STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VANCOUVER ASSOCIATION OF EDUCATIONAL SUPPORT PROFESSIONALS, Complainant, vs. VANCOUVER SCHOOL DISTRICT, Respondent.	CASE 25012-U-12-6398 DECISION 11791-A - PECB DECISION OF COMMISSION

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On July 30, 2012, the Vancouver Association of Educational Support Professionals/WEA (union) filed an unfair labor practice complaint alleging that the Vancouver School District (employer) refused to bargain and interfered with employee rights when, after the union made a new proposal, the employer declined to meet and negotiate. The unfair labor practice manager reviewed the complaint pursuant to WAC 391-45-110 and issued a preliminary ruling for refusal to bargain in violation of RCW 41.56.140(4).

Examiner Karyl Elinski held a hearing and issued a decision finding that the employer refused to bargain when, following the employer's lawful implementation upon impasse, the employer declined to bargain layoff and recall language.[1] The employer appealed.

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[1] *Vancouver School District*, Decision 11791 (PECB, 2013).

ISSUE

Did the employer refuse to bargain when, following the employer's lawful implementation of lay off and recall language on impasse, the employer refused to resume bargaining when the union made a new proposal and requested bargaining?

We affirm the Examiner. The union's offer showed sufficient movement to break the impasse and require further negotiations. After the employer lawfully implemented, it remained obligated to continue bargaining, upon demand.

APPLICABLE LEGAL PRINCIPLES

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 whether a duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1).

The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *University of Washington*, Decision 11414-A (PSRA, 2013). A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982).

In order to resolve their contractual differences through negotiations, parties to the collective bargaining agreement must meet in a timely fashion. *Seattle School District*, Decision 10732-A

(PECB, 2012), *citing Morton General Hospital*, Decision 2217 (PECB, 1985). 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. *State – Washington State Patrol*, Decision 10314-A (PECB, 2010). 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. *State – Washington State Patrol*, Decision 10314-A, *citing City of Clarkston*, Decision 3246 (PECB, 1989). What may be reasonable conduct in one case may not be reasonable in another. *Id.*

The "impasse" concept grows out of the premise that the duty to bargain does not impose upon the parties an obligation to agree. Circumstances exist in which a party may lawfully conclude that further negotiations will not result in an agreement. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), *quoting Charles D. Bonanno Linen Service*, 243 NLRB 1093-1094 (1979). [2] Even when an impasse is "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process", the duty to bargain remains part of the overall environment. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. at 412.

The Commission closely scrutinizes any declaration of impasse. The concept of "impasse" is even more critical in the public sector, because public employees are generally denied the right to strike and are left no recourse other than the filing of an unfair labor practice complaint. RCW 41.56.120; *South Kitsap School District*, Decision 1541 (PECB, 1983); *Skagit County*, Decision 8746-A (PECB, 2006).

The existence of a lawful impasse is a legal determination to be made by the Commission, not a matter controlled by the parties' statements made in the heat of negotiations. When determining

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[2] Decisions construing the National Labor Relations Act (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).

whether impasse exists, the Commission is often hampered by the "inherently vague and fluid ... standard" applicable to the concept of impasse. *Skagit County*, Decision 8746-A, *citing NLRB v. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342, 352 (1958). Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. at 412.

An impasse exists where "there are irreconcilable differences in the positions of the parties after good faith negotiations." *Federal Way School District*, Decision 232-A (EDUC, 1977). There can be no legally cognizable impasse if a cause of the deadlock is the failure of one of the parties to bargain in good faith. *Id.* An impasse does not exist if parties are able to change their positions. *City of Brier*, Decision 5089-A (PECB, 1995). If the party declaring impasse has bargained in good faith, and if its conclusion about the status of negotiations is justified by objectively established facts, then the party's duty to bargain is satisfied. *Skagit County*, Decision 8746-A, *citing Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 393, 543 n.5 (1998).

The focus of the inquiry is whether the party declaring impasse could reasonably conclude that no realistic prospect existed that continued discussion would be fruitful. *Mason County*, Decision 3706-A (PECB, 1991); *Grant County Public Hospital District 1*, Decision 8460 (PECB, 2004); *Pierce County*, Decision 1701 (PECB, 1983). A fixed definition of an impasse w ich can be applied mechanically to all factual situations does not exist. *Skagit County*, Decision 8746-A, *citing Dallas General Drivers, Warehousemen and Helpers, Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). The Commission analyzes at least five factors when determining whether the parties have reached a good faith impasse: (1) the bargaining history; (2) the parties' good faith in negotiations; (3) the length of the negotiations; (4) the importance of the issue(s) on which the parties disagree; and (5) the contemporaneous understanding of the parties as to the state of negotiations. *Skagit County*, Decision 8746-A, *citing Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). These factors are not exclusive and provide a useful basic framework for guidance in determining whether impasse existed. *Skagit County*, Decision 8746-A.

