City of Puyallup, Decision 6674 (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF PUYALLUP, Complainant,	)	CASE 13566-U-97-3313
vs.	)	DECISION 6674 - PECB
PUYALLUP PROFESSIONAL PUBLIC SAFETY MANAGERS' ASSOCIATION, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Foster, Pepper and Shefelman, by P. Stephen DiJulio, Attorney at Law, appeared for the complainant.

Schwerin, Campbell, Barnard LLP, by Larry Schwerin, Attorney at Law, appeared for Respondent

On November 26, 1997, the City of Puyallup filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Puyallup Professional Public Safety Managers' Association as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice was issued. After an amended complaint was filed, a preliminary ruling issued on May 14, 1998, found a cause of action to exist for:

> Union failure to bargain in good faith, by regressive bargaining during mediation in November, 1997.

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[1] At that stage of the proceedings, all of the facts alleged in the 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 Commission.

A hearing was conducted by Examiner J. Martin Smith on October 14, 1998. The parties filed briefs to complete the record.

Based on the evidence presented and the arguments advanced by the parties, the Examiner finds that the conduct at issue, while not a model of propriety, does not warrant a finding that the union acted in bad faith or violated RCW 41.56.150(4).

BACKGROUND

The Puyallup Professional Public Safety Managers Association (union) represents a bargaining unit consisting of two assistant fire chiefs employed by the City of Puyallup (employer). The union was certified as exclusive bargaining representative on July 31, 1996, although the employer pursued an appeal to court.[2]

The parties commenced negotiations for a first contract on or about June 17, 1997. The employer retained Richard Sokolowski to represent it in those negotiations, and he was usually accompanied at the bargaining table by Fire Chief Merle Frank and Human Resources Director Diane Berger. Pamela Taylor joined the employer's team later, upon the retirement of Berger. Both members of the bargaining unit sat at the bargaining table, although Lyle Nicolet appears to have been the union's principal negotiator.

The parties resolved a number of issues, and reached tentative agreement on at least one issue at nearly every meeting they held

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[2] City of Puyallup, Decision 5460-B (PECB, 1996). The Commission dismissed objections filed by the employer, on the basis they were not served on the union until several days after the deadline for their filing. The superior court affirmed the Commission's decision in 1998.

over a period of several months.[3] Their usual practice was to prepare and sign a document to indicate their tentative agreements. By September, the parties agreed to request mediation from the Public Employment Relations Commission. Their September 29, 1997 session was also the first mediation session. A number of issues were agreed upon in mediation, including an agreement reached on October 8 with regard to bereavement leave (after the union reduced its demand from five days to three), holidays, and vacations (after the union modified its demands on October 21), grievance procedure (after the employer drafted different language on October 21 which was acceptable to the union), and sick leave (which was agreed to on October 22, based upon an employer proposal).

This case involves disputes about eight issues that remained unresolved in the negotiations for that first contract:

- A General Purpose article, setting out goals for the contract, philosophy, etc., and/or a preamble;
- Overtime provisions, including compensatory time issues;
- Wages and deferred compensation provisions;
- Insurance benefits, including life and medical components;
- Union activities, grievance and negotiation committees;
- Management rights language; and
- Prevailing rights language (effects of past practice).

The General Purpose Article -

The union's original proposal in June set forth an expectation that the contract would "maintain the existing harmonious relationship

[3] Sokolowski's notes indicate the parties met on at least July 30, 1997, August 7 and 14, 1997, September 29, 1997, twice in October of 1997 and on November 14, 1997.

between the Fire department and its employees... ." The employer never seems to have countered that proposal. In October, the union eliminated the second paragraph and re-designated the article as a "Preamble." But the union then reverted to the June language in November. (Exhibits 1, 2A, and 2B.)

The Overtime Article -
The union's initial proposal in June called also for computation of overtime at a time-and-one-half rate, and allowed for the employees to select between payment in cash or compensatory time off (subject to an 80-hour limit on accrual of compensatory time and a requirement that compensatory time be taken within 365 days following the time it was earned). The employer apparently responded that it did not like the idea of either paying overtime or accruing compensatory time for these assistant chiefs, except where they were called out to work in fire mobilizations or declared disasters, but the record does not contain an employer proposal on this subject.

The union appears to have addressed some of the concerns voiced by the employer in a proposal it advanced in October, adding:

> Payment in cash for overtime will be granted only in those instances where an employee is participating in a fire mobilization or a declared disaster.

The union made other slight changes in how extra work time would be handled after an employee accumulated 80 hours on the books, and other sub-issues. The employer's negotiator testified, at TR. 35-36, of understanding those proposals were in response to:

> ... our concern about having a large bank or accumulation of unfunded liability in comp time, and [an] attempt to try to address that.

There is no indication the employer accepted those modified proposals when or soon after they were made. To the employer's dismay, the union returned to its June proposal in November.

The Wages Issues -
The union's opening proposal called for the assistant fire chiefs to be paid at an annual rate of $75,856 as of July 1, 1997, and for cost-of-living increases of 3% to 6% in 1998, keyed to changes in the Consumer Price Index (CPI) for Seattle for the 1996-97 period. During mediation in October, the union made an offer delaying the effective date of the $75,856 annual salary to January 1, 1998, and deleting the reference to a CPI-driven increase for 1998. The union also altered its initial offer regarding deferred compensation, lowering the contribution to be made by the employer. Again, there is no indication that the employer accepted all or any part of those compromises. The union’s wage proposal of November 14 then re-proposed the June language.

The Insurance Provisions -
In its June proposal, the union wanted insurance provisions addressing the situation of LEOFF II employees, even though both of the current bargaining unit members are LEOFF I employees.[4] A new union proposal made in October deleted three sections of the June offer, all dealing with LEOFF II participants. The employer asked some questions in October regarding the nomenclature of insurance plans offered through the Association of Washington Cities, but the parties don’t seem to dispute where they ended up on this point. (TR 40-42.) In its November 14 proposal, the union returned to its offer of June. (Exhibits 5A - 5D.)

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4 The Law Enforcement Officers and Fire Fighters retirement statute, Chapter 41.26 RCW, provides distinctly different benefits for employees who first became members of that system prior to October 1, 1977 (LEOFF I employees) than for employees who first became members of that system thereafter (LEOFF II employees).

The Union Activities Issues -

The first two sections proposed by the union in June suggested methods by which the two bargaining unit members would be involved on the Negotiations Committee and the Grievance Committee, and how they would be compensated for leave if such meetings took place during their duty hours. The third section became contentious because it sought a pool of 20 paid working days over the life of the contract agreement for the union's officials to be released from their normal duties to accommodate "other union business".[5]

The union made two changes to this proposal: First, on July 28 it reduced the 20 day pool to 8 days, and second, on October 8, 1997, the union offered a proposal which altogether eliminated section 3 concerning union business. On November 14, the union re-proposed its original June offer, including the 20 paid working days of union business leave.

The Management Rights Clause -

In June, the union proposed short-form management rights language, as follows:

> It is recognized that the City shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Fire Department, including but not limited to, the right to direct the work force, to plan, direct and control the operations and services of the Fire Department, to determine the methods and means by which such operations and services are to be conducted, lawfully recruit, assign, reassign or promote employees within the Fire Department and, for just cause, to demote, suspend, discipline or discharge employees, and to make reasonable changes or eliminate existing methods, equipment or facilities...

[5] Labor conventions and educational conferences were mentioned as other union business.

The union continued to propose the same language in its package of July 28.

The Standards Clause -

The union's June proposal regarding Prevailing Rights contained the following text:

> All rights and privileges held by the employees at the present time which are not included in this agreement shall remain in force, unchanged and unaffected in any manner.

The employer objected to that language because it inferred that there would be no "impact[s] bargaining" if there were unanticipated alterations to the fire service at Puyallup. After several bargaining sessions, the union ameliorated its stance on October 8, so that the clause read "...unchanged and unaffected, *during the term of this Agreement unless changed by mutual consent.*" The employer still objected to the October language, because it did not distinguish between mandatory and permissive topics for bargaining. On November 14, 1997, the union returned to its June language.

The employer initiated this proceeding after the union's change of position in November of 1997.

DISCUSSION

Bargaining Conduct

The obligations of "collective bargaining" are defined in RCW 41.56.030(4) as:

> [T]he 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 re-

> spect 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 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.

The Commission has examined the good faith obligation of the collective bargaining process in a number of unfair labor practice cases.[6] In determining whether a party has engaged in unlawful bargaining tactics, the "totality of circumstances" must be analyzed. See, City of Mercer Island, Decision 1457 (PECB, 1982); Walla Walla County, Decision 2932-A (PECB, 1988). In other words, the complaining party must prove that the respondent's total bargaining conduct demonstrated a failure or refusal to bargain in good faith, or an intention to frustrate or avoid an agreement. See, also, City of Clarkston, Decision 3246 (PECB, 1989).

In at least five cases, parties have been found to have engaged in unlawful conduct by altering their proposals in a manner which frustrated the negotiations. In one of those cases, an employer had second thoughts about ratifying the tentative agreement it had reached with a union representing its employees, and escalated its demands in a clear attempt to scuttle the contract. Entiat School District, Decision 1361 (PECB, 1982). Both increasing the distance between the parties, and introducing new issues late in the bargaining process, have been found to unlawfully disrupt the prospect of settlement and to be evidence of bad faith. See, Snohomish County, Decision 1868 (PECB, 1984); Columbia County,

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[6] According to one commercially available case research index, the Commission has used the "bargaining in good faith" terminology in no fewer than 304 decisions since 1976, ranging from State of Washington, Department of Printing, Decision 28 (PECB, 1976) to Pierce County Housing Authority, Decision 6494 (PECB, 1998).

Decision 2322 (PECB, 1985). The Examiner's task in this case is to determine whether the union's conduct fell below the standard of "good faith" that is imposed by the statute on employers and unions alike.

The Union's Motion to Dismiss

During the hearing, the Examiner denied a union motion for dismissal of the complaint. As of the close of the hearing, the evidence demonstrated union behavior sufficiently similar to that of the unions found guilty of bad faith in two previous cases, to warrant detailed review of the evidence. In City of Clarkston, supra, and in City of Pasco, Decision 3641 (PECB, 1990), union negotiators escalated their bargaining demands or refused to make proposals on mandatory topics for bargaining, in anticipation of the interest arbitration process. On the facts presented here, the union cannot deny that it made conciliatory proposals during the parties' negotiations, and particularly during mediation. Nor can the union deny that it returned to its initial proposals on the remaining issues, just prior to requesting certification of those issues for interest arbitration.

The Employer's "Per Se Violation" Claim

The employer maintains that the decision in Spokane County Fire District 1, Decision 3447-A (PECB, 1990), stands for the proposition that the parties in negotiations eligible for interest arbitration may ***never*** withdraw a proposal on wages (or, perhaps on any other item subject to interest arbitration), but the Examiner finds that overstates the Commission's decision. The Commission concluded in Spokane Fire District 1 that:

> [B]y withdrawing its previous proposal on the only issue open for negotiations ... **under circumstances that suggest the withdrawal was punitive in nature**, Spokane County Fire Dis-

> trict 1 breached its obligation to bargain in good faith under RCW 41.56.030(4) and so committed an unfair labor practice under RCW 41.56.140(1) and (4).
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> [Emphasis by **bold** supplied.]

The parties to that case had emerged from mediation under RCW 41.56.440, and the only issue separating them--wages--had been certified for interest arbitration under RCW 41.56.450. The employer had left the mediation process with an offer for a 3% wage increase on the table. Soon after certification for interest arbitration, however, that employer asserted a new comparator theory based on a "model fire fighter" and proposed that there be no wage increase. In deciding that those changes unlawfully frustrated an agreement, the Commission wrote:

> In contrast to the employer's actions in making the "model fire fighter" comparison and communicating it in a timely manner in an effort to reach agreement and avert interest arbitration, we find the employer's actions in reducing its pending wage offer to 0% **inconsistent with the mental state of trying to reach an agreement.** Judged in the totality of the circumstances, **it is reasonable to infer a punitive motive for the changes in wage offer**, despite the denials of the employer's negotiators. See, City of Snohomish, [Decision 1661-A (1984)] Regressive bargaining proposals made to punish the opposite party raise an inference of bad faith. Columbia County, [Decision 2322 (1985)]
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> [Emphasis by **bold** supplied.]

The Examiner finds the behavior of the union in this case to be far different from the behavior of the employer in Spokane Fire District 1:

First, it cannot be said that the union's position in this case took the parties "back to square one", inasmuch as there was

no contract language in place to which the parties could retreat.[7] By contrast, the parties in Spokane Fire District 1 were clearly engaged in negotiations for a successor contract.

Second, the union's November proposal, while undoubtedly disappointing to the employer, was to positions no farther away than the positions advanced by the union at the beginning of the parties' negotiations the previous June.[8] By contrast, the "no increase" proposal advanced by the employer in Spokane Fire District 1 appears to have put the parties farther apart than any proposal advanced in bilateral negotiations up to that time.

Third, the evidence in this case discloses little or no change of the employer's positions in response to the compromise offers to which the employer would now have the union bound. By contrast, the wage proposal withdrawn by the employer in Spokane Fire District 1 appears to have been a basis for counterproposals exchanged between the parties while that offer was on the bargaining table. Thus, an effort to "scuttle an agreement," as was present in Entiat, supra, is not presented by these facts.

Fourth, it is difficult to characterize the union's change of positions as "punitive in nature" or as "evincing the mental state inconsistent with reaching an agreement," as was the case in the applicable precedents, where the negotiations were conducted under the cloud of a pending employer petition for judicial review

[7] The parties to a new collective bargaining relationship bargain from the "status quo" which existed at the time the representation petition was filed, but that is often difficult to discern and define. Once an initial collective bargaining agreement is in place, the burden falls equally on both parties to propose changes to or deletions from that agreed-upon base, and either side is able to rely on that contract as basis for a good faith proposal to retain the "current contract language".

[8] This is also different from the situation in Clarkston, supra, where an inference is available that the onset of interest arbitration was seen as an opportunity to escalate the union's wage proposal to a level higher than any discussed in negotiations and mediation.

challenging the existence of the bargaining unit, and where the employer had seemingly made few proposals or counterproposals on the subjects involved.

The Spokane Fire District 1 decision does not establish a per se prohibition against all changes of position in bargaining, and must be read in light of the "totality of conduct" test it applied. The Examiner finds Spokane Fire District 1 is inapposite here.

Availability of Interest Arbitration

The gravamen of the employer's argument based on the evidence is that, through casual comments and gestures, the union's negotiators (and members, who all merge into one in this small unit) evinced an attitude that they were actually preparing to move the impasse along to interest arbitration, and were not interested in achieving a settlement through mediation. The "regressive" proposals of November 14 are also seen by the employer as having been a fuse designed to detonate the discussions and move the impasse toward interest arbitration. Whether these events occurred as a result of bad faith on the part of the union requires review of the negotiations in the context of the mediation, and of several legal actions between these parties.

While the precedents supporting creation of a separate bargaining unit of supervisors are clear and of long standing, under Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), and City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied, 96 Wn.2d 1004 (1981), the employer vigorously resisted the creation of this bargaining unit of supervisors. That led to a decision by the Executive Director, in March of 1996, that the assistant fire chiefs were not excludable as confidential

employees under the "labor nexus" standard imposed by IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978).[9]

The union filed an unfair labor practice complaint in January of 1996, alleging discrimination in violation of RCW 41.56.140(1).[10]

When the union prevailed on a cross-check conducted in April of 1996 under RCW 41.56.060, the employer filed (but did not timely serve) objections constituting an appeal under the Commission's representation case procedure, Chapter 391-25 WAC.

When the Commission dismissed the employer's objections in July of 1996, the employer filed a petition for judicial review which inherently perpetuated its challenge to the existence of the entire bargaining unit.

The union filed another unfair labor practice complaint in September of 1996, alleging that the employer had refused to make payroll deductions for union dues under RCW 41.56.110.[11]

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[9] City of Puyallup, Decision 5460 (PECB, 1996). The Executive Director relied, at least in part, on evidence of an agreement made to induce Nicolet to accept his present position as assistant chief, under which the fire chief agreed that Nicolet would not be obligated to perform any "labor nexus" duties vis-a-vis the local union that represents the non-supervisory fire fighters. Nicolet had previously headed that local union.

[10] Notice is taken of the Commission's docket records for Case 12300-U-96-2906. That case was closed, as "withdrawn", on July 24, 1996, just a few days after the Commission issued its decision on the representation case.

[11] Notice is taken of the Commission's docket records for Case 12685-U-96-3033. That case was closed, as "withdrawn", on January 8, 1997.

The union filed yet another unfair labor practice complaint in April of 1997, alleging that the employer had refused to bargain.[12]

Nearly a year passed from the issuance of the certification to the date indicated in this record for the onset of the parties' negotiations. As with the protracted problems described in Fort Vancouver Regional Library, Decision 2350-C (PECB, 1988), these parties made it clear that achieving a first contract would not be easy. With the employer's petition for judicial review pending throughout the June to November time frame for their negotiations in 1997, and the employer's apparent reluctance to make counter-proposals which might have closed the gap between the parties on these issues, the union had reasonable basis to fear that the employer did not want a collective bargaining agreement, and was merely stalling for time. Under these circumstances, the union's attempt to invoke the interest arbitration process made available to it by statute was not only understandable, but predictable.

The employer makes much of a comment attributed to Carmen. During negotiations on October 21, 1997, after mediation had begun, the topic of medical and retirement plans came up. Sokolowski testified that Carmen was weary of the employer's chilly response on the issue, and that Carmen turned to Nicolet saying, "This would be a good argument in arbitration; don't worry about it." It was Sokolowski's interpretation that the union did not want to settle the case in mediation:

> My concern was that the parties were already thinking of filing for arbitration or going to an arbitrator; that that was on the top of their mind.

TR. 29

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[12] Notice is taken of the Commission's docket records for Case 13100-U-97-3169. That case was also closed as "withdrawn", but not until November 5, 1997.

The surrounding circumstances do not support that interpretation, however. The employer's negotiator did not raise his concern at the time the statement was made, either in face-to-face meetings with the union or through the mediator. Were this a critical barrier to settlement, it's not likely there would have been a 10th meeting, on October 22, or an 11th meeting, on November 14.[13] Carmen's comment was not addressed to the employer or its negotiator, and is subject to interpretations other than as indicating bad faith. It could have been made in jest and, at a minimum, must be viewed in the context that both parties should certainly have been aware of the possibility of interest arbitration after they had not reached an agreement after more than three months in negotiations and a month in mediation. The evidence does not support a conclusion that the quoted comment is proof of a violation of the good faith obligation. See, City of Bremerton, Decision 3843-A (PECB, 1994).

The Mediation Context

During mediation, parties are held to the same bargaining obligation as during bilateral negotiations, e.g., to meet, confer, and negotiate in good faith. The method of communicating often changes, however, in a mediation context. Face-to-face meetings where the "stare-down" of one another are less common, because the mediator often prefers to avoid personal confrontations that might exacerbate an already-difficult situation. It is more common for proposals to be exchanged through the impartial mediator, often in a "what-if" format, which avoids one or both of the parties being bound to a particular proposal or position. There are often

[13] Indeed, the docket records of the Commission indicate that the parties continued to negotiate even after the certification for interest arbitration in Case 14040-I-98-310. The interest arbitration case was closed, on January 9, 1999, on the basis of an agreement reached by the parties.

expectations of rapid settlement, but there are also opportunities for a party to desperately grasp a sacred position, using the mediator as a shield against unwanted ideas. Parties mediating in a context where interest arbitration is available must be presumed to know that a negotiated agreement reached through mediation is not the only option available to them. Within the range of "good faith," there is always a possibility that a party can fashion its proposals in a way that will be persuasive to an arbitration panel charged with the task of fashioning a collective bargaining agreement that will regulate the parties' future interests. Making a winnable proposal does not necessarily demonstrate bad faith.

Neither the duty to bargain nor the rubrics of mediation impose a precise formula with regard to the nature of the flow of proposals. In taking positions, a union or employer may put forth a package of items, or may put forth independent proposals on one or more items. The "power of acceptance" normally available to a receiving party in the negotiation of commercial contracts may be limited by a right of ratification reserved by one or both parties at the outset of the negotiations,[14] but a party receiving a proposal has many possible responses available to it. Those include rejecting part or all of a proposal without a counterproposal, making a counter-proposal on some or all items, or accepting part or all of a proposal (and offering to sign-off a tentative agreement if that is the local custom). There are no statutorily-required "packages". Even though items technically remain independent of one another, tradeoffs of related items allow parties to build a collective

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[14] While unions often reserve a right for their members to ratify any agreement reached, that relates to their constitutions and bylaws rather than a statutory right. Naches Valley School District, Decision 2516 (EDUC, 1987). Public employers often reserve a right for their governing bodies to ratify any agreement reached, in order to comply with Open Public Meetings Act precepts that parallel their collective bargaining obligations. State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970).

bargaining agreement as they would a masonry wall--one brick at a time--rather than dealing with the whole range of issues at once.[15]

In the negotiations now before the Examiner, proposals for a first contract came in packages, but were sometimes discussed or counter-proposed independently. There was nothing unusual, or inherently unlawful, about the union's bargaining procedure.

<u>The November 14, 1997 Meeting</u>

The employer's negotiator described the November 14 mediation session, where the mediator brought back the union's June proposals after having a caucus with the Union. His reaction was

> ... any of the movement that had been shown before that, in all these articles, had re-gressed back to 6/19 or had remained unchanged. ... [W]e were essentially back to 6/19 on some very critical issues such as wages.

TR. 55

Sokolowski testified that, after receiving the union's proposal, his team discussed whether they could respond to "regressive" bargaining, and considered taking the matter to the city manager as soon as possible. It is not clear, however, what action the employer actually took. It only seems clear that the employer's negotiators did not invite the mediator to assess where the negotiation should proceed from that point.

The Examiner does not accept the employer's contention that the positions of the parties were "intransigent" as of November 14. The employer admits that the union "was not avoiding agreement on

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[15] Mediators often utilize this technique to winnow the issues to a manageable number, and to elicit responses from parties on "what-if" concepts. These often follow problem-solving or brainstorming in parties' caucuses.

October 22." In cross-examination, Sokolowski indicated that no tentative agreements were withdrawn, even by the actions that occurred on November 14. It is by no means clear that, in getting to the fateful meeting of that date, the employer had ever clearly stated its proposals on the remaining issues. Indeed, it is only clear that the employer's viewpoint was expressed verbally on a number of issues: The employer objected to the Prevailing Rights language suggested by the union, and asked for language limiting the rights to those which were mandatory topics under Chapter 41.56 RCW, but it had not made its own language proposal; the union had countered its own language on October 8 (adding a "during the term of this agreement unless changed by mutual consent" qualifier), but the employer had not accepted that language. Similarly, the employer characterized the union's most "conciliatory" proposal on management rights to be the one of October 8, but that proposal wasn't acceptable and was counter-proposed on October 22. While the employer saw the union's October 8 proposal on wages to be the most "conciliatory", the employer did not accept that proposal and it appears the employer never made a written proposal on wages.

Most important, there was no face-to-face meeting of the parties on November 14. Apart from the evidentiary problem presented by the employer's exclusive reliance on hearsay testimony about what was said by a mediator who is not available as a witness for either party,[16] the employer's negotiators did not confront the union with the perceived insult to the collective bargaining process. Instead, the employer waited until after the union team departed to vent their frustrations about "regressive bargaining" to the mediator.

None of the events of November 14 were so unusual, either in bilateral negotiations or mediation, to sustain the employer's

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[16] See, WAC 391-08-810 and 391-55-090, implementing the authority reserved to the Commission by RCW 5.60.072.

burden of proof in this case. What is unusual, in the Examiner's view, is that this employer made so little effort to fashion its initial collective bargaining agreement with the supervisory bargaining unit. Had the employer made specific proposals in reliance on the feelers put forth by the union, or even if it had offered specific language embodying its suggested changes to union proposals on matters such as the prevailing rights clause, the employer would perhaps be in a better position to complain that the union's November proposals language unraveled substantial work done by the parties up to that time. Parties may lawfully insist to impasse on their proposals concerning mandatory subjects of collective bargaining and, given the applicability of the statutory interest arbitration process to these parties, an agreement was inevitable. Chapter 41.56 RCW requires parties to bargain in good faith *with each other*, not with themselves. The union is not chargeable with bad faith for returning to its earlier positions when the employer did not respond to the union's more conciliatory positions of October 8.

Finally, the evidence in this record does not indicate the types of escalation/regression found unlawful in earlier cases which involved alleged attempts to scuttle an agreement. See, Entiat School District, supra. The union did not introduce new issues late in the process, with an effect of "disturbing the prospect of settlement." See, Snohomish County, supra. The union certainly did not move the target to a level never before discussed in the parties' negotiations. See, City of Clarkston, supra.

FINDINGS OF FACT

1. The City of Puyallup is a municipal corporation of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1).

2. The Puyallup Professional Public Safety Managers Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of supervisor fire fighter employees of the City of Puyallup. At all times pertinent to this case, Lyle Nicolet and Dick Carmen were the only officers and negotiators for that organization, as well as being the only members of the bargaining unit.

3. All of the employees in the pertinent bargaining unit are "uniformed personnel" within the meaning of RCW 41.56.030(7), and the parties' collective bargaining relationship has been subject, at all times, to the interest arbitration procedures set forth in RCW 41.56.430, <u>et seq</u>.

4. The parties began their negotiations on a first contract in June 1997, after a substantial period of delay marked by the union's filing of several unfair labor practice complaints following the issuance of a certification in July of 1996. Throughout the period pertinent to this proceedings, the negotiations were conducted under the cloud of a petition for judicial review filed by the employer to challenge the certification of the union.

5. The parties reached tentative agreements, between June and November of 1997, on various issues including recognition, bereavement leave, holiday leave, and a grievance procedure.

6. The parties did not reach agreement on other issues in bilateral negotiations over a period of more than 60 days, including a general purpose / preamble clause, wages, overtime, and prevailing rights. Mediation was requested, and the parties' negotiations on and after September 29, 1997, were in mediation under RCW 41.56.440.

7. On October 8, the union made compromise-proposals designed to respond to employer objections and settle the negotiations as a whole. While the employer viewed the union's October 8 proposals on certain issues as positive "movements", it did not accept or make counter-proposals on those issues.

8. During a meeting held on October 21, 1997, a union negotiator made a comment to the other union negotiator concerning argument(s) the union might make before an interest arbitration panel. The remark was not directed to any employer official, and was subject to multiple interpretations. While the employer's negotiator testified in this proceeding that he interpreted the remark as an indication that the union was refusing to bargain in good faith, no such interpretation was discussed with the union's negotiators at the time the comment was overheard.

9. On November 14, 1997, the employer received a union proposal conveyed by the mediator, but there was no face-to-face meeting between the parties' representatives. After the union's representatives departed from the meeting, the employer's negotiators informed the mediator that the union had returned to proposals advanced by the union at the outset of or earlier in the negotiations.

10. Before another mediation session could be scheduled and held, the union made a request that the remaining issues be certified for interest arbitration under RCW 41.56.450.

CONCLUSIONS OF LAW

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

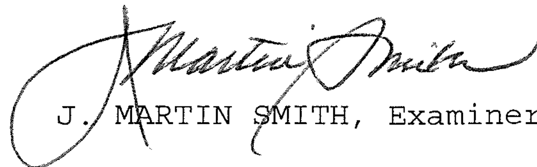
2. The employer has failed to sustain its burden of proof that the Puyallup Professional Public Safety Managers Association acted in bad faith, or failed and refused to bargain in good faith under RCW 41.56.030(4), by its action of reverting to its prior position(s) in the parties' negotiations, after compromise proposals it advanced in mediation were not accepted by the employer, so that no violation of RCW 41.56.150(4) has been established in this case.

ORDER

The complaint charging unfair labor practices filed by the City of Puyallup in this matter is DISMISSED on its merits.

Issued at Olympia, Washington, on the 4th day of May, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.