City of Seattle, Decision 9957 (PECB, 2008)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD,	)	CASE 20402-U-06-5196
	)	DECISION 9957 - PECB
Complainant,	)	
	)	CASE 20687-U-06-5271
vs.	)	DECISION 9958 - PECB
	)	
CITY OF SEATTLE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

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

Thomas A. Carr, Seattle City Attorney, by *Jean M. Boler*, appeared for the employer.

On May 19, 2006, the Seattle Police Officers' Guild (union) filed an unfair labor practice complaint alleging that the City of Seattle (employer) bargained in bad faith with respect to an issue involving the citizen's police review process. A second complaint alleging failure to bargain changes in the police review process before bargaining had concluded in 2006 was filed October 5, 2006, and the two matters were consolidated. J. Martin Smith was appointed Examiner. A hearing was held on April 24 and 25, 2007, at Kirkland, Washington. Briefs were filed to complete the record.

ISSUES

1. Did the employer refuse to bargain and interfere with employee rights by changing a city ordinance altering the procedures of the Office of Professional Accountability Review Board (OPARB)?

2. Did the employer refuse to bargain in good faith by passing an ordinance that made changes effective before completion of the parties' collective bargaining procedure, including interest arbitration?

Based on the record as a whole, the Examiner rules that the employer's actions constitute a violation of RCW 41.56.140(1) and (4). The employer passed an ordinance that altered the process of the OPARB, and set an automatic effective date implementing that change prior to the completion of the collective bargaining process during 2006 and 2007. By these actions, the employer has failed in its duty to meet, confer and negotiate in good faith, and remedies are ordered herein.

RULE

The law of this case concerns general rules with regard to the obligation to bargain in good faith, as impacted by the nature of police and security work in the public sector. Since police officers negotiate under interest arbitration procedures pursuant to RCW 41.56.450, the parameters of these procedures must be included in any review by the Commission and its examiners.

The Duty to Bargain in Good Faith

The parties in this case bargain collectively pursuant to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Their duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means . . . 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 . . . .

That duty is enforced through RCW 41.56.140(4) and unfair labor practice proceedings under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270(1)(a). The burden to establish affirmative defenses lies with the party asserting the defense. WAC 391-45-270(1)(b). The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, and employers are prohibited from changing mandatory subjects of bargaining except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991); *City of Tacoma*, Decision 4539-A (PECB, 1994).

A complainant alleging a "unilateral change" must establish the relevant status quo. *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1989). In general, the bargaining obligation allows for changes to be made, but the employer must first give notice to the exclusive bargaining representative, and provide that organization a meaningful opportunity to bargain the subject. *South Kitsap School District*, Decision 472 (PECB, 1978) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964)). Such notice must be timely, giving sufficient time in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *City of Vancouver*, Decision 808 (PECB, 1980). Such a requirement affords the union the opportunity to explore all the possibilities, provide counter-arguments and offer alternative solutions or proposals regarding the issue raised by the proposed change. *Spokane County*, Decision 2377 (PECB, 1986). The respondent has the burden of proving that actual notice was given within a time period in which the exclusive bargaining representative could take effective action

on behalf of the affected employees. *City of Tukwila*, Decision 2434-A (PECB, 1987); *Lake Stevens School District*, Decision 9840 (PECB, 2007).

With bargaining units like county sheriff's departments and city police departments, however, the parties are subject to RCW 41.56.440 and successive provisions which state that the wages, hours, and other conditions of employment in a police contract remain and "shall not be changed" during the pendency of proceedings before an arbitration panel. *See* RCW 41.56.470. This means that employers are put to a unique limitation on the right to effect changes during bargaining or even after a contract has terminated. *City of Seattle*, Decision 1667-A (PECB, 1984).

General Police Work

The work of city police departments is well known and visible to the public. In addition, police departments and their activities are subject to particular rules about how to bargain and negotiate under RCW 41.56.440, .450 and .470. While many police department policies are contained in Procedures Manuals or even the labor contract, some policies are set out by the legislative body of the employing municipality, as by city ordinance. Such is the case here. If an employer seeks a change in policy, those changes must be real and provable. Newspaper reports that a police practice will be changed are not sufficient. *City of Tacoma*, Decision 9157 (PECB, 2005). There must be a proven change from a verifiable past practice. *Whatcom County*, Decision 7288 (PECB, 2001).

