STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY DEPUTY SHERIFF'S ASSOCIATION, Complainant, vs. SNOHOMISH COUNTY, Respondent.	CASE 19175-U-05-4875 DECISION 9196 - PECB
SNOHOMISH COUNTY Complainant, vs. SNOHOMISH COUNTY DEPUTY SHERIFF'S ASSOCIATION, Respondent.	CASE 19297-U-05-4899 DECISION 9197 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

Perkins Coie, by *Lawrence B. Hannah*, Attorney at Law, for the employer.

The Snohomish County Deputy Sheriff's Association (union) filed an unfair labor practice complaint on February 7, 2005, alleging that Snohomish County (employer) interfered with employee rights and refused to bargain in good faith concerning changes of payroll practices. The employer filed an unfair labor practice complaint on March 18, 2005, alleging that the union interfered with employee

rights and refused to bargain concerning the payroll practice changes that are the subject of the union's complaint.

Both complaints were found to state causes of action, and they were consolidated with four other unfair labor practice cases that had been filed by these same parties in 2004. All six cases were assigned to this examiner, and a hearing was set for June 16 and 17, 2005.[1] The parties resolved the earlier-filed four cases shortly before the scheduled hearing, so the hearing was limited to the above-captioned cases. The parties filed post-hearing briefs to complete the record.

Motion to Correct Transcript

Following the receipt of briefs, the employer filed a motion to correct the transcript at three places. The union did not respond to the motion. The transcript is clear that the witnesses understood the questions; their answers reflect the corrections offered by the employer, and the examiner accepts the probability that the corrections suggested by the employer make more sense than do the words contained in the transcript. The employer's motion is thus granted.

ISSUES

Issue 1: Did the employer fail or refuse to bargain in good faith, by proposing changes to its payroll practices in September 2004?

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[1] Case 18907-U-04-4807 was filed by the employer; Cases 18857-U-04-4789, 18600-U-04-4733, and 18584-U-04-4729 were filed by the union.

Issue 2: Did the union fail or refuse to bargain in good faith by denying that it had any duty to bargain the payroll practice changes proposed in September 2004 and/or by delaying meeting with the employer to discuss the payroll practice changes proposed by the employer?

The examiner rules that the employer did not commit an unfair labor practice when it proposed negotiating the issue of changing the monthly payroll from once a month to twice a month, so that the union's complaint must be dismissed. The examiner rules that the union did not commit an unfair labor practice concerning the payroll practice changes even though no agreement was reached, so that the employer's complaint must also be dismissed.

Applicable Legal Principles

The state statutes that apply here have been frequently interpreted and applied, and both of these cases are ultimately governed by the same legal principle. RCW 41.56.030(4) states:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining 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 of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.140 enforces that duty to bargain upon public employers, 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;
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> . . . .
>
> (4) To refuse to engage in collective bargaining.

In a parallel fashion, RCW 41.56.150 enforces the duty to bargain upon unions, as follows:

> It shall be an unfair labor practice for a bargaining representative:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
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> . . . .
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> (4) To refuse to engage in collective bargaining.

The employees involved in these cases are "uniformed personnel" eligible for interest arbitration, and RCW 41.56.470 also establishes how bargainable issues are to be handled while the interest arbitration procedures are being implemented:

> 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 but a party may so consent without prejudice to his rights or position under chapter 131, Laws of 1973.

The interest arbitration process applies equally to contract negotiations and issues raised in mid-term reopeners. *City of Seattle*, Decision 1667-A (PECB, 1984).

Commission precedents holding that payroll practices are a component of "wages" need not be reviewed or restated here, because both parties acknowledge in this case that the disputed change of payroll practices was a mandatory subject of bargaining.

ANALYSIS

The facts of these cases are largely undisputed, and the same basic facts apply to both of the issues framed above. Since approximately 1959,[2] the employer's practice was to pay its employees once a month, usually on the last day of the month. Employees could request to "draw" 30 percent of their wages for a month at mid-month, but no deductions were taken from "draw" amounts and their end-of-month checks were reduced by the amount of the draw along with all appropriate deductions for the month. Approximately 60 percent of the employees regularly requested a mid-month draw on their salary.

