Kitsap County, Decision 11675-A (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY 911 EMPLOYEES' GUILD, Complainant, vs. KITSAP COUNTY, Respondent.	CASE 24240-U-11-6210 DECISION 11675-A - PECB DECISION OF COMMISSION

Cline & Associates, by *James M. Cline*, Attorney at Law, for the union.

Prosecuting Attorney Russell D. Hauge, by *Jacquelyn M. Aufderheide*, Chief Civil Deputy Prosecuting Attorney, for the employer.

On September 12, 2011, the Kitsap County 911 Employees' Guild (union) filed an unfair labor practice complaint alleging that Kitsap County (employer) refused to bargain and interfered with employee rights in violation of Chapter 41.56 RCW. Pursuant to WAC 391-45-110, the Unfair Labor Practice Manager reviewed the complaint and issued a preliminary ruling. Causes of action existed for employer refusal to bargain by breach of its good faith bargaining obligation by the authority of the employer's bargaining representatives and the role of legal counsel in negotiations and the employer's refusal to ratify a tentative agreement.

Examiner Guy O. Coss conducted a hearing and issued a decision.[1] The Examiner concluded that the employer did not breach its good faith bargaining obligation because its bargaining representatives had authority to bargain on its behalf. The employer failed to bargain in good faith when it refused to ratify the collective bargaining agreement containing the employer's

[1] *Kitsap County*, Decision 11675 (PECB, 2013).

proposal on Article 26.F. Additionally, the Examiner struck and did not consider the overlength portion of the employer's brief.

The employer appealed the Examiner's decision that it refused to bargain when it failed to ratify the tentative agreement. The employer appealed the Examiner's decision to strike the employer's overlength post-hearing brief. The employer appealed the conclusion of law that the employer failed to bargain in good faith by failing to ratify the tentative agreement and the portion of the Examiner's order requiring the employer to process all grievances filed by the union from January 1, 2010 through compliance with the order. The employer did not appeal the order to ratify the inclusion of the parties' March 8, 2010 tentative agreement on Article 26.F in the January 1, 2010 through December 31, 2011 collective bargaining agreement.

The union cross-appealed the Examiner's conclusion that the employer's bargaining team had authority to bargain on the employer's behalf. The union argues that the employer's negotiators lacked authority to enter into tentative agreements and that by giving the employer's legal counsel veto authority over the agreement, the employer failed to send negotiators to the table who had the authority to enter into tentative agreements. The union argues that the employer misrepresented the authority of the bargaining team and failed to send negotiators to the table who had the actual authority to bind the employer, subject only to final ratification by the Board of County Commissioners. The union does not assert that having tentative agreements subject to ratification by the employer's governing body is bad faith bargaining. According to the union, the bad faith bargaining resulted because the employer did not communicate all of the parties responsible for review and having the authority to disapprove the tentative agreements.

ISSUES

1. Did the Examiner err when he struck pages 26 through 35 of the employer's post-hearing brief?
2. Did the employer breach its good faith bargaining obligation by sending negotiators to the table without authority to enter into agreements and by failing to disclose the role of its legal counsel in the negotiations?

3. Did the employer breach its good faith bargaining obligation by failing to ratify a tentative agreement entered into by the employer's bargaining representative during collective bargaining?

We affirm the Examiner. The employer improperly filed an overlength post-hearing brief. The Examiner was correct to strike the overlength portion of the brief. The employer sent representatives to negotiations who had authority to enter tentative agreements on the employer's behalf. The employer breached its good faith bargaining obligation when it failed to ratify a tentative agreement.

STANDARD OF REVIEW

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission reviews findings of fact to determine whether they are supported by substantial evidence, and if so, whether the findings of fact in turn support the conclusions of law. *Cowlitz County*, Decision 7007-A (PECB, 2000). 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. *Cowlitz County*, Decision 7007-A. The rule is based on the notion that the trier of fact is in the best position to decide factual issues. The Commission attaches considerable weight to the factual findings and inferences made by staff. *Cowlitz County*, Decision 7007-A.

APPEAL PROCEDURES

When appealing a decision of an Examiner, the appealing party "shall identify, in separate numbered paragraphs, the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error." WAC 391-45-350(3). Unchallenged findings of fact are considered verities on appeal. *Brinnon School District*, Decision 7210-A (PECB, 2001).

ISSUE 1: Did the Examiner err when he struck pages 26 through 35 of the employer's post-hearing brief?

