State – Washington State Patrol, Decision 10314-A (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE PATROL TROOPERS ASSOCIATION, Complainant, vs. STATE – WASHINGTON STATE PATROL, Respondent.	CASE 21538-U-08-5487 DECISION 10314-A - PECB DECISION OF COMMISSION

Aitchison and Vick, by *Hillary McClure*, Attorney at Law, for the union.

Robert M. McKenna, Attorney General, by *Morgan Damerow*, Assistant Attorney General, for the employer.

The Washington State Patrol Troopers Association (union) represents a bargaining unit of all commissioned officers of the Washington State Patrol (employer), through the rank of sergeant. The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is applicable to the officers under RCW 41.56.473. The commissioned officers of the employer are also eligible for interest arbitration under the provisions set forth in RCW 41.56.475.

On February 20, 2008, the union filed a complaint with this agency alleging that the employer committed an unfair labor practice by failing and refusing to meet and negotiate with the exclusive bargaining representative of its employees in violation of RCW 41.56.140(4) and (1).[1] A preliminary ruling was issued and Examiner Charity L. Atchison held a hearing where the parties provided evidence and testimony on the record. They submitted post-hearing briefs. The

[1] The union's complaint also alleged that the employer failed to provide necessary and relevant collective bargaining information in violation of RCW 41.56.140(4) and (1). Prior to hearing, the union withdrew that allegation.

Examiner held that the employer committed an unfair labor practice by failing to make a timely response to the union's request for bargaining and by failing to engage in timely bargaining.[2] The employer now appeals that decision.

ISSUE PRESENTED

Does substantial evidence support the Examiner's findings and conclusions that this employer committed an unfair labor practice by failing to make a timely response to the union's request for bargaining and by failing to engage in timely bargaining with the union?

For the reasons set forth below, we affirm the Examiner's conclusion that the employer committed an unfair labor practice. Substantial evidence supports the Examiner's findings that the employer failed to make a timely response to the union's demand to bargain a successor collective bargaining agreement. Additionally, the totality of the circumstances also demonstrates that the employer failed to meet with the union at reasonable times following receipt of the union's demand to bargain.

DISCUSSION

In order to place our decision in its proper context, a brief recitation of the facts is necessary. The employer and union are parties to a collective bargaining agreement that was in effect between July 1, 2007, and June 30, 2009. Although the uniformed officers of the Washington State Patrol bargain under Chapter 41.56 RCW, the collective bargaining process parallels the bargaining process for other state civil service employees who collectively bargain under Chapter 41.80 RCW. RCW 41.56.473. Although it is not necessary to describe that process in detail, it is important to stress that RCW 41.56.473 only permits the Governor to make a request for funds if the compensation and fringe benefit provisions of the contract are submitted to the Office of Financial Management (OFM) by October 1 prior to the legislative session at which the requests will be considered. RCW 41.56.473(5)(a). Furthermore, the compensation and fringe benefit provisions must be certified by OFM as financially feasible for the state unless those

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[2] *State – Washington State Patrol*, Decision 10314 (PECB, 2009).

provisions are the result of an interest arbitration award. RCW 41.56.473(5)(b); *see also State – Office of the Governor*, Decision 10313 (PECB, 2009), *aff'd*, Decision 10313-A (PECB, 2009). Thus, it is necessary for the employer and the union to begin negotiating a successor collective bargaining agreement well before the existing agreement expires.

In order to work within the RCW 41.56.473 timeframe, Article 29.4 of the parties' 2007-2009 collective bargaining agreement allowed either party to "request negotiations of a successor agreement by notifying the other party in writing no sooner than January 1, 2008, and no later than January 31, 2008." In the event notice is given, negotiations will begin at a time agreed upon by the parties."

On October 31, 2007, Jeffrey Julius, the union's chief negotiator, sent an e-mail message to Diane Lutz, a negotiator with the State Labor Relations Office, asking about the employer's availability to discuss scheduling the next round of negotiations. Julius understood that Lutz would be negotiating with the union on behalf of the state. In that e-mail message, Julius recognized that it was technically too early to make a formal request for negotiations, but he nevertheless wanted to schedule dates before "everyone's calendars [began] to fill up." In November and December of 2007, Julius had two follow-up conversations with Lutz to further inquire about scheduling dates for negotiations. During a December 28, 2007 meeting on an unrelated matter, Julius once again asked Lutz about scheduling dates for negotiations.

