State - Corrections, Decision 11060-A (PSRA, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. STATE - CORRECTIONS, Respondent.	CASE 23325-U-10-5941 DECISION 11060-A – PRSA DECISION OF COMMISSION

Younglove and Coker, by *Christopher J. Coker,* Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Lawson Dumbeck*, Assistant Attorney General, for the employer.

On June 30, 2010, the Washington Federation of State Employees (union) filed a complaint charging unfair labor practices against the Washington State Department of Corrections (employer). Examiner Kenneth J. Latsch held a hearing on November 2, 2010, and subsequently ruled that the employer committed four unfair labor practices. He ordered the parties to engage in good faith negotiations with interest arbitration to determine any unresolved issues, and ordered the employer to pay attorneys fees. This case comes before the Commission on an appeal filed by the employer seeking reversal of the remedies only.

ISSUE

Did the Examiner appropriately order the extraordinary remedies of interest arbitration and attorneys fees in this case? We hold that the Examiner did not apply the appropriate remedy of interest arbitration because a standard remedy will also effectuate the purposes of Chapter 41.80 RCW State Collective Bargaining (the Act). We also hold that the award of attorneys fees is

inappropriate because a standard remedy is sufficient to address the effects bargaining violation and because there is no pattern of conduct suggesting future violations of the attached order will occur. Therefore, we reverse the Examiner, and order good faith effects bargaining and a limited backpay remedy.

BACKGROUND

In the later part of 2009, the employer determined that the Pine Lodge Correctional Center for Women (PLCCW) would have to be closed because of a lack of funding. The union represented a bargaining unit composed of inmate transport officers and sergeants at PLCCW. The employer notified the union of the impending closure. The employer decided these positions would be eliminated with the closure of the PLCCW and laid off all bargaining unit employees. The employer also decided that correctional officers represented by Teamsters Union, Local 117 at nearby Airway Heights Corrections Center would then perform the unit's work once the facility was closed. The employer did not bargain the effects of eliminating the transport positions. Most of the PLCCW transport employees went to work at the Airway Heights facility, but none of them performed any transport work.

In his decision, the Examiner concluded that the employer committed the following unfair labor practices:

(1) unilaterally eliminated the inmate transportation work from PLCCW without the opportunity to negotiate in good faith the effects of the closure;
(2) circumvented the union by posting the inmate transportation work at Airway Heights before it met with the union and started bargaining;
(3) skimmed bargaining unit work from the union's jurisdiction without the opportunity for meaningful negotiations about the effects of the closure;
(4) refused to bargain with the union in good faith by presenting the union with a *fait accompli.*

To remedy these violations, the Examiner ordered the employer to bargain in good faith the effects of the transfer of inmate transportation work, and in the event that the negotiations were unsuccessful, to submit the remaining issues to interest arbitration for resolution. He also ordered the employer to pay reasonable attorneys fees.

LEGAL STANDARDS

Appellate Review

Generally, if the appealing party fails to assign error to a specific finding of fact, the unchallenged finding is considered to be a verity on appeal. *C-Tran*, Decision 7087-B and 7088-B (PECB, 2002). Most appeals to the Commission present mixed questions of law and fact. Unlike the review of findings, the Commission reviews an examiner's interpretation of the law *de novo* and thus is not bound by it. *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

Limited Discretion to Award Remedies

In creating the Commission, the Legislature expressed its intention to achieve efficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services. RCW 41.58.005. The authority of this Commission to prevent and remedy unfair labor practices is set forth in RCW 41.80.120 as follows:

> (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders....
>
> (2) If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.

