STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

REDMOND POLICE ASSOCIATION,	)	
	)	
Complainant,	)	CASE 16910-U-02-4403
	)	
vs.	)	DECISION 8879-A - PECB
	)	
CITY OF REDMOND,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	

Snyder and Hoag LLC, by *David A. Snyder*, Attorney at Law, for the union.

Summit Law Group, by *Bruce L. Schroeder*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Redmond (employer) seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner Paul T. Schwendiman.[1] The Redmond Police Association (union) supports the Examiner's decision.

ISSUES PRESENTED

1. Did the employer refuse to bargain in good faith when it replaced a June 20, 2002, 3.51 percent wage proposal with an October 18, 2002, 2.53 percent wage proposal?

2. Did the employer fail to timely respond to the union's request for a copy of a wage survey prepared by the employer?

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[1] *City of Redmond*, Decision 8879 (PECB, 2005).

For the reasons set forth below, we affirm the Examiner's conclusion that the employer refused to bargain in good faith when it replaced its 3.51 percent wage proposal with a 2.53 percent wage proposal. We also affirm the Examiner's conclusion that the employer failed to timely respond to and satisfy the union's request for information, although we do so for other reasons.

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ISSUE 1 - CONDITIONAL PROPOSALS AND REGRESSIVE BARGAINING

Applicable Legal Standard

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as the mandatory subjects of bargaining under *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), citing

NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); 41.56.150(1) and (4).

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988). 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 intention to frustrate or avoid an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989).

Regressive Bargaining Standard

Regressive bargaining occurs when one party at the bargaining table in some manner evidences an attempt to make a proposal less attractive. In order for a party to regressively bargain in violation of RCW 41.56.140(1), the bad faith element must infect the collective bargaining process. For example, a party bargaining in a manner to avoid reaching an agreement violates its statutory duty to bargain in good faith. RCW 41.56.140(4); RCW 41.56.150(4); *City of Redmond*, Decision 8863-A (PECB, 2006).

In *Columbia County*, Decision 2322 (PECB, 1985), an employer violated the statute when it withdrew its total package proposal that contained a sick leave cash-out proposal and substituted a new package that contained no provision for sick leave cash-out after the union rejected the employer's first total package. In *Grant County Public Hospital District 1*, Decision 8460 (PECB, 2004), an employer violated the statute when it unilaterally implemented conditions different from its previous final offer when it incorrectly believed it was at impasse.

The parties' collective bargaining agreement called for a reopener to bargain a wage increase for 2002. In mid-2002, the parties commenced negotiations for a new wage package. The employer proposed that it would recommend a "3.51 percent across the board salary increase retroactive to January 1, 2002 to the City Council if that is the only change in compensation, and the process did not drag out."[2] The employer argues on appeal that the Examiner failed to properly consider this a "conditional" proposal that permitted the employer to revoke the 3.51 percent wage proposal if the union failed to meet the conditions attached. Thus, we first examine whether the employer made a conditional offer to the union. If the employer made a conditional offer, then it was permitted to withdraw that offer if the union rejected the conditional terms.

Conditional Proposals Standard

Conditional offers are a lawful means to explore alternatives. *Whatcom County*, Decision 7244-B (PECB, 2004).[3] This Commission encourages parties to engage in free and open exchanges of ideas as part of the collective bargaining process. *See* WAC 391-45-550. Similar to other offers presented by parties during the collective bargaining process, this Commission emphasizes that parties making conditional offers must clearly communicate the proposals that they wish the other party to consider.

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[2] Exhibit 3.

[3] Conditional proposals may be advanced at any time during the collective bargaining process. While conditional proposals are typically part of a concept package (*see, e.g., Asotin County*, Decision 4568-C (PECB, 1996)) or posed through a mediator (*see, e.g., Spokane County Fire Protection District 1*, Decision 3447-A (PECB, 1990)), parties are free to attach conditions to a single issue of bargaining and need not wait to make such proposals in mediation.

In *South Columbia Irrigation District*, Decision 1404-A (PECB, 1982), this Commission found an employer committed an unfair labor practice by making ambiguous proposals that concealed the true intent of the proposal. The parties in that case agreed to submit their proposals to one another in writing, and agreed that any matter contained in their previous collective bargaining agreement and not included in a proposal would be included in the new collective bargaining agreement. That employer's wage proposal, which the parties ultimately adopted, did not include prior language pertaining to a "wage cushion" that grandfathered the wages of that employer's former federal employees above the contractual journeyman rate when the employer assumed control of the operation. The union in *South Columbia Irrigation District* assumed that the employer, by its omission, did not intend to eliminate the cushion, but rather, pursuant to the parties' negotiating rules, intended to have it reincorporated into the new agreement. The employer argued that its wage proposal replaced the previous contract language, including eliminating the wage cushion. Under the circumstances presented, the Commission construed the ambiguity against the employer, and held the employer's deliberate failure to clarify the intent of its proposal was a violation of the good faith bargaining obligation. *South Columbia Irrigation District*, Decision 1404-A.

Commission precedents interpreting a party's good faith bargaining obligation apply to conditional contract offers. As such, conditional offers must also be clearly expressed, must not be ambiguous, and if asked to do so, the party making the conditional offer must explain to the other party the conditions and the implications of a failure to satisfy those conditions.[4] Addition-

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[4] This is not to say that a party making a conditional offer must use the magic word "conditional" when making

ally, the party to which the condition is made must be able to reasonably identify and objectively meet those conditions.

Subjective or Ambiguous Conditional Offers

A "subjective conditional offer" is an offer that is based upon the party's "perceptions, feeling, or intentions, as opposed to [an] externally identifiable phenomenon." *Cf.* BLACK'S LAW DICTIONARY 1438 (7th ed. 1999)(definition of "subjective"). While not per se illegal, subjective conditional offers often hamper or frustrate the bargaining process because they lack any objective standards for determining whether the conditions are satisfied. This is particularly true in cases like this, where the party making the subjective conditional offer withdraws its proposal on the basis that its set "condition" for acceptance has not been met.

Commission precedents value a free flow of communication between the parties and, as such, we decline to craft any rule that absolutely construes subjective or ambiguous conditional offers against the party who makes such a proposal.[5] If the totality of the evidence demonstrates that both parties reasonably understood that a subjective ambiguous condition exists, then this Commission will treat the proposal as a conditional one.

Withdrawal of Subjective or Ambiguous Conditional Offers

In order to determine whether a party has legally withdrawn or rescinded an offer with a subjective or ambiguous condition on the

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these types of offers. The offer needs only to reasonably communicate the party's intent that a conditional element attaches to it and, if that element is not met, the offer may be permissibly withdrawn.

[5] *See, e.g., Whatcom County*, Decision 8512-A (PECB, 2005). (Limitations on the terms upon which parties may agree must be imposed only with great caution and restrain.)

grounds that the condition has not been met or has expired, this Commission will examine the reasonableness of the individual party's belief that a subjective or ambiguous condition has expired. Factors that this Commission will consider in determining whether a subjective or ambiguous conditional offer has expired are the communications between the parties, whether one party attempted to clarify or narrow the subjective or ambiguous condition, and if other intervening circumstances warrant a change in circumstances.[6]

Application of Subjective Conditional Offer Standard

Here, the employer attempted to condition its proposal by informing the union that the proposal remained in effect if the offer "is the only change in compensation, and [if] the process did not drag out." While the employer clearly expressed its first condition, that the increase be the "only change on compensation," could reasonably be understood and reasonably met, the second condition, that "the process not drag out" is ambiguous. Reasonable minds can reasonably disagree as to how many days, weeks, or months it takes for the collective bargaining "process to drag out." Simply put, the employer failed to explain what it considered having the "process . . . drag out." We conclude that the employer's conditional wage proposal was ambiguous.

Application of Withdrawal of Subjective Conditional Offer Standard

The employer argues that the failure of parties to reach an agreement regarding the wage proposal permitted it to withdraw its proposal. To support that argument, Doug Albright, the representative performing the negotiations for the employer, testified that "things change over time and . . . three months later . . . we felt

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[6] This is by no means an extensive list of factors that will be considered, but provides some guidance about what facts will be examined in these types of cases.

at that time that the process had drug out . . . ." , and therefore the employer believed the union failed to meet the employer's state condition. [7]

While the employer may have been reasonable in its belief that negotiations "drug out" beyond a time-frame reasonable to it, this record lacks evidence that the employer ever communicated that belief to the union. Had the employer informed the union prior to the withdrawal of its wage proposal that it believed that negotiations had almost reached a point where they had "drug out", and then given the union a reasonable amount of time to reach a deal, the employer would be permitted to withdraw its proposal.

This record supports the Examiner's findings and conclusions that the employer bargained in bad faith when it regressively altered its wage proposal from 3.51 percent to 2.53 percent. At hearing the employer testified that the reason it lowered its wage proposal was that it "reassessed what the council would approve in light of the circumstances and what was going on in the city and other bargaining units at the time."[8] The employer presented no other compelling reason for its decision to lower its wage proposal.

The totality of the circumstances will be examined to determine whether a party's ambiguous conditional offer has been withdrawn in accordance with statutes this Commission administers. We affirm the Examiner's findings and conclusions that the employer regressively bargained in bad faith.

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[7] Transcript at 65.

[8] Transcript at 61.

ISSUE 2 - DUTY TO PROVIDE INFORMATION

Applicable Legal Standard

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. RCW 41.56.030(4); *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). In *City of Bellevue*, Decision 3085-A, this Commission stated that if, "at any time, an employer has acquired information that it believes is relevant on the question of comparable wages, hours and conditions, it has the duty to disclose that information, *upon request*, during the course of negotiations." (emphasis added).

Application of Duty to Provide Information Standard

Here, there is no question that the requested wage information is relevant to the collective bargaining process. *See, generally, City of Bellevue*, Decision 3085-A. This dispute centers around the timeliness of the employer's response to the union's request. The employer argues that the Examiner failed to consider the fact that, under the standard announced in *City of Seattle*, Decision 3066, employers are under no obligation to create documents for collective bargaining, and the union is entitled only to the documents or information in existence at the time of the request. Thus, the employer asserts that since it had yet to complete the requested

wage survey at the time of the union's complaint, it was under no obligation to provide the union with a copy of the information.

The Examiner found that the wage survey was not a "specific document" and that the employer should have turned over "any relevant information showing comparable wages, hours and working conditions." We disagree. The record demonstrated that the union requested "the results of the City's wage survey"[9] and would respond to the employer's wage proposal once it received that information, but nowhere in the evidence is it suggested that the union specifically requested the *data* used to compile the wage survey. The Commission's decision in *City of Bellevue* specifically notes that a party must turn over data used to compile a report such as the wage survey at issue *upon request*. Neither that decision nor its progeny require a party to turn over the data used to compile a report if *that data is not requested*, and we decline to expand *City of Bellevue* to make such requirement.

Examining the union's actual request for the "wage survey," we agree with the employer that it was not obligated to create a document, but since it had already informed the union that it intended to create the document and was actually working on it, the employer's collective bargaining obligation included producing a copy of that document in a timely manner. While the fact that the employer communicated to the union that the employee working on the survey left and some different employee would need to finish the survey mitigates some of the delay in producing the document, the fact that the employer produced the document only after the filing of the unfair labor practice complaint weighs against it. The employer also attempts to excuse its tardiness in producing the

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[9] Exhibit 4.

wage survey by claiming it did not realize the union was requesting this information in its July 15 e-mail.

We find that the union's statements in its July 15 e-mail sufficiently placed the employer on notice that it was requesting the wage survey.[10] The union unambiguously stated that it could neither accept nor reject the employer's proposal until it viewed the results of the survey.[11] The evidence and testimony demonstrates that the union was waiting for the employer's "wage survey," and the union would react to the employer's proposal once it received that information. Thus, the employer's good faith bargaining obligation required it to keep the 3.51 percent wage offer open until: 1) the union either expressly accepted or rejected the wage proposal by affirmatively informing the employer that it was accepting or rejecting the offer; 2) the union failed to meet the employer's condition; or 3) circumstances reasonably changed to such an extent that warranted a modification to the offer.

Here, the employer's conduct prevented the union from meeting the condition. The employer could have informed the union that the employee working on the wage survey had left her position, and that production of the wage survey would be delayed. Had the employer communicated this fact to the union, it would then have a reason-

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[10] Assuming for the sake of argument that the employer unambiguously conditioned its 3.51 percent wage offer, the employer's failure to timely respond to the union's request for the wage survey would demonstrate a failure to bargain in good faith on the employer's part.

[11] While the union's request is not couched in formal terms, the totality of the evidence demonstrates that the union clarified with the employer that it was waiting for the promised wage survey before it responded to the employer's wage proposal, and the employer should have been aware that the wage survey was necessary for a possible agreement.

able amount of time to complete the survey, or to discuss alternatives. Absent such communications and agreement to do otherwise, the employer was required to provide the union with the wage survey.

REMEDY

In addition to the usual posting and public reading of the attached notices outlining the employer's violation of Chapter 41.56 RCW, the Examiner also ordered the employer to reinstate its 3.51 percent wage offer effective January 1, 2002, without condition. If the union accepted that offer, the Examiner ordered the employer to implement that offer. While we affirm the ordered remedy, we clarify that this remedy, in effect, places the parties in the position they would have been in had the employer not violated the statute. The employer placed only one condition on its 3.51 percent wage proposal: that the wage increase be the "only change on compensation." The union met that condition, and the employer should have forwarded that proposal to the City Council with a recommendation that the City Council accept that proposal. Thus, in order to return the parties to the status quo, the employer is directed to submit in good faith the 3.51 percent wage proposal, effective January 1, 2002, to the City Council with a recommendation that the proposal be accepted.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Paul T. Schwendiman in the above-captioned case are AFFIRMED and ADOPTED as the Findings of Fact of the Commission, except as amended as follows:

16. All unambiguous contingencies specified in the employer's June 20, 2002, 3.51 percent wage offer were satisfied on October 18, 2002. The 3.51 percent offer was subject to union acceptance prior to its repudiation on October 18, 2002.

The Conclusions of Law and Order issued by Examiner Paul T. Schwendiman are AFFIRMED and ADOPTED as the Conclusions of Law and ORDER of the Commission.

Issued at Olympia, Washington, the 13th day of December, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner