City of Fife, Decision 5645 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 160,	)	CASE 11905-U-95-2800
Complainant,	)	
vs.	)	DECISION 5645 - PECB
CITY OF FIFE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Hafer, Price, Rinehart and Robblee, by M. Lee Price, Attorney at Law, appeared on behalf of the complainant.

McGavick Graves, by Loren D. Combs, Attorney at Law, appeared on behalf of the respondent.

On July 14, 1995, International Association of Machinists and Aerospace Workers, District Lodge 160, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Fife violated RCW 41.56.140-(4) by refusing to execute a collective bargaining agreement reached by the parties. The Executive Director's preliminary ruling issued August 15, 1995, pursuant to WAC 391-45-110, found a cause of action. The respondent filed its answer on September 1, 1995. At the outset of a hearing held on November 29, 1995, before Examiner Paul T. Schwendiman, the parties agreed to stipulate the facts. The parties filed briefs on December 15, 1995.

BACKGROUND

The City of Fife (employer) operates under a "mayor-council" form of government and has previously been determined to be a "public

employer" within the meaning of RCW 41.56.030(1).[1] International Association of Machinists and Aerospace Workers, District Lodge 160 (union) is the certified exclusive bargaining representative of certain employees of the City of Fife.[2] The parties had a collective bargaining agreement effective from January 1, 1992 through December 31, 1994. This controversy arose during negotiation of a successor agreement.

STIPULATED FACTS

The parties stipulated to the following facts:

1. The Complainant is the recognized bargaining representative for the Office Clerical, Administration Senior Center Pool and other related employees within the City;

2. The most recent Collective Bargaining Agreement terminated on December 31, 1994, a true and correct copy of that Agreement being attached to the Respondent's Answer as Exhibit A, and by reference incorporated herein.

3. Prior to and since the expiration of the most recent Collective Bargaining Agreement the Complainant and Respondent, through their respective negotiating teams, have been attempting to negotiate a new Collective Bargaining Agreement.

4. The City's negotiating team had a member of the Respondent's City Council at the negotiating sessions. During the several month period the negotiating team, with the knowledge of the Complainant, had received its instructions from the City Council by way of meetings held in Executive Session. The positions taken by the

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[1] City of Fife, Decision 3055 (PECB, 1989)

[2] City of Fife, Decision 3206 (PECB, 1989).

City's negotiating team were approved by the City Council in Executive Session meetings.

5. At the negotiating session that occurred on May 25, 1995, the City submitted to the employees' bargaining team an offer, the terms of which are attached to Respondent's Answer as Exhibit B, and by reference incorporated herein.

6. The City's negotiating team believed, from all indications it had received from the City Council, that any subsequent proposals would not contain any more monetary benefits, but would be a restructuring of the economic package contained in the proposal submitted on May 25, 1995 and conveyed that information to the Union negotiating team.

7. At the end of the May 25, 1995 negotiating session the Union bargaining representative asked the City bargaining representative if this was their last, best and final offer, the City lead negotiator responded "yes".

8. The Complainant subsequently notified the Respondent City of Fife that the bargaining unit had voted on the proposal submitted by the City at the May 25, 1995 negotiating session and had authorized the Complainant to sign the new Collective Bargaining Agreement attached as Exhibit B to Respondent's Answer.

9. The proposal was then placed upon a City Council Meeting Agenda for the public meeting to be held on July 11, 1995 for the purpose of authorizing the Mayor to execute the new Collective Bargaining Agreement, attached as Exhibit B to Respondent's Answer. At that time the proposal became public record and was subject to public scrutiny.

10. On July 11, 1995, the City Council held a public meeting at which time it considered the proposal approved by the Bargaining Unit and recommended by the negotiating team.

11. Since the time the proposal had become public record, some of the Councilmembers would testify that they had discussed the proposal with their constituents and the constituents had objected to the job security/no layoff clause contained in paragraph 11.4.

12. The City Council recognized that the negotiating team had been authorized to make the offer in the negotiating session, but refused to authorize the Mayor to execute the new Collective Bargaining Agreement.

13. On August 8, 1995, the City Council passed Resolution No. 523 authorizing the Mayor to execute the Collective Bargaining Agreement attached to Respondent's Answer as Exhibit C and dated August 8, 1995.

POSITIONS OF THE PARTIES

The union argues that an agreement was reached on a successor collective bargaining agreement when the union accepted the employer's "last, best, and final offer". The union contends that parties have a responsibility to bargain in good faith, and to execute a written agreement reflecting terms reached through collective bargaining. The union claims that a refusal to sign a written agreement was a per se refusal to bargain.

The employer asserts there is a two part process in reaching a collective bargaining agreement: The first part is the negotiation process under which the parties reach agreement in executive session without public scrutiny; the second part is the ratification process under which the agreement is submitted to public scrutiny under the open meeting mandate of RCW 42.30.060. The employer argues that a city council may refuse to ratify a collective bargaining agreement reached in executive session, when citizens oppose the agreement.

DISCUSSION

This controversy concerns the basic issue of whether the employer's rejection of its own last, best and final offer (hereinafter "best/final offer"), after that offer was been accepted and ratified by the union, constitutes a failure to bargain in good faith. The answer to that question depends on the totality of the circumstances surrounding the employer's rejection its own offer.[3] This case touches on the authority required of a public employer's collective bargaining representative, its negotiating committee and its governing body and other decisionmakers, to enter into a collective bargaining agreement with an employee organization in a negotiations session. Finally, this case concerns the Commission's authority to adopt remedies to effectuate the policies and purposes of the Public Employees' Collective Bargaining Act (PECBA), Chapter 41.56 RCW.

Both parties rely on State ex rel. Bain v. Clallam County, 77 Wn.2d 542, 548 (1970). The union cites the case as authority that only written collective bargaining agreements are valid under Chapter 41.56 RCW. The employer finds comfort in its holding that any agreement reached by the parties is not a binding agreement under a legislative requirement for a public meeting, unless the agreement has gone through ratification at a public meeting.

The union cites Kiona-Benton School District, Decision 4312 (PECB, 1993), among others, for the proposition that "upon completion of good faith collective bargaining negotiations, the parties are to reduce their agreements to writing and sign the contract". The union cites City of Richland, Decision 246 (PECB, 1977); Island County, Decision 857 (PECB, 1980); and Mason County, Decision 2307-

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[3] The stipulated facts do not present, and the Examiner need not decide, the obligations of parties upon the making and acceptance of an offer which is not denominated as "final offer".

A (PECB, 1986) for the proposition that a refusal to sign a written contract is a per se refusal to bargain. This case is not, however, about whether a collective bargaining agreement must be reduced to writing and signed. Rather, it is about whether these parties reached a collective bargaining agreement.

The employer argues that it may reconsider its best/final offer when the agreement is opposed by its citizens prior to ratification of the collective bargaining agreement by the city council in an open public meeting. The employer contends the ratification process would otherwise be rendered meaningless as a "rubber stamp", citing City of Centralia, Decision 2594 (PECB, 1987). The employer is incorrect, however, in claiming that the Open Public Meetings Act (OPMA), Chapter 42.30 RCW, necessarily requires ratification of all collective bargaining agreements at a public meeting prior to reaching and executing a collective bargaining agreement at a private collective bargaining session.

The "Best/Final Offer" Terminology

RCW 41.56.140(1) and (4) define unfair labor practices by a public employer to include:

> (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.

That leads, in turn, to the definition of "collective bargaining" set forth in RCW 41.56.030(4):

> (4) "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. ...

While they do not appear within the statutory definition of collective bargaining, terms such as "best offer" or "final offer" are customarily used with care in collective bargaining, to indicate that the negotiations have reached a critical point. City of Milton, Decision 4513 (PECB 1993).[4] When a best/final offer by either an employer or union is rejected by the other party in the private sector, that is often followed by a work stoppage and/or a unilateral implement of changed wages, hours or working conditions.[5]

Use of the best/final offer terminology is often sufficient to induce a union to submit an employer proposal that may not have otherwise been submitted for a vote of bargaining unit members,[6] or even to recommend an employer offer. The unstated implication is that if the union does not accept the best/final offer, then no collective bargaining agreement will be negotiated unless the union

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[4] The Examiner has eschewed use of the ambiguous term "last offer", which may merely mean the chronologically latest offer made by a party in negotiations.

[5] Chapter 41.56 RCW does not confer or protect a right to strike. RCW 41.56.120.

[6] Ratification of agreements by vote of bargaining unit members is customary, and is even required by the constitutions and bylaws of many unions, but is not a requirement imposed by state law. Naches Valley School District, Decisions 2516, 2516-A (EDUC, 1987).

can bring more pressure on the employer.[7] Use of best/final offer terminology is sometimes a warning that unilateral implementation by the employer may follow union rejection of the offer.[8]

Where the Commission has assigned a mediator under RCW 41.56.100 and 41.58.020(1), submission of an employer's last offer for a secret ballot vote among affected employees is a suggested means of settling disputes. RCW 41.58.020(3) reads:

> (3) If the director is not able to bring the parties to agreement by mediation within a reasonable time, the director shall seek to induce the parties to voluntarily seek other means of settling the dispute without resort

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[7] A union may interpret such a statement as: "Do not expect to have a collective bargaining agreement unless the union applies sufficient additional pressure to force the employer to make a better offer". While pressure to better an employer's final offer is sometimes successful, it often is destructive of the parties' bargaining relationship and may be against public policy. See, Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317 (1958) and RCW 41.56.120.

[8] If the parties have reached a genuine impasse on all outstanding items, an employer may implement its final offer on a mandatory subject of bargaining. Pierce County, Decision 1710 (PECB, 1983); Clark County PUD, Decision 2045-A (PECB, 1989). RCW 41.56.100 requires:

> ... **If a public employer implements its last and best offer where there is no contract settlement,** allegations that either party is violating the terms of the implemented [last and best] offer shall be subject to grievance arbitration procedures if and as such procedures are set forth in the implemented [last and best] offer, or, if not in the implemented [last and best] offer, if and as such procedures are set forth in the parties' last contract. [Emphasis by **bold** supplied.]

Employer unfair labor practices will disallow implementation. Federal Way School District, Decision 232-A (EDUC, 1977). Any implementation is also subject to RCW 41.56.123, which generally requires maintenance of all terms and conditions of an expired collective agreement for a period of one year.

> to strike or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this chapter.

The legislative history of RCW 41.58.020(3) is not helpful in determining whether the words "settling the dispute" mean the formation of a collective bargaining agreement or merely a preliminary agreement that could be later rejected by the employer.

The language of RCW 41.58.020(3) is copied from the federal Labor Management Relations Act of 1947 (LMRA or Taft-Hartley Act),[9] which is applicable in the private sector. In a private sector context, acceptance of an employer's offer by the affected employees would result in a collective bargaining agreement. In the public sector, more might be required.[10] Decisions construing the National Labor Relations Act are persuasive in interpreting similar provisions of Chapter 41.56 RCW. Nucleonics Alliance, Local Union 1-369 v. WPPSS, 101 Wn.2d 24, 32-33 (1984). Similarly, in absence of direction from the courts, the legislative history of Section

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[9] LMRA Section 203(c) was adopted as proposed by a conference committee, amending House Resolution 3020.

[10] In State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), the court found that RCW 41.56.030(4) defining collective bargaining was designed to:

> [S]how a legislative intention that ... until reduced to writing and executed by the bargaining parties, an agreement does not, under the statute, become a collective bargaining agreement. ...

The court also indicated:

> ... In all official actions of the board, such as the enactment of resolutions or ordinances adopting proposed contracts or salary schedules ... No board ... shall adopt any ordinance, resolution ... or directive, except in a meeting open to the public ...

203(c) of the LMRA can be used by the Examiner and the Commission to aid in the interpretation of the nearly identical language of RCW 41.58.020(3):

* As originally passed by the House, HR 3020 Section 203(c) required the director of a new "Federal Conciliation Service" to seek to settle disputes by mandatory submission of the disputed issues to a fact finding board that would publicly recommend a settlement. If no agreement resulted after 30 days, a mandatory secret ballot vote of the bargaining unit employees on the employer's last offer was required. If the offer was accepted, a second vote was taken to designate an exclusive bargaining representative and it constituted creation of a contract to be signed by a newly elected employee representative.

* As originally passed by the Senate, Section 203(c) sought settlement by binding voluntary arbitration.

* A conference committee commented on resolution of disputed language of section 203(c) in House Conference Report No. 510, on H.R. 3020 at pages 62-63, as follows:

> One important duty of the Director which was not included in the Senate amendment is included in the conference agreement and is derived from the provisions of the House bill providing for a secret ballot by employees upon their employer's last offer of settlement before resorting to strike. Under the conference agreement it is the duty of the Director, if he is not able to bring the parties to agreement by conciliation within a reasonable time, to seek to induce them to seek other means of settling the dispute, including submission to the employees in the bargaining unit of the employer's last offer of settlement for refusal or for approval or rejection in a secret ballot. While the vote on the employer's last offer by secret ballot is not compulsory as it was in the House bill, it is expected that this procedure will be extensively used and that it will have the effect of preventing many strikes which might otherwise take place.

Thus, the House and Senate originally anticipated that collective bargaining agreements would be formed by favorable vote of the affected employees or by binding arbitration. Nothing in the federal legislative history suggests that the Conference Committee contemplated some third method outside of the original House and Senate methods for forming collective bargaining agreements. Given the legislative history of the LMRA, the best way of settling any ambiguity in RCW 41.58.020(3) is to imply the formation of a collective bargaining agreement if an employer's best/final offer is actually accepted by secret ballot of the employees.

The Per Se Violation

The refusal of a public employer to approve any collective bargaining agreement negotiated by its authorized representative is evidence of a failure to bargain in good faith.[11] Such evidence may not be sufficient, however, to find an employer breached its obligation of good faith.[12] Thus, a refusal to sign any particular

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[11] City of Mukilteo, Decision 1571, (PECB, 1983). See, also, Columbia Basin Irrigation Districts, Decision 1404 (PECB, 1982). In like manner, an employer commits an unfair labor practice by refusing to execute a written document reflecting the agreements reached in collective bargaining. Island County, Decision 857 (PECB, 1980).

[12] In City of Centralia, supra, the union's "excellent negotiating" pushed the employer's representative beyond the authority conferred upon him by the city council. The employer representative repeatedly told the union that his offer was beyond his authority and subject to approval by at least one other member of the council, and the employer representative actually recommended ratification of the agreement. In State ex rel. Bain v. Clallam County, supra, the agreement was clearly conditioned on prior approval of the employer's attorney, and the attorney disapproved based on his good faith opinion concerning the law in question. The court also found that uncertainty of a verbal agreement reached at a negotiating session sufficient to avoid formation of a collective bargaining agreement.

written collective bargaining agreement, standing alone, may or may not be a per se failure to bargain in good faith.[13]

At the negotiating session held on May 25, 1995, the employer's negotiating team submitted an offer which had previously been approved by the city council in executive session. The terms of that offer are set forth in Exhibit B, which is referred to in paragraph 5 of the stipulated facts. At that session, the employer's representatives assented to the characterization of that offer as the employer's last, best and final offer. Within what was impliedly a short time thereafter, the union notified the employer that the bargaining unit had voted to accept the proposal, and had authorized the union to sign the new collective bargaining agreement containing the terms set forth in Exhibit B. The city council considered its own last, best and final offer at a public meeting held on July 11, 1995. The city council refused to authorize the mayor to execute the new collective bargaining agreement at that time.

The employer's rejection of (or refusal to approve a contract formed by acceptance of) its own best/final offer is such convincing evidence of bad faith that it is sufficient, standing alone, to demonstrate a per se failure to bargain in good faith. The employer must provide evidence of an adequate cause for the rejection of its own final offer.

The totality of the circumstances, in this case, do not provide adequate evidence of good faith bargaining by the employer to shift

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[13] "Per se" is defined as by itself, in isolation, or unconnected with other matters. Blacks Law Dictionary, 4th ed. at page 1294. Presentation of evidence of a per se violation during a complainant's case in chief will withstand a motion to dismiss and require the respondent to provide a defense of its actions. It may, without evidence of the contrary, sustain an unfair labor practice charge.

the evidentiary balance to justify refusing to approve execution of the new collective bargaining agreement. The stipulated facts also indicate:

* Both the union and employer have attempted to negotiate an agreement from at least January 1, 1995 through May 25, 1995;

* The employer's May 25, 1995 proposal was authorized by the city council, and was put on the city council July 11, 1995 meeting agenda some time between May 25 and July 11, 1995;

* Since the time the proposal had become a public record, some of the councilmembers would testify that they discussed the proposal with their constituents and the constituents had objected to the job security/no layoff clause contained in paragraph 11.4 of Exhibit B;

* The city council refused to authorize the mayor to execute a collective bargaining agreement reflecting the terms proposed by the employer; and

* On August 8, 1995, the city council passed resolution 523 authorizing the mayor to execute a somewhat different collective bargaining agreement identified in this record as Exhibit C.

The fact that negotiations were ongoing for at least five months provides more reason for acceptance of the contract than rejection. Such a lengthy period of negotiations suggests that the parties had ample time to reach a meeting of the minds, and to form a collective bargaining agreement without any misunderstandings.

The fact that the employer's May 25 offer was pre-authorized by the city council and was placed on the meeting agenda show that an agreement was reached, and that there was no question concerning the authority of the employer's negotiators. Nothing suggests that the city council had something other than an agreement to present to the public.

The fact that some council members discussed their pre-authorized proposal with constituents later, and that some unnamed constitu-

ents had unspecified objections to the job security/no layoff clause, is too vague to base a conclusion that the city council had sufficient reason to reject the collective bargaining agreement already accepted by the union. Some public opinion against one or more provisions of a collective bargaining agreement is to be expected, and that possibility should have been considered before the city council authorized the employer's negotiators to make what they characterized as a best/final offer.

Apart from the stipulated facts being insufficient to show why there was opposition, there is no indication that the reasons for the employer's change of position were ever explained (or even communicated) to the union prior to the city council's rejection of the collective bargaining agreement negotiated by the city negotiating team. This clearly suggests a breakdown of the good faith communications called for by RCW 41.56.030(4).

The fact that the city council authorized the mayor to sign a different collective bargaining agreement than was offered to (and accepted by) the union does not excuse the employer. The stipulated facts do not show that Exhibit C was negotiated with (or even presented to) the union prior to its purported ratification by the city council.[14] Such unilateral action is indicative of bad faith rather than good faith bargaining.

Effect of the Open Public Meetings Act

The employer defends that purported legal requirements outside of Chapter 41.56 RCW excuse the refusal of the city council to approve

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[14] There are three substantial differences between Exhibit B and Exhibit C: (1) Exhibit C deletes the job security/no layoff clause contained in paragraph 11.4 of Exhibit B; (2) Exhibit C contains a $177 increase in the amount of a one-time payment from that contained in Exhibit B; and (3) Exhibit C increases wage/salary payments during the agreement by up to one-half percent.

and implement the agreement. The employer's argument rests, however, on a mistaken understanding that the Open Public Meetings Act (OPMA) always requires employer ratification at a public meeting before execution of a collective bargaining agreement.

In Bain, supra, the Supreme Court recognized limits on collective bargaining agreements reached outside of public meetings under the "public meetings" statutes then in effect, RCW 42.32.010 and RCW 42.32.020:

> Although the board may conduct negotiations in closed meetings and may for purposes other than the final adoption of any ordinance, resolution, rule, regulation, order or directive (RCW 42.32.020), hold executive session, the converse of the same proposition is equally true. In all official actions of the board, such as the enactment of resolutions or ordinances adopting proposed contracts or salary schedules:
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> > No ... authority of any political subdivision exercising legislative, regulatory or directive powers, shall adopt any ordinance, resolution, rule, regulation, order or directive, except in a meeting open to the public ... RCW 42.32.010.
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> ... [O]ur statutes contemplate that a board of county commissioners can act authoritatively only by resolutions properly spread upon the minutes and joined in by a majority of the board. Stoddard v. King County, 22 Wn.2d 868, 158 P.2d 78 (1945).
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> ...
> ... Until they had, as the collective bargaining statute declares, entered into a written agreement, adopted by the county at an open public meeting of the board of commissioners at a time fixed either by law or upon notice, the commissioners could not convert a tentative agreement into a contract binding upon the county and its treasury.

Bain at 549.

Since Bain was decided: (1) The cited provisions in Chapter 42.32 RCW were replaced by the Open Public Meetings Act of 1971 (OPMA), Chapter 42.30 RCW; (2) the Supreme Court has interpreted RCW 41.56.905 as resolving conflicts between Chapter 41.56 RCW and other statutes in favor of the PECBA;[15] and (3) the OPMA was amended in 1990 to exempt collective bargaining sessions.

Since 1990, a collective bargaining agreement negotiated at a private collective bargaining session is a valid agreement. Collective bargaining agreements can be submitted for a vote of the elected governing body of the public employer at a regular or special public meeting called in accordance with the spirit, if not the letter, of the OPMA. Absent demonstrated unusual circumstances, however, approval by a majority of the governing body at a public meeting should be routine. Failure to ratify a collective bargaining agreement reached by a public employer's authorized representative may, as here, constitute sufficient evidence to conclude that the employer has committed a "refusal to bargain" unfair labor practice.

The Open Public Meetings Act of 1971 -

The OPMA adopted as Chapter 250, Laws of 1971, was broader and more explicit than its predecessor, which was simultaneously repealed. The definitions found in RCW 42.30.020 in 1971 read:

> RCW 42.30.020 Definitions. As used in this chapter unless the context indicates otherwise:
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> (1) "Public agency" means:
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> (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute other than courts and the legislature;
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> (b) Any county, city, school district, special purpose district, or other municipal

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[15] Rose v. Erickson, 106 Wn.2d 420 (1986); Pasco v. PERC, 119 Wn.2d 504 (1992).

> corporation or political subdivision of the state of Washington;
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> (c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;
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> (2) "Governing body" means the multi-member board, commission, committee, council, or other policy or rulemaking body of a public agency.
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> (3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to a collective decision made by a majority of the members of a governing body, a collective commitment or promise by a majority of the members of a governing body to make a positive or negative decision, or an actual vote by the majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.
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> (4) "Meeting" means meetings at which action is taken.

The Legislature combined the terms defined in RCW 42.30.020 to specify the types of meetings required to be open to the public:

> RCW 42.30.030 Meetings declared open and public. All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

The 1971 legislation narrowly exempted executive sessions from the requirement for public meetings in RCW 43.20.110:

> RCW 42.30.110 Executive sessions. Nothing contained in this chapter shall be construed to prevent a governing body from holding executive sessions during a regular or special meeting to consider matters affecting national security; the selection of a site or

> the acquisition of real estate by lease or purchase, when publicity regarding such consideration would cause a likelihood of increased price; the appointment, employment, or dismissal of a public officer or employee; or to hear complaints or charges brought against such officer or employee by another public officer, person, or employee unless such officer or employee requests a public hearing. The governing body also may exclude from any such public meeting or executive session, during the examination of a witness on any such matter, any or all other witnesses in the matter being investigated by the governing body.

In 1971, RCW 42.30.140 entirely shielded only three types of meetings at which "actions" could be taken by governing bodies without application of the OPMA:

> RCW 42.30.140 Chapter controlling--application. ... This chapter shall not apply to:
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> (1) The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a member of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or
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> (2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or
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> (3) Matters governed by chapter 34.04 RCW, the Administrative Procedure Act, except as provided in section 17 of this 1971 amendatory act.

In 1973, the Legislature amended the OPMA to add one additional exclusion from coverage of the OPMA as RCW 42.30.140(4):

> (4) That portion of a meeting during which the governing body is planning or adopt-

> ing the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in such negotiations or proceedings while in progress.

During the debate on House Bill 268 in 1973,[16] an attempt was made by Representative King to enlarge the new exemption to cover:

> [N]egotiations between public agencies and their employees or recognized bargaining representatives ... PROVIDED, HOWEVER, That final adoption or ratification of a collective bargaining agreement by the governing body of a public agency shall be at a meeting open to the public. [1973 House Journal at 822]

Representative Thompson moved to further amend the bill, by adding a proviso that "negotiations shall be conducted at a meeting of the public upon demand by either party". Both of those proposed amendments failed, however, and collective bargaining was not altogether excluded from coverage of the OPMA when the Legislature added the RCW 42.30.140(4).[17] The debate continued for the balance of the decade, but no legislation was adopted in that period to exclude collective bargaining from coverage of the OPMA.[18]

During the balance of the 1970's and into the 1980's, it appears that the Commission and public employers generally followed the advice set forth in a formal opinion of the Attorney General of Washington:

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[16] House Bill 258 of 1973, would have exempted collective bargaining from the OPMA. HB 258 was rejected by the House Local Government Committee, which sent House Bill 268 to the floor with a "do pass" recommendation, to later be enacted into the law adding RCW 42.30.110(4).

[17] 1973 House Journal at 822-823.

[18] This history was reviewed in McClintock, *Impact of Open Meeting Laws*, 15 Gonzaga Law Review 65 (1980).

> [I]f the collective bargaining negotiations are conducted by a body which is not a governing body ... then the [OPMA] does not apply. For example, when one or two members of a five-member governing body are designated as a negotiating committee, then their activities in this capacity are not subject to the act. However, the final adoption or ratification of the collective bargaining agreement itself would, of necessity, be by the governing body - and thus, that adoption or ratification would have to be at a public meeting. ...
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> AGO 1971 No. 33 at 23.

Thus, agreements reached at negotiation sessions by less than a majority of the governing body were not void under the OPMA.[19]

In Chapter 366, Laws of 1985, the Legislature enacted amendments which appeared to further clarify a distinction between "final action" and other types of actions taken by or on behalf of governing bodies of public employers.

The 1990 Amendment to the OPMA -

In Mason County, Decision 2307-A (PECB, 1986), the Commission found the employer guilty of an unfair labor practice for completely

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[19] In City of Centralia, Decision 2594 (PECB, 1987), the Examiner commented on the authority demanded of employer representatives in the public sector:

> In the public sector, employer negotiating teams normally must submit agreements reached in the collective bargaining process for ratification under the procedures of the Open Public Meetings Act before the contract is final. A public employer may discuss the proposed collective bargaining agreement in a closed executive session outside the "sunshine" of the open public meeting, but the final document is to be ratified in such a meeting. However, the requirements of the Open Public Meetings Act, Chapter 42.30 RCW, do not negate the obligation of the public employer under ... Chapter 41.56 RCW to bargain in good faith.

repudiating a collective bargaining agreement which had been negotiated at private sessions attended by two of the three members of the employer's governing body.[20] In attempting to rehabilitate the situation in harmony with both the OPMA and Chapter 41.56 RCW, the Commission clarified its interpretation of the impact of the OPMA on collective bargaining:

> The Supreme Court held in State ex. rel. Bain v. Clallam County, 77 Wn.2d 542, 548 (1970) that public sector collective bargaining negotiations under Chapter 41.56 RCW were not subject to the Open Public Meetings Act then in effect, which required only that final action be taken at open public meetings. A revised Open Public Meetings Act was enacted in 1971. The new act defines a broad spectrum of "action" which must take place at open meetings. Thus, the continued validity of that aspect of the Bain decision is questionable.
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> A county board of commissioners is a "public agency" within the meaning of the Open Public Meetings Act, RCW 42.30.020(2), just as it is a "public employer" within the coverage of the Public Employees Collective Bargaining Act, RCW 41.56.020. "Governing body" is defined by RCW 42.30.020(2) as the:
>
> > [M]ultimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.
>
> Since the Open Public Meetings Act applies only to "action" by the "governing body", collective negotiations in which the "governing body" does not actually participate would not be subject to the Open Public Meetings Act.
>
> ...
> It is debatable whether ... [a] negotiating session, attended by two of the three county

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[20] The two participating members, who were "lame ducks" at the time, had even signed the agreement in private.

> commissioners, was subject to the Open Public Meetings Act. The Open Public Meetings Act itself is not clear as to whether actions by less than the entire "governing body" are subject to the Act. The Washington Attorney General, relying on California Attorney General opinions and case law, has concluded that non-final actions, including collective negotiations by a majority membership of a governing body, are subject to the Open Public Meetings Act, while negotiations conducted by less than a majority are not subject to the Act. AGO 1971 No. 33, at 9, 23-25.

The Commission ordered the employer to consider the agreement for ratification or rejection at a public meeting.

On appeal by the employer, the Court of Appeals ruled that the OPMA applied to (and was violated by) the collective bargaining sessions attended by the two commissioners, and it rejected the concept of rehabilitating the situation by bringing the tainted agreement up for approval or rejection at an open, public meeting:

> We conclude that the [OPMA] applies to collective bargaining sessions in which the decisionmaking representatives of the public agency participate. We conclude, further, that the public agency may not ratify the proposed agreement reached at meetings conducted in violation of the Act because the decisions resulting from those sessions and the ultimate formulation of the proposed agreement are void. The County could not ratify a void agreement and its refusal to consider the proposed agreement does not amount to an unfair labor practice.

Mason County v. PERC, 54 Wn. App. 38 (1989), review denied, 113 Wn.2d 1008 (1989).

The Court of Appeals commented further about the limited exemption to the OPMA for prior planning related to collective bargaining:

> Although some meetings are expressly exempted from application of the Act's requirements,

> collective bargaining sessions are not. The proviso contained in RCW 42.30.140 exempts "that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by such governing body during the course of any collective bargaining ..." RCW 42.30.140(4). We are persuaded by this provision that the Legislature intended collective bargaining itself to be conducted in open public meetings.

Mason County v. PERC, supra, at 40.

The Court of Appeals then continued:

> We believe further that the [Open Public Meetings] Act and the Public Employees' Collective Bargaining Act can be reconciled by conducting collective bargaining sessions at open meetings. There are no serious conflicts between the two acts. ibid.

The Court of Appeals based its decision on RCW 42.30.060,[21] and does not appear to have implemented the distinction between "final action" and other types of actions found in RCW 42.30.110 and the 1985 legislation.

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[21] RCW 42.30.060 provides:

> (1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.
>
> (2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter.

The Legislature reacted to the court's interpretation of the OPMA at its next session, by enacting Chapter 98, Laws of 1990, now codified as RCW 42.30.140(4)(a):

> RCW 42.30.140 Chapter controlling-Applications. ... [T]his chapter shall not apply to:
>
> ...
>
> (4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; ... .

The bill reports by the House Commerce and Labor Committee and the Senate Government Operations Committee provide background on the need to exempt collective bargaining sessions from the OPMA:

> In 1989, the Washington State Court of Appeals decided Mason County v. Public Employment Relations Commission, 54 Wn. App. 36 (1989). In Mason County, two of the three county commissioners participated in collective bargaining negotiation sessions. The court held that the exemption under the Open Public Meetings Act for collective bargaining sessions was limited and that the act required the collective bargaining sessions to be conducted in open public meetings.

In enacting the amendment to RCW 42.30.140 in 1990, the Legislature ended the need to reconcile the OPMA and the PECBA.

When considered in light of: (1) The Supreme Court decision in Rose v. Erickson, 106 Wn.2d 420 (1986) (interpreting RCW 41.56.905 as resolving conflicts between Chapter 41.56 RCW and other statutes in favor of the PECBA); (2) previous legislative actions which limited OPMA exemptions of preliminary actions taken at executive sessions (while retaining final actions under coverage of the

OPMA);[22] and (3) the language in the Senate and House committee reports showing concern about the effects of Mason County v. PERC, supra; the expansive language used in RCW 42.30.140(4)(a) indicates the Legislature intended to altogether exempt collective bargaining negotiations from the OPMA. RCW 42.30.140(4)(a) has:

* Allowed participation of any number of decisionmakers, including the governing body of a public employer as defined in RCW 42.30.020(2),[23] to directly participate in private collective bargaining sessions without violating the OPMA;

* Made certain that any "action", including final action as defined in RCW 42.30.020(3),[24] taken at a collective bargaining session for the purpose of collective bargaining negotiations with a labor organization, is not void under the OPMA;[25]

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[22] The Legislature has shielded several types of preliminary actions (but not final actions as defined in the OPMA) from a need for a public meeting. See RCW 42.30.110(1)-(c), (f), (g), (h) and (j).

[23] In Chapter 42.30 RCW, governing body means the multi-member board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

[24] Chapter 42.30 defines action as the transaction of the official business of a public agency by a governing body, including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. Final action means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

[25] Code reviser's notes indicate that numerous other statutes refer to the OPMA. Under the rules of statutory construction, a change to the referenced statute (here, the OPMA) operates wherever that statute is referenced.

* Avoided subjecting members of a governing body who attend private collective bargaining sessions to penalties under RCW 42.30.120;[26] and

* Avoided subjecting elected officials who attend private collective bargaining sessions to recall petitions under Chapter 29.82 RCW,[27] based on violations of the OPMA.

Collective bargaining is not defined in the OPMA, but RCW 42.30.140(4)(a) uses the term "collective bargaining sessions" followed by examples which touch on contract administration as well as contract negotiations. The definition of collective bargaining found in RCW 41.56.030(4) also describes a process that is broader than contract negotiations:

> (4) "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. ...

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[26] RCW 42.30.120 provides that each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of the OPMA with knowledge of the fact that the meeting is in violation is subject to personal liability in the form of a civil penalty in the amount of one hundred dollars.

[27] Allegations of facts that would be an intentional violation of the OPMA may constitute a factually sufficient basis to petition for recall of an elected official under Chapter 29.82 RCW. Recall of Beasley, 128 Wn.2d ___ (1996); Eastey v. Dempsey, 104 Wn.2d 597 (1995).

The process established by Chapter 41.56 RCW includes a variety of dispute resolution mechanisms (including negotiation, mediation and arbitration), as well as adjudicative proceedings under the Administrative Procedure Act (APA). Using Chapter 41.56 RCW as a frame of reference to interpret the term collective bargaining sessions in the OPMA, it is concluded that the OPMA now exempts meetings, conferring, and negotiating on collective bargaining matters, as well as executing written contracts reflecting the terms agreed upon in collective bargaining.

Public Access Through Other Statutes

The ability of a public employer to sign a written collective bargaining agreement during a collective bargaining session without violating the OPMA does not mean that the public is to be denied knowledge of the agreement. Although not cited or relied upon by the employer, the Examiner finds it necessary to consider the effect of the several other statutes which independently require open public meetings for some actions. The Legislature did not alter or repeal those statutes when it amended the OPMA in 1990.

RCW 35A.33.105, which regulates adjustment of wages, etc., of employees by ordinance, includes:

> Notwithstanding the appropriations for any salary, or salary range of any employee or employees adopted in a final budget, the **legislative body** of any code city **may**, by ordinance, **change the wages, hours, and conditions of employment of** any or all of its appointive **employees** if sufficient funds are available for appropriation to such purposes.

[Emphasis by **bold** supplied.]

Both ordinances and contracts are regulated by RCW 35A.12.110, concerning council meetings of many code cities:

> **No ordinance or resolution shall be passed, or contract let or entered into**, or bill for the payment of money allowed **at any meeting not open to the public**, nor at any public meeting the date of which is not fixed by ordinance, resolution, or rule, unless public notice of such meeting has been given ... as provided in RCW 42.30.080 as now or hereafter amended. ...
>
> [Emphasis by **bold** supplied.]

RCW 42.24.180 (which concerns the issuance of warrants or checks before approval by a local government legislative body) and RCW 35A.21.010 (which concerns the validity of ordinances and contracts of certain code cities) also require approvals at public meetings.

Other examples of statutes requiring public meetings exist,[28] and the failure of the Legislature to eradicate those public meeting requirements outside of the OPMA supports a conclusion that the Legislature did not intend RCW 42.30.140(4)(a) to completely exclude privately-negotiated collective bargaining agreements from public meeting requirements found in other statutes.

At a minimum, the "public records" provisions Chapter 42.17 RCW, beginning at RCW 42.17.250, require that documents such as collective bargaining agreements be available for public inspection. The

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[28] Examples of other statutes which require a public meeting independent of the OPMA include:

1. RCW 28A.505.170, concerning the procedure for additional appropriation resolutions by first class school districts;
2. RCW 36.68.060, concerning public meetings required of park and recreation boards; and
3. RCW 43.52.383, requiring that the business and deliberations of joint operating agencies be conducted openly and with opportunity for public input; and
4. RCW 47.64.170, which exempts negotiating sessions from the OPMA but requires a public meeting of the transportation commission for ratification of a collective bargaining agreement covering employees of the Washington State Ferries system.

"construction" language in RCW 42.17.251 is similar to the declaration of purpose found in the OPMA,[29] except for omission of the first two sentences of the OPMA language.[30] Disclosure of collective bargaining agreements under Chapter 42.17 RCW allows the people to remain informed of any written collective bargaining agreement reached at a private collective bargaining session. The people may not be informed by the collective bargaining contract document of their individual elected representatives' responses to a particular collective bargaining agreement. That objective of the OPMA is recognized by requiring open voting at meetings covered by the OPMA.[31] Such open voting may be necessary to inform the people so that they may retain control over the instruments they have created, as an objectives of both the OPMA and the Chapter 42.17 RCW, our public records law.[32]

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[29] RCW 42.17.251 and RCW 42.30.010 each provide:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

[30] The first two sentences in RCW 42.30.010 read:

> The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

[31] RCW 42.30.060(2).

[32] The most effective control the people retain may be at the ballot box when voting for or against incumbent elected officials.

The last surviving provision of the statute interpreted by the Supreme Court in Bain, supra, is RCW 42.32.030, which imposes a universal requirement for minutes of public meetings.[33] Regardless of who represents a public employer at a private collective bargaining session (e.g., an authorized representative; a majority of the governing body; or (as here) a minority of the governing body), the votes of individual members on approval or disapproval of a collective bargaining agreement need to be duly recorded. The minutes required by RCW 42.32.030 allow the people to have the information necessary for informed communications with their elected officials, either directly or at the ballot box.

The foregoing interpretation is consistent with a comment in the House bill report on the 1990 legislation, which indicated that the proponents understood that approval of the collective bargaining agreement would still occur at a public meeting of the governing body. Such an interpretation is also consistent with the spirit, if not the letter, of the OPMA.[34]

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[33] RCW 42.32.030 provides:

> The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection. [1953 c 216 s 3]

[34] It is implausible that the Legislature intended to effectuate that declared purpose of both the OPMA and the state public record law included in Chapter 42.17 by making only the written collective bargaining agreement available to the press and public as a public document. Public document disclosure does not require disclosure of individual voting records of elected members of a governing body of the public employer except through the OPMA. Considering the retention of other statutes independently requiring public meetings, the better interpretation of RCW 42.30.140(4)(a) is that the Legislature intended, at a minimum, to continue the presentation of written collective bargaining agreements at public meetings, and to record the votes of the members of the governing body on approval or rejection in the minutes of regular or special meetings.

Failure to ratify a collective bargaining agreement at a public meeting may constitute a "refusal to bargain" violation under RCW 41.56.140(4), unless the good faith obligation of RCW 41.56.030(4) is met. The Examiner need not speculate on the borderline between lawful and unlawful conduct in this case, since the unspecified objections from unspecified persons mentioned in the stipulated facts fall far short of what would be necessary to support a conclusion that the employer was acting in good faith. As noted above, any employer should anticipate some opposition to any particular offer, and should carefully evaluate the nature and extent of potential opposition before it makes a best/final offer. On the stipulated facts in this case, it must be concluded that the parties reached an agreement in lawful collective bargaining negotiations, and that the employer unlawfully refused to sign a written contract reflecting the terms agreed upon.

REMEDY

Duty to Sign Contract

The union requests that the employer be ordered to sign the collective bargaining agreement the terms and conditions of which are embodied in Exhibit B referred to in paragraph 8 of the stipulated facts. Consistent with its view of the OPMA, the employer argues that it should never be ordered to sign a contract that has not been ratified by the city council.

The remedy adopted by the Examiner, in order to effectuate the purposes of Chapter 41.56 RCW in the context of the stipulated facts, is to order the employer to sign the contract and to take such other action as is necessary to retroactively implement the collective bargaining agreement formed by the union's acceptance of the employer's authorized best and final offer of May 25, 1995. The terms of the contract to be executed are those which were

reduced to writing in Exhibit B, referred to in the stipulated facts.[35] Additionally, the employer will be required to waive all time limits under that collective bargaining agreement, for the purpose of initiating grievances occurring from January 1, 1995, up to the date the contract is signed and otherwise executed.[36]

An order to sign a collective bargaining agreement is a normal remedy when bargaining concluded with an agreement reached. Bremerton School District, Decision 1589 (PECB, 1983); Olympic Memorial Hospital, Decision 1587 (PECB, 1983); City of Poulsbo, Decision 2068 (PECB, 1984); Naches Valley School District, Decisions 2516 and 2516-A (EDUC, 1987); City of Olympia, Decisions 2629 and 2629-A (PECB, 1987 and 1988); Kiona-Benton School District, Decision 4312 (EDUC, 1993); and Kitsap Transit Authority, Decision 5143 (PECB, 1995).

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[35] The authority of an employer's representative to make a best or final offer, or to take other action that might be taken by the employer's entire governing body at a private collective bargaining session, may be necessary to bargain in good faith. Otherwise, employee representatives might insist on having the entire governing body, at all private collective bargaining sessions. That question remains unanswered because there is no question that employer representatives had the requisite authority to make the employer's offer of May 25, 1995.

[36] The Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla, Decision 104 (PECB, 1976). A party to a collective bargaining agreement may bring an action in court to enforce the collective bargaining agreement, or the parties may use grievance and arbitration machinery set forth within the contract itself. Article VI in Exhibit B, which is titled "Grievance Procedure", contains time limits that may not allow the union to grieve actions alleged to be in violation of the retroactively-implemented collective bargaining agreement. To make the retroactive implementation of the contract a meaningful remedy, such time limits must be waived.

In other cases where bargaining concluded with something less than a final agreement, employers have been ordered to present the collective bargaining agreement for good faith ratification at a meeting of its governing body. Island County, Decision 857 (PECB, 1980); South Columbia Irrigation District, Decisions 1404 and 1404-A (PECB, 1982); and Mason County, Decisions 2307 and 2307-A (PECB, 1985).

The only case decided since RCW 42.30.140(4)(a) was added to the OPMA is City of Milton, Decisions 4512 and 4513 (PECB, 1993), which was cited by the employer here for the proposition that an order to sign or otherwise execute an agreement that has not been ratified by the city council would be improper. The Examiner in the Milton case did not consider the implications of RCW 42.30.140(4)(a), but did note:

> The union requests an order compelling the employer to execute a written agreement incorporating the terms of the "last, best and final" offer. It cites City of Poulsbo, Decision 2068 (PECB, 1984), where the city council had already ratified the agreement, but refused to sign it.
>
> ...
> Because the union accepted the "last, best and final" offer put forth by the employer's representatives, it is now appropriate for the city council to present the agreement reached at the bargaining table at a public meeting, and consider it in good faith for ratification. The "good faith" obligation must be emphasized, and the failure of the city council to ratify that which it authorized and/or which its agents have advanced, as described above, could be the basis for further unfair labor practice proceedings if the union has reason to believe that the employer's action is a continuation of unlawful bargaining tactics.

The Milton case is distinguished from the situation before the Examiner by the fact that the Fife City Council has already

considered and rejected the collective bargaining agreement in public, and has refused at a public meeting to allow the mayor to sign the collective bargaining agreement. The city council in Milton did not reject the collective bargaining agreement, but simply postponed the decision on whether to ratify the agreement. The remedial order in Milton included:

> Present the agreement reached with International Association of Machinists and Aerospace Workers, District Lodge 160, at an open public meeting, and give good faith consideration to that agreement for ratification and signature.

Allowing the Milton City Council one opportunity to accept the agreement at a public meeting was justified by the facts. The Examiner in the Milton case also noted that:

> ... While the Examiner in Sultan drew some distinctions between public sector practice and private sector practice relating to the ability of management negotiators to conclude an agreement, ... that is not coin to conclude that a city council can authorize an offer and then fail to ratify it.

The decision in Sultan School District, Decision 1930 (PECB, 1984), had described a "dual" ratification process with reference to Bain, supra, long before the 1990 amendment to the OPMA. While that decision was affirmed by the Commission,[37] it no longer describes the legal framework applicable in public sector bargaining.

Given the factual distinction between the instant case and the Milton case, the Examiner here is not persuaded that a simple order for reconsideration of the collective bargaining agreement by the Fife City Council will effectuate the purpose of Chapter 41.56 RCW. The Island County decision included:

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[37] Decision 1930-A.

> [T]he duty to bargain in good faith requires that when parties at a bargaining table arrive at a tentative agreement, **each side is obligated to pursue ratification and finalization of that tentative agreement in good faith.**
>
> RCW 42.30, the Open Public Meetings Act, declares that all political subdivisions of the state exist to aid in the conduct of the peoples' business. "It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly." RCW 42.30.101. The duty to bargain in good faith does not subvert nor hamper the intent of this chapter. ... **The duty to bargain in good faith allows each side to believe that the other party is not going to sabotage the agreement reached through compromise at the bargaining table in presenting the agreement at a ratification meeting.** The Open Public Meetings Act was passed to protect the public interest, not to give a public employer a means of circumventing the duty to bargain in good faith in RCW 41.56.030.
>
> ...
> The NLRB under its statutory authority to grant affirmative relief to effectuate the purposes of the labor management relations act may order an employer at the request of a union to sign a written contract embodying agreed terms. H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

[Emphasis by **bold** supplied.]

A major consideration in Island County, supra, was avoiding a remedy that ordered the public employer to violate the OPMA. Since the addition of RCW 42.30.140(4)(a) to the OPMA in 1990, a public employer may sign a collective bargaining agreement at a private collective bargaining session without violation of the OPMA. The rationale of Island County for not ordering the employer to sign a collective bargaining is no longer valid. At the same time, the collective bargaining obligation has not changed since Island County was decided, and the City of Fife has already taken a public action which violated the good faith obligation of the collective bargaining statute.

Even before RCW 42.30.140(4)(a) was enacted in 1990, the Supreme Court's 1987 decision in Rose v. Erickson, supra, established the dominance of Chapter 41.56 RCW over the OPMA. The Supreme Court reasoned in Rose v. Erickson, supra, at 424:

> RCW 41.56.905 was added as a part of the 1973 amendment to chapter 41.56. Laws of 1973, ch. 131, SS 10. Significantly, in Laws of 1983, ch. 287, SS 5, the Legislature changed the references to the 1973 amendment and enacted the provisions stating that liberal construction should be given to all of RCW 41.56 and conflicts resolved in favor of the dominance of that chapter. The change is significant and we conclude that in the event of conflict between RCW 41.14 and RCW 41.56, RCW 41.56 must prevail.
>
> RCW 41.14 has been amended often since the enactment of RCW 41.56. The Legislature has not amended the pertinent portion of RCW 41.14.080 cited above. See Laws of 1980, ch. 108, s 1. This indicates that the Legislature did not intend the procedures of RCW 41.14 to supplant RCW 41.56. We conclude that the Legislature intended that RCW 41.56 prevail.

Applying similar reasoning resolves conflicts of dominance between Chapter 41.56 RCW and Chapter 42.30 RCW, the OPMA, in favor of Chapter 41.56 RCW dominance. RCW 42.30.140 in part reads:

> If any provision of this chapter conflicts with the provisions of any other statute, the provisions of this chapter shall control, ...

Chapter 42.30 RCW, including the language of RCW 42.30.140, was enacted in 1971. Chapter 42.30 RCW has been amended often since the 1983 amendment which expanded RCW 41.56.905 to make all of Chapter 41.56 RCW predominate over other statutes. RCW 41.56.905 provides:

> The provisions of this chapter are intended to be additional to other remedies and shall be

> liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

The Legislature has not, however, amended the pertinent portion of RCW 42.30.140 cited earlier. This indicates that the Legislature did not intend the "chapter controlling section" of Chapter 42.30 RCW, the OPMA, to supplant the dominance of Chapter 41.56 RCW provided by RCW 41.56.905.

Entry of the signed collective bargaining agreement and the Commission's order to sign the agreement into the minutes of a regular city council meeting provides a written public notice to the news media and to the public of the terms of the agreement and the reason for its signature. Recording the vote of the council members on implementing the signed contract entered into by the council's authorized representative or on appealing the order in this case will offer the public a means of assessing the acts of and controlling the performance of their elected officials.[38]

Rather than signing and implementing the agreement formed when the union accepted the employer's best and final offer, the city

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[38] RCW 42.30.140(4)(a) shields actions taken at a private collective bargaining session from public scrutiny, but a written collective bargaining agreement resulting from private negotiations is not shielded from public scrutiny. The presence or absence of good faith on the part of a public employer may be decided by the Commission upon the sworn testimony of elected officials and others at a public hearing held by the Commission under RCW 41.56.160 and Chapter 34.05 RCW, including testimony about what transpired at a private session. The transcript of such a hearing is a public document which may also be a source of information for the public by which to assess and control their elected officials. Public access to such information serves the spirit of the OPMA, as well as the purposes of Chapter 41.56 RCW.

council used the public meeting to reject that agreement for reasons which are not sufficient to base a finding that it acted in good faith, and it authorized the mayor to sign a different collective bargaining agreement that was not negotiated with the union. Given those facts, the Examiner finds it unlikely that the employer would sign and otherwise execute and implement the agreement, absent an order requiring it to do so. Based on the stipulated facts of this case, an order to sign and otherwise execute the collective bargaining agreement is necessary to effectuate the purpose of Chapter 41.56 RCW.

The Request for an Extraordinary Remedy -

The union has requested an award of attorney fees in this case. The Commission has authority to order payment of attorney fees as an extraordinary remedy upon finding an unfair labor practice, but the union's request for such a remedy is not appropriate in this case.

In City of Kelso, Decision 2633-A (PECB, 1988), the Commission noted that an award of attorney fees is appropriate if:

> 1) such an award is necessary to make the Commission's order effective; and
> 2) the defense to the unfair labor practice charge is frivolous; or
> 3) there is pattern of conduct evidencing a patent disregard for the duty to bargain in good faith.

The employer did not offer a frivolous defense in the case before the Examiner, nor did it pursue a pattern of conduct evidencing a patent disregard of the duty to bargain in good faith. The employer based its defense on earlier cases resolving conflicts between Chapter 41.56 RCW and the OPMA. The addition of RCW 42.30.140(4)(a) to the OPMA in 1990, for the first time, allowed final actions by the employer's governing body at private collective bargaining sessions, and this case is the first to discuss the

application of RCW 42.30.140(4)(a) to an OPMA-based defense of a public employer's refusal to sign a collective bargaining agreement. The novelty of this case excuses the employer's defense based on earlier cases.

Extensive bargaining that actually produces a collective bargaining agreement between a union and an employer is an indicator of good faith bargaining. The stipulated facts in this case show that the employer bargained with the union for an extensive period and actually reached agreement with the union on an entire collective bargaining agreement. The union first complained of bad faith bargaining when the employer refused to sign that agreement. In this case, the stipulated facts show no pattern of employer activity that might justify an award of attorney fees.

FINDINGS OF FACT

1. The City of Fife, a municipality of the state of Washington, is a public employer within the meaning of Chapter 41.56 RCW.

2. International Association of Machinists and Aerospace Workers, District Lodge 160, an employee organization within the meaning of Chapter 41.56 RCW, is the exclusive bargaining representative of certain employees of the City of Fife. The bargaining unit includes office-clerical, administration, senior center, pool and other related employees.

3. The parties waived hearing in this matter and submitted the case for decision on the following stipulated facts:

    1. The Complainant is the recognized bargaining representative for the Office Clerical, Administration Senior Center Pool and other related employees within the City;

2. The most recent Collective Bargaining Agreement terminated on December 31, 1994, a true and correct copy of that Agreement being attached to the Respondent's Answer as Exhibit A, and by reference incorporated herein.

3. Prior to and since the expiration of the most recent Collective Bargaining Agreement the Complainant and Respondent, through their respective negotiating teams, have been attempting to negotiate a new Collective Bargaining Agreement.

4. The City's negotiating team had a member of the Respondent's City Council at the negotiating sessions. During the several month period the negotiating team, with the knowledge of the Complainant, had received its instructions from the City Council by way of meetings held in Executive Session. The positions taken by the City's negotiating team were approved by the City Council in Executive Session meetings.

5. At the negotiating session that occurred on May 25, 1995, the City submitted to the employees' bargaining team an offer, the terms of which are attached to Respondent's Answer as Exhibit B, and by reference incorporated herein.

6. The City's negotiating team believed, from all indications it had received from the City Council, that any subsequent proposals would not contain any more monetary benefits, but would be a restructuring of the economic package contained in the proposal submitted on May 25, 1995 and conveyed that information to the Union negotiating team.

7. At the end of the May 25, 1995 negotiating session the Union bargaining representative asked the City bargaining representative if this was their last, best and final offer, the City lead negotiator responded "yes".

8. The Complainant subsequently notified the Respondent City of Fife that the bargaining unit had voted on the proposal submitted by the City at the May 25, 1995 negotiating session and had authorized

the Complainant to sign the new Collective Bargaining Agreement attached as Exhibit B to Respondent's Answer.

9. The proposal was then placed upon a City Council Meeting Agenda for the public meeting to be held on July 11, 1995 for the purpose of authorizing the Mayor to execute the new Collective Bargaining Agreement, attached as Exhibit B to Respondent's Answer. At that time the proposal became public record and was subject to public scrutiny.

10. On July 11, 1995, the City Council held a public meeting at which time it considered the proposal approved by the Bargaining Unit and recommended by the negotiating team.

11. Since the time the proposal had become public record, some of the Councilmembers would testify that they had discussed the proposal with their constituents and the constituents had objected to the job security/no layoff clause contained in paragraph 11.4.

12. The City Council recognized that the negotiating team had been authorized to make the offer in the negotiating session, but refused to authorize the Mayor to execute the new Collective Bargaining Agreement.

13. On August 8, 1995, the City Council passed Resolution No. 523 authorizing the Mayor to execute the Collective Bargaining Agreement attached to Respondent's Answer as Exhibit C and dated August 8, 1995.

CONCLUSIONS OF LAW

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

2. The parties reached an agreement through collective bargaining under RCW 41.56.030(4), on the basis of what the International

Association of Machinists and Aerospace Workers, Lodge 160, reasonably understood to be an authorized best and final offer made by the employer and accepted by the union. The terms of that employer offer, and thus of that agreement, included job security/no layoff clause in paragraph 11.4 as set forth in Exhibit B to the stipulated facts.

3. By the subsequent action of its city council to reject the parties' agreement, and by its refusal to authorize the mayor to sign a collective bargaining agreement reflecting the terms agreed upon by the parties, as embodied in Exhibit B to the stipulated facts, the City of Fife has failed and refused to bargain in good faith, and has committed and is committing unfair labor practices under RCW 41.56.140(4) and (1).

Based upon the foregoing findings of fact and conclusions of law, the Examiner makes the following:

ORDER

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

   A. CEASE AND DESIST from:

      (1) Refusing to execute and implement the collective bargaining agreement reached by the parties, as set forth in Exhibit B to the stipulated facts filed in this matter.

      (2) In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

(1) Execute and implement the collective bargaining agreement reached when the International Association of Machinists and Aerospace Workers, District Lodge 160 accepted the employer's best and final offer of May 25, 1995.

(2) Append a copy of the collective bargaining agreement executed pursuant to the preceding paragraph, together with a copy of this decision, to the minutes of the public meeting of the city council at which action is taken to comply with this order, and make those materials available as public record of the actions.

(3) Take any additional actions which are necessary to implement the subject collective bargaining agreement retroactive to January 1, 1995.

(4) Process any and all grievances filed by International Association of Machinists and Aerospace Workers, District Lodge 160, concerning claimed violations of the collective bargaining agreement during the period from January 1, 1995, up to the date of the employer's compliance with this order, without asserting any procedural defenses based on failure to comply with contractual time limits.

(5) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices

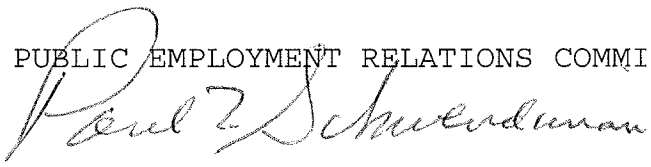
are not removed, altered, defaced, or covered by other material.

(6) Notify the above-named 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 above-named complainant with a signed copy of the notice required by the preceding paragraph.

(7) Notify the Executive Director 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 Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 21st day of August, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



PAUL T. SCHWENDIMAN, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

"APPENDIX"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL execute and implement the collective bargaining agreement which was reached when the International Association of Machinists and Aerospace Workers, District Lodge 160, accepted the City of Fife's best and final offer of May 25, 1995.

WE WILL append that collective bargaining agreement and a copy of the Commission's order to the minutes of the Fife City Council, to provide public notice of those transactions.

WE WILL take any additional action necessary to implement that collective bargaining agreement retroactive to January 1, 1995.

WE WILL process any grievances filed by District Lodge 160, claiming violations of the subject collective bargaining agreement occurring between January 1, 1995 and the date of our compliance with the Commission's order, without asserting any procedural defenses based on failure to comply with contractual time limits.

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

DATED: _____ CITY OF FIFE

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.