For some time, the employer was aware of both accounting and legal issues raised by its payroll practice. As early as 1993, the employer began working with labor organizations representing six bargaining units organized among its employees, in an effort to correct the situation. In bargaining for the parties' 2000-2003 collective bargaining agreement, this union agreed to an employer proposal which gave the employer the right to open the contract in mid-term to negotiate changes to the payroll system. The employer did not exercise that contractual right during the term of that contract, however, even though this record indicates it discovered further problems with the historical payroll practices.

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[2] The 1959 date is based on the enabling legislation in Chapter 3.32 of the Snohomish County Code.

These parties opened negotiations for a successor collective bargaining agreement in 2003, but the employer did not make any proposal in those negotiations concerning the problematic payroll system.[3] The parties were unable to reach an agreement, and they participated in mediation. Acting on recommendation of the mediator, the Executive Director of the Commission certified 14 issues for interest arbitration under RCW 41.56.450 - .490 and WAC 391-55-200 to -265, on March 23, 2004.

In August 2004, while the interest arbitration case remained pending, the employer determined that it had an Internal Revenue Service problem with the mid-month draw practice.[4] On September 23, 2004, the employer requested bargaining on changes to the payroll system. The union's response was that it had no duty to bargain the issue. The union asserted that the issue was untimely, having been raised after the other issues existing between the parties had been certified for interest arbitration.

Despite the union's ongoing reservations, the parties met concerning the payroll practice changes on October 14 and December 2, 2004. The parties were unable to reach an agreement, and the employer requested mediation. When the parties met with a mediator from the Commission staff in February and March 2005, the union acknowledged that payroll practices are generally a mandatory subject of bargaining, but it continued to assert it had no duty to

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[3] The employer had, in the meantime, reached agreement on payroll system changes with all of the other labor organizations representing its employees.

[4] The employer was not in compliance with an IRS requirement that federal income tax withholdings and social security taxes be deducted from all salary draws.

bargain in this particular instance.[5] The parties were unable to resolve their differences on the payroll issue.

Issue 1: Did the employer fail or refuse to bargain in good faith, by proposing changes to its payroll practices in September 2004?

The union contends the employer escalated its demands late in the bargaining and interest arbitration process (a "late hit"), which has long been a forbidden tactic in collective bargaining. It cites *City of Clarkston*, Decision 3246 (PECB, 1989) and *Seattle School District*, Decision 2079-B (PECB, 1986), and it quotes from a third case to explain what constitutes a late hit by an employer:

> An employer's sudden injection of a new proposal at an advanced stage of bargaining has been held to be indicative of a lack of good faith and an unfair labor practice. Such tactics are subject to close scrutiny.

Whatcom County, Decision 7244-A (PECB, 2003). The employer defends that it lawfully raised the payroll practices issue in September 2004. The examiner acknowledges the general validity of the precedents cited by the union, but accepts the employer's defense.

The duty to bargain in good faith continues throughout an interest arbitration process. *City of Bellevue v. IAFF, Local 1604*, Decision 3085-A (PECB, 1989), *affd*, 119 Wn.2d 373 (1992). In several cases where a late hit violation has been found, the offender altered its proposals in a manner that frustrated the

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[5] During the same timeframe as these mediation sessions, the parties filed the unfair labor practice complaints litigated here.

negotiations.[6] Widening the gap between negotiating parties, introducing new issues late in the bargaining process, and re-raising issues abandoned earlier in negotiations are among the types of tactics that have been found to unlawfully disrupt the prospect of settlement and to be evidence of bad faith. *Snohomish County*, Decision 1868 (PECB, 1984); *Columbia County*, Decision 2322 (PECB, 1985).

Close scrutiny of the facts and the statute controlling the interest arbitration process contradicts the union's "late hit" characterization in this case, however. A rough timeline reveals that there were substantial time gaps in the overall sequence of events that transpired after the parties opened negotiations for a successor contract in January 2003:

- 60 days elapsed until March 31, 2003, when the parties' 2000-2003 contract (which reserved the employer's right to reopen the contract at mid-term to negotiate on payroll practices) expired.
- 359 additional days elapsed until March 24, 2004, when the remaining issues in the negotiations for a successor contract were certified for interest arbitration.
- 145 additional days elapsed until August 16, 2004, when the employer's finance director issued a memo pointing out the conflict between the past practice and federal law/rules. The

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[6] For example, in *Entiat School District*, Decision 1361-A (PECB, 1982), the employer unlawfully escalated its demands in an attempt to avoid a final agreement, after it had reached a tentative agreement with the union.

employer's request for negotiations was sent to the union just 38 days thereafter, on September 23, 2004.

