City of Ocean Shores, Decision 10670 (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF OCEAN SHORES, Complainant, vs. TEAMSTERS LOCAL 252, Respondent.	CASE 22363-U-09-5704 DECISION 10670 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Lane Powell, by *J. Markham Marshall,* Attorney at Law, for the employer.

Reid, Pedersen, McCarthy & Ballew, by *David W. Ballew*, Attorney at Law, for the union.

On March 30, 2009, the City of Ocean Shores (employer) filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The employer alleged that Teamsters Local 252 (union) refused to engage in collective bargaining upon the employer's request pursuant to reopener language in the parties' contracts. A preliminary ruling was issued on April 1, 2009, finding that the employer's complaint stated a cause of action under RCW 41.56.150(4). Examiner Karyl Elinski conducted a hearing on the matter on August 18, 2009. The parties filed post-hearing briefs.

ISSUES

Issue 1: Does a factual mistake in the preliminary ruling preclude a ruling in this case?

Because: 1.) the employer clearly set forth its factual assertions in its complaint that the issue in question concerned "reopener language," 2.) the union answered the complaint admitting that the

contracts contained the alleged reopener language, and 3.) the preliminary ruling was consistent with the statutory legal theories upon which the employer based its complaint, a factual inaccuracy in the preliminary ruling does not preclude a ruling on the employer's complaint.

Issue 2: Did the union refuse to bargain in violation of RCW 41.56.150(4) by refusing to meet and negotiate with the employer concerning a contract reopener request from the employer?

Based upon the record as a whole, the employer failed to meet its burden of proof, and the Examiner finds that the union did not violate RCW 41.56.150(4).

ISSUE 1: PRELIMINARY RULING

APPLICABLE LEGAL STANDARDS

The Commission has adopted the following rule regarding review of unfair labor practice complaints under the preliminary ruling process:

> WAC 391-45-110 – Deficiency Notice – Preliminary Ruling – Deferral to Arbitration
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> The executive director or a designated staff member shall determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute.
>
> . . . .
>
> (2) If one or more allegations state a cause of action for unfair labor practice proceedings before the commission, a preliminary ruling summarizing the allegation(s) shall be issued and served on all parties.
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> (a) A preliminary ruling forwarding a case for further proceedings is an interim order which may only be appealed to the commission by a notice of appeal filed after the issuance of an examiner decision under WAC 391-45-310.
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> (b) The preliminary ruling limits the causes of action before an examiner and the commission. A complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling.

The preliminary ruling in this case provides:

The complaint charging unfair labor practices filed in this matter has been reviewed under WAC 391-45-110. The allegations concern:

> Union refusal to bargain in violation of RCW 41.56.150(4) [and if so, derivative "interference" in violation of RCW 41.56.150(1)], by its refusing to meet and negotiate with the employer concerning successor collective bargaining agreements for the Clerical and Public Works bargaining units.

Assuming for purposes of this preliminary ruling that all of the facts alleged in the complaint are true and provable, it appears that an unfair labor practice violation could be found.

ANALYSIS

The union represents two different bargaining units of employees working for the employer. One unit includes clerical workers. The other includes public works department employees. Each unit is involved in this action. In its complaint, the employer asserted that each unit has its own collective bargaining agreement with the employer containing the following language:

> 16. DURATION OF AGREEMENT
>
> > . . . This Agreement shall become effective July 23, 2007 and will continue through July 22, 2013. Either party hereto may open this Agreement for negotiations by serving written notice upon the other party one hundred twenty (120) calendar days prior to the anniversary date of this Agreement.

The employer attached copies of the referenced contract language to its complaint. In its answer, the union admitted that the contracts contained this language.

The employer further alleged in the complaint that "[b]y letter from its Mayor, on March 9, 2009, the City notified Local 252 that it wishes to engage in collective bargaining in accordance with the contracts between the parties." A copy of that letter is attached as an exhibit to the employer's complaint. The union responded to that letter denying that the contracts permitted a

reopener, but offering to "meet and discuss any issues with you." A copy of the union's responsive March 16, 2009 letter is attached as an exhibit to the employer's complaint.

The union argues that the preliminary ruling's mistaken reference to "successor collective bargaining agreements," instead of the alleged reopener provision of the contracts, dooms the employer's complaint. The union's answer specifically admits that the contracts contained the alleged language in question, and that the employer sent a letter to the two bargaining units requesting bargaining pursuant to that language, but denies that the request was consistent with the terms of the contracts. The preliminary ruling presumes that all facts alleged in a complaint are true and provable. The complaint contains no reference to successor agreements.

WAC 391-45-110 addresses procedures that parties should follow when a preliminary ruling fails to address particular causes of action. It does not address the present situation, where the only dispute as to the causes of action listed in the preliminary ruling relate to facts clearly asserted in the complaint. While a preliminary ruling does control the legal issues to be determined in subsequent proceedings, it does not control the facts. Although the preliminary ruling erroneously referred to "successor agreements" rather than "reopeners," the mistake was not fatal to the employer's complaint. The legal theory of refusal to bargain as advanced in the preliminary ruling continues to control the proceedings, despite the error.

Limiting the employer's right to obtain a determination on the merits of its complaint because of the factual inaccuracy contained in the preliminary ruling would unfairly prejudice the employer due to an error beyond its control. The preliminary ruling adopts the same legal theories that the employer advances in its complaint. The union had full opportunity to respond to the employer's complaint, and did so. Due to the nature of the preliminary ruling process, which assumes that all facts asserted in a complaint are true and provable, a factual mistake in the preliminary ruling does not preclude a decision based on the reopener language.

ISSUE 2: REFUSAL TO BARGAIN

APPLICABLE LEGAL STANDARDS

Burden of proof - The complaining party carries the burden of proof by a preponderance of the evidence that an unfair labor practice was committed. *Whatcom County*, Decision 7244-B (PECB, 2004); *City of Tacoma*, Decision 6793-A (PECB, 2000); WAC 391-45-270(1)(a).

Contract Interpretation - The Commission has long followed the "objective manifestation" theory of contract interpretation espoused by the Washington State Supreme Court, imputing to the parties an intention that corresponds to the reasonable meaning of their words and acts. *Plumbing Shop, Inc. v. Pitts,* 67 Wn.2d 514 (1965); *State – Social and Health Services*, Decision 9690-A (PSRA, 2008); *North Franklin School District,* Decision 5945-A (PECB, 1998). Where collective bargaining agreement language is unambiguous, the Commission considers the subjective intentions of the parties irrelevant and goes no further to determine the parties' intentions. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The Commission will not find contract language ambiguous simply because the parties disagree about the meaning. *City of Wenatchee,* Decision 8802-A (PECB, 2006).[1]

Conduct Constituting Refusal to Bargain - A bargaining representative commits an unfair labor practice when it refuses "to engage in collective bargaining." RCW 41.56.150(4). A refusal to bargain claim will be sustained where one party refuses to meet to bargain a mandatory subject of bargaining under the applicable law. *Highline School District (Highline Education Association)*, Decision 1054-A (EDUC, 1981). Determining whether the duty to bargain exists

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[1] In *Berg v. Hudesman*, 115 Wn.2d 657 (1990), the Washington State Supreme Court expanded the objective manifestation theory, stating: "We . . . reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled." [citations omitted]. The court further found that extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.

for a particular subject is a question of law and fact for the Commission to decide. WAC 391-45-550.

ANALYSIS

The facts in this case are largely undisputed. On or about March 9, 2009, Ocean Shores Mayor LaDean Bunkers sent a letter to union business agent Russ Walpole requesting that the union reopen the clerical and public works agreements for negotiation pursuant to Article 16 (Duration) of the contracts. Bunkers explained:

> As authorized by the . . . collective bargaining . . . agreements . . . the City of Ocean Shores serves this written notice that it desires to open these agreements for negotiation . . . [t]he City is facing a very difficult financial situation, and it is my hope that we can come to a mutually agreeable solution to this dilemma. As you know, the City is required to have a balanced budget for fiscal year 2009 and beyond. Additionally the City Council has expressed a desire to maintain a three month rolling average in reserves (~$1.5M), and is unwaivering in its determination to maintain a minimum of $1M in reserves for the 2009 budget year.

On or about March 16, 2009, Walpole responded:

> In [your] letter you are requesting to open the Public Works Department and the Clerical Collective Bargaining Agreements for the purpose of negotiations. The Union is not in agreement with your interpretation of the language in the Public Works Department Collective Bargaining Agreement, Section 16.1.1 or the Clerks Collective Bargaining Agreement, Section 16.1. Therefore, the Union is not willing to open the Public Works Department or the Clerical CBA for the purpose [sic] negotiations. As I have stated to you before, I am always willing to meet and discuss any issues with you.

Although the union subsequently met with the employer to discuss money-saving measures, the union refused to do so under the guise of reopening the contracts.

The employer urges that the duration clause language contained in Article 16 permits yearly reopening of the contracts. The employer failed to meet its burden of proof. A collective

bargaining agreement is a living document governing employees' terms and conditions of employment, which by their nature are variable. Collective bargaining agreements are often the product of complex negotiations that occur at regular intervals, building upon previous contract language. Due to the complex nature of the written agreement and the circumstances under which it is drafted, it can sometimes fail to capture fully the intent of the parties. Countless arbitrators and Commission staff have been called upon to assist parties in determining the meaning of provisions of a collective bargaining agreement. In order to ascertain the meaning of a particular clause, the parties often rely upon evidence of what transpired during bargaining.

In this case, the employer did not present any evidence regarding the history of the language upon which it bases its case. The employer did not present the testimony of anyone involved in the contract negotiations, nor did it present any documentary evidence pertaining to the language other than the contract language itself. Instead, the employer relied upon the language contained in the duration clause, which provides for opening the contract upon written notice 120 days prior to the anniversary date of the contract.

The employer presented evidence that the union and city also negotiated a collective bargaining agreement for a police unit with the same expiration date as the agreements at issue. That agreement provides the following duration language:

> 14. DURATION OF AGREEMENT
> 14.1.1 It is agreed that this Agreement shall be in effect from July 23, 2007 through July 22, 2013. The parties agree to begin negotiations for the 2013 contract year on or before April 1, 2013.

The police agreement language specifically requires the parties to begin bargaining prior to the expiration of the agreement. The employer presented this language to highlight the differences in the police contract duration clause with those at issue in this case. Notably, the police contract does not include a wage reopener clause. The union asserted that the duration language in the police agreement was created to comply with statutory deadlines which are not applicable to the agreements at issue in this case. The employer did not offer any evidence as to the origin or

evolution of the language in the police contract. It failed to connect this language in any meaningful way to the language contained in the agreements at issue.

On the other hand, Walpole credibly testified that he sat at the bargaining table when specific language concerning wage reopeners was eliminated from the contracts at issue. The following language relating specifically to compensation had been included in the contracts between the parties as Article 7.1.4 since at least January 1, 2001, continuing through December 31, 2006:

> This agreement may be opened by either party in the second year (2002) of this agreement for the sole purpose of negotiating base wage adjustments for each classification covered by this agreement. Such negotiated wage adjustments would become effective January 1, 2003. No other issues may be introduced into negotiations unless such issues are introduced based upon mutual agreement between the Union and the Employer. All other provisions of this agreement shall continue in full force and effect during such negotiations.

Walpole credibly testified that the union agreed to eliminate the wage reopener language in the current 2007-2013 agreements in exchange for the union's agreement to accept a six-year term. According to the union, the employer's former city manager proposed the extended term so the employer could depend on economic certainty by locking in wage increases.

The language contained in Article 16 of the current agreements regarding contract reopeners also appeared in the parties' predecessor agreements. At no time during negotiations did the employer state that by eliminating the wage reopener language in Article 7.1.4, the parties could rely on Article 16 to reopen any provision of the contracts on a yearly basis.

Standing on its own, the duration clause language in Article 16 could have been better crafted to reflect the parties' intentions. The bargaining history, however, lends credence to the union's assertion that Article 16 was never intended as a general reopener for the entire contract, but merely as a mechanism to describe how and when the parties would go about opening bargaining for a successor contract upon expiration of the current contract. The duration clause language, if read as an annual reopener clause for the entire contract, would have rendered the wage reopener clause redundant and meaningless. Such interpretation would also have obviated the need to

eliminate the wage reopener language in adopting the current six-year contract. Any other reading of the duration clause would create in essence a one-year contract whose every term could expire and/or be negotiated on a yearly basis.

FINDINGS OF FACT

1. The City of Ocean Shores is a public employer within the meaning of RCW 41.56.030(1).

2. Teamsters Local 252, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of two bargaining units of employees working for the employer: public works and clerical.

3. The preliminary ruling in this case provides:

> The complaint charging unfair labor practices filed in this matter has been reviewed under WAC 391-45-110. The allegations concern:
>
> > Union refusal to bargain in violation of RCW 41.56.150(4) [and if so, derivative "interference" in violation of RCW 41.56.150(1)], by its refusing to meet and negotiate with the employer concerning successor collective bargaining agreements for the Clerical and Public Works bargaining units.
>
> Assuming for purposes of this preliminary ruling that all of the facts alleged in the complaint are true and provable, it appears that an unfair labor practice violation could be found.

4. Although the preliminary ruling erroneously referred to "successor collective bargaining agreements" rather than "reopeners," the mistake was not fatal to the employer's complaint. The legal theory of refusal to bargain is advanced in the preliminary ruling continue to control the proceedings, despite the error.

5. The clerical and public works units had collective bargaining agreements in effect from July 23, 2007, to July 22, 2013. Each of the current contracts contain the following language:

> 16. DURATION OF AGREEMENT
>
> . . . This Agreement shall become effective July 23, 2007 and will continue through July 22, 2013. Either party hereto may open this Agreement for negotiations by serving written notice upon the other party one hundred twenty (120) calendar days prior to the anniversary date of this Agreement.

6. The clerical and public works contracts since at least January 1, 2001, continuing through December 31, 2006, contained the following wage reopener language:

> 7.1.4. This agreement may be opened by either party in the second year (2002) of this agreement for the sole purpose of negotiating base wage adjustments for each classification covered by this agreement. Such negotiated wage adjustments would become effective January 1, 2003. No other issues may be introduced into negotiations unless such issues are based upon mutual agreement between the Union and the Employer. All other provisions of this agreement shall continue in full force and effect during such negotiations.

7. On or about March 9, 2009, Ocean Shores Mayor LaDean Bunkers sent a letter to union business agent Russ Walpole requesting that the union reopen the clerical and public works agreements for negotiation pursuant to Article 16 (Duration) of the contracts.

8. On or about March 16, 2009, Walpole responded to Bunkers' March 9, 2009 letter stating that the union did not agree with Bunkers' interpretation of Article 16 of the current contracts, and that it was not willing to open the contracts for the purpose of negotiations. In his letter, Walpole stated he was willing to meet and discuss any issues.

9. In bargaining for the current 2007-2013 agreements, the union agreed to eliminate the wage reopener language as described in Finding of Fact 6, in exchange for the employer's proposal to extend the contract duration to six years.

10. Article 16 of the current contracts, as described in Finding of Fact 5, does not impose a duty for annual contract reopeners.

CONCLUSIONS OF LAW

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

2. The factual mistake in the preliminary ruling, as described in Finding of Fact 4, did not violate WAC 391-45-110.

3. By its actions described in Findings of Fact 5 through 10, the union did not refuse to bargain in good faith in violation of RCW 41.56.150(1) or RCW 41.56.150(4).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 9th day of February, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S/ ROBBIE DUFFIELD

CASE NUMBER:	22363-U-09-05704	FILED:	03/30/2009	FILED BY:	EMPLOYER
DISPUTE:	UN GOOD FAITH				
BAR UNIT:	MIXED CLASSES				
DETAILS:	see also case 22465-S-09-0100				
COMMENTS:					

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