Impasse only temporarily suspends the duty to bargain. *Seattle School District*, Decision 2079-C (PECB, 1986), *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. at 412. Thus, neither party is in a position to unilaterally foreclose bargaining for a specified period of time. *Seattle School District*, Decision 2079-C. The impasse doctrine is not a device to allow any party to continue to act unilaterally or ignore the collective bargaining process in determining the conditions of employment. *Skagit County*, Decision 8746-A, *citing McClatchy Newspapers*, 321 NLRB 1386 (1996). The determination of whether a party has refused to bargain, including after impasse has been reached, is, however, a question of fact to be determined by considering all of the relevant circumstances in the particular case. *Skagit County*, Decision 8746-A, *citing City of Snohomish*, Decision 1661-A (PECB, 1984).

An employer can implement a unilateral change after bargaining in good faith to an impasse. *Spokane County*, Decision 2167-A (PECB, 1985). Under Chapter 41.56 RCW, an employer may not implement upon lawful impasse until one year has passed since the expiration of the collective bargaining agreement. RCW 41.56.123. If the parties have bargained in good faith to impasse, then an employer may implement changes provided those changes are not different from or greater than changes the employer had proposed during negotiations. *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *Atlas Track Corporation*, 22 NLRB 222 (1976). The employer must remain willing to bargain all other mandatory subjects of bargaining and remain willing to return to bargaining, upon request, regarding the implemented subject. *See Skagit County*, Decision 8746-A (PECB, 2006); *Griffin School District*, Decision 10489-A (PECB, 2010).

After implementation, the continued existence of an impasse depends on whether, in view of all the circumstances of the bargaining, further discussions would be futile. Anything that creates a new possibility of fruitful discussion, even if it does not create a likelihood of agreement, breaks an impasse: a strike may; bargaining concessions, implied or explicit, may; the mere passage of time may. *Gulf States Mfg. Inc. v. N.L.R.B.*, 704 F.2d 1390, 1398-99 (5th Cir. 1983) (citations omitted). Even if impasse is reached over an issue, it may be broken if one of the parties moves off its previously adamant position. *Anderson Enterprises*, 329 NLRB 760, 761-62 (1999), *citing Tom Ryan Distributors*, 314 NLRB 600, 604-605 (1994), *enf'd. mem.*, 70 F.3d 1272 (6th

Cir. 1995) (no impasse found where union demonstrated an intent to move on a key issue, parties had met only eight times before employer declared impasse, and the key issue had been discussed conceptually but not in detail).

BACKGROUND

The collective bargaining agreement between the employer and the union expired on August 31, 2010. The parties engaged in collective bargaining for a successor agreement beginning in 2010. After negotiating and mediating, the parties were unable to reach an agreement on the layoff and recall provision of the collective bargaining agreement. After reaching impasse, the employer implemented its "contract," including tentative agreements and the layoff and recall language. On September 9, 2011, the union filed an unfair labor practice complaint.

The Layoff and Recall (Article IV, Section 2) provision of the 2009-2010 collective bargaining agreement provided for layoff by job classifications. The employer implemented layoff and recall language that provided for "elimination of a position(s) and/or to a reduction in pay, hours, or workdays. The implemented language made changes to the placement rights and procedures of placement.

On October 19, 2011, Missy Hallead (Hallead), the employer's Executive Director of Human Resources, e-mailed Lynn Davidson (Davidson), the union's UniServ Representative. Hallead informed Davidson that the employer's implementation meant "the parties now have a contract that expires on the date specified in the VAESP last and best offer, which is August 31, 2013." The employer declined to engage in further bargaining. The employer suggested that the union could provide the employer with "a written proposal that would address the needs of the District as provided in the revised layoff and recall language of the contract."[3]

An Examiner held a hearing on the union's September 9, 2011 unfair labor practice complaint and concluded that the parties were at impasse and the employer had lawfully implemented the

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[3] Exhibit 8.

layoff and recall language. *Vancouver School District*, Decision 11315 (PECB, 2012). The Examiner issued the decision on March 13, 2012.