APPLICATION

Background Analysis

As counsel ably demonstrate in their respective memoranda, this case requires a summary of the facts and history which lead up to the filing of this charge.

The issues in this case surround a controversial police officer review system in Seattle's police department, and how recent changes to that system impacted working conditions and bargaining unit members of the representative union.[1] In 1999, the Seattle City Council adopted the Office of Professional Accountability (OPA), which was granted an independent review authority to audit, examine and review arrest records and contacts between Seattle police officers and citizens. The examinations were based upon "citizen complaints," and not police department action, because certain citizen groups had complained of harassment and aggressive police tactics. Ordinance 119825 was the result, also creating an independent "auditor" position and a secondary review panel called the Office of Professional Accountability Review Board.

During negotiation of the labor agreement in 2000, the union agreed to certain changes in OPA and department-wide internal investigation procedures, and to a three-member panel review system for OPARB. They also agreed that OPARB could review all redacted police complaint forms that had been filed by citizens outside the department.[2]

In January of 2001, the parties initiated an interest arbitration procedure, and by mutual consent agreed to submit their tentative agreement to the arbitrator for purposes of drafting the exact terms of the settlement. Arbitrator Janet Gaunt issued those terms

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[1] Much of the record in this case is composed of official documents between the City of Seattle and union representatives, but the entire controversy resulted in prevalent media scrutiny by Seattle newspaper and television stations. Certain photos and video of police incidents and arrest are well-known to the public and the parties, but are not relied upon by the Examiner.

[2] The city council circulated a press release praising the agreement with the union on this issue.

in an award on November 26, 2001. Gaunt's interpretation of the labor contract left intact the old Appendix E and set out specific powers of the OPARB. The redacted file rule was not changed. The city council was informed of the impacts of union negotiations in January of 2002.

During the 2001-2005 period, Chief Gil Kerlikowske disciplined certain officers, IIS (internal affairs investigations) took place as usual, and the OPA reviewed police-citizen conflicts in the same manner as they had prior to 2001.

After 2001 there emerged a growing effort by the OPARB panel to see more of the files and to be more "investigative." Members of the OPARB panel filed their own complaints or urged citizens to file claims with the OPA directly. Examples are:

- May 2001, a complaint filed by OPARB member Peter Holmes regarding a stolen property complaint from Sand Point (east Seattle);

- March 2004, a complaint from member Sheley Secrest regarding an arrest in South precinct;

- August 2004, a complaint from Secrest regarding excessive force in an arrest situation;

- May 2005, a complaint filed by Secrest regarding an arrest taking place that month;

- February 2006, a complaint from Holmes to John Fowler of the OPA, regarding a citizen complaint in November of 2005.

During the summer of 2005, it became evident that OPARB supporters, unhappy with the chief, OPA and the mayor, began to plan a revised city ordinance which would enlarge OPARB's authority by allowing review of "unredacted" files. Holmes and the OPARB members engaged the OPA Director Sandra Pailca and City Attorney Tom Carr in a series of emails and letters in 2005-06. Pailca advised Holmes that talking to one citizen complainant in particular was ill-advised for safety's sake and involved an "open" file. In June 2005, Holmes again asked Pailca for (redacted) files which were late in arriving and complained that the chief had held up one of them. Pailca responded and said the redacted files were being transferred, but not the open case.

By September of 2005, Pailca had expressed concern about Holmes' request for the names of police officers disciplined more than three times,[3] or who otherwise showed poor credibility records in court.

Until this point, OPARB had no visible dispute with the union. But in March of 2006, union attorney Chris Vick sent a letter to David Bracilano, city labor relations coordinator, alerting him that rumors of an unredacted file ordinance would cause the Guild to file unfair labor practice claims, if no bargaining took place. The following week, Vick also demanded to bargain OPA-OPARB review processes.

The last chapter of the drama ensued in May of 2006. On May 30, Councilman Nick Licata sponsored, and the full council passed, an

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[3] The parties used a colloquialism "frequent flyers" to describe police officers who were often the subject of a citizen complaint to OPA. The Examiner prefers other terms.

amendment to SMC 3.28.290(a). That ordinance provided in particular that:

> AN ORDINANCE relating to Office of Professional Accountability (OPA) records reviewed by the Office of Professional Accountability Review Board (OPA Review Board); *providing that the OPARB will have access to unredacted OPA files*. . . .
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> . . .
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> WHEREAS, in its December 2002 report the OPA Review Board observed that the process of redacting OPA files is unnecessarily labor intensive for the OPA, is unproductive, and is a practical impediment to its work . . . .
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> . . .
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> . . . redaction prevents it from determining patterns of complaints against particular officers or within specific precincts. . . .
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> . . .
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> NOW, THEREFORE, . . .
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> . . .
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> [A] . . . the OPA Review *Board shall have access to unredacted complaint forms of all OPA complaints and unredacted files of all closed OPA investigations*. . . .
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> [B] [disclosure rules amended].