Thus, the fashioning of remedies is a discretionary action of the Commission.[1] *University of Washington*, Decision 11075-A (PSRA, 2012); *see 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. *Municipality of Metropolitan Seattle*, Decision 2845-A (PECB, 1988), *aff'd, Municipality of Metropolitan Seattle (METRO) v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). The purpose of the Act is to provide public employees with the right to join and be

[1] The language of Chapter 41.80 RCW and Chapter 41.56 RCW concerning remedial orders is identical. RCW 41.80.120(1) and RCW 41.56.160(1).

represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right. *METRO*, 118 Wn.2d 621 (citations omitted). With that purpose in mind, the Supreme Court interpreted the statutory phrase "appropriate remedial orders" as including those remedies necessary to effectuate the purposes of the Act and to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d 621. The Commission's expertise in resolving labor-management disputes has also been recognized and accorded deference. *METRO*, 118 Wn.2d 621, *citing Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983).

The standard remedy for a unilateral change violation includes ordering the offending party to cease and desist and, if necessary, to restore the status quo; make employees whole; post notice of the violation; publicly read the notice; and order the parties to bargain from the status quo. *City of Anacortes*, Decision 6863-B (PECB, 2001) (citations omitted). An examiner may exercise some creativity when crafting a remedial order, but needs to fit the remedy to the violation and needs to use extraordinary remedies sparingly. *Community College District 13 (Lower Columbia College)*, Decision 8638-A, (PSRA, 2005); *City of Burlington*, Decision 5841-A (PECB, 1997), *citing Seattle School District*, Decision 5542-C (PECB, 1997). When asked to review an extraordinary remedy that has been properly explained in an examiner's decision, we generally will not disturb a remedial order that is consistent with the purposes of Chapter 41.80 RCW. *METRO*, 118 Wn.2d 621. However, an extraordinary remedy is not appropriate when a standard remedy will also work because, as stated above, extraordinary remedies must be used sparingly.

Interest Arbitration

The authority of the Commission is broad enough to authorize the extraordinary remedy of interest arbitration in limited cases when such an award is necessary to make the order effective and where a respondent has engaged in a pattern of conduct showing a patent disregard of the statute. *METRO*, 118 Wn.2d 621. The award was upheld in *METRO* where the court stated:

> When faced with a situation such as that which exists here, there is little that a union can legally do to enforce the collective bargaining rights of its members. For 7 years Metro has been involved in litigation over the representation rights of these five employees. Court orders and financial sanctions have had no effect on

> Metro. The employer's delays and legal maneuvering have, in fact, resulted in a prolonged period in which the employees have not had an opportunity to negotiate the terms and conditions of their employment. During this time Metro accomplished the disbursement of the employees represented by Local 17 so that the bargaining unit became unidentifiable. This disbursement of employees throughout other bargaining units was the reason for PERC's order requiring a return to the status quo.

METRO, 118 Wn.2d 621. There, the employer used the law to avoid its clear obligation to collectively bargain with the union. The court explained that such a remedy was to be used cautiously and sparingly, and only in those cases where there is a clear history of bad faith refusal to bargain and where there is a very strong likelihood that such refusal will continue. It stated that the case presented a genuine need to remedy flagrant abuses of the process in situations where employees are unable, through legal means or by use of traditional economic weapons, to remedy the situation themselves.

The "Transmarine" Remedy

In *Transmarine Navigation Corp. (Transmarine)*, 170 NLRB 389 (1968), the National Labor Relations Board (Board) developed a test to address effects bargaining violations where a facility has been closed. This remedy has withstood the test of time and been consistently applied. *In re Garrett's Markets, Inc.*, 2004 WL 73522 (NLRB Div. of Judges) (citations omitted). In that case, the Board ordered limited backpay and effects bargaining. The combination of these standard remedies has proven sufficient to address effects bargaining violations by leveling the playing field. *See Garrett's Markets, Inc.*, 2004 WL 73522; *Transmarine*, 170 NLRB 389.

Similarly in *Entiat School District*, Decision 1361-A (PECB, 1982), the employer refused to negotiate about the effects of layoffs and reduced hours before these decisions were implemented. The Commission following the rationale in *Transmarine* wrote the following:

> We shall also order that Respondent bargain with the Union over the effects on its employees of the discontinuance of its operations. It is clear, however, that a bargaining order alone cannot fully remedy the unfair labor practices committed by Respondent because, as a result of Respondent's failure to bargain with the Union about the effects of discontinuing operations, Respondent's employees were denied an opportunity to bargain through their exclusive representative at a time when such bargaining would have been meaningful. Meaningful bargaining

> cannot now be assured until some measure of economic strength is restored to the Union. Accordingly, in order to effectuate the purposes of the Act, we shall accompany our order to bargain with a limited backpay requirement designed both to make whole the seven employees ... for losses suffered as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for Respondent. We shall do so in this case by requiring Respondent to pay backpay to its employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389. As in *Transmarine*, we shall require that the backpay for those employees be not less than the amounts they would have earned during a two-week period of employment, at the rate of their normal wages when last in Respondents employ.

Entiat School District, Decision 1361-A. Although the decision in *Transmarine* involved a violation limited to a refusal to bargain concerning the effects of a layoff decision, other Board and Commission decisions that have appropriately applied the *Transmarine* remedy have found violations in addition to a refusal to bargain violation. *Entiat School District*, Decision 1361-A (increasing bargaining demands); *Jen Holdings, Inc.* 357 NLRB No. 11 (2011) (threatening employees; disparaging the union; denying employees work opportunities; failing to continue in effect the terms and conditions of the collective bargaining agreement; direct dealing; interfering, restraining and coercing); *In re Garrett's Markets, Inc.*, 2004 WL 73522 (direct dealing; failing or refusing to furnish information; interfering, restraining or coercing).

Attorneys Fees

The authority granted to the Commission by the remedial provision of the statute has also been interpreted to authorize an award of attorneys fees. The extraordinary remedy can be granted in special cases: (1) if such an award is necessary to make the order effective, and (2) if the defense to the unfair labor practice is frivolous or meritless, or if there has been a pattern of conduct showing a patent disregard of the party's collective bargaining obligations. *METRO*, 118 Wn.2d 621; *State ex. rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60 (1980); *see Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *rev. denied*, 97 Wn.2d 1034 (1982). The Commission uses the extraordinary remedy of attorneys fees sparingly. *Pasco Housing Authority*, Decision 5927-A (PECB, 1997). Commission orders awarding attorneys fees have usually been based on a repetitive pattern of illegal conduct or on egregious or willful bad acts by the respondent. *Western Washington University*, Decision 9309-

A (PSRA, 2008); *City of Bremerton*, Decision 6006-A (PECB, 1998): *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996).

ANALYSIS

Neither of the parties disputes that any of the Findings of Fact or Conclusions of Law are in error. Thus, they stand as verities on appeal. The only issue before us involves the appropriate remedy.[2] The Examiner stated that it would be beyond his authority to restructure the inmate transportation work now being performed at Airway Heights, but that the employer's unlawful activity must be acknowledged and an appropriate remedy created. He therefore ordered good faith effects bargaining with the extraordinary remedy of interest arbitration, and attorneys fees.

On appeal, the employer argues that the extraordinary award of interest arbitration should not have been ordered because: (1) there has been no clear history or pattern of bad faith refusal to bargain, and (2) there is also no high likelihood of recurrence. It notes that the Examiner did not find a historic pattern of the employer rejecting basic bargaining principles. It points out that in recent time, only one other unfair labor practice filed by the union involved a failure to bargain employee reallocation, and no violation was found.[3] The employer also asserts that the award of attorneys fees is unnecessary to make the order effective, because its defense was not frivolous or meritless, and its behavior did not evidence a clear history of conduct that showed a patent disregard for the statute.

The union argues that interest arbitration is appropriate under the unique facts of this case, i.e., that the PLCCW was closed. It asserts that a traditional remedy cannot cure the violations. The union argues that for interest arbitration to be appropriate violations need not continue over years, but rather one bargaining session violation may be sufficient. It also asserts that attorneys fees is an appropriate punitive remedy based on the employer's egregious conduct.

---

2 Although the employer argues that the Examiner erred in crafting the cease and desist requirement in Section 1.a of the Order, the union acknowledges that the purpose of the Examiner's Order is to direct the employer to bargain the effects of the closure. We, therefore, see no reason to address the issue.

3 *State – Corrections*, Decision 10842-A (PSRA, 2011). This case is currently on appeal before the Commission.

Effects Bargaining Remedy

We have reviewed the entire record and fully considered the arguments of the parties. As a result of the employer's unfair labor practices, the at-issue employees were denied the opportunity to negotiate through their union at a time when the employer was still in need of their services, and a measure of balanced bargaining power existed. Had effects bargaining taken place a reasonable time before the closure, the union might well have been able to obtain additional benefits for these members. Thus, to remedy the situation and to effectuate the purposes of the Act meaningful bargaining needs to occur.

Accordingly, considering the facts of this case, we hold that the standard *Transmarine* remedy is sufficient to remedy bargaining over the effects of the employer's decision to close its facility. Consistent with using extraordinary remedies sparingly, the extraordinary remedy of interest arbitration is, therefore, inappropriate because a standard remedy will sufficiently address the violations. We order the employer to engage in good faith effects bargaining upon demand by the union and to pay limited backpay to the at-issue inmate transportation employees. The remedy shall be ordered similarly to standards laid out in *Transmarine*. This remedy is designed to both make the employees whole for any losses suffered as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining is not entirely devoid of economic consequences.

Attorneys Fees

Because a standard remedy is sufficient to remedy the unfair labor practices violations and because there is no pattern of conduct suggesting future violations of the statute will occur, we reverse the Examiner's extraordinary remedy of attorneys fees. These remedies should be used sparingly to effectuate the purposes of the Act. We hold that, in this case, an award for attorneys fees will not assist these parties in developing a good collective bargaining relationship.

Notice Posting v. Mailing and Distribution

Since the employer closed its facility, the PLCCW is no longer available to post a notice to employees regarding violations and remedies. Therefore, we order the employer to mail signed copies of the notice to the union and to the last known addresses of the at-issue inmate transportation employees to inform them of the outcome of our decision. *Jen Holdings, Inc.*, 357

NLRB No.11; *Excel Containers*, 325 NLRB No. 14 (1997) (changing *Transmarine* remedy from posting to mailing order). So that appropriate agency personnel are aware of the Commission's decision, we also order the employer to distribute a signed copy of the notice to the Secretary of Corrections and his direct reports.

CONCLUSION

The Order of the Examiner is reversed. To effectuate the purposes of the Act, a standard remedy is sufficient and, therefore, appropriate in this case. The employer is ordered to engage in good faith effects bargaining upon demand by the union, and to pay limited backpay to the at-issue inmate transportation employees at the former PLCCW in a manner similar to the standards laid out in *Transmarine*.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact and Conclusions of Law issued by Examiner Kenneth J. Latsch are AFFIRMED and adopted as the Findings of Fact and Conclusions of Law of the Commission.

AMENDED ORDER

The Order is issued by Examiner Kenneth J. Latsch is AMENDED as follows:

The Washington State Department of Corrections, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

    a) Upon request, bargain collectively in good faith with the Washington Federation of State Employees with respect to the effects of our decision to close the Pine Lodge

Correctional Institution for Women (PLCCW) on the inmate transportation employees who were employed there and to reduce to writing any agreement reached as a result of such bargaining.

b) The employer shall pay to the at-issue inmate transportation employees at the former PLCCW represented by the union their normal wages when last employed by the employer from 5 days after the date of the issuance of this decision until the occurrence of the earliest of the following conditions: (1) the date the employer bargains to agreement with the union on those subjects pertaining to the effects of the decision to close the PLCCW facility; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the union to request bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of the employer's notice of its desire to bargain with the union; or (4) the subsequent failure of the union to bargain in good faith. In no event shall the sum paid to any of the at-issue inmate transportation employees exceed the amount that they would have earned as wages from the date of the closure of the PLCCW to the time they secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the employer's employ at the PLCCW, with interest.[4]

c) Preserve and, within 14 days of a request, make available for examination and copying all payroll records, social security payment records, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.[5]

---

4 This remedy is as provided for in *Transmarine, modified, Melody Toyota*, 325 NLRB 846 (1998); *recognizing modification In re Garrett's Markets, Inc.*, 2004 WL 73522. Backpay and interest on all monies paid pursuant to this decision shall be in accordance with WAC 391-45-410.

5 *Jen Holdings, Inc.* 357 NLRB No. 11 (imposing 14 day time period).

d) Mail a copy of the official Notice in this case to the Washington Federation of State Employees, and to the last known addresses of the at-issue inmate transportation employees who were employed at the former PLCCW.

e) Distribute a copy of the official Notice in this case to the Secretary of the State Department of Corrections and his direct reports.

f) Notify the union, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply with this Order, and at the same time provide the union with a signed copy of the notice provided by the Compliance Officer.

g) Notify the Compliance Officer of the Pulic Employment Relations Commission, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply with this Order, and at the same time provide the Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 24th day of August, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

CASE 23325-U-10-5941
DECISION 11060-A - PSRA

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *WASHINGTON STATE DEPARTMENT OF CORRECTIONS* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY failed to negotiate in good faith with the Washington Federation of State Employees concerning the effects of removing inmate transportation work when Pine Lodge Correctional Center for Women (PLCCW) was closed.

WE UNLAWFULLY circumvented the Washington Federation of State Employees by posting inmate transportation positions at the Airway Heights facility before meeting with the union to begin negotiations.

WE UNLAWFULLY failed to negotiate in good faith by presenting the Washington Federation of State Employees with a final position before any negotiations took place concerning the inmate transportation work.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL, upon request, bargain collectively in good faith with the Washington Federation of State Employees, with respect to the effects of our decision to close the PLCCW on the inmate transportation employees who were employed there and to reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay to the at-issue inmate transportation employees at the former PLCCW represented by the union their normal wages when last employed by the employer from 5 days after the date of the issuance of this decision until the occurrence of the earliest of the following conditions: (1) the date the employer bargains to agreement with the union on those subjects pertaining to the effects of the decision to close the PLCCW; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the union to request bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of the employer's notice of its desire to

bargain with the union; or (4) the subsequent failure of the union to bargain in good faith. In no event shall the sum paid to any of the at-issue inmate transportation employees exceed the amount that they would have earned as wages from the date of the closure of the PLCCW to the time they secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the employer's employ at the PLCCW, with interest.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE. AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 08/24/2012

The attached document identified as: DECISION 11060-A - PSRA has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23325-U-10-05941	FILED:	06/29/2010	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	JAILERS				
DETAILS:	Transport positions being abolished when Pine Lodge CC closes				
COMMENTS:					

EMPLOYER: STATE - CORRECTIONS
ATTN: RICK HALL
210 11TH AVE SW STE 331
PO BOX 43113
OLYMPIA, WA 98504-3113
Ph1: 360-725-5540

REP BY: LAWSON DUMBECK
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DRIVE SW
PO BOX 40145
OLYMPIA, WA 98504-0145
Ph1: 360-664-4180 Ph2: 360-664-4167

PARTY 2: WA FED OF STATE EMPLOYEES
ATTN: GLADYS BURBANK
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501-2332
Ph1: 800-562-6002 Ph2: 360-352-7603

REP BY: CHRISTOPHER COKER
YOUNGLOVE COKER
PO BOX 7846
OLYMPIA, WA 98507-7846
Ph1: 360-357-7791