Following the Examiner's decision, the union requested further bargaining on the layoff and recall language. On March 28, 2012, Hallead responded to Davidson's request:

> This responds to your request to bargain revisions to the layoff procedures adopted by the Board on September 13, 2011. The PERC Hearing Examiner declined to order such remedy in the recent ULP proceeding and, instead, affirmed the action of the District in unilaterally adopting the revised layoff procedures. Consequently, the District has fulfilled its bargaining responsibility and has no obligation to bargain the issue during the life of the current contract which expires in 2013.
>
> We also note that the District has already returned to the bargaining table in a mediated session following implementation of the best and final. This action was undertaken based on the Association's assertion that it was prepared to bargain the issue. However, once again, the Association refused to move from its position of not bargaining a change to layoff even though the District offered concessions in mediation to many of the Association's concerns.
>
> The District is willing to consider modifications to the adopted layoff provisions consistent with its offers to the Association during mediation last August and September. The Association is welcome to submit a written proposal within this limitation with the understanding that consideration by the District of such proposal would not constitute the reopening of negotiations and would be restricted to layoff as the single issue in which we were at impasse.

On May 16, 2012, Davidson wrote to Hallead and provided the union's new proposal on the layoff and recall language. The union explained that "an impasse may temporarily suspend the obligation to bargain." The union asserted that an impasse no longer existed and requested that the employer "revert to the language of the expired collective bargaining agreement until the parties have fulfilled their bargaining obligations." The union's May 16, 2012 proposal contemplated a reduction in hours.

On May 29, 2012, the employer responded to the union's request to resume negotiations. The employer wrote that the union's proposal was "based on the expired contract as opposed to the current contract and which you claim removes the impasse." The employer asserted that it

implemented according to law. The employer declined the union's request to bargain, but "remain[ed] willing to consider modifications to the adopted layoff provisions consistent with those offered during mediation prior to and after implementation of the best and final." The employer invited the union submit a written proposal within this limitation of the implemented final offer.

On June 22, 2012, the union responded. The union asserted that its May 16, 2012 proposal did address the employer's concerns and requested a response. On June 26, 2012, the employer responded that "the District is not prepared to reopen bargaining on a closed issue."

ANALYSIS

In the expired 2009-2010 collective bargaining agreement, Article IV, Section 2 Layoff and Recall provided for layoffs by job classification. Throughout bargaining, the union proposed minimal changes to the layoff and recall language. *Vancouver School District*, Decision 11315. The union objected to a reduction in work hours as a form of layoff. *Id.* The parties were at a lawful impasse on the layoff and recall provision when the employer implemented its final offer on that provision and the tentative agreements the parties had reached. *Id.* The layoff and recall language implemented by the employer made changes to the expired collective bargaining agreement. The employer implemented layoff language that allowed the employer to eliminate positions and reduce pay, hours, or workdays and made cha ges to employees' bumping rights. By implementing its final offer, the employer gained authority for layoffs. The implemented language became the status quo. Contrary to the union's assertions, the employer was not obligated to revoke the language it implemented on September 1, 2013.

The employer gives significance to the expiration date implemented as part of its final offer. The employer's reliance on the expiration date as a basis for refusing to bargain with the union is sorely misplaced. In *Seattle School District*, Decision 2079-C, the employer implemented its final offer, including a duration clause, after impasse. In that case, the employer did not send the message, and the union did not hear the message, that the duration clause foreclosed bargaining until expiration. However, in this case, the employer relies on the duration clause as a basis for

refusing to bargain.[4] The employer was communicating it position that its bargaining obligation was satisfied until the imposed "contract" expired. Contrary to the employer's assertions, bargaining over the implemented language was not foreclosed until the expiration date the employer implemented.[5] *Seattle School District*, Decision 2079-C.

At the time the employer implemented the tentative agreements and its final offer on the layoff and recall provision, the parties did not have a contract. What the parties had was the employer's implemented final offer, which included tentative agreements. In a fully agreed to and ratified collective bargaining agreement, the duration clause is of great import and suspends the bargaining obligation over subjects addressed in the collective bargaining agreement. Unlike a final collective bargaining agreement, about which the duty to bargain subjects covered by the agreement is closed until the expiration date of the collective bargaining agreement, the implemented final offer included an obligation to continue to bargain if impasse was broken.

After implementation, it cannot be presumed that the parties will continue to be at impasse. *See Deister Concentrator Company*, 253 NLRB 358 (1980). Circumstances may change causing the impasse to be broken. Indeed the passage of time may break an impasse. *Jeffrey-De Witt Insulator Co. v. N.L.R.B.*, 91 F.2d 134, 139 (4th Cir, 1937) (a month of "cooling time" had elapsed since the negotiations resulting in a strike). A modification of a bargaining proposal may break an impasse. *N.L.R.B. v. Webb Furniture Corp.*, 366 F.2d 314 (4th Cir. 1966). It is necessary to re-examine whether an impasse continues to exist in order to determine whether the employer refused to engage in collective bargaining upon request.