- 134 additional days then elapsed before the union filed its unfair labor practice complaint in February 2005.

Thus, there was plenty of time for intervening events and outside entities to influence or affect the positions of the parties.

The union ignores the ongoing duty to bargain in arguing that the employer raised the payroll issue six months after bargaining had effectively ceased. RCW 41.56.030(4) and *City of Bellevue*, Decision 3085-A, cannot be so compartmentalized. Even if the employer can be criticized for failing to exercise the right it had reserved in the parties' 2000-2003 contract while that contract remained in effect, that is not a basis to rule that the employer was prevented from requesting bargaining in a timely manner after it learned of the conflict between its payroll practice and federal law or rules. Beyond preserving existing wages, hours, and working conditions during the pendency of interest arbitration proceedings, RCW 41.56.470 explicitly contemplates negotiations and agreements between parties in that same period. The employer's request for bargaining on the payroll practices was within the language of RCW 41.56.470. The examiner rejects the union's focus on the negotiations for a successor contract, and equates the payroll practices issue that arose in August 2004 with any other issue that might arise (and to which the duty to bargain would apply) outside of the context of contract negotiations.[7]

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[7] Indeed, countless Commission precedents would provide basis to find the employer guilty of an unfair labor practice if it had implemented changes to its payroll system unilaterally, without giving notice to the union and providing an opportunity for negotiations, mediation and interest arbitration on the mid-term issue.

No effect of the the payroll practices issue and other issues is established in this record, let alone that the employer's raising of the payroll practices issue in September 2004 frustrated the bargaining on the successor contract. The payroll practices issue clearly had no connection with the prolonged period of negotiations and mediation (419 days) which preceded the certification of 14 issues for interest arbitration. This record contains no evidence that the parties had any further negotiations on the successor contract after that dispute was certified for interest arbitration in March 2004.[8] None of the facts here are consistent with the "late hit" precedents.

The conclusion on the union's complaint is that the employer did not commit an unfair labor practice by raising the payroll practices issue in September 2004, the month after it learned of the conflict with federal requirements.

Issue 2: Did the union fail or refuse to bargain in good faith by denying that it had any duty to bargain the payroll practice changes proposed in September 2004 and/or by delaying meeting with the employer to discuss the payroll practice changes proposed by the employer?

The employer contends that the union was intransigent, that it attempted to avoid meeting on the payroll issue, and that (after

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[8] If anything, taking notice of the Commission's docket records for the interest arbitration case would tend to confirm the absence of a negative effect. An entry made in the transaction log for Case 18358-I-04-00428 on October 25, 2004 (which was prior to the parties' second meeting on the payroll practices issue and well in advance of the mediation request or mediation sessions), suggests the parties already had a tentative agreement on the successor contract.

engaging in what the employer describes as a protracted dialogue of frustration including agreeing to meet in mediation), the union had no intention of settling the issue and continued to insist it had no obligation to bargain the payroll practices issue. The union has continued to assert the impropriety of the issue in the related case, but does not admit a refusal to bargain.

Just as the employer has been faulted earlier in this decision for failing to bring the payroll practices issue forward while the parties' 2000-2003 contract (and its included reopener) were in effect, the union can be faulted here for not wanting to deal with a mandatory subject of bargaining. First and foremost, the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, establishes a process for communications between labor and management. That said, the analysis of this turns to whether the union's tactics rose to the level of a refusal to bargain.

The union responded in a timely manner when the employer finally decided to raise the payroll practices issue after leaving it dormant for several years. As noted above, the employer invoked a process that might have resulted in a final resolution of the type contemplated in RCW 41.56.470: It gave notice to the union, provided opportunity for the union to request bargaining, and withheld implementation of any change pending the outcome of the collective bargaining process. The union provided a sufficient response to avoid a "waiver by inaction" issue in these cases.

