Mason County, Decision 10798-A (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 252, Complainant, vs. MASON COUNTY, Respondent.	CASES 22424-U-09-5723 22425-U-09-5724 22426-U-09-5725 22427-U-09-5726 DECISIONS 10798-A - PECB 10799-A - PECB 10800-A - PECB 10801-A - PECB
THE COUNCIL (TEAMSTERS LOCAL 252 AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302), Complainant, vs. MASON COUNTY, Respondent.	CASE 22423-U-09-5722 DECISION 10802-A - PECB DECISION OF COMMISSION

Reid, Pedersen, McCarthy & Ballew, by *Kenneth J. Pedersen*, Attorney at Law, for the union.

Mason County, by *Monty Cobb*, Chief Deputy Prosecutor, for the employer.

Mason County Juvenile Court, by *Robert Sauerlender*, Deputy Administrator, for the employer.

On April 27, 2009, Teamsters Local 252 (union) filed a complaint alleging that Mason County (employer) refused to bargain in good faith in violation of RCW 41.56.140(4) and (1) when the employer rejected a tentative collective bargaining agreement that had been ratified and signed

by the union. The union's complaints were filed on behalf of four bargaining units it represents: general services, appraisers, probation services, and juvenile detention. The union also filed a fifth complaint on behalf of International Union of Operating Engineers, Local 302 (IUOE), who represented a bargaining unit of public works employees. Examiner Joel Greene held a hearing and found that the employer violated its good faith bargaining obligation when the board of county commissioners rejected the negotiated agreement, which consisted almost exclusively of proposals the employer offered that were ratified by the union's membership. The board of county commissioners took this action at a public meeting without providing prior notice to the union.[1] We affirm.[2]

DISCUSSION

The Examiner's decision accurately describes the facts of this case. The employer and union were parties to agreements that expired on December 31, 2008. The parties began negotiations on October 16, 2008, for the public works bargaining unit and on November 20, 2008, for the four other bargaining units. Human Resources Manager T.J. Martin represented the employer during negotiations. Various department heads also assisted the employer, including Harris Haertel, who was present during negotiations on behalf of the Mason County Superior Court for the juvenile detention and probation services bargaining units. The union and IUOE were represented by local President Gary Johnson.

Almost from the outset of negotiations, the employer informed the union that the county was in a dire economic situation. The employer's opening proposal offered the five bargaining units a 1% cost-of-living adjustment (COLA), but also asked employees to take seven unpaid furlough days. Although the union had originally sought a 5.4% COLA, the union ultimately abandoned

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1 *Mason County*, Decision 10798 (PECB, 2010).

2 This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

that proposal in light of the economic reality. The evidence demonstrates that the union was willing to agree to most of what the employer was proposing.

During the course of negotiations, Johnson sought assurances from Martin that any tentative agreement would be ratified by the board of county commissioners. Johnson testified that Martin gave assurances that he was keeping the board of county commissioners informed of the state of negotiations. Johnson also testified that Martin continued to reassure him that ratification by the board of commissioners would be a mere formality. The employer presented no evidence or testimony refuting these facts. There is also no evidence or testimony that Haertel informed Johnson that any of the employer's non-economic proposals were unacceptable to the employer's court system.

On February 25, 2009, the employer made a comprehensive proposal to the union for the general services and appraisers bargaining units. The union accepted the employer's proposal for the two bargaining units, provided that the employer agreed to one economic change. Martin accepted that change on behalf of the employer. Transcript, page 26, ln. 8-19. A summary was presented to the employer on March 2, 2009, for both units.

On February 27, 2009, the employer made a comprehensive proposal for the probation and juvenile detention bargaining units. The record demonstrates that the union had concerns about an error in the proposal regarding the employer's contribution to health insurance benefits. Transcript, page 46, ln. 19 – 47, ln. 3, and page 54, ln. 19 through page 55, ln. 6; Exhibits 17 and 21. The record also demonstrates that the union objected to the employer's proposal increasing the number of hours that part-time employees needed to work before qualifying for benefits, as the employer's proposal would have made the part-time employees ineligible for the independent Taft-Hartley Health and Welfare Trust. After Martin approved the change suggested by the union, the parties concluded that they had a tentative agreement for the probation services and juvenile detention bargaining units.

On March 4, 2009, the employer and union reached a tentative agreement for the public works bargaining unit.

The union presented the tentative agreements to the membership of each of the five bargaining units between March 9 and 25, 2009. Each agreement was ratified, signed, and presented to the employer. The agreements were placed on the "consent agenda" for the board of county commissioners' April 7, 2009 regular meeting. Matters placed on the consent agenda were considered "routine by commission."

At the meeting, Judge Finlay requested that the juvenile detention and probation services agreements be removed from the agenda. The board of county commissioners then removed all of the agreements from the agenda. The employer did not give the union any notice of its intended action.

Applicable Legal Standards

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as the mandatory subjects of bargaining under *City of Richland*, Decision 2448-B (PECB, 1987), *remanded, IAFF, Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); 41.56.150(1) and (4).

In certain circumstances, the failure to ratify a collective bargaining agreement may be an unfair labor practice. This Commission has previously recognized that parties are, upon request, obligated to execute a written agreement, and a refusal to sign a contract incorporating agreed upon terms is a per se violation of the act. *Naches Valley School District*, Decision 2516-A (EDUC, 1987), *cited with approval in Shoreline School District*, Decision 9336-A (PECB, 2007). *See also* M*ason County*, Decision 2307-A (PECB, 1986), *reversed on other grounds, Mason County v. Public Employment Relations Commission*, 54 Wn. App. 36 (1989). Similarly, a party that is dissatisfied with the results of negotiations after its offer is accepted commits an

unfair labor practice violation if it seeks to retrench from its offer and bring other issues to the bargaining table. *Island County*, Decision 857 (PECB, 1980).

In determining whether an unfair labor practice has occurred, this Commission examines the totality of circumstances when analyzing conduct during negotiations. *Shelton School District*, Decision 579-B (EDUC, 1984). A party may violate its duty to bargain in good faith either by one per se violation, such as a refusal to meet at reasonable times and places, by refusing to make counter proposals, or through a series of questionable acts which, when examined as a whole, demonstrate a lack of good faith bargaining, but by themselves would not be a *per se* violation. *Snohomish County*. Decision 9834-B (PECB, 2008).

Duty to Bargain – Superior Court Employers

Chapter 41.56 RCW applies to district and superior courts and allows public employees of those two entities the right to organize for purposes of collective bargaining. RCW 41.56.020, RCW 41.56.030(13). With respect to which entity is the employer of the district and superior court employees, RCW 41.56.030(13) states that "the public employer of district court or superior court employees for wage-related matters is the respective county legislative authority, or person or body acting on behalf of the legislative authority, and the public employer for nonwage-related matters is the judge or judge's designee of the respective district court or superior court." In *Washington State Council of County and City Employees v. Hahn*, 151 Wn.2d 163 (2004), the Supreme Court of Washington expressly recognized that judges are required to engage in good faith collective bargaining about the employees' non-economic terms and conditions of employment.

Application of Standards

The Examiner held that the totality of circumstances demonstrates that the employer committed an unfair labor practice when it withdrew from the tentative agreements with the five bargaining units. In reaching this conclusion, the Examiner found that at the time the employer was making its economic proposals, the employer was aware of its economic situation but continued to assure the union that the agreements would be ratified. Thus, according to the Examiner, the employer was not permitted to withdraw from its proposals. We agree.

This record establishes that even though the employer's finances were an issue at the table, at no time did Martin or any other employer representative inform the union that the terms and conditions being negotiated would be subject to availability of funds. Additionally, Martin informed the union during the course of negotiations that the board of county commissioners would ratify the agreements. Transcript, pg. 79. ln. 9 through pg. 80 ln. 3. *Naches School District* is particularly instructive on this point:

> It must be reiterated that when a union or employer representative says to the other party: "We will reach agreement with you at this table, but we must ratify it with our [membership/board of directors] before we have a contract", each party must anticipate a period of only limited risk while the tentative agreement is converted into a binding contract. . . . The exclusive bargaining representative and the principal representative of the employer possess a mutual duty to bargain in good faith, and each party has apparent authority as well as actual authority to reach agreement which will become a collective bargaining agreement. Each party has a right to rely upon the other's authority to reach such an agreement.

Here, Martin gave the union the impression that he had full authority to negotiate on behalf of the employer and that final ratification of the agreement by the board of county commissioners would be a mere formality. Therefore, the union could have reasonably expected that the negotiated agreements would be reduced to complete written and signed agreements. Additionally, because the negotiated agreements predominately contained proposals advanced by the employer, the union's reliance upon Martin's statements must be given additional weight.

The actions of Finlay in asking the board of county commissioners to remove the probation services and juvenile detention agreements from the consent calendar also contributed to the employer's unfair labor practice. In *Shoreline School District*, Decision 9336-A, the Commission found the employer committed an unfair labor practice when it failed to support a tentative agreement it reached with its represented employees. In that case, the employer's representative, who had authority to bargain on behalf of the employer, negotiated and reached a tentative agreement about a catering proposal with the exclusive bargaining representative of its employees. The district's superintendant, who was not present at negotiations, spoke against the agreement on the basis of the catering proposal, and the school board rejected the tentative agreement.

The facts here are almost identical. Superior court judges are employers of public employees only for non-economic terms and conditions of employment. Finlay was represented during negotiations by both Martin and Haertel. Martin and Haertel, as Finlay's designees, had the responsibility to keep Finlay informed of the non-economic proposals being offered by the employer, and if any proposal was unacceptable to her, she had an obligation to direct Martin and Haertel to alter their proposals or to reject the union's proposal during negotiations, and not after negotiations had concluded and the agreements were ratified by the union. Because Finlay only had the ability to negotiate the non-economic conditions of the agreement, any attempt by Finlay to negotiate the economic provisions of the agreement, including asking the board of county commissioners to remove the agreement from the consent agenda based upon the economic terms of the agreement, was an unfair labor practice.

The Office of the Governor Decision

The employer argues that the Examiner erred by not applying the legal standards set forth in *State – Office of the Governor*, Decision 10353 (PSRA, 2009), to the facts of this case. In the employer's opinion, the *State – Office of the Governor* decision provides public employers a roadmap to withdraw from tentative agreements in certain circumstances. We disagree.

In that case, the Office of the Governor, as the employer of state employees who collectively bargain under Chapter 41.80 RCW, negotiated a tentative agreement with Service Employees International Union, Local 1199NW (SEIU) by October 1, 2008, as required by RCW 41.80.010(3)(a). In November 2008, the State Forecast Council issued a report projecting a substantial state budget deficit. On December 18, 2008, the Director of the Office of Financial Management (OFM) issued a letter informing SEIU that the negotiated agreement would not be certified as financially feasible for the State as required by RCW 41.80.010(3)(b) and, therefore, it would not be forwarded to the Legislature for consideration. Following the issuance of the December 18, 2008 letter, the employer did not request additional bargaining with the complainant bargaining representative. SEIU filed a complaint alleging that the Governor committed an unfair labor practice by failing to submit to the Legislature a request for funds to implement the compensation and fringe benefit provisions of the agreement. *State – Office of the Governor*, Decision 10353.

In ruling on the complaint, the Commission found that the unique statutory structure of Chapter 41.80 RCW permitted the Governor to withdraw from a previously negotiated agreement if the Director of OFM certified that agreement as not being financially feasible. Therefore, the act of withdrawing from the tentative agreement was not by itself an unfair labor practice. Furthermore, there was no evidence that the Governor was aware of the severity of the budget crisis during negotiations. However, the Governor's Office did commit an unfair labor practice when it failed to immediately notify the SEIU of the budget short fall and by failing to immediately request bargaining upon rejection of the tentative agreement.

As the Examiner correctly points out, *State – Office of the Governor* was decided under a unique statutory scheme that places certain restrictions on the financial aspect of the negotiated agreement and, in certain circumstances, expressly allows the employer to repudiate the negotiated agreement provided the Director of OFM declares the agreement not financially feasible. The *State – Office of the Governor* decision also expressly stated that the facts surrounding that case were unique, and that "it would be unwise to extrapolate from . . . specific circumstances that would permit a party to withdraw from a tentative agreement." *State – Office of the Governor*, Decision 10353, note 4. Accordingly, the *State - Office of the Governor* case is not applicable to this employer.

Turning to the employer's argument that it was not aware of the magnitude of the impending financial crisis during bargaining, this argument is not supported by the record. Commissioner Lynda Ring Erickson testified that Martin kept the board of county commissioners informed about the state of negotiations. Transcript, pg. 170, ln. 24 through pg. 171, ln. 3. Thus, the employer was aware of what proposal Martin was offering to the union. Furthermore, Ring Erickson also testified that the employer was aware as early as the second week in February that its revenues were declining. Transcript, pg. 173, ln. 17 – 25. The employer presented no evidence demonstrating why it was precluded from informing the union of this fact.

This Commission has provided guidance to employers bargaining under Chapter 41.56 RCW who are facing an economic crisis. In *Griffin School District*, Decision 10489-A (PECB, 2010), this Commission held that Chapter 41.56 RCW does not handcuff employers from taking action

in the wake of a financial crisis. The Commission explained that "should an employer be faced with a situation where it needs to make a change to a certain mandatory subject of bargaining, it should inform the union of the issue, the importance of the issue to the employer (including the timeline in which the employer needs to complete bargaining), and, upon request, bargain in good faith." *Griffin School District*, Decision 10489-A. The Commission also explained that if the parties reach a lawful impasse, an "employer is then permitted to lawfully implement its last offer on that topic, while remaining willing to bargain all other mandatory subjects of bargaining, and remain willing to return to bargaining regarding the subject of bargaining implemented by the employer if the union makes such a request." *Griffin School District*, Decision 10489-A, *citing Skagit County*, Decision 8746-A (PECB, 2006).

The Open Public Meetings Act

The employer claims that the Examiner ignored the fact that the Washington State Open Public Meetings Act, Chapter 42.30 RCW, required the board of county commissioners to take all of its actions in an open public meeting, including withdrawing from a tentative agreement. The employer further asserts that this requirement caused the employer to delay its decision to notify the union of its financial circumstances. The employer also claims that the Examiner's reliance upon the *Mason County* decision was in error because that decision was overruled by the Washington State Court of Appeals. *See Mason County v. Public Employment Relations Commission*, 54 Wn. App. 36. The employer also asserts that reliance upon *Shoreline School District* was also in error because that decision in large part relies upon the *Mason County* decision. We reject both of these assertions.

With respect to the employer's argument that the Open Public Meetings Act requires the board of county commissioners to take all actions in a public meeting, RCW 42.30.140(4) expressly states that the Open Public Meetings Act shall not apply to:

> Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or . . . that portion of a meeting during which the governing body is planning or adopting 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 the negotiations or proceedings while in progress.

That statute, adopted in 1990 to overturn *Mason County v. Public Employment Relations Commission,* allows public employers and unions representing public employees to negotiate outside the confines of the Open Public Meetings Act. *See City of Fife*, Decision 5645 (PECB, 1996). Accordingly, if there were problems with the financial aspects of the negotiated agreement, the Open Public Meetings Act did not preclude the employer from immediately communicating its concerns with the union outside of a public meeting.

With respect to the employer's argument that reliance upon the Commission's *Mason County* decision is misplaced because that decision was overturned by *Mason County v. Public Employment Relations Commission*, the Court of Appeals decision was predicated on the fact that the employer had negotiated the collective bargaining agreement in violation of the Open Public Meetings Act, and because RCW 42.30.060 made any action taken by a public body that was in violation of the Act null and void, the employer could not have committed an unfair labor practice. However, the Court of Appeals did not address the Commission's interpretation of Chapter 41.56 RCW in that decision, and the Commission's re-adoption of the principles announced in *Mason County* in later decisions such as *Shoreline School District*, combined with the Legislature's exemption of the collective bargaining process from the Open Public Meetings Act, leads to a conclusion that the Examiner's reliance on *Mason County* and its progeny decisions was correct.

Derivative Interference

The employer challenged the Examiner's conclusion that the employer interfered with protected employee rights on the basis that the union did not allege that the employer interfered with such rights, and there is no evidence demonstrating that the employer made any threat of reprisal in connection with an employees' exercise of protected rights. When this Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights. *Battle Ground School District*, Decision 2449-A (PECB, 1986). Although derivative interference violations "automatically" attach to any refusal to bargain violation, it is generally unnecessary for an examiner to explain her or his

reasoning for finding the derivative interference violation. *Snohomish County*, Decision 9834-B. This standard applies here. Because substantial evidence supports the Examiner's findings and conclusions that the employer refused to bargain in good faith with the union, it also derivatively interfered with employee rights.

Remedy

The Legislature empowered this Commission to prevent and remedy unfair labor practices. RCW 41.56.160. The fashioning of remedies is a discretionary action of the Commission. *City of Seattle*, Decision 8313-B (PECB, 2004). When interpreting the Commission's remedial authority, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish its purpose. *METRO v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). Appropriate remedial orders include remedies necessary to effectuate the purposes of the collective bargaining statute and to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d at 633.

To remedy the employer's unfair labor practices and effectuate the purposes of Chapter 41.56 RCW, the Examiner ordered the employer to ratify the agreement. The employer challenges this finding, and points to *Island County*, Decision 857 (PECB, 1980), as standing for the proposition that this Commission cannot compel a public body to ratify an agreement.

The facts of this case demonstrate that Martin: 1) gave the union a clear impression that he had the authority to bargain on behalf of the employer, 2) the negotiated agreements were comprised almost exclusively of employer advanced proposals, and 3) the board of county commissioners was kept fully informed of the state of negotiations and voiced no opposition to what was being negotiated. Furthermore, Martin assured the union that final ratification of the agreements was a mere formality, and the employer articulated no justification for removing ratification of the agreements from the consent calendars.

Taken as a whole, it is clear that the employer and union had reached an agreement. Thus, this case is distinguishable from *Shoreline School District*, where the employer's representative informed the union that although he would "sell" the tentative agreement to the school board, the

board still had to ratify the agreement. Here, the Examiner's ordered remedy is not compelling the employer to agree to substantive terms of an agreement because the employer *had already* agreed. The order simply requires the employer to stand by the terms and conditions of employment that it negotiated with the union.

Finally, future parties should be cautioned that our decision to affirm the ordered remedy is based upon the totality of the unique specific factual circumstances of this case. This Commission continues to adhere to its case-by-case approach, and the slightest variation in facts could lead to a different conclusion and/or remedial order.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 11th day of October, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

Chairperson Marilyn Glenn Sayan took no part
in the consideration or decision of this case.