On January 1, 2008, the union made a formal demand to bargain. On January 10, 2008, Julius sent Lutz another e-mail requesting dates. On January 16, 2008, Diane Leigh, the then Acting-Director of the State Labor Relations Office, sent union president Tommy Pillow a letter stating:

> I am in receipt of your January 1, 2008 letter requesting to negotiate a successor agreement . . . . I have designated Diane Lutz as the negotiator representing the Employer for the WSPTA master agreement. She will be in contact with you to discuss dates and locations for negotiations.

On February 7, 2008, Julius attempted to contact Lutz because he had not heard from her. Lutz finally responded by e-mail that same day offering April 21, 2008, as the first day the employer

would be available for bargaining.[3] Lutz explained that the employer would not be able to present its economic proposal until after the economic forecast, and the employer was worried the union would prematurely declare impasse. Furthermore, the employer asserted that it was too busy to schedule dates because the Legislature was in session.

In response, Julius suggested that the parties commence bargaining over non-economic issues, but the employer once again stated that it was concerned that the union would prematurely declare impasse regarding those subjects without fully considering the employer's complete proposal. The union also attempted to provide assurances to the employer that it would satisfy its statutory obligation to meet with the employer regarding economics without a mediator. However, these assurances were not accepted by the employer, which insisted on negotiating in the spring of 2008.

The union eventually accepted the employer's offer to commence bargaining on April 21, 2008, but also stated that it believed the employer was committing an unfair labor practice by not timely engaging with the union in negotiations. The union then filed this complaint.

Applicable Legal Standard

Chapter 41.56 RCW imposes a mutual obligation upon public employers and the exclusive bargaining representative of public employees "to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to the grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided by statute." RCW 41.56.030(4). In order to resolve their contractual difference through negotiations, parties to the collective bargaining agreement must meet in a timely fashion. *Morton General Hospital*, Decision 2217 (PECB, 1985).

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*,

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[3] The employer also offered April 23, April 29, April 30, and May 1 dates.

Decision 1457 (PECB, 1982). The complainant union must first demonstrate that it is the exclusive bargaining representative of the employees involved and that it requested negotiations on a collective bargaining agreement or some issue that was a mandatory subject of bargaining. If the complainant establishes these two facts, it must then demonstrate that the employer either failed or refused to meet with the complainant, or imposed unreasonable conditions or limitations which frustrated the collective bargaining process. *See City of Clarkston*, Decision 3246 (PECB, 1989). What may be reasonable conduct in one case may not be reasonable in another.

Application of Standard

The Examiner held that the employer failed to respond promptly to the union's January 1, 2008 demand to bargain. Specifically, she found that the employer's January 16, 2008 response did not satisfy the employer's duty to promptly respond to a demand to bargain, and therefore the employer's February 7, 2008 response asking for bargaining dates was not timely. Additionally, the Examiner found that the employer's refusal to meet with the union until April 21, 2008, was not reasonable in light of the fact that the employer knew the union desired to commence bargaining at an earlier time.

On appeal the employer argues the Examiner committed reversible error on several points. The employer claims that the Examiner impermissibly narrowed the scope of the preliminary ruling, relied upon National Labor Relations Act (NLRA) precedent that is inapplicable to cases decided under Chapter 41.56 RCW, erred in concluding that the employer failed to timely respond to the union's demand to bargain and failed to engage with the union in timely negotiations, and impermissibly relied upon facts that occurred before January 1, 2008, to support that conclusion. The employer also argues that the Examiner's decision substantially shifts the balance of power inherent in collective bargaining in favor of the union.

The Preliminary Ruling

The February 29, 2008 amended preliminary ruling in this case frames the relevant issue as "refusal to bargain in violation of RCW 41.56.140 . . . by failing or refusing to meet and negotiate with the exclusive bargaining representative of its employees[.]" The Examiner framed the issue as:

> Whether the employer refused to bargain and interfered with employee rights when the union demanded to bargain and the employer (1) did not respond for over a month; (2) did not propose dates for approximately six weeks; and (3) would not commence bargaining until over four months after the union made its demand to bargain?

The employer claims that the Examiner applied an incorrect statement of the issue, and as a result, substantially prejudiced the state. We disagree.

The Examiner's statement of the issue directly related to whether the employer failed or refused to meet and negotiate with the union. Furthermore, the Examiner's statement of the issue directly corresponds with the statement of facts that accompanied the union's February 20, 2008 complaint as well as the evidence and testimony at the hearing. Thus, we do not agree that the Examiner has impermissibly reframed the issue, rather the Examiner simply specified which actions of the employer may or may not have constituted an unfair labor practice.

Finally, the employer also failed to address how the Examiner's statement of the issue precluded the employer from putting on a defense or responding to the union's complaint.

Reliance Upon NLRA Precedent

In reaching her conclusion that the employer committed an unfair labor practice, the Examiner cited to, and relied upon, decisions of the National Labor Relations Board (NLRB) which held that under the NLRA, an employer has a positive legal duty to commence bargaining in an expeditious and prompt manner when a union requests a meeting. *State – Washington State Patrol*, Decision 10314 (PECB, 2009), *citing Exchange Parts Company*, 139 NLRB 710 (1962), and *Burgie Vinegar Company*, 71 NLRB 829 (1946). The employer claims that reliance on federal precedent is inappropriate because the federal precedent is inconsistent with the state law, and by adopting federal caselaw that requires employers to "commence bargaining in an expeditious and prompt manner when a union requests a meeting," the Examiner has effectively rewritten RCW 41.56.030(4). We disagree.

The Supreme Court of the State of Washington has ruled that decisions construing the NLRA are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v.*

Washington Public Power Supply System, 101 Wn.2d 24 (1984). Section 8(d) of the NLRA defines the obligation to bargain collectively as:

> . . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .

Decisions from this agency have consistently held that RCW 41.56.030(4) closely paraphrases Section 8(d) of the NLRA. *See, e.g., Port of Pasco*, Decision 4021 (PECB, 1992). The standard the NLRB applied in *Exchange Parts Company* is a reasonable interpretation of an employer's obligation to promptly meet and collectively bargain with the exclusive bargaining representative of its employees under Section 8(d), and therefore a reasonable and persuasive interpretation of the standard that should be applied under RCW 41.56.040(3). Accordingly, it was not reversible error for the Examiner to rely upon NLRA precedent in this case.[4]

Employer's Failure to Timely Respond to Union's Bargaining Request

The Examiner found that the employer failed to timely respond to the union's January 1, 2008 demand to bargain. In reaching this conclusion, she examined the totality of the circumstances, including the union's attempts to arrange bargaining dates prior to January 1, 2008, and the efforts that the union needed to undertake to elicit any response from the employer after its January 1, 2008 request to bargain. Additionally, the Examiner specifically held that the employer's initial January 16, 2008 response to the union was not a sufficient response, particularly in light of the fact that the employer was well aware that the union was interested in commencing bargaining soon after January 1, 2008.

The employer argues that the Examiner's conclusions are in error and that the employer did provide a reasonably timely response to the union's bargaining demand. The employer also argues that the Examiner erred in considering any evidence regarding the union's efforts to

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[4] The employer's brief simply claimed that the NLRB precedent should not be persuasive in this case without engaging in any analysis as to how section 8(d) of the NLRA and RCW 41.56.030(4) are different.

secure bargaining dates prior to January 1, 2008. The employer cites the parties' collective bargaining agreement as precluding either the employer or union from requesting bargaining prior to January 1, 2008. Therefore, according to the employer, the union has contractually waived its right to bargain a successor contract prior to January 1, 2008. We disagree.

The employer is correct that contractually the parties agreed that no request for bargaining for a successor agreement would occur prior to January 1, 2008. However, this contractual provision is not a "waiver" of the right to demand bargaining about a particular term or condition of employment, rather it is simply an agreement between the parties that neither will demand bargaining before a certain date. As such, application of agency precedent regarding "waiver of bargaining rights" is inapplicable.[5]

Furthermore, the Examiner did not find that any of the events occurring prior to January 1, 2008 by themselves constituted an unfair labor practice. Rather, the Examiner permissibly utilized those events to provide context to the employer's response to the union's formal demand to bargain. *Cf. City of Seattle*, Decision 5852-C (PECB, 1998)(although a cause of action cannot exist as to events occurring outside the statute of limitations period, that does not preclude consideration of those events as background information to support the complaint).

The Examiner then found that Leigh's January 16, 2009 letter failed to qualify as a timely response to the union. To support this conclusion, the Examiner noted that when the union made its formal demand to bargain, it was well aware that Lutz would be handling the negotiations based upon its earlier communications and Lutz made no effort to refute this fact in her interactions with Julius. We agree.

Leigh's January 16, 2008 letter did not attempt to establish dates for bargaining or respond to the union's request for bargaining dates. In cases such as this where the parties have a fully developed collective bargaining relationship, routine correspondence that restates information already known will not satisfy a party's obligation to respond to a demand to bargain.

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[5] If the employer wishes to seek enforcement of this provision, it must do so through the contract's grievance procedure or the courts. *See City of Walla Walla*, Decision 104 (PECB, 1976).

Finally, Lutz responded to the union on February 7, 2008, thirty-eight days after the union's January 1, 2008 formal demand to bargain, and she did so only after continued prodding by the union. This delay in even contacting the union to set up dates for bargaining is not reasonable, particularly in light of the fact that the employer was well aware that the union desired to begin negotiations shortly after January 1, 2008.[6] Based upon the totality of the circumstances, we find substantial evidence supports the Examiner's findings and conclusion that the employer failed to make a timely response to the union's demand to bargain.

Employer's Failure to Bargain at Reasonable Times

The Examiner also found that when the employer finally responded to the union's demand to bargain, the employer refused to commence bargaining until April 21, 2008. Lutz testified that the employer could not commence bargaining until that time because it would not have its economic proposal ready, the employer feared the union would prematurely declare impasse and request mediation prior to presentation of the employer's economic proposal, and because the Legislature was in session. The Examiner held that the employer's approach to scheduling bargaining dates was inconsistent with its obligation to meet and confer with the union at reasonable times because the employer insisted that bargaining occur on the employer's time schedule, and not through mutually agreed upon dates.

The employer argues that the Examiner's decision ignores the long standing premise that "no" can be a legitimate response to a bargaining proposal, provided the response is made in good faith. According to the employer, the employer had legitimate reasons for delaying bargaining until its economic proposal was ready. In the employer's opinion, the Examiner's decision impermissibly shifts the balance of power in favor of the union because the Examiner's decision will compel the employer to bargain on the union's schedule without restriction or consideration of the employer's limitations.

From the outset, we reject the employer's attempt to engraft our longstanding rule that "no is a legitimate response to a bargaining proposal" on cases concerning the parties' duty to meet and

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[6] Even if we were to accept that Leigh's January 16, 2008 letter was a valid response, the twenty-one day delay in contacting the union was not reasonable given the facts of this case.

confer at reasonable times. "No" may be a reasonable response to a bargaining proposal if accompanied by a reasonable explanation as to why the proposal is unacceptable, but such a response is not applicable to the parties' affirmative obligation to meet and confer at reasonable times. The obligation to meet and confer at reasonable times and places is an affirmative obligation, and both employers and unions must make reasonable efforts to promptly secure bargaining dates and locations following a demand to bargain. In cases such as this, this Commission will examine the totality of the circumstances to determine whether the stated reasons for delaying bargaining are reasonable.

Turning to the employer's stated reasons for insisting that negotiations not commence until April 21, 2008, the employer argues that it could not negotiate while the Legislature was in session. In the employer's opinion, bargaining during the legislative session would require it to "fly blind in negotiations and either accept a union proposal or arbitrarily refuse and offer a counter-proposal for the sake of an appearance of bargaining."

Unless the Legislature is actively discussing a piece of legislation that directly impacts a term or condition of employment that the parties are actively negotiating about, the fact that the Legislature is in session is not a valid impediment to bargaining. Once a valid request for bargaining has been made, it is incumbent upon the party desiring a delay in negotiations over a particular subject to explain why it cannot bargain that issue.