The union came to the bargaining table for both bilateral negotiations and mediation on the payroll practices issue. Even if the union was not anxious to address the issue, this record does not support a conclusion that its resistance rose to the level found

unlawful in *City of Pasco*, Decision 3641 (PECB, 1990), where a union "continued to avoid negotiations" on a disliked subject.

The union was not obligated to agree to the employer's proposal on a change of payroll practices, or even to make any concession. RCW 41.56.030(4). In this eligible for interest arbitration-bargaining unit, the union's taking of a hard stance was at risk that the issue would be certified for interest arbitration, and that the neutral chair of an interest arbitration panel convened to resolve the issue might be influenced by the federal laws and rules cited by the employer. With the ruling here that the employer lawfully raised the issue, and in the absence of a certification of the payroll practices issue for interest arbitration,[9] the parties have the opportunity to return to the bargaining table and/or to mediation, in a renewed effort to reach a resolution of that issue short of interest arbitration.

The conclusion on the employer's complaint is that the evidence in this limited record does not support finding the union guilty of a "refusal to bargain" violation on the payroll practices issue.

FINDINGS OF FACT

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

2. Snohomish County Deputy Sheriff's Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the

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[9] Notice is taken of the Commission's docket records, which indicate both: (1) Case 19086-M-04-6219, the mediation case initiated in December 2004, remains open; and (2) no interest arbitration case has been docketed for this bargaining unit since December 2004.

exclusive bargaining representative of certain law enforcement officers employed by Snohomish County.

3. The employees represented by the union are covered by the Law Enforcement Officers and Fire Fighters Retirement System (LOEFF), Chapter 41.26 RCW.

4. The employer and union were parties to a collective bargaining agreement which was in effect from April 1, 2000, through March 31, 2003. Although Article 24.3 of that agreement provided that the employer could re-open the agreement to negotiate a change of payroll practices, the employer did not exercise that right while that contract was in effect.

5. In January 2003, the parties opened negotiations for a successor agreement to replace the agreement described in paragraph 4 of these findings of fact. The employer did not raise a payroll practices issue in those negotiations.

6. The parties were unable to reach an agreement in the negotiations described in paragraph 5 of these findings of fact, and they participated in mediation with a member of the Commission staff.

7. The Executive Director of the Commission certified 14 unresolved issues for interest arbitration on March 25, 2004.

8. Separate and apart from the negotiations for a successor contract described in paragraphs 5 through 7 of these findings of fact, the employer ascertained during or about August 2004 that its historical payroll practices (which included a mid-month draw payment made without deductions) conflicted with

federal law or regulations requiring collection of federal taxes from wage payments.

9. By letter dated September 23, 2004, by an e-mail message sent on September 29, 2004, and by a more detailed letter dated October 4, 2004, the employer gave notice to the union and provided an opportunity for bargaining on the issue of payroll practices. The employer proposed five dates in October 2004 when it was available to meet to discuss the issue.

10. The parties met and discussed the payroll practices in October and December 2004. The parties participated in mediation with a member of the Commission staff in February and March 2005. The payroll practices issue remains unresolved.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The employees involved here are "uniformed personnel" within the meaning of RCW 41.56.030(7)(e), so that the parties' collective bargaining relationship is subject to the interest arbitration procedures set forth in RCW 41.56.430 - .905.

3. The employer's raising of the payroll practices issue as described in paragraphs 8 and 9 of the foregoing findings of fact was consistent with RCW 41.56.470, and was not an unlawful tactic associated with the negotiations for a successor contract; so the union has failed to establish that the employer breached its good faith obligations under RCW

41.56.030(4) or that it committed an unfair labor practice under RCW 41.56.140(4) or (1).

4. The union's resistance concerning the payroll practices issue did not rise to the level of a failure to meet or a rejection of the collective bargaining process; so the employer has failed to establish that the union breached its good faith obligations under RCW 41.56.030(4) or that it committed an unfair labor practice under RCW 41.56.150(4) or (1).

ORDER

1. (Case 19175-U-05-4875; Decision 9196 - PECB) The complaint filed by the Snohomish County Deputy Sheriff's Association is DISMISSED.

2. (Case 19297-U-05-4899; Decision 9197 - PECB) The complaint filed by Snohomish County is DISMISSED.

Issued at Olympia, Washington, on the 19th day of December, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, 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.