After the Examiner issued his opinion, the union made changes to its position. The result of the first unfair labor practice complaint may have broken the impasse. By changing its position, the union does not unravel the implementation. The implemented language continues as the status quo. By changing its position, the union presented additional circumstances that may have broken the impasse.

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4 Exhibits 8 and 9.

5 The only issue the parties had reached impasse on was the layoff and recall provision of the collective bargaining agreement. There is no evidence that the parties were not in agreement over the duration of the collective bargaining agreement.

A union must offer more than assertions of flexibility and promises of new proposals to compel a return to bargaining. *Holiday Inn, Downtown-New Haven*, 300 NLRB 774 (1990). In *Holiday Inn*, the parties reached an impasse on subcontracting. In an effort to convince the employer to resume bargaining, the union sent the employer letters assuring the employer that the union was prepared to be flexible and make new offers on the subcontracting issue. However, the union also informed the employer that the union was "amazed and concerned" by the employer's position and continued to find the employer's position "unreasonable and extreme." The employer refused to meet with the union. The NLRB found that the employer did not refuse to bargain when it refused to resume negotiations. The mere promise of flexibility and new proposals was not enough to require the employer to return to bargaining. The union "failed to give a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful."

Unlike the union in *Holiday Inn*, the union in this case made a proposal that showed movement from its position when the parties reached impasse. The employer may have viewed the union's request to return to the language of the expired collective bargaining agreement as intransigence. However, the union's May 16, 2012 proposal indicated a change in position that might lead to fruitful negotiations. For the first time, the union's proposal contemplated a reduction of work hours. While the movement may not have been as monumental as desired b the employer, the movement was sufficient to require the employer to resume bargaining. In this case, the employer refused to bargain when it refused to return to negotiations after the union made a proposal that showed movement.

An employer is not required to engage in futile discussions and may lawfully refuse to continue negotiations when good-faith bargaining demonstrates that the parties are unable to reach agreement. *Webb Furniture Corp.*, 152 NLRB 1526 (1965), *citing N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862 (C.A. 2 1938). The employer was not required to engage in marathon discussions after the union's proposal. After resuming negotiations, the employer could have lawfully suspended the negotiations if the parties reached impasse.

The Public Employees' Collective Bargaining Act requires parties to "meet at reasonable times..." RCW 41.56.030(4). Collective Bargaining requires the parties to engage in full and frank discussions on the issues in dispute. "It is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table. *United States Cold Storage Co.*, 96 NLRB 1108 (1951), *enf'd*, 203 F.2d 924 (5th Cir. 1953). The bargaining obligation is not met by inviting the other party to submit a proposal in writing when the other party requested bargaining in person. *N.L.R.B. v. United States Cold Stor. Corp.*, 203 F.2d 924, 928 (5th Cir. 1953) (a strike of three months may have broken the impasse). In this case, the employer refused to meet with the union until it received a proposal that met its needs. However, the employer made no efforts to explore with the union whether the union's new offer could produce fruitful discussions. Upon receiving a new proposal with movement from the union, the employer was obligated to resume bargaining and meet at a reasonable time with the union. A meeting with the union may have resulted in further movement toward agreement.

It was not reasonable for the employer to foreclose bargaining because it had implemented its final offer on the layoff and recall provision. The employer could not have reasonably concluded that the parties remained at impasse and further bargaining was unnecessary. The unfair labor practice had been resolved in the employer's favor. The union received the consequences of maintaining an inflexible position through the Examiner's position and the employer's implemented language. Following the result of the unfair labor practice complaint, the union modified its proposal and requested bargaining. These are factors that could have broken the impasse.

The objective facts do not lead to a conclusion that impasse continued to exist. The circumstances changed sufficiently to obligate the employer to return to bargaining with the union.

CONCLUSION

After implementation, an employer must return to the bargaining table, upon request, if changes have occurred that would result in the impasse being broken. The disruption of impasse may not

be long lasting. However, the obligation to bargain requires a return to bargaining to determine whether the impasse remains.

After receiving the result of the first unfair labor practice complaint, the union made changes to its position significant enough to break the impasse. The employer refused to return to negotiations upon request. The employer refused to bargain in violation of RCW 41.56.140(4).

NOW, THEREFORE, it is

ORDERED

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

ISSUED at Olympia, Washington, this 12th day of November, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

Commissioner Brennan did not
participate in the consideration of
or the decision in this case.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	25012-U-12-06398	FILED:	07/27/2012	FILED BY:	PARTY 2
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BAR UNIT:	MIXED CLASSES				
DETAILS:	-				
COMMENTS:					

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