Exhibit 6. (emphasis added). The ordinance included an effective date of March 31, 2007, some ten months later.

The remainder of the new ordinance cautioned that OPARB members could not disclose information from the OPA files, nor could the periodic reports reveal officers' badge numbers, addresses, e-mail addresses or other "identifying information." The new ordinance also included a "hold harmless" clause, protecting OPARB members from any legal effects of disclosure.

There was no acknowledgment of the union's demand to bargain until July 12, 2006, when the city labor negotiator sent a letter to

union president Rich O'Neill -- presumably, an opening proposal for a 2007-2008 labor contract. There were 16 main items, numbers 11-13 of which addressed the OPA-OPARB files issue. The very first request was for access to un-redacted files in accordance with the "recently passed City Ordinance."

Not mentioned in the employer's bargaining letter was the unique ordinance provision that made it effective March 31, 2007, "to allow an opportunity to collectively bargain the effects of any of this ordinance's provisions on the wages, hours and working conditions of SPOG members. . ."

Occasionally the OPARB requested particular (closed) OPA files which had not been randomly selected for their review but involved situations that the members learned about from the community. Those files were redacted and provided to OPARB. During the 2005-06 period, OPARB actually saw and reviewed one IIS file which provided the names of police officers in eleven instances, and the names of investigating police department personnel. These documents were intended to be redacted but omissions in the process happened. These omissions did not change the relevant status quo.

Eventually, the OPA continued to prepare files for review by OPARB. OPARB received ten un-redacted files from November of 2006 and eight un-redacted files which had been closed during December 2006. The OPARB also received ten un-redacted and closed January 2007 files on April 5, 2007. No reports from 2006 or 2007 were made a part of the record in this case.

Case Analysis on Failure to Bargain

The Effect of the May 2006 Ordinance The Examiner concludes that the employer changed a mandatory topic for bargaining at both the

decision and effect levels. All of the requisite features are met. Specifically,

a. The Status Quo The policy which existed prior to May 2006, approved by Arbitrator Gaunt, was a redacted file rule. Between 2002 and 2005, the ordinance and the contract allowed only *redacted files* to go to the OPARB. The employer had proposed eliminating the redacted file requirement during bargaining in 2003, but withdrew the proposal and signed a collective bargaining agreement through 2006 which left Appendix E in place. As to the *confidentiality rule*, OPARB members were barred by the ordinance from revealing testimony and information about a particular case, and were barred from disclosing information they reviewed. The labor contract was consistent with this rule.

Although the employer attempted through bargaining to change the rule in 2003, the reports written in 2003 and 2004 depended on closed, redacted files. The record is evident that the city council made a public determination that it would oppose OPA and chief of police policies and the requirements of the collective bargaining agreement and instead direct a new set of policies that tilted away from OPA and the labor contract.[4] This remains a clear and unmistakable change in the status quo, and raises problems with the obligation to bargain under RCW 41.56.450.

b. Timely Notice to the Union The union concedes that it first received notice of the employer's plans to change the

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[4] The Examiner will not rule on whether OPARB members' encouragement of the filing of claims with the OPA was improper behavior, but it is clear that it concerned Pailca, the chief and the mayor. See the July 12, 2005 letter from Holmes to OPA Director Pailca asking her to look into allegations from a personal acquaintance; and, attempts by OPARB members to file OPA complaints over their own signatures on behalf of city residents.

ordinance in March of 2006 when Rich O'Neill met with Councilman Nick Licata. The employer acknowledged that the union made a demand to bargain after that meeting, but continued to seek the ordinance change on April 10, 2006, and passed it on May 31, 2006. The employer also included the change in its proposal to the union on July 12, 2006. Even with a problematical linkage to make the ordinance effective on March 31, 2007, the employer shows on these facts that it gave notice to the union in compliance with RCW 41.56.140. The employer made a timely statement of the changes.

c. Union Makes a Timely Request to Bargain The union also made a timely demand to bargain the changes in accordance with *South Kitsap School District*, Decision 472.[5] Here, the union made a timely request to bargain the decision and effects of the ordinance change in March of 2006, after rumors surfaced, and again in July after bargaining commenced for a successor agreement. The unfair labor practice complaint, filed here on May 19, 2006, was timely as to the redacted file and confidentiality rules.

The Examiner is invited to discuss the union's "alternative" fait accompli argument under *Clover Park School District*, Decision 8534-A (PECB, 2004). In *Clover Park*, the Commission firmly stated that a union would not be subject to a "waiver" defense when the employer established a "complete planned change" related to the parking fees for staff. A fait accompli was established, and the union endured unfair disadvantage in requesting bargaining. But since the facts here demonstrate that the employer gave timely notice and the union made an early and even pre-emptive demand to bargain, it makes better sense to analyze this case along the lines

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[5] But see discussion regarding the distinction between bargaining the *decision* to make the change, and the *effects* of the change.

of unilateral change and failure to bargain, as is required by the cases following *City of Seattle*, Decision 1667-A.

d. Ordinance Subject is a Mandatory Topic The Examiner concludes that the ordinance changes impacted a mandatory topic for bargaining, and especially the potential for discipline of bargaining unit employees. In determining whether a particular matter is a mandatory subject of collective bargaining, the Commission initially determines whether such a matter directly impacts the wages, hours, or working conditions of bargaining unit employees. *Lower Snoqualmie Valley School District*, Decision 1602 (EDUC, 1983). Managerial decisions that only remotely affect terms and conditions of employment, and decisions that are predominantly "managerial prerogatives," are classified as permissive subjects. *IAFF Local 1052 v. PERC*, 113 Wn.2d 197 (1989). In the facts of this case, the topic of redacted files for the police review boards impacts closely on the working conditions of the employees, since there is a clear potential for scrutiny and discipline by their employer.

The employer depends upon a classic "balancing test" analysis as to whether the redacted file rule and the constraints of confidentiality comprise a mandatory topic. The question asked is, does the topic go to the core of entrepreneurial control, or does it have some or no direct bearing on wages, hours or conditions of employment? *King County Fire District 43,* Decision 9236 (PECB, 2006). The employer also relies on *IAFF Local 1052 v. PERC* for the proposition that the police review board is a "management function" at the core of the city's responsibilities. It also cites *City of Spokane*, Decision 5054 (PECB, 1995), and asserts that PERC's finding of a mandatory topic there is distinguishable because it

involved review of the chief firing officers. The difference between this case and Spokane is scant.[6]

For the most part, the Examiner is not surprised, and concurs with the union's reliance upon *City of Yakima*, Decision 3503 (PECB, 1990), for the proposition that civil service rules covering discipline of police officers are mandatory topics which should have been bargained. The Examiner also relies upon the holding of *City of Pasco*, Decision 4197-A (PECB 1994), dealing with vehicle accident and firearm incident reporting. In Pasco, it was a mandatory topic to change the method by which officers were disciplined by a review board. Impacts on officer discipline were clear. The Examiner further relies on *City of Pullman*, Decision 8086-A (PECB, 2003), where a decision to tape record interviews in police disciplinary cases could lead to further discipline and hence was held to be a mandatory subject for negotiation. The Commission cautioned in *City of Pullman*, Decision 8086-A, that "impatience with the collective bargaining process" was no excuse for the employer to refuse to bargain. Such "excuses" are not acceptable in the instant case.

The Examiner credits that the City of Seattle has always taken the OPA and OPARB functions seriously, and wanted their activities to be visible, accountable, and public. In his testimony, Assistant Director of OPA, John Fowler, depicted patiently how the OPA handled citizen complaints and revealed that "traditional standing" requirements did not exist: any citizen could file a complaint about any police employee. The complaints could be anonymous.

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[6] Remarkably enough, the union in that case also filed its unfair labor practice complaint upon hearing rumors that the city council would pass a resolution. In addition, the mission statement of the Spokane Citizen Review Panel and its secondary review panel is almost identical in scope as the OPA-OPARB system.

Fowler's tone was to emphasize the aspect of "total transparency" -- a public encouragement of citizens without fear or anxiety to file complaints over their encounters with uniformed officers.[7] In his view, a philosophy of transparency motivated the OPARB to review only *randomly selected* and *closed* OPA files. In later testimony, OPARB chairman Holmes also used the term "transparency."

Neither Holmes nor Fowler's testimony deflects from an obvious conclusion -- the redacted file rule and the confidentiality standards for reviewing complaints by citizens are not *de minimis*, and can have a direct impact on employee working conditions, especially related to discipline. Elements of the city government beyond OPA and OPARB were concerned as well: Sandra Pailca of OPA was concerned about continuing pressures from Holmes and OPARB to read *open* (not only closed) files. That concern was shared by the chief of police. OPA also knew about pressures from OPARB to reveal "frequent flyers" or even a software system to identify police officers who were deserving of special scrutiny by the citizen panel. In fact, the OPARB implied that the redaction requirement could be used to identify officers frequently complained about by citizens. This is evidence of the clear connection between redaction of the files and employee working conditions. Also, another level of review could adversely impact an officer's ability to testify truthfully and fully in a court of law, which is necessary to convict suspected and arrested citizens. Since discipline of an employee can ultimately affect whether that employee continues to be employed, matters that affect discipline have long been held to be mandatory subjects of bargaining. In the face of such serious consequences for its officers, it is strange

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[7] PERC is familiar with employee concerns about anonymity and privacy in the workplace, supporting the right of nursing employees *not* to wear identifying name-tags in a large jail facility. *See King County*, Decision 5810-A (PECB, 1997), *aff'd*, 94 Wn. App. 431 (1999).

that the city and its council were so "impatient" with the bargaining process in May of 2006.[8]

In the Examiner's view, Holmes and OPARB cannot explain these events away. The employer cannot explain away any distinctions between this case and *Spokane County*, where the topic of who would sit on police review boards was ruled to be mandatory. If anything, the instant case is *more* mandatory than *Spokane*, since it more directly touches concerns and impacts on working conditions, and especially discipline.

Both the decision to change the redaction requirement and its effects are mandatory subjects of bargaining.

Before the collective bargaining procedure was concluded, the employer changed the redacted file and confidentiality rules for OPARB.

The Examiner concludes that the employer did not allow a reasonable time for bargaining the *decision* to change the redacted file rule, since it had unilaterally decided that it would only bargain (unspecified) effects of that decision.

With respect to the employer's obligation to bargain the *effects* of the change, the Examiner further concludes that the employer's enactment of the ordinance violated its good faith obligations. Establishing an effective date for implementation of changes in a bargaining unit eligible for statutory interest arbitration is inherently problematic. *City of Seattle*, Decision 1667-A, requires

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[8] The Examiner in *City of Spokane*, Decision 5054, accurately pointed out that the new CRP created yet another opportunity for a an officer to be disciplined, even if the chief of police concluded that the officer's conduct was justified. That would happen in this matter as well.

that even a single proposed mid-term change to a mandatory subject proceed through the required negotiation process, including mediation and interest arbitration if the parties are unable to reach agreement. Here, the changes were to become effective during the time when bargaining might still be taking place, or when the parties might legally submit their issues to binding interest arbitration. Even if this passage of time might have provided an "opportunity" to bargain, with the possibility of reaching agreement, the employer made only one proposal during that period. Most important is that the automatic effective date of March 31, 2007, presumed a right not provided under the provisions of the statute involving uniformed employees. It is therefore necessary to find a violation of RCW 41.56.140.

a. Reasonable time for bargaining As noted in *City of Vancouver*, Decision 808 (PECB, 1980), the employer must afford the union a reasonable time for bargaining once it has indicated that a change is imminent. The record here indicates an off-hand approach to negotiations, which expressed the result first, and the rationale of the proposal last. The employer only announced the city council decision at the bargaining table, and that it would be effective ten months later. The employer deployed the hopeful (but wrong) belief that the union would only need to negotiate the *effects* but not the *decision* to accept an un-redacted file rule. The changes in the OPARB procedures, both relating to the redacted file policy and the confidentiality requirements for OPARB members, were carried out at city council chambers rather than the bargaining table. The employer failed to provide or participate in meaningful collective bargaining on this issue, and it made no proposals after July of 2006, when negotiations began.