Here, there is no evidence demonstrating that the employer even attempted to ascertain which issues the union wanted to bargain over. Furthermore, the union affirmatively stated that it would delay bargaining about certain subjects, such as compensation, that might have been impacted by the 2008 legislative session. The employer's failure to even ascertain what bargaining subjects were at issue, particularly in light of the union's willingness to delay bargaining over certain bargaining subjects, demonstrated an approach that was not reasonably consistent with its good faith obligation.

Furthermore, the employer's reliance upon the 2008 legislative session as an impediment to bargaining prior to April 21, 2008, is not believable based upon the facts of this case. The 2008

session ended March 13, 2008. Thus, there was a period of thirty-nine days following the end of the legislative session and the employer's first supposed date of availability. The employer offered no valid explanation regarding this delay. Thus, we agree with the Examiner that the employer's excuse of not bargaining during the legislative session was not reasonable.

The employer's unwillingness to bargain prior to April 21, 2008, must also be examined in light of RCW 41.56.440 and RCW 41.56.473(5). RCW 41.56.440 requires negotiations between employers and the exclusive bargaining representative of their interest arbitration eligible employees to commence "*at least* five months prior to the submission of the budget to the legislative body of the public employer." (emphasis added). This statutory criteria sets forth a minimum amount of time for bargaining, not a maximum. RCW 41.56.473 also requires any negotiated agreement between these parties to be submitted by October 1 prior to the legislative session in which the request for funds was to be considered. This last provision is unique to the uniformed officers of the Washington State Patrol, and other law enforcement officers who collectively bargain under Chapter 41.56 RCW, and are not faced with a similar hard deadline for the completion of negotiations; they are only required to bargain for a minimum amount of time in accordance with RCW 41.56.440.

When RCW 41.56.473 is read in conjunction with the collective bargaining agreement's provision limiting requests for bargaining a successor agreement to no earlier than January 1, 2008, the employer's insistence upon bargaining no earlier than April 21, 2008, only allowed a period of about five months for bargaining a successor agreement. That amount of time includes the necessary time for any potential interest arbitration hearing. Given the union's desires to maximize the amount of bargaining time, in addition to the employer's unreasonable reliance upon the legislative session as an impediment to bargaining and delay in responding to the union's demand to bargain, we find the totality of the employer's conduct demonstrates a pattern of conduct that is contrary to its obligation to meet and negotiate with the union at reasonable times.

Employer's Balance of Power Argument

The employer asserts that the Examiner's decision would impermissibly shift the balance of power in favor of unions. The employer cites to the provisions of RCW 41.56.440 that allow either party to declare impasse without the consent of the other party after sixty days of negotiation and request mediation services from this agency. To bolster this argument, the employer points out that, should the union have the ability to request and commence negotiations well before the employer is able to make its economic proposal, the union would be able to declare impasse on a particular subject that was bargained in isolation and without the benefit of the employer's complete offer.

We disagree with the employer that the Examiner's decision impermissibly shifts the balance of power in favor of unions. Both employers and unions have a continuing obligation to promptly commence negotiations at reasonable times upon request. Neither our nor the Examiner's decision stands for the proposition that *any* delay in responding to a request for bargaining or in the commencement of negotiations is a per se unfair labor practice. As previously noted, we will examine each case by considering its own unique facts and circumstances. Based upon the totality of the circumstances presented in this case, the employer's delays were not reasonable.

With respect to the employer's argument that this decision allows the union to declare impasse without the benefit of knowledge of the employer's total bargaining package, a declaration of "impasse" under RCW 41.56.440 simply triggers the mediation process, and does not imply that the parties are at a lawful impasse that triggers interest arbitration.[7] The Executive Director certifies parties for interest arbitration only after a reasonable period of negotiations and mediation. We are fully confident that the Executive Director will ensure that agency mediators have exhausted every possibility of settlement before certifying parties to interest arbitration.

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[7] The employer's argument seems to suggest that involvement of a mediator prior to presentation of its complete offer is premature. If the employer believes that the union is not bargaining in good faith based upon a failure to consider the employer's total bargaining package, the employer is free to file an unfair labor practice, and, depending on the facts and evidence presented at a hearing, the appropriate order will be issued. Having said that, parties are encouraged to utilize this agency's services at their earliest convenience in order to facilitate resolution of contractual disputes without the need for litigation or arbitration.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Charity L. Atchison are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 2nd day of February, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner