have produced the documents by the August 29 meeting with the union. If the union had been rebuffed by the Civil Service Examiner in its attempts to procure the requested information, the employer's collective bargaining duty would then include assisting the union in gathering the information. That duty would be satisfied by making a reasonable effort to assist the union in procuring the information, including making a good faith effort to review its own files for the requested information.

Here, the union failed to act on the employer's suggestion to contact the Civil Service Examiner directly about the information until approximately two and a half months after presentation of the interest arbitration case. That failure to contact the Civil Service Examiner directly constitutes a waiver by inaction, and the union waived its right to allege that the employer failed to bargaining in good faith by not providing collective bargaining information.[4] *See, e.g. City of Anacortes*, Decision 6830-A (PECB, 1999)(discussing waiver by inaction).

Additionally, although the Human Resource Director failed to immediately direct the union to the entity possessing the information, that failure was not in bad faith, and the totality of the circumstances in this case do not warrant finding a violation.

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[4] Although the union's inaction precludes a finding that the employer violated Chapter 41.56 RCW by failing to provide information, that does not mean that it waived its right to the information.

Once the union objected to the employer's direction, the employer attempted to negotiate with the union concerning the production of documents. Labor relations by definition involves two parties, an employer and an employee representative, and both parties have statutory responsibilities in the bargaining process. The union failed to make any alternate proposal concerning access to information possessed by the Civil Service Examiner. Had the union negotiated with the employer concerning the requested information and the employer failed or refused in good faith to consider those alternatives, the result may be different.

The union also alleges that the employer's failure to provide it information prejudiced the presentation of the union's interest arbitration case. We disagree. The record does not contain any evidence that information was purposefully withheld by either the employer or the Civil Service Examiner. If the union found evidence in the Civil Service Examiner's files that would bolster its case concerning recruitment and retention, it could have requested the arbitrator reopen the interest arbitration hearing to consider that evidence before issuing the decision.

Regarding the information discovered in early 2003, the union did not present evidence of any relevant information contained in those files. The union failed to demonstrate that it could not have procured the requested information directly from the Civil Service Commission once the employer directed it to do so, and failed to demonstrate that the employer withheld any information it possessed in bad faith. The employer produced the civil service documents it found in its files, albeit over a period of several months, and no evidence exists that the Civil Service Commission possessed any other relevant information that it did not produce.

ISSUE 3 - Regressive Bargaining

Applicable Legal Standards

The good faith bargaining obligation under Chapter 41.56 RCW extends to cases involving bargaining units eligible for interest arbitration. Offers can be changed after interest arbitration has been invoked, particularly when there is an apparent attempt to narrow the parties' differences. However, regressive bargaining occurs when one party at the bargaining table in some manner evidences an attempt to make a proposal less attractive.

In *City of Clarkston*, Decision 3246 (PECB, 1989), a union violated RCW 41.56.140(1) and (4) when it escalated its demands in interest arbitration. The examiner in that case first noted that interest arbitration is not a substitute for collective bargaining, rather it is a substitute for economic activities, such as strikes and lockouts. The examiner then stated that full and frank communication was needed in the bargaining process leading up to interest arbitration so that timely explanation of proposals could assist in reaching an agreement between the parties.[5] The union in *City of Clarkston* failed to communicate with the employer its intention to change the comparables the union was relying upon, and was found to have committed an unfair labor practice.

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *City of Mercer Island*, Decision 1457 (PECB, 1982). The evidence must support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an

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[5] *See also Skagit County*, Decision 8746-A (PECB, 2006)(good faith requires parties to fully explain the consequences of a failure to reach an agreement).

intention to frustrate or avoid an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989).

Application of Standards

The Examiner found that Annette Sandberg, who represented the employer in the interest arbitration proceedings, credibly testified that the employer informed the union that it wanted to propose a three-year collective bargaining agreement because by the time the interest arbitrator issued her decision, the parties would be back in negotiations.[6] The Examiner also found that the union failed to produce any evidence to rebut Sandberg's testimony.

The union argues that the employer changed its position without notifying the union. That alone does not necessarily demonstrate that the employer bargained in bad faith. The burden of proof is on the complaining party to demonstrate that an unfair labor practice occurred; dissatisfaction with an approach taken by a party does not satisfy the burden. The union's failure to demonstrate how the employer's proposal was intended to punish the union or frustrate the collective bargaining process left the Examiner with no other choice than to dismiss its complaint.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene in the above-captioned case are AFFIRMED and

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[6] This Commission attaches considerable weight to the credibility findings of its examiners, and absent substantial evidence demonstrating otherwise, those credibility findings will remain undisturbed. *Renton Technical College*, Decision 7441-A (CCOL, 2002).

Adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 5th day of September, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner