STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
BELLEVUE POLICE OFFICERS GUILD	)	CASE NO. 7210-E-88-1242
	)	
	)	DECISION 2917-A - PECB
Involving certain employees of:	)	
	)	
CITY OF BELLEVUE	)	DIRECTION OF ELECTION
	)	
	)	

Aitchison and Moore, by Peter A. Ravella, Attorney at Law, appeared on behalf of the petitioner.

Richard L. Kirkby, Attorney at Law, appeared on behalf of the employer.

Davies, Roberts & Reid, by James Oswald, Attorney at Law, appeared on behalf of the incumbent intervenor, Teamsters Local 763.

The petition for investigation of a question concerning representation was filed in the above-entitled matter on January 4, 1988, by the Bellevue Police Officers Guild (guild). The guild seeks certification as exclusive bargaining representative of certain police support employees of the City of Bellevue (employer). Teamsters Local Union No. 763 was granted intervention in the proceedings as the incumbent exclusive bargaining representative of the petitioned-for employees.

A pre-hearing conference was held on March 16, 1988, at Bellevue, Washington. Two motions for dismissal of the

petition made by Local 763 and briefed by both the petitioner and Local 763 were the subject of a previous decision in this matter, City of Bellevue, Decision 2917 (PECB, May 5, 1988), wherein both motions for dismissal were denied.[1]

On May 10, 1988, a hearing was convened before Walter M. Stuteville, Hearing Officer. The parties stipulated the propriety of the petitioned-for bargaining unit and all issues precedent to a direction of election, except for the timeliness of the petition. As to the latter, Local 763 moved for reconsideration of the denial of its motion for dismissal concerning the effects of the previous untimely petition filed by the petitioner. Evidence was taken on the motion, and the parties agreed to a schedule of responsive briefs on the motion. Only Local 763 filed a brief.

FACTS

Local 763 and the employer were parties to a collective bargaining agreement which expired on December 31, 1987.

On October 5, 1987, the Washington State Council of County and City Employees (WSCCCE) filed a timely and properly supported

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[1] Local 763 first made, but later abandoned, a motion for dismissal based upon a claimed defect in the showing of interest filed in support of the petition. Second, the incumbent moved to dismiss the instant petition because, as a result of an untimely petition filed by the guild on November 2, 1988, the intervenor and the employer were prevented from bargaining until December 7, 1987, and were therefore unable to conclude a collective bargaining agreement prior to the filing of the instant petition on January 4, 1988.

petition for investigation of a question concerning representation for the bargaining unit involved in this case. That petition properly shut down bargaining between the employer and the incumbent until it was withdrawn by the WSCCCE and dismissed by the Commission on November 24, 1987.[2]

In the meantime, the guild attempted to file its own petition for the same bargaining unit, but did not deliver it to the Commission's office prior to the close of business on the last day of the statutory "window" period.[3] Accordingly, the guild's first petition was docketed as having been filed on the next business day, November 2, 1987. The guild continued to support the validity of its petition as late as December 4, 1987, but it was dismissed as untimely on December 7, 1987. City of Bellevue, Decision 2822 (PECB, 1987). The guild did not petition for review of that dismissal.

As a result of the November 2, 1987 petition, Local 763 and the employer could have been prevented from negotiating a contract during the 13-day period from November 25, 1987 to December 7, 1987.

On January 4, 1988, the guild filed the petition in this case. In denying the motion for dismissal, it was noted:

> The situation might be markedly different if there were indication of forbearance by the incumbent or of a refusal to bargain by the employer in reliance on the petition filed by the guild, but there is no

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2 The dismissal was formalized in City of Bellevue, Decision 2813 (PECB, 1987).

3 RCW 41.56.070 specifies filing within the period not more than 90 nor less than 60 days prior to the expiration of an existing collective bargaining agreement.

> allegation or offer of proof of actual prejudice to the rights of the incumbent during the period between November 25 and December 7. That period included the Thanksgiving holiday weekend when, it can be inferred, the offices of both the employer and incumbent were closed and nothing would have been happening.
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> Finally, Local 763's brief filed in support of the motions to dismiss states:
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> > On December 7, 1987, the Petition of the Guild was dismissed as untimely. The parties resumed their negotiations on December 23, 1987, and were engaged in negotiations when a second petition was filed by the Guild on January 4 ...
>
> Local 763 states that the parties "might well have been able to conclude an agreement within the insulated period.", but does not state what specific attempts were made during the November 25 to December 7 period, or how else the union was prejudiced by the shortened contract bar period. Thus, it does not appear that the incumbent pursued the negotiations aggressively once the way was clear for doing so. Local 763 surely must have known, or could reasonably have inferred, that it would be challenged as soon as the "contract bar" ceased to operate. Nevertheless, once the period of delay caused by the timely WSCCCE petition is eliminated from consideration, it does not appear to have acted to protect its own interests or to have been prejudiced by the guild's untimely petition.

In support of its motion for reconsideration, Local 763 produced the testimony of the employer's Personnel Director, Howard Strickler, and the employer's chief negotiator, Cabot Dow, to establish that the parties did actively pursue negotiations during the remainder of the insulated period. According to their testimony the parties met on December 23,

1987, and again on December 31, 1987. Those parties had not been able to meet earlier than December 23, 1987, because of scheduling conflicts encountered by Dow. They had scheduled a meeting for January 8, 1988, but cancelled that meeting when they received notice that the petition in the instant case had been filed. Both Dow and Strickler testified that the parties were close to agreement and that, given additional time, they believed that they could have reached agreement.

POSITIONS OF THE PARTIES

Local 763 argues that in past cases where parties have been deprived of an insulated period by the filing of a defective petition, a new insulated period has been provided to make the incumbent exclusive bargaining representative and the employer whole for the loss of their right to an insulated period for negotiations during the last 60 days of their collective bargaining agreement. Further, the incumbent argues that it was, in fact, prejudiced by the guild's petition which suspended negotiations for an additional 14 (sic) days after the WSCCCE petition was dismissed. Local 763 asks that it be given a 14 day period in which to attempt to reach a new collective bargaining agreement.

The guild did not file a brief on the motion for reconsideration, and is presumed to stand on the position it took on the original motion. It there argued that the Commission has imposed an insulated period only in cases where there has been a lengthy interruption in the period in which bargaining could have taken place. Additionally, it asserted that the disruption in the bargaining did not sufficiently disable the parties from reaching a settlement of the contract to warrant an imposition of an additional contract bar period.

The employer has not taken a position on the timeliness issue.

DISCUSSION

In its motion for reconsideration, Local 763 has responded to the above-quoted statement in Decision 2917 which noted that the incumbent had not offered argument or evidence that it had been actually prejudiced by the shortened contract bar "insulated" period. The incumbent has not provided detailed evidence of attempts during the November 25 - December 7 period to resume negotiations with the employer, but it has supported its motion for reconsideration with testimony from the collective bargaining representatives of the employer. The "contract bar" policy is a specific statutory exception to the general rule of RCW 41.56.040 giving public employees the right to select representatives of their own choosing. Dismissal of the petition herein would be an extension of the contract bar exception. The question at hand is whether the evidence of prejudice put forth by the incumbent is sufficient to justify such an extension.

Local 763 was undoubtedly hampered in its attempt to show actual prejudice by the departure of its chief negotiator for this bargaining unit, Richard Basarab, from its staff. Basarab has left the state, which prevented calling him as a witness in these proceedings.[4] In the absence of a witness competent to testify as to the union's side of efforts to schedule bargaining after November 24, 1987, the incumbent relied upon testimony of employer officials. Strickler had discussed the need to suspend bargaining with Basarab while both petitions

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[4] The union offered an affidavit provided by Basarab, but that was properly excluded from evidence by the Hearing Officer upon the objection of the petitioner.

were pending, and he testified that the guild's petition was still valid, so far as he knew, up to the time it was dismissed. Strickler appears to place his next contact with Basarab in the period shortly after December 7, 1987. There was then a period of delay due to scheduling conflicts, particularly involving Dow, but the record would not sustain a finding of unusual delay on the part of the employer. Some scheduling conflicts and delays are a reality in collective bargaining. Cabot Dow is well-known to the Commission as a management consultant who has appeared in numerous cases before the Commission representing numerous different employers. In any case, the delay evidently did not rise to a level sufficient to cause Local 763 to file "refusal to bargain" unfair labor practice charges against the employer.

Strickler and Dow both stated their opinion that a contract settlement would have been possible. Their testimony can be given weight as opinion, but may not be viewed as fact. There is no way that anyone can accurately estimate what might have occurred. Collective bargaining is an organic process; not a mechanical process. It is not simply a matter of assembling facts and arguments and arriving at a decision.[5] Rather it is a communication process involving personalities, bargaining goals and objectives which are often contradictory. Many an

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[5] Writing in an arbitration case decided by measurement to the one-hundredth of a mile over a 34 mile distance, Arbitrator Donald B. Lee stated in his award issued on the day of man's first landing on the moon:

> ... now that we have "computerized" a man to the moon and we have today "odometerized" an arbitrator's decision, why can we not devise a "Solomon-Box" that will, when fed the facts and findings, infallibly render decisions which can be mutually construed as victories by the parties.

J. P. Cullen & Son Corp., 69-2 CCH-Arb, para. 8772.

agreement has fallen short of conclusion because of small details that the parties had not anticipated. Thus, the testimony predicting the result had the parties had two additional weeks available to them to negotiate is, at best, conjecture.

The motion to reconsider the motion to dismiss the petition is denied.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction of the Public Employment Relations Commission among all full-time and regular part-time non-commissioned employees of the police department of the City of Bellevue, excluding supervisors, confidential employees, relief employees, and the Secretary for the Public Safety Training Center, for the purpose of determining whether a majority of those employees desire to be represented for purposes of collective bargaining by the Bellevue Police Officers Guild, by Teamsters Union Local 763, or by no representative.

DATED at Olympia, Washington this 29th day of June, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing timely objections with the Commission pursuant to WAC 391-25-590(1).