It is instructive to follow the timeline concerning discussions about the redacted files issue:

- In 2002, Arbitrator Gaunt retained Appendix E in the collective bargaining agreement;
- In June of 2005, OPARB Chairman Holmes requested names of officers involved in discipline, and open files being reviewed by OPA; OPARB members filed citizen complaints with OPA;
- In March of 2006, the union was informed that an ordinance was being proposed to change the redacted file and confidentiality rules, despite Appendix E of the labor agreement;
- In June of 2006, the city council passed the new ordinance, changing Seattle Municipal Code 3.28 but not the labor contract;
- On July 12, 2006, the city officially proposed to amend Appendix E and the labor contract by incorporating the elements of the new ordinance;
- On September 15, 2006, the Guild requested PERC mediation, and the first meeting was held on November 13, 2006;
- During April 2007 and the time of hearing on the matter, mediation continued, and no successor agreement was achieved;
- Effective April 1, 2007, the un-redacted file policy was implemented and files from November 2006 and more current were forwarded to OPARB.

The ordinance amendments of 2006 clearly resulted from OPARB's discussions with Councilman Licata and certain members on the city council. They did not result from collective bargaining.[9]

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[9] Union attorney Vick's testimony was credible in stating the pattern of conversation between 2005 and 2006, and between the union negotiators and the employer. No one who bargained for the city actually testified, and the employer otherwise created no shadows or doubts about what was said at the bargaining table. John Fowler, on the OPA's behalf, did not rebut any of the union's claims.

b. Negotiation of the OPARB confidentiality and hold harmless rules Peter Holmes and the city council sought a more protective rule which held the panelists harmless against attempts to prosecute or file legal claims in the event a fragment of file information was revealed to the press or the community.[10] In many cases, a city government's effort to hold its public board members harmless in the event they revealed information deemed to be confidential would not impact labor contracts or public employees. But that is not the case here. The new ordinance created a more protective rule because it was predicated on the idea that the OPARB would see more and know more about citizen complaints made the prior year, and they would know more only because of the un-redacted file rule.

Holmes and John Fowler of the OPA were the only City of Seattle witnesses. While generally credible, their testimony regarding their rationale and the concerns leading to their belief that a change in practice was necessary does not change the fact that the employer was required to negotiate such changes. Release of an officer's name or badge number, and consequent discipline or scrutiny, impacts a mandatory topic of bargaining under RCW 41.56.140. Whether an urge to focus on police officers frequently in trouble with elements of the community is political or necessary is not for PERC to say. But the actions taken by the employer here constitute exactly the type of "impatience with the collective bargaining process" which we ruled to be illegal in *City of Pullman*, Decision 8086-A.

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[10] Note also that no resolution was reached as to whether OPARB members needed their own attorney appointed, since City Attorney Carr held firm in January 2006 that city counsel would be adequate for this purpose.

The redacted file and confidentiality rules are tied together. Since the employer proposed them in the same document and negotiated them in the same manner, they failed the reasonable-time-for negotiation test and hence violated RCW 41.56.140.

CONCLUSION

Based on the exhibits and the testimony of Chris Vick, John Fowler, and Peter Holmes, the Examiner concludes that the employer violated the obligation to bargain in good faith when it unilaterally adopted a change in the confidentiality and redacted files rule utilized by OPARB and OPA. Both the decision and effects of that change were mandatory topics for bargaining and subject to the mediation and interest arbitration procedures of RCW 41.56.450 - .905.

The normal remedy in this type of case is to return the parties to the bargaining table. The parties are directed to return to the bargaining table and seek to resolve these two issues prior to March 31, 2008. This time period is to include any period of mediation by one of the Commission's mediators. The parties may have understood their positions in mid-2006, but did not return to the issues because of the intervention of the unfair labor practice claims. The parties need to address the "impatience" and timelines problem. *City of Pullman*, Decision 8086-A. The parties also must negotiate the impacts of OPARB reports written for years 2006 and 2007, since those reports may contain or utilize information from un-redacted files.

If impasse remains on matters concerning the decision and its effects as of April 1, 2008, the parties shall submit any such issues to interest arbitration in accordance with RCW 41.56.450 - .905.

Otherwise, the employer is directed to restore the status quo ante and to rescind the un-redacted file and confidentiality/indemnification rules contained in Ordinance 122126.

FINDINGS OF FACT

1. The City of Seattle is a municipal corporation and an employer within the meaning of RCW 41.56.030(1).

2. The Seattle Police Officers' Guild (union) is a labor organization and exclusive bargaining representative within the meaning of RCW 41.56.030(3).

3. The Office of Professional Accountability (OPA), established in 1999 by the city council, reviews citizen complaints about police conduct. The OPA was granted independent review authority to audit, examine and review arrest records and contacts between police officers and citizens. At the same time it established the OPA, the city council also created an independent "auditor" position and a secondary review panel called the Office of Professional Accountability Review Board (OPARB).

4. During negotiation of their collective bargaining agreement in 2000, the employer and the union agreed to implement certain changes to OPA and OPARB. The parties agreed to allow review of "all redacted files" of closed citizen complaint cases, and those stemming from internal investigations. The practice of providing only redacted, closed police conduct review files to the OPARB established the status quo for future collective bargaining.

5. The parties to these proceedings are subject to the interest arbitration provisions of RCW 41.56.450 - .905. They initi-

ated a statutory interest arbitration procedure in January 2001. In November of 2001, Arbitrator Janet Gaunt ruled that certain changes to the labor agreement were to be made, but did not change the "redacted file" rule under Appendix E of the agreement.

6. During bargaining in 2003, the employer proposed eliminating the redacted file requirement. It ultimately withdrew that proposal and signed a collective bargaining agreement through the end of 2006 that left the redacted file rule in place. That collective bargaining agreement continued to include language barring OPARB members from disclosing information about a particular case.

7. Occasionally the OPARB requested particular (closed) OPA files which had not been randomly selected for their review but involved situations that the members learned about from the community. Those files were redacted and provided to OPARB.

8. In mid-2005, members of the OPARB complained to OPA Director Sandra Pailca that a review of a redacted internal investigation file limited the OPARB ability to respond to issues, because the names of both the police officer and the victim were redacted and deleted from the reports.

9. During the 2005-2006 period, OPARB actually saw and reviewed one IIS file which provided the names of police officers in eleven instances, and the names of investigating police department personnel. These documents were intended to be redacted but omissions in the process happened. These omissions did not change the relevant status quo.

10. In March 2006, City Councilman Nick Licata met with the union president and informed him that the city council planned to change the city ordinance regarding file redaction and confidentiality matters relating to OPARB. Following that meeting, in March 2006, union attorney Chris Vick sent a letter to Labor Relations Coordinator David Bracilano, alerting him that the union would file unfair labor practice claims if the employer adopted an un-redacted file ordinance without bargaining. The union also made a separate and timely request to bargain the decision and effects of changing the confidentiality and redaction-of-files process in March 2006.

11. On May 30, 2006, the city council adopted a change to Seattle Municipal Ordinance 3.28.290(a). That change, to become effective on March 31, 2007, allowed OPARB to review un-redacted files from the OPA investigations. The city council also changed certain confidentiality requirements for OPARB board members, in an attempt to hold the members harmless in the event un-redacted file information was improperly revealed to the public or the media.

12. The employer did not bargain any of these matters with the union prior to adopting the ordinance change in May 2006.

13. The employer and union began negotiations for a new collective bargaining agreement in July 2006, at which time the union repeated its request to bargain concerning the decision and effects of the confidentiality and un-redacted file issues. At that time, the employer made a bargaining proposal that included access to un-redacted files in accordance with the "recently passed City Ordinance." On September 15, 2006, the union requested a Commission mediator to assist with the negotiations. Mediation continued during April 2007 and the

time of the hearing. The employer made no further proposals on these subjects during the course of bargaining, and the parties reached no agreement on these issues. Commission docket records reveal no request as yet to certify the parties to interest arbitration under RCW 41.56.450 - .905.

14. The OPARB received ten un-redacted closed OPA files on April 5, 2007, including cases closed in January of 2007. They also received eight un-redacted files from December of 2006 and ten un-redacted files which were closed during November 2006.

15. The issue of whether files provided to the OPA and OPARB are redacted directly concerns working conditions and discipline of employees within the bargaining unit. The confidentiality rules for members of OPARB are directly tied to the redacted-file issue, and thus to employee working conditions. Because of the direct connection of these matters to employee working conditions, both the decision to change the redaction and confidentiality rules and the effects of the decision are mandatory subjects of bargaining.

16. Absent agreement through the collective bargaining process, both statutory and case law preclude an employer from making changes to the status quo regarding mandatory subjects of bargaining in a bargaining unit subject to the interest arbitration provisions of Chapter 41.56 RCW.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these cases under Chapter 41.56 RCW.

2. By adopting a city ordinance containing a new, un-redacted file policy and a new policy enhancing the confidentiality and hold harmless provisions of OPARB assignments, without bargaining the decision to do so, the employer refused to bargain in violation of RCW 41.56.140(4) and interfered with employee rights in violation of RCW 41.56.140(1).

3. By adopting a city ordinance containing a new, un-redacted file policy and a new confidentiality policy with a specified effective date, the employer did not satisfy its duty to negotiate in good faith, and violated RCW 41.56.140(4) and (1).

4. By making only one proposal in collective bargaining regarding the effects of the un-redacted file and confidentiality policies, the employer failed to bargain in good faith in violation of RCW 41.56.140(4) and (1).

5. By implementing a city ordinance containing a new, un-redacted file policy and a new confidentiality policy prior to reaching agreement with the union or receipt of an interest arbitration award concerning those issues, the employer failed to bargain in good faith in violation of RCW 41.56.140(4) and (1).

ORDER

The City of Seattle, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to meet, confer and negotiate with the Seattle Police Officers' Guild with regard to the decision to

change the redacted file and confidentiality practices of the OPARB, and the effects of those changes;

b. Adopting a specific effective date for changes to redacted file and confidentiality practices of the OPARB, without first having satisfied its bargaining obligation;

c. Implementing changes to OPARB redacted file and confidentiality practices without first reaching agreement in collective bargaining or receiving an interest arbitration award on those issues pursuant to RCW 41.56.450;

d. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Give no further effect to city council Ordinance # 122126 which changed the OPARB confidentiality and redacted file practices.

b. Purge all findings and records of the OPARB based on any un-redacted files reviewed for 2006 or 2007, and return any un-redacted documents and files from that time period to the OPA.

c. Restore the *status quo ante* by reinstating the wages, hours, and working conditions which existed for the employees in the affected bargaining unit prior to the

unilateral change in the redacted file and confidentiality practices.

d. Give notice to and, upon request, negotiate in good faith with Seattle Police Officers' Guild regarding the redaction of documents and confidentiality issues.

e. If no agreement is reached in negotiations on these issues by March 31, 2008, submit any remaining issues on these matters to interest arbitration. Submit a request for interest arbitration of such remaining issues to the Public Employment Relations Commission by April 20, 2008.

f. Post copies of the notice attached to this order in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. This notice shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

g. Read the notice attached to this order into the record at a regular, public meeting of the Seattle City Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

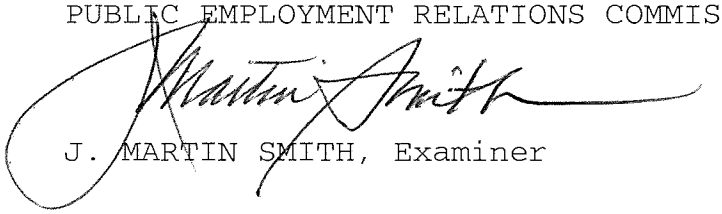
h. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same

time provide the complainant with a signed copy of the notice attached to this order.

i. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this order.

ISSUED at Olympia, Washington, this 23rd day of January, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, 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.

COLLECTIVE BARGAINING

PERC

STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with employee rights and failed to meet and negotiate in good faith regarding mandatory topics for bargaining, by adopting a city ordinance changing the OPARB reporting and redacted file procedure without bargaining the decision to do so with the Seattle Police Officers' Guild.

WE UNLAWFULLY interfered with employee rights and failed to meet and negotiate in good faith by adopting an implementation date of March 31, 2007, for those changes.

WE UNLAWFULLY interfered with employee rights and failed to meet and negotiate in good faith by making only one proposal in collective bargaining regarding the effects of the un-redacted file and confidentiality practices.

WE UNLAWFULLY interfered with employee rights and failed to meet and negotiate in good faith by implementing a city ordinance containing new un-redacted file and confidentiality policies prior to reaching agreement with the Seattle Police Officers' Guild or receiving an interest arbitration award concerning those issues.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL purge all findings of the OPARB based on un-redacted files reviewed for 2006 and 2007, and return any un-redacted documents and files from that time period to the OPA;

WE WILL NOT give effect to Ordinance 122126;

WE WILL restore the *status quo ante* by reinstating the wages, hours, and working conditions which existed for bargaining unit employees prior to the change in the redacted file and confidentiality practices.

WE WILL, upon request, meet and negotiate with Seattle Police Officers' Guild with respect to mandatory topics of bargaining.

WE WILL submit any issues unresolved in bargaining by March 31, 2008, to statutory interest arbitration proceedings under RCW 41.56.450.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ CITY OF SEATTLE

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.