DISCUSSION

Briefs are limited to twenty-five pages. WAC 391-45-290(2). A party wishing to file a brief in excess of twenty-five pages must file and serve a motion requesting permission to file a longer brief to address novel or complex legal and/or factual issues. WAC 391-45-290(2)(a). A party wishing to file a longer brief may orally make the motion to the Examiner at the end of the hearing. WAC 391-45-290(2)(c). An overlength brief may not be filed unless the motion is granted by the Examiner. WAC 391-45-290(2).

The employer filed a thirty-five page brief without a motion requesting permission to file an overlength brief. The union filed a motion to strike the employer's brief. The employer responded to the union's motion and moved to file an overlength brief. The union filed a reply brief. When the Examiner issued his decision, he denied the employer's motion to file an overlength brief and struck pages 26 through 35 of the employer's brief.

In its notice of appeal, the employer appealed three sentences in the Examiner's decision addressing the overlength brief. The employer did not appeal Findings of Fact 23 or 24. The employer did not appeal Conclusion of Law 2 in which the Examiner ruled that the employer's "motion to file an over length brief did not meet the requirements of WAC 391-45-290(2)." We will not disturb Conclusion of Law 2, which the employer did not appeal.

Before the Examiner the employer pointed to rules for length of briefs in other jurisdictions. Specifically, that the Rules for Superior Court do not contain page limits, the Rules of Appellate Procedure allow for 50 page briefs, and Chapter 10-08 WAC does not contain page limits for briefs. The Commission has exercised its discretion and enacted a rule limiting briefs to twenty-five pages. WAC 391-45-290(2). A party that disregards the Commission's rules does so at its own peril. The Examiner's ruling striking the overlength portion of the employer's brief is affirmed.

ISSUE 2: Did the employer breach its good faith bargaining obligation by sending negotiators to the table without authority to enter into agreements and by failing to disclose the role of its legal counsel in the negotiations?

ISSUE 3: Did the employer breach its good faith bargaining obligation by failing to ratify a tentative agreement entered into by the employer's bargaining representative during collective bargaining?

BACKGROUND

The employer and the union were parties to a collective bargaining agreement that expired on December 31, 2009. [2] In November 2009, the parties began negotiations for a successor collective bargaining agreement. The employer was represented by Labor Relations Manager Fernando Conill, CENCOM Director Richard Kirton, and CENCOM Deputy Director Maria Jameson-Owens. The union was represented by Attorney Chris Casillas, President Laura Woodrum, Vice President Tonya Shaw, and bargaining unit members Donna Kelly, Jeff West, Stephanie Trueblood, Mary Valerio, and Tom Powers.

The union proposed changes to Article 26 Overtime. At issue in this proceeding is Article 26.F. On November 16, 2009, the union made its initial proposal on Article 26.F:[3]

> An employee who is eligible for overtime may, at his/her option, take compensatory time off (at the rate of 1-1/2 hours off for each hour of overtime earned) in lieu of overtime pay if the compensatory time is taken off within sixty 60) days of when it is earned; **Provided**, an employee cannot accrue more than ~~forty~~sixty (~~40~~60) hours of compensatory time. The employee shall notify the Director~~,~~ of his/her decision to take compensatory time off or paid compensation at the overtime rate, when advised of his/her overtime duty. Compensatory time may be used by the employee ~~only as scheduling permits as determined by the Director~~within a reasonable period of time after the employee makes a request so long as such use does not unduly disrupt the operations of the agency. In accord with the written opinion of the Department of Labor, the creation of an overtime situation as a result of granting a compensatory time request is not a situation that

[2] The Examiner's decision sets out the facts in greater detail.

[3] Underline indicates additions. Strikethrough indicates deletions. Emphasis in original.

> would unduly disrupt the operations. The employee whose request to use compensatory time is denied because ~~of the needs of~~ it would unduly disrupt the Center shall receive payment for the time requested at his or her hourly rate. Compensatory time will be automatically cashed out if it is not used within ~~sixty~~ninety (~~60~~90) days of when it was earned. An employee may choose to cash their unused compensatory time earlier than ~~sixty~~ninety (~~6~~90) days.

On November 16, 2009, the employer made a counterproposal to maintain the existing contract language. On February 8, 2010, the union again proposed the above changes to Article 26.F. On February 22, 2010, the employer proposed to maintain the existing contract language.

At the March 8, 2010 negotiation session, the employer and union reached a tentative agreement on Article 26.F. The employer proposed inserting the phrase "in and of itself" into Article 26.F. The language agreed to stated:

> An employee who is eligible for overtime may, at his/her option, take compensatory time off (at the rate of 1-1/2 hours off for each hour of overtime earned) in lieu of overtime pay if the compensatory time is taken off within sixty 60) days of when it is earned; **Provided**, an employee cannot accrue more than ~~forty~~sixty (~~40~~60) hours of compensatory time. The employee shall notify the Director~~,~~ of his/her decision to take compensatory time off or paid compensation at the overtime rate, when advised of his/her overtime duty. Compensatory time may be used by the employee ~~only as scheduling permits as determined by the Director~~within a reasonable period of time after the employee makes a request so long as such use does not unduly disrupt the operations of the agency. In accord with the written opinion of the Department of Labor, the creation of an overtime situation as a result of granting a compensatory time request, **in and of itself**, is not a situation that would unduly disrupt the operations. The employee whose request to use compensatory time is denied because ~~of the needs of~~ it would unduly disrupt the Center shall receive payment for the time requested at his or her hourly rate. Compensatory time will be automatically cashed out if it is not used within ~~sixty~~ninety (~~60~~90) days of when it was earned. An employee may choose to cash their unused compensatory time earlier than ~~sixty~~ninety (~~6~~90) days. (emphasis added).

The tentative agreement was captured in a memorandum sent from Conill to Casillas on March 16, 2010.

Negotiations for the successor agreement continued into the fall of 2010. All communications issued and proposals made by the employer included the tentative agreement on Article 26.F. On October 27, 2010, Conill e-mailed the union the employer's last, best, and final proposal. The proposal contained the tentative agreement on Article 26.F. The union did not take the employer's proposal to a vote of the membership. The parties continued to negotiate.

In January 2011, Conill and Kirton met with the employer's Board of County Commissioners to discuss negotiations. Conill advised the union that he discussed the employer's proposals with the Board of County Commissioners. [4]

On March 17, 2011, the employer made a proposal that included the tentative agreement on Article 26.F. On April 22, 2011, the employer made a new economic proposal. No bargaining occurred at this point over the tentative agreement to Article 26.F. The union agreed to take the employer's proposal to a vote of the membership.

The employer and the union then began preparing for ratification. The union's ratification process included providing an opportunity for bargaining unit members to review the collective bargaining agreement and vote by mail on whether or not to ratify the agreement.

The employer's internal review process involved the prosecuting attorney's office reviewing the collective bargaining agreement. On June 7, 2011, Conill notified Casillas that Deputy Prosecuting Attorney Jacquelyn Aufderheide had reviewed the collective bargaining agreement and an issue existed with the tentative agreement to Article 26.F. Aufderheide recommended striking a portion of the tentative agreement. Conill informed Casillas that Conill "could not recommend ratification to the BOCC until the 26.F language provision is resolved somehow." Conill began the process of working with the union to resolve the issue.

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[4] The Examiner did not find the County Commissioners' testimony to be credible and found Casillas to be a more credible witness on this point. We will not disturb the credibility determinations made by the Examiner.

At the time Conill notified the union of the issue with Article 26.F, the union had begun the ratification process. On June 21, 2011, Conill confirmed that the union notified the employer that the union had ratified the collective bargaining agreement.

On July 5, 2011, Conill sent Casillas a copy of a memorandum of understanding drafted by Aufderheide. The parties exchanged drafts of the document.

On August 12, 2011, Conill sent Casillas and the union bargaining team a memorandum. Conill notified the union that the Board of County Commissioners did not ratify the 2010-2011 collective bargaining agreement. Conill wrote, "[f]or the Board of County Commissioners, the langague in Section 26.F (tentatively agreed to at the bargaining table on March 8, 2010, which I include below) was a major concern, and one they could not agree to as part of the April 22, 2011, Kitsap County Proposal." The Board of County Commissioners was willing to ratify the employer's April 22, 2011 proposal if Article 26.F remained current contract language.

Conill further explained that the prosecuting attorney's office reviewed the collective bargaining agreement. The prosecuting attorney's office raised concerns with Article 26.F and refused to "approve the contract as to form." County Commissioner Josh Brown testified that the Board of County Commissioners does not regularly ignore the advice of counsel.

APPLICABLE LEGAL PRINCIPLES

Authority of Bargaining Agent

An agent's authority to bind his principal may be of two types, either actual or apparent. *King v. Riveland*, 125 Wn.2d 500, 507 (1994); *Community College District 13*, Decision 8117-B (PSRA, 2004). Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principle is deemed to have actually intended the agent to possess. *Id.* Both actual and apparent authority depend upon objective manifestations made by the principal. *Id.* With actual authority, the principal's objective manifestations are made to the agent. *Id.* With apparent authority, they are made to a third person or party. *Id.* Apparent authority is created through a manifestation by the principal to a third party that supplies a

reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Waterville School District*, Decision 11556, *citing Tyson Foods, Inc.*, 311 NLRB 552 (1993); *NLRB v. Donklin's Inn*, 532 F.2d 138 (9th Cir. 1976); and *Alliance Rubber Co.*, 286 NLRB 645 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this is conduct likely to create such a belief. *Tyson Foods, Inc.*, 311 NLRB 552, *citing* Restatement (Second) of Agency § 27 cmt. (1958). "Authority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351 (1966).

When determining whether an employee is an agent, the Commission examines the totality of the circumstances. *Waterville School District*, Decision 11556 (EDUC, 2012), *citing LVI, Inc.*, 2006 WL 2657512 (N.L.R.B. Div. of Judges, 2006).

Duty to Bargain

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). The determination as to when the duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer commits an unfair labor practice when it refuses to engage in collective bargaining. RCW 41.56.140(1) and (4).

The duty to bargain in good faith requires that when parties arrive at a tentative agreement, each side is obligated to pursue ratification and finalization of that tentative agreement in good faith. *Island County*, Decision 857 (PECB, 1980). In certain circumstances, the failure to ratify a collective bargaining agreement may be an unfair labor practice. The 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. *Shelton School District*, Decision 579-B (PECB, 1983); *Naches Valley School District*, Decision 2516-A (EDUC, 1987), *cited with approval in Shoreline School District*, Decision 9336-A (PECB, 2007). Similarly, a party that is dissatisfied with the results of negotiations after its offer

is accepted commits an unfair labor practice if it seeks to retrench from its offer and bring other issues to the bargaining table. *Mason County*, Decision 10798-A (PECB, 2011), *citing Island County*, Decision 857.

When analyzing conduct during negotiations, the Commission examines the totality of the circumstances to determine whether an unfair labor practice has occurred. *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 or refusing to make counterproposals, 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 per se violations. *Snohomish County*, Decision 9834-B (PECB, 2008).

ANALYSIS

The public sector does not demand the employer's representative sit at the table with authority that is final and binding upon the employer. *City of Centralia*, Decision 2594 (PECB, 1987). However, it does require that all parties bargain in good faith. The employer delegated the task of negotiating the collective bargaining agreement to Conill and Kirton. The employer's negotiators communicated to the union that while they had authority to enter tentative agreements, ratification of those agreements was conditioned upon approval by the Board of County Commissioners. The negotiators had authority to enter tentative agreements at the bargaining table.

When the employer's negotiator represents to the union that he or she has full authority to enter into tentative agreements and represents that ratification will be a formality, the union may reasonably expect that the negotiated agreement will result in a complete written and signed agreement. *Mason County*, Decision 10798-A. In *Mason County*, the employer's negotiator represented that he had full authority to bargain and that ratification would be a mere formality. The agreement predominately contained proposals advanced by the employer. When the collective bargaining agreement came before the County Commissioners, one of the employer's negotiators contributed to the unfair labor practice by asking that the agreement be removed from

the Commissioner's consent calendar. The employer bargained in bad faith when it refused to ratify the agreement.

The duty to support a tentative agreement does not preclude an official, who did not participate in the negotiations, from expressing his or her concerns about the proposal. *Shoreline School District*, Decision 9336-A. In *Shoreline School District*, the employer presented a proposal that incorporated elements of both parties' proposals. The union was aware that the employer's negotiators thought the agreement may have been a "stretch" over what the employer's governing body would accept. The negotiators committed to "sell" the proposal. Prior to ratification, the parties took steps to implement the collective bargaining agreement, thereby demonstrating that they expected ratification. The employer's superintendent was not part of the negotiating team. The employer's negotiating team did not communicate to the union that it needed the superintendent's support to reach an agreement and only communicated that ratification of the tentative agreement was contingent upon a vote of the Board of Directors. After the employer's negotiators reached an agreement on a compromise proposal, the superintendent recommended that the school board not ratify the agreement. The failure of the superintendent to support the agreement resulted in the Board of Directors failing to ratify the agreement. The employer argued that the union knew the agreement was contingent on the school board's ratification and that the superintendent's approval would be necessary. The employer informed the union that school board ratification was necessary, but did not inform the union that the superintendent's support was necessary. The employer's failure to support its compromise proposal was an unfair labor practice. "Absent any timely communication demonstrating that [the superintendent's] support was needed, the union was safe to assume that the employer's bargaining team had the authority to reach binding tentative agreements, and that the employer would fully support any terms it proffered, contingent on ratification."

Unlike *Mason County*, there is no evidence that Conill represented to the union that ratification was a mere formality. In this case, the employer's negotiators informed the union that the tentative agreement was contingent on ratification by the Board of County Commissioners. The employer's negotiators did not communicate that the tentative agreement needed the approval or support of any other employer officials. Upon reaching the tentative agreement on Article 26.F,

the employer ensured that overtime requests were processed in accordance with the tentatively agreed upon language. As in *Shoreline School District*, the implementation of the tentative agreement demonstrated that the employer's negotiators expected the tentative agreement to be ratified.

Similar to *Shoreline School District*, an employer official not involved in the negotiations made a recommendation that resulted in the tentative agreement being rejected. Just as the superintendent's recommendation not to ratify the agreement caused the school board to reject the tentative agreement, Aufderheide's recommendation not to approve the contract as to form led to the County Commissioners rejecting the tentative agreement.

The tentative agreement on Article 26.F exemplifies a compromise reached in the bargaining process. The union proposed changes to the article. Initially, the employer resisted those changes. However, during the course of bargaining, the employer's negotiators proposed other changes and agreed to changes proposed by the union. Consistently, the employer represented to the union that the parties had a tentative agreement on Article 26.F. As in *Shoreline School District*, the employer rejected a tentative agreement that it helped craft.

During the course of bargaining, a negotiator should communicate any areas of agreement that they foresee being problematic during ratification. When being briefed about the status of negotiations, the employer's governing body should identify any areas it sees as problematic with the agreement. Those problem areas must then be promptly addressed in negotiations. The employer's negotiators did not communicate that they foresaw any complications in the ratification of the tentative agreement, including Article 26.F.

Casillas testified that Conill kept the Board of County Commissioners informed of the issues in bargaining.[5] In January 2011, Conill met with the Board of County Commissioners. After the meeting, the employer did not communicate concerns or issues with the tentative agreement on

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[5] The Examiner found Casillas's testimony that Conill advised the union that Conill was in communication with the employer's governing bodies about all aspects of the negotiations credible. The Examiner's credibility determinations are afforded great weight by the Commission.

Article 26.F. The problems with Article 26.F did not arise until the collective bargaining agreement went through the employer's internal review process.

When rejecting the tentative agreement, the Board of County Commissioners relied on Aufderheide's recommendation not to approve the tentative agreement "as to form." "Approval as to form means approval of the structure of something, as opposed to its substance." *Guillen v. Pierce County*, 127 Wn. App. 278, 287 (2005). Aufderheide objected to the tentative agreement on Article 26.F on the basis of her legal research. Her objection went to the substance of the tentative agreement, not just to the form. The evidence supports the Examiner's finding that Aufderheide's recommendation not to approve the contract as to form led to the Board of County Commissioners rejecting the agreement.

Conill promptly notified the union that the tentative agreement on Article 26.F would be problematic in the ratification process once he had notice that the prosecuting attorney's office would not approve the contract due to form. It is bad faith for the employer to wait until the ratification process to vet its proposals and notify the union of a significant road block to reaching an agreement. Through its actions of relying on the recommendation of Aufderheide, the Board of County Commissioners attempted to limit the authority of its negotiators. The Board of County Commissioners bargained in bad faith when it did not honor the agreement reached by its negotiators.

It is bad faith for an employer to back away from an agreement after the parties have reached agreement if the employer is no longer satisfied with the agreement. In the August 21, 2011 memorandum communicating the rejection of the tentative agreement, the employer expressed concerns with the legal interpretation of the article and with the fiscal impact of the agreement on other bargaining units. The employer entered a tentative agreement. Then, based on Aufderheide's opposition, the employer then changed its demand on Article 26.F prior to ratification. By changing its demand and subsequently rejecting the tentative agreement reached with the union, the employer bargained in bad faith.

CONCLUSION

The employer's actions and words led the union to reasonably believe that the employer's negotiating team had authority to make proposals and enter tentative agreements.

While the employer clearly communicated to the union that any tentative agreements were subject to ratification by the employer's governing body, the governing body must remain apprised of the status of negotiations and identify proposals or tentative agreements that are problematic when the problem arises. The employer had an obligation to direct its negotiators to alter proposals during the negotiations and not wait until the ratification process to identify significant roadblocks to the agreement. The employer bargained in bad faith when it refused to ratify a tentative agreement containing a compromise proposal made by the employer's negotiators. [6]

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Guy O. Coss are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 14th day of August, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

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[6] Commissioner McLane concurs in the result only. He believes *Shoreline School District* was wrongfully decided. However, it is binding precedent unless and until the Commission overrules it.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ DIANE THOVSEN

CASE NUMBER:	24240-U-11-06210	FILED:	09/12/2011	FILED BY:	PARTY 2
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BAR UNIT:	ALL EMPLOYEES				
DETAILS:	-				
COMMENTS:					

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