STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE MANAGEMENT ASSOCIATION, Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 10588-U-93-2458 DECISION 4844 - PECB PARTIAL ORDER OF DISMISSAL
CITY OF SEATTLE, Complainant, vs. SEATTLE POLICE MANAGEMENT ASSOCIATION, Respondent.	CASE 10595-U-93-2461 DECISION 4845 - PECB PARTIAL ORDER OF DISMISSAL

Webster, Mrak and Blumberg, by James H. Webster and Lynn D. Weir, Attorneys at Law, appeared for the union.

Mark H. Sidran, City Attorney, by Cathy L. Parker, Assistant City Attorney, appeared for the employer.

On July 15, 1993, the Seattle Police Management Association filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Seattle had committed a number of "refusal to bargain" violations in connection with the parties' negotiations for a new collective bargaining agreement. That complaint was docketed as Case 10588-U-93-2458.

On July 20, 1993, the City of Seattle filed a complaint charging unfair labor practices with the Commission, alleging that the Seattle Police Management Association had committed a number of

"refusal to bargain" violations in connection with the parties' negotiations for a new collective bargaining agreement. That complaint was docketed as Case 10594-U-93-2461.

The City of Seattle (employer) and the Seattle Police Management Association (SPMA) were about to commence hearings in an interest arbitration proceeding when the above-captioned cases were filed,[1] and they requested expedited preliminary rulings under WAC 391-45-110.[2] The Executive Director reviewed both complaints on July 23, 1993, and the results of that exercise were communicated by telephone and telefacsimile to counsel for the parties and to the neutral chair of the interest arbitration panel. The interest arbitration proceedings were "suspended" as to issues on which one or both of the complaints appeared to state a cause of action. No preliminary ruling letter or formal order was issued at that time.

The SPMA filed an amended complaint on July 27, 1993,[3] and a second amended complaint on August 9, 1993. After further correspondence between the parties, the Executive Director issued a letter on October 12, 1993, setting November 3, 1993 as the deadline for

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[1] Case 10376-I-93-222. The parties' last collective bargaining agreement had expired on August 31, 1992. The Commission provided mediation services in Case 9878-M-92-3762, in response to a request filed by the SPMA on July 9, 1992. A total of 14 topics were certified for interest arbitration on April 15, 1993. The parties had selected Arbitrator Gary Axon as the neutral chair of their interest arbitration panel, and a hearing was scheduled for the week of July 26, 1993.

[2] At this stage of the proceedings, all of the facts alleged in each complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

[3] A telefacsimile copy of the union's amended complaint was available to the Executive Director when the cases were being reviewed on July 23, 1993.

filing of written comments. That touched off another round of correspondence which continued through January 19, 1994.[4]

A formal preliminary ruling letter issued on February 8, 1994, was based on the employer's complaint and the SPMA's second amended complaint.[5] The parties were given a period of 14 days in which to file and serve amended complaints on the several allegations which were found insufficient to state a cause of action. The preliminary ruling letter indicated that a formal order would follow on any allegations to be dismissed.[6]

On February 18, 1994, counsel for the parties submitted a jointly signed letter, as follows:

> The parties to the above-captioned cases are in receipt of your letter of February 8, 1994, setting forth your preliminary rulings. Your letter states that you will hold open the

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[4] That correspondence included the interest arbitration award issued by Arbitrator Axon on December 31, 1993.

[5] The SPMA's second amended complaint did not refer back to the original or first amended complaint. It re-numbered some of the allegations set forth in the earlier pleadings, and omitted others. The following allegations of the original complaint and first amended complaint were thus deemed to have been dropped:

3.2 (repudiation of tentative agreement on dental plan)
3.3 (repudiation of tentative agreement on clothing allowance)
3.4 (insistence to impasse on non-mandatory subjects)
3.4.1 (management rights clause containing waivers of statutory bargaining rights)
3.4.2 (zipper clause containing waiver of statutory bargaining rights)
3.4.3 (subordination clause making collective bargaining agreement subject to changes of local ordinances)
3.4.4 (duration clause containing a waiver of statutory bargaining rights and/or functioning as an automatic renewal clause)
3.4.5 (exemption of positions from the bargaining unit)
3.4.5.2 (supervisor of employee wellness)
3.4.5.3 (supervisor of personnel accountability)
3.8.5 (refusal to provide information on compensation in other cities employer intended to use as comparables in interest arbitration)

[6] The "14-day letter" procedure followed in this case was consistent with Commission practices that have been in effect for more than 15 years.

> cases for 14 days to allow for filing and service of amended complaints.
>
> The parties to these cases have been engaged in good faith discussions geared toward finding a mutually-acceptable compromise on a range of issues. Among these issues are the subjects of the unfair labor practice charges addressed by your letter.
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> In order to facilitate the ongoing discussions, the parties have agreed to seek your permission to extend the open period for an additional 30 days. The City is aware that during that time the SPMA will be seeking review by the Commission of the determination regarding the SPMA's charge in paragraph 3.6.2 of the Second Amended Complaint that the City refused to provide information requested regarding comparables.
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> We will expect to hear from you immediately only if you cannot agree to the parties' stipulated extension.

Adding 30 days to the period originally allowed resulted in a due date of March 24, 1994.

On February 28, 1994, the SPMA purported to file a "petition for review" of the February 8, 1994 preliminary ruling letter. The SPMA sought Commission review of the anticipated dismissal of its allegation that the employer refused to bargain by refusing to provide information requested by the union in advance of the interest arbitration hearing. While characterizing the SPMA's February 28, 1994 filing at one point as a "request for reconsideration", the employer nevertheless responded with an extensive brief and exhibits filed on March 22, 1994.[7] There is no provision for a party to obtain Commission review of an interlocutory action such as the preliminary ruling letter issued in this case on February 8, 1994, and the case has not been transferred to the Commission. The materials submitted by the parties have been considered by the

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[7] The SPMA filed an unsolicited "reply brief" on April 19, 1994. The Commission's rules make no provision for reply briefs.

Executive Director in connection with the preparation of this partial order of dismissal.

Neither party filed an amended complaint within the time specified in the letter jointly submitted by counsel. In a letter filed on March 23, 1994, counsel for the employer stated:

> The City now formally withdraws its complaint regarding the Union's proposed exemption from Civil Service rules as moot. The City reserves its right to raise this issue again if a new case or controversy arises. The same is true of the City's complaint regarding promotions, and benefits for retirees and dependents.

The employer continued to urge an immediate restoration of a "civilianization" issue to the jurisdiction of the interest arbitration panel. The union resisted that request on several grounds, including that the interest arbitration panel had completed its task and was functus officio. That exchange of correspondence continued through August 10, 1994.

Introductory Allegations

Several of the allegations of the SPMA's second amended complaint were taken to be only background to other allegations:

* Paragraphs 1 and 2, describing the parties' bargaining relationship;
* Paragraph 3, alleging that the violations occurred within the past six months;
* Paragraph 3.1, alleging generally that the employer's proposals on medical insurance were indefinite and that the employer refused to provide requested information;
* Paragraph 3.2, alleging generally that the employer insisted to impasse on proposals concerning matters that were not mandatory subjects of collective bargaining;

* Paragraph 3.7, alleging generally that the employer engaged in regressive bargaining and insisted to impasse on an unlawful proposal concerning the duration of the contract; and

* Paragraph 3.7.1, alleging that the parties had agreed early in their negotiations upon a three-year duration for their new contract.[8]

Similarly, several of the allegations of the employer's complaint were taken to be only background to other allegations:

* Paragraphs 1 through 3, describing the parties' bargaining relationship;

* Paragraph 4, alleging generally that the SPMA insisted to impasse on proposals which are not mandatory subjects of collective bargaining; and

* Paragraph 6, alleging generally that the SPMA has committed unfair labor practices.

In the absence of an amended complaint from either party, the characterization of these allegations as "introductory" is deemed to have been accepted by both the SPMA and the employer.

Allegations Concerning Medical Insurance

Several SPMA allegations concerning medical insurance benefits were previously found to state a cause of action:

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[8] This was not taken as an operative allegation of employer misconduct, because of the lack of details. Notice is taken of the Commission's file for Case 10376-I-93-222, which discloses that "duration" was one of the issues certified for interest arbitration on April 16, 1993. The issue was first raised in the amended complaint filed on July 27, 1993, which was timely only as to conduct occurring after January 27, 1993. The date on which the employer "regressed" from the alleged tentative agreement was not specified. These parties were negotiating to replace a contract that expired in 1992, so RCW 41.56.440 required them to commence bargaining well in advance of the earliest date for which the complaint is timely.

* Paragraph 3.1.1, alleges that the "PPO" plan proposed by the employer was too indefinite to constitute good faith collective bargaining;

* Paragraph 3.1.2, alleges that the employer refused to provide information concerning insurance premium costs;

* Paragraph 3.1.3, alleges that the employer refused to provide information concerning the provider agreements that would be required by the PPO plan; and

* Paragraph 3.6.4, alleges that the employer did not make a timely response to the SPMA's request for information about the medical claims history of bargaining unit employees, as well as the claims experience projected under the employer's proposed PPO plan.

Allegation Concerning Training Commander

Paragraph 3.2.2 of the SPMA's second amended complaint, dealing with the commander in charge of training, was not found to state a cause of action. Without benefit of a copy of the disputed proposal, it appeared that the employer was merely seeking to establish what would be the wages, hours and working conditions of the training commander **as a member of the SPMA bargaining unit.**[9] The fact that the employer was proposing to reduce compensation was not, in and of itself, a sufficient basis to conclude that a cause of action existed. In the absence of any amendment, that allegation will now be dismissed.

Allegation Concerning Holidays

Paragraph 3.6.3 of the SPMA's second amended complaint alleges that the employer did not make a timely response to the SPMA's request for information about the frequency by which bargaining unit employees would have lost benefits under an employer proposal

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[9] There would be no reason for the employer to be negotiating with the SPMA on the wages, hours and working conditions of persons outside of its bargaining unit.

concerning holidays. That allegation was previously found to state a cause of action.

Allegations Concerning Duration

Two SPMA allegations concerning the duration of the contract being negotiated were found to state a cause of action:

* Paragraph 3.7.2, alleges that the employer proposed a 40-month contract just prior to the interest arbitration hearing;[10]

* Paragraph 3.7.3, alleges that the employer engaged in a breach of good faith when it altered its position to seek a 28-month contract during the interest arbitration proceedings.[11]

Allegations Concerning Promotions

Both the employer and the SPMA filed charges concerning the "promotions" subject matter.[12] The February 8, 1994 preliminary ruling letter noted that analysis of this issue was also hampered

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[10] RCW 41.56.070 arguably invalidates any collective bargaining agreement with a term of more than three years ab initio, so that the employer could be found guilty of attempting to make the entire collective bargaining process a futility.

[11] The interest arbitration panel awarded a 28-month contract. A footnote to the February 8, 1994 preliminary ruling letter had observed that the jurisdiction of the Commission was invoked prior to the close of the interest arbitration hearing, so that the employer's conduct immediately preceding and at the interest arbitration hearing could be subject to the remedial authority of the Commission if a violation is found. This situation was thus distinguished from Spokane County Fire District 1, Decision 3447-A (PECB, 1990), where a party did not seek Commission intervention until after the interest arbitration proceedings had been completed.

[12] One available interpretation of the employer's March 23, 1994 letter, quoted above, is that it was withdrawing its complaint on this issue. Due to the ambiguity of that letter, the issue is being processed as if it was not withdrawn.

by the absence of a copy of the disputed proposals from either party, and that the debate appeared to revolve around whether the disputed proposals involved positions within or outside of the bargaining unit.[13] Both complaints were thus found insufficient to state a cause of action on this subject area, but the principles on which the case could be decided were outlined in anticipation of the actual proposals being made available to be considered.[14] The parties have not responded with the actual proposals at issue, so these allegations will now be dismissed.

Allegations Concerning Benefits for Retirees

Both the employer and the SPMA filed charges concerning the union's proposal to provide ongoing medical benefits accessibility for current employees and their dependents when they retire.[15]

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[13] The exclusive bargaining representative of a bargaining unit has the right to bargain concerning both standards and procedures for promotions within the bargaining unit it represents, but is not thereby empowered to meddle in the employer's selection of persons to fill positions outside of its bargaining unit. City of Yakima, Decision 2387-B (PECB, 1986).

[14] The validity of a proposal could be determined along the following lines: (a) To the extent that a union makes proposals and requests information concerning promotions within the bargaining unit that it represents, a union complaint could state a cause of action with respect to an alleged failure or refusal by the employer to supply the requested information, and an employer complaint would fail to state a cause of action with respect to the union's pursuit of such proposals; (b) To the extent that a union makes proposals and requests information about promotions to positions outside of the bargaining unit that it represents, a union complaint would fail to state a cause of action, and an employer complaint would state a cause of action with respect to the union's pursuit of such proposals.

[15] The employer's March 23, 1994 letter is also ambiguous about withdrawing this allegation. Due to the ambiguity of that letter, the issue is being processed as if it was not withdrawn.

* Paragraph 3.5 of the union's complaint alleges that the employer has refused to bargain on the matter.

* Paragraph 4.c of the employer's complaint alleges that the union's proposal does not involve a mandatory subject of collective bargaining.

Both complaints were found to state a cause of action on these diametrically opposed cross-allegations.

Duty to Disclose Comparability Data

Both parties filed charges concerning alleged refusals to provide information on comparables to be used in interest arbitration. Paragraph 3.6.2 of the SPMA's second amended complaint alleged that the employer refused to provide the data, results, and factual and methodological assumptions for a study prepared for the employer by the Runzheimer Company. Paragraph 5 of the employer's complaint alleges that the SPMA refused to provide information obtained by SPMA members concerning cost of living differences between Seattle and California cities. Neither allegation was found to state a cause of action in July of 1993 or in the February 8, 1994 preliminary ruling letter. That conclusion was the subject of the SPMA's purported petition for review and written materials submitted by both parties. The Executive Director's reconsideration of those rulings is based in part on the interest arbitration award issued in the related proceedings.

In the introduction section of his decision, Arbitrator Axon set forth the following:

> The first Collective Bargaining Agreement between the parties was effective September 1, 1978. In 1983 the parties went to interest arbitration before a panel chaired by arbitrator Michael H. Beck. The parties again resorted to interest arbitration in 1984 before a panel chaired by arbitrator Allen [sic] R.

> Krebs. Once again the parties went to interest arbitration in 1987 before a panel chaired by arbitrator Carlton Snow, to resolve the terms of agreement which took effect on September 1, 1986. Concurrently with the proceeding before arbitrator Snow, the City also resorted to interest arbitration with the International Association of Firefighters [sic] Locals 27 and 2893 representing bargaining units within the Seattle Fire Department.
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> In 1989 the City and its two firefighter units submitted to interest arbitration its [sic] contract dispute for resolution before a panel chaired by arbitrator Phillip [sic] Kienast. Following the 1989 award by Kienast, the City sued to set the award aside. The parties resolved the litigation with a new Agreement. The City and the firefighter unions were thereafter able to negotiate successor contracts expiring on August 31, 1994, without resort to arbitration.
>
> The parties to this arbitration made extensive reference to the decisions issued by the other arbitrators in the earlier awards. Each side found support for its respective positions from the prior interest arbitration awards. The previous arbitration awards were specifically cited by the parties with respect to how the other arbitrators dealt with the issue of the City's attempt to introduce evidence concerning relative differences in the cost of living among the various comparator jurisdictions. Each of the other arbitrators was required to address a private study the City had commissioned from the Runzheimer Company on the issue of relative differences in the cost of living among the seven West Coast jurisdictions the parties had used for purposes of comparison. ...

A declaration by counsel attached to the employer's brief in response to the union's purported petition for review contains the following statement:

> During the course of **ordinary negotiations**, the City did not arrive at a precise cost-of-living differential, and could have bargained to a conclusion without ever having done so if

> the Union had not insisted to impasse on a 30+% increase. The Union's position was that the members be moved in ranking back toward the top of the West Coast Seven [sic] cities regardless of cost-of-living or any other factor.
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> The City took a generalist approach by suggesting that movement from the 30% increase proposal could be based on a general recognition of differences in the cost of living. **No decision to solicit a report from the Runzheimer Company was made until negotiations ended and arbitration was set.** ...

Emphasis by **bold** supplied.

Arbitrator Axon held eight days of hearing between July 26 and August 9, 1993. Briefs were filed on October 8, 1993, some 74 days after the hearing was opened. Arbitrator Axon's 107-page decision was issued 84 days after the briefs were filed, which was 16 months after the parties' previous contract expired.

A serious question arises as to whether interest arbitration has become an arena for lawyers and protracted litigation, in contravention of a legislative intent to provide an extension of and safety net under the collective bargaining process. At a minimum, the implied disdain for "ordinary" negotiations and the indicated reverence for past interest arbitrations are troublesome.

Legislative History -

The interest arbitration provisions now contained in RCW 41.56.430 through 41.56.490 date back to legislation enacted in 1973.[16] The procedure was altered by amendments enacted in 1979.[17]

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[16] Chapter 131, Laws of 1973. The coverage of that statute was limited to firefighters, law enforcement officers employed by cities with a population of 15,000 or more, and law enforcement officers employed by King County.

[17] 1979 ex. sess. c 184.

As compared to the 60-day period that is customary for contract negotiations in the private sector under Section 8(d) of the National Labor Relations Act, the Legislature requires that negotiations concerning employees eligible for interest arbitration commence at least "five months prior to the submission of the budget to the legislative body of the public employer".[18] RCW 35.33.057 requires submission of a budget message at least 60 days before the beginning of the next fiscal year, and cities customarily follow a January 1 - December 31 fiscal year, so the negotiations are to commence by early June for most of the units eligible for interest arbitration.

Under both the original and amended versions, the statute details a rigorous schedule of procedural steps which occupy five months and, in theory, should produce a negotiated contract or an interest arbitration award prior to the submission of the employer's budget. Those procedures are outlined as follows:

Event or Action	1973 Process	1979 Process
NEGOTIATION - Minimum period of bilateral negotiations	45 days 45 total	60 days 60 total
MEDIATION - Pragmatic time needed to assign mediator	5 days 50 total	5 days 65 total
10 day fixed period of mediation	10 days 60 total	n/a
Reasonable period of mediation (estimated)	n/a	10 days 75 total
ONSET OF FACTFINDING - Factfinding panel "shall be created" in absence of agreement	Per clock after 10 days of mediation	n/a
* Parties have 2 days to name partisan members	2 days 62 total	n/a
* Partisan members have 2 days to select factfinder	2 days 64 total	n/a

[18] RCW 41.56.440.

FACTFINDING PROCEDURE * Hearing shall commence within 5 days after factfinding panel formed; reasonable notice of hearing; hearing informal and judicial rules of evidence not binding	5 days 69 total	n/a
* Recommendations shall be issued within 30 days after hearing commenced	30 days 99 total	n/a
ONSET OF INTEREST ARBITRATION Interest arbitration "shall be created" if agreement not reached within 45 days" [sic] after mediation and factfinding commenced	Each party submits list of 3 nominees as its partisan arbitrator	n/a
Interest arbitration initiated by PERC Executive Director on recommendation of mediator	n/a	Done by letter to parties
* Partisan arbitrators named	2 days 101 total	7 days 82 total
* Impartial arbitrator agreed upon by partisan arbitrators	2 days 103 total	7 days 89 total
* Parties may obtain impartial arbitrator from outside source	Est. 5 days 108 total	Est. 7 days 96 total
INTEREST ARBITRATION PROCEDURE * Hearing to commence	5 days 113 total	Promptly
* Reasonable notice of hearing; hearing informal and judicial rules of evidence not binding	Same	Same
* Hearing concluded within 20 days after they commence	20 days 133 total	n/a
* Hearing concluded within 25 days after neutral chair named	n/a	25 days 121 total
* Deadline for issuance of interest arbitration award after hearing concluded	15 days 148 total	30 days 151 total

Between all of the "shall" terms and tight time lines, there clearly was no opportunity in the original law for the extensive evidentiary presentations and voluminous interest arbitration awards which have become common in the 1980's and 1990's. The amendments made in 1979 shifted emphasis to bilateral negotiations and the role of the mediator, so care must be taken lest the modicum of flexibility added to the process at that time become an

exception that swallows the rule. The Legislature has added additional employee groups to the coverage of the interest arbitration process over the years,[19] but it has not made substantive changes to the procedure itself.

The Duty to Bargain -

Collective bargaining is a process for communications, built on an assumption that neither labor nor management is to have a statutory advantage over the other. Both parties have some protection from intrusions by the other: The exclusion of "confidential" employees protects the internal workings of the employer;[20] the prohibition of employer assistance and domination assures that employee organizations will be independent and free from employer involvement in their internal affairs.[21]

These parties were under a statutory duty to bargain in good faith at all times during this controversy.[22] That duty inherently includes an obligation to be forthcoming with explanation of the proposals made or positions taken in collective bargaining, as well as a duty to provide the opposite party with requested information that is reasonably necessary to prepare for collective bargaining or contract administration. The duty to bargain in good faith is

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[19] Law enforcement officers employed by counties with a population of 70,000 or more came under the procedure in 1984. Certain "paramedics" came under the procedure by amendments enacted in 1985 and 1993. Certain security personnel, corrections personnel in counties with a population of 70,000 or more, and Washington State Patrol troopers came under the procedure in 1993. Law enforcement officers in some smaller cities and counties will come under the procedure in 1995, as a result of legislation enacted in 1993.

[20] RCW 41.56.030(2)(c); IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978).

[21] RCW 41.56.140(2).

[22] RCW 41.56.030(4); 41.56.140(4); 41.56.150(4).

not terminated or suspended by certification of a dispute for interest arbitration, and the Commission retains the authority to decide unfair labor practice claims after it has certified unresolved collective bargaining issues for interest arbitration. City of Bellevue v. IAFF, Local 1604, 119 Wn.2d 373 (1992). In that unanimous decision, the Supreme Court of the State of Washington rejected interpretations that "would not promote negotiated resolutions of collective bargaining impasses", adding:

> An employer or the bargaining representative of uniformed personnel **cannot rely on the availability of interest arbitration as an excuse for serious efforts to resolve negotiating impasses.** Interest arbitration would become the primary forum where public employers and uniformed personnel would fashion collective bargaining agreements. ... **[T]he Legislature did not intend statutory interest arbitration to displace the negotiating process;** it intended it to be used to promote uninterrupted and dedicated service by uniformed personnel and to avoid strikes. RCW 41.56.430. Thus, **it is more appropriate to view interest arbitration not as a substitute for collective bargaining, but as an instrument of the collective bargaining process** that displaces certain economic tactics.

[Emphasis by **bold** supplied.]

Thus, the Supreme Court clearly placed emphasis on the collective bargaining to be conducted by parties through bilateral negotiations and mediation, consistent with the shift of emphasis in the amendments adopted by the Legislature in 1979.

There is an expectancy that each party will do its own preparation for collective bargaining, regardless of whether interest arbitration is available to resolve impasses. That necessarily includes consideration of "market" and other factors influencing the positions to be taken at the bargaining table. At the same time, parties are aptly and uniformly criticized if they fail to make timely preparations, fail to make timely use of information they

have obtained, or fail to communicate fairly with their counterparts on the opposite side of the bargaining table.[23]

The scrutiny given to parties' bargaining tactics actually increases as parties approach or reach the critical point of "impasse". Parties must shed their proposals on permissive subjects and unit determination issues at such a time.[24] In Pierce County, Decision 1710 (PECB, 1983), the employer's full discussion of issues and full disclosure of information at the bargaining table appears to have been a substantial factor supporting the conclusion that it had lawfully implemented unilateral changes. Changes of position made by parties in an effort to obtain tactical advantage in interest arbitration have been found unlawful in several cases. City of Spokane, Decision 1133 (PECB, 1981); City of Clarkston, Decision 3246 (PECB, 1989); Spokane County Fire District 1, Decision 3447-A (PECB, 1990).

The conclusions reached in the previous preliminary rulings made in these matters suffered from an attempt to distinguish between the actions of parties in collective bargaining and their preparations for interest arbitration. It may be true that labor and management are not required to disclose each and every piece of information that is considered prior to putting proposals or arguments on the bargaining table. That is not to say that labor or management has a right to withhold information relating to the proposals or arguments which they have actually put on the bargaining table. In fact, preservation of some artificial sphere of privileged information would only tend to promote gamesmanship by parties, and to

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[23] See, for example, Highline School District, Decision 1054-A (EDUC, 1981); South Columbia Irrigation District et al., Decision 1404-A (PECB, 1982); City of Mercer Island, Decision 1457 (PECB, 1982); City of Pasco, Decision 2919 (PECB, 1988); Fort Vancouver Regional Library, Decision 2350-C (PECB, 1988); and King County, Decision 4236 (PECB, 1992).

[24] Spokane School District, supra.

encourage highly complex and detailed statistical presentations in interest arbitration proceedings that take on the appearance of a court trial.

There is a credible argument to be made that collective bargaining will be hampered, perhaps to the point of being a fruitless exercise, if parties are able to sandbag one another by withholding information until it can be produced dramatically at an interest arbitration hearing. A policy that requires full disclosure of evidence and arguments at the bargaining table as a condition precedent to their submission to an interest arbitration panel would be consistent with other Commission rules and policies: The "bargain and file" two-step required of parties by WAC 391-35-020 as a condition precedent to a unit clarification petition assures that both parties will be on notice when they sign a collective bargaining agreement covering disputed positions; the "notify" requirement imposed by King County Fire District 39, Decision 2328 (PECB, 1985), as a condition precedent to filing an "insistence to impasse" unfair labor practice gives a proponent an opportunity to alter its proposal on a claimed permissive subject prior to reaching an impasse.

The Legislature has funded and required the use of mediation, which has proven success in assisting parties to resolve differences in collective bargaining negotiations. The efforts of a mediator are seriously hampered, however, if the parties are not prepared to present (or are permitted to withhold) information that could result in compromise of particular issues. The resolution of an entire dispute may well hinge on resolution of one or a few issues among many framed by the parties, so there is no basis to suggest a differentiation within the scope of mandatory bargaining.

The Employer's Complaint -
Paragraph 5 of the employer's complaint alleged that the SPMA refused to provide information concerning the cost of living:

> During bargaining, the SPMA indicated that its members had spent a good deal of time researching numbers related to the relative cost of difference in living [sic] between California and Washington. The SPMA asserted there was no difference in the cost of living. The SPMA has refused to provide that data that it has obtained, apparently because it contends such differences are "irrelevant under applicable law". This is relevant information which the City needs to understand and evaluate the SPMA's justification for a wage increase of over 30 percent.

Those allegations readily take on a new light in view of the foregoing analysis. The debate about cost of living comparisons arose at the bargaining table; the SPMA is alleged to have made a study and to have taken a position based on its results; the employer asked for the information in bargaining; the SPMA is alleged to have refused. Taking the parties out of the interest arbitration context, there is no evident basis on which to excuse a union from disclosing the information on which its proposals and arguments are based.

The employer would have the Commission "preserve the traditional spheres of activity between the Commission and an arbitrator", but the argument is merely a variant on the "jurisdiction" arguments rejected by the Supreme Court in Bellevue, supra. The only logical purpose to protect information from disclosure at the bargaining table would be to preserve it for eventual presentation in interest arbitration. If full disclosure makes bargaining more complicated or lengthy, so be it. The legislative purpose, as interpreted by the Supreme Court in Bellevue, will be better served by giving the parties the wherewithal to settle their differences in bilateral negotiations or mediation.

The allegation is found to state a cause of action, and will be subject to further proceedings before an Examiner under Chapter 391-45 WAC.

The Union's Allegation -

Taking the two complaints together, Paragraph 3.6 of the SPMA's second amended complaint suggests the existence of a "chicken and egg" problem. The SPMA alleged:

> 3.6 The City has refused timely to provide the the [sic] Association on request the following information that is reasonably necessary for carrying out the Association's collective bargaining responsibilities:
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> ...
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> 3.6.2 Data the City supplied for a study it retained the Runzheimer Company to perform, and the results and factual and methodological assumptions of the Runzheimer study, which purports to demonstrate that higher costs of living prevail in jurisdictions employed by the parties for comparisons under RCW 41.56-.460(c) than prevail in Seattle, the result of which justifies, according to the City, lower wages for bargaining unit personnel than prevail in the comparable jurisdictions; as a result of the City's refusal, the Association was deprived of access to such information, which was not otherwise available to the Association, and it has been prejudiced in preparing and presenting its case in the interest arbitration proceeding.

There is a possibility that a refusal by the SPMA to disclose information at the bargaining table prompted the employer to commission the Runzheimer study, which it then refused to disclose fully prior to interest arbitration.

The only logical purpose to protect information about the Runzheimer study from disclosure at the bargaining table would be to preserve it for eventual presentation in interest arbitration. Two wrongs do not make a right.

The union's allegation is thus also found to state a cause of action, and will be subject to further proceedings before an Examiner under Chapter 391-45 WAC.

The "Civilianization" Issues

Both the employer and the SPMA filed charges concerning the status of certain positions and/or work. The February 8, 1994 preliminary ruling letter noted that analysis of this issue was hampered by the absence of a copy of the disputed proposals from either party, and that the debate appeared to revolve around whether the disputed proposals raised a unit determination issue or merely involved a transfer of work to persons outside of the bargaining unit.[25] The preliminary ruling letter also outlined the principles on which the case might be decided, once copies of the actual proposals were available to be considered.[26]

Paragraph 3.2.1 of the union's second amended complaint only alleged generally that the employer had insisted to impasse on a unit determination matter. The union has not supplied a copy of the employer proposal at issue. Without benefit of the actual

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[25] Unit determination is not a mandatory subject of collective bargaining. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). It is unlawful for a party to insist on concessions on "unit" matters while at impasse in collective bargaining. Spokane School District, Decision 718 (EDUC, 1979). On the other hand, a decision to transfer work from a bargaining unit to employees outside of that bargaining unit is a mandatory subject, for which an employer properly gives notice and provides opportunity for collective bargaining. South Kitsap School District, Decision 472 (PECB, 1978).

[26] The validity of a proposal could be determined along the following lines: (a) If the employer was really proposing to remove incumbents from the bargaining unit, a cause of action would exist on the union's complaint; if the SPMA was really insisting to impasse on adding positions to its bargaining unit, a cause of action would exist on the employer's complaint. (b) Conversely, if the employer was really only proposing to transfer work historically performed within a bargaining unit of uniformed personnel to non-uniformed employees (i.e., "civilianization"), no cause of action would exist on the union's complaint about the transfer.

proposal, the allegation fails to state a cause of action and will now be dismissed.

Paragraph 4.b of the employer's complaint alleged that the union insisted to impasse on inclusion of four positions in its bargaining unit. The union's proposals supplied under cover of the employer's letter filed on March 23, 1994 include:

> Positions. Add new section providing that:
>
> - The position of Director of Personnel shall be filled by an employee holding the rank of Police Captain or Police Major.
>
> - The position of aid [sic] or assistant to the Director of Personnel shall be filled by an employee holding the rank of Police Lieutenant.
>
> - The position of commander of the Budget and Police [sic] Section of the Inspectional Services Division shall be filled by an employee holding the rank of Police Lieutenant.
>
> - Command of the training functions of the Seattle Police Department shall be vested in an employee holding the rank of Police Captain.
>
> - In the event of any changes of organization, the command responsibilities for the functions defined above shall not change.

Those proposals may appear at first glance to be aimed at preservation of existing work jurisdiction, but they must be taken in context with the employer's specific allegation that none of that work is currently performed by bargaining unit employees. The allegation thus now states a cause of action.

Remaining to be dealt with is Paragraph 3.6.1 of the union's second amended complaint, which now alleges that the employer failed to provide a "timely" response to the SPMA's request for information concerning positions to be civilianized. The allegation states a cause of action, but the debate does not end there.

The union's original complaint had alleged a complete refusal by the employer to provide information on the civilianization of certain work. The October 12, 1993 letter inviting comment noted a shift in the union's second amended complaint to allege only that certain information was not provided in a "timely" manner, and concluded:

> The employer could be found guilty of an unlawful delay in providing the requested information, so the complaint still states a cause of action. The remedy for such a violation would likely be limited to a "cease and desist" order, however, and it is difficult to conceive of a set of circumstances in which the employer would be permanently barred from submitting its "civilianization" proposal to an interest arbitrator. Accordingly, now that the requested information has been supplied, I have difficulty formulating any basis to continue the exclusion of the "civilianization" issue from the jurisdiction of the interest arbitrator.

The employer renewed its request for interest arbitration on the civilianization issue in a letter filed on July 8, 1994.

In a response filed on August 3, 1994, the union does not claim that it lacks the requested information, but asserts that it is entitled to further bargaining before facing an interest arbitration panel on the subject. Given what is said above about the requests for cost-of-living information, there is some merit to the union's position. The issue will be remanded to the mediator for further efforts under RCW 41.56.440, prior to any restoration of the issue to the jurisdiction of Arbitrator Axon.[27]

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[27] Although the SPMA argues that the proceedings before Arbitrator Axon have been concluded, and that he is now functus officio, his jurisdiction was merely "suspended" by the preliminary ruling actions taken in July of 1993. No provision of the statute is cited or found which would support creation of another interest arbitration panel to resolve the civilianization issue separately.

NOW, THEREFORE, it is

ORDERED

1. DECISION 4844 - PECB. The following allegations advanced by the Seattle Police Management Association are DISMISSED for the reasons stated above:

   a. Paragraph 3.2.1, dealing with the budget director in inspectional services.

   b. Paragraph 3.2.2, dealing with the training commander.

   c. Paragraph 3.4, dealing with promotions not limited to promotions within the bargaining unit.

   d. Paragraphs 3.6 and 3.6.2, relating to refusal to provide information on comparability data.

2. DECISION 4845 - PECB. The following allegation advanced by the City of Seattle is DISMISSED for the reasons stated above: Paragraph 4.a, relating to promotions.

3. The following allegations advanced by the Seattle Police Management Association shall be the subject of further proceedings under Chapter 391-45 WAC:

   a. Paragraphs 3.1.1, 3.1.2, 3.1.3 and 3.6.4, relating to medical insurance benefits for current employees.

   b. Paragraph 3.5, relating to medical benefits for retirees.

   c. Paragraph 3.6.1, relating to a delay in providing requested information on civilianization.

d. Paragraph 3.6.2, relating to refusal to provide requested comparability data.

e. Paragraph 3.6.3, relating to holidays.

f. Paragraphs 3.7.2 and 3.7.3, relating to duration of the collective bargaining agreement being negotiated.

4. The following allegations advanced by the City of Seattle shall be the subject of further proceedings under Chapter 391-45 WAC:

a. Paragraph 4.b, relating to insistence to impasse on inclusion of positions in the bargaining unit.

b. Paragraph 4.c, relating to medical benefits for retirees.

c. Paragraph 5, relating to refusal to provide information on comparability data.

ISSUED at Olympia, Washington, on the 20th day of September, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

Paragraphs 1 and 2 of this order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.