

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PIERCE COUNTY PROSECUTING  
ATTORNEYS' ASSOCIATION,

Complainant,

vs.

PIERCE COUNTY,

Respondent.

CASE 130576-U-18

DECISION 13023-A - PECB

DECISION OF COMMISSION

*Kathleen Phair Barnard and Melissa Greenberg, Attorneys at Law, Barnard Iglitzin & Lavitt LLP, for the Pierce County Prosecuting Attorneys' Association.*

*Daniel A. Swedlow, Attorney at Law, Summit Law Group PLLC, for Pierce County.*

The collective bargaining agreement between the Pierce County Prosecuting Attorneys' Association (union) and Pierce County (employer) expired on December 31, 2017. The parties began negotiating a successor agreement in October 2017. Before the parties met, the employer communicated that it would pay retroactive wages through January 31, 2018, if the union ratified the contract by January 31, 2018. At the first negotiation meeting, the employer extended payment of retroactive wages to February 28, 2018, if the union ratified the collective bargaining agreement by February 28, 2018. On February 7, 2018, the employer offered to pay retroactive wages through March 30, 2018, if the union ratified the agreement by March 30, 2018. The employer extended its offer to pay a retroactive wage increase each time the expiration of its offer neared until March 30, 2018. After the March 30, 2018, deadline in the employer's offer passed and the parties had not reached an agreement, the union filed an unfair labor practice complaint alleging that the employer refused to bargain by setting an arbitrary date for bargaining to conclude and conditioned bargaining on a permissive subject of bargaining.

After the union filed the unfair labor practice complaint, the parties continued negotiating. The parties reached an agreement that provided a wage increase retroactive to March 26, 2018.

In accordance with WAC 391-45-110, Unfair Labor Practice Administrator Emily Whitney reviewed the complaint and issued a preliminary ruling. Examiner Elizabeth Snyder conducted a hearing and concluded that the employer did not breach its good faith bargaining obligation. *Pierce County*, Decision 13023 (PECB, 2019). The union filed a timely appeal.

The issue before the Commission is whether the employer refused to bargain in good faith by conditioning a retroactive wage increase on the requirement that the parties conclude an agreement by a specified date. We affirm the Examiner.

#### *Standard of Review*

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006). The Commission reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

The Commission reviews factual findings for substantial evidence in light of the entire record. 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. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference is highly appropriate in fact-oriented appeals. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

#### *Application of Standard*

On appeal, the union agreed that the Examiner correctly determined retroactive wage payment to be a mandatory subject of bargaining. The union views the employer's proposal that it would pay a retroactive wage increase only if the union completed ratification by a date certain as unlawfully setting a deadline by which the parties must conclude bargaining. The union characterizes the

employer's conditional offer as an impermissible insistence past the point of impasse on a deadline for concluding bargaining, which it contends is a "ground rule" and thus a permissive subject of bargaining.

The employer argues that its proposal was a conditional proposal. The employer asserts that it did not set a deadline for bargaining. Rather, the employer remained willing and bargained after the condition for retroactive pay passed.

Conditional offers are a lawful means to explore alternatives. *Whatcom County*, Decision 7244-B (PECB, 2004). Conditional proposals may be advanced at any time during the bargaining process. *City of Redmond*, Decision 8879-A (PECB, 2006). A party making a conditional offer must clearly communicate the proposal for consideration. *Id.*

Commission precedents require that conditional offers be clearly expressed and not be ambiguous. If asked to do so, the party making the conditional offer must explain to the other party the conditions and implications of the failure to satisfy those conditions. *Id.* The party to which the conditional offer is made must be able to reasonably identify and objectively meet those conditions. *Id.*

In *City of Redmond*, the employer proposed to the union that it would recommend a "3.51 percent across the board salary increase retroactive to January 1, 2002 to the City Council if that is the only change in compensation, and the process did not drag out." The employer attempted to make a conditional proposal. The first condition was if the 3.51 percent salary increase was the only change. The union could have reasonably understood the condition and met the condition. The second condition was that "the process not drag out." The second condition was ambiguous. The employer did not explain what it would mean for the process to drag out. The Commission concluded that the employer's conditional proposal was ambiguous.

In this case, the employer made a conditional offer that was clearly expressed and was not ambiguous. The employer proposed a wage increase that would be retroactive if the union ratified the collective bargaining agreement by February 28, 2018. The employer later extended to

March 31, 2018, the date by which the union needed to ratify the agreement in order for the employer to pay retroactive wages. Both the February 28, 2018, and March 31, 2018, dates passed without the parties reaching agreement. The condition expired.

The parties continued to negotiate after March 31, 2018. The parties reached an agreement that included a wage increase retroactive to March 26, 2018.

The Examiner correctly identified the employer's proposal as a conditional offer. The condition, that the union ratify the collective bargaining agreement by a certain date to receive retroactive pay, was clearly expressed. The union could have identified the condition and met the condition. When the employer changed the date by which the union must ratify the collective bargaining agreement to receive retroactive pay, it did so without ambiguity as the deadline for the employer to pay retroactive pay came and went.

A party is entitled to stand firm on a position, and engaging in hard bargaining is not illegal. *See Mansfield School District*, Decision 4552-B (EDUC, 1995). The employer engaged in hard bargaining when it maintained a firm position that it would not pay retroactive wages unless the union ratified the collective bargaining agreement by a certain date. The employer's offer was meant to incentivize settlement rather than, as the union asserted, establish a deadline for bargaining to conclude. The employer remained firm in its position but did not insist that negotiations proceed on a timeline established by the employer. As the conditional dates for retroactive wages passed, the employer remained willing to negotiate.

The Examiner properly considered evidence that the employer and the union continued to bargain after the conditional offer expired. Evidence that the parties' negotiations continued was admissible to establish the course of bargaining and to determine the entire course of conduct.

### *Conclusion*

The employer presented the union with a conditional offer—the employer would pay retroactive wage increases if the union ratified the collective bargaining agreement by a certain date. The employer

changed the date, which evidenced a willingness to bargain. The parties reached a resolution that included retroactive pay. The employer did not set a date by which bargaining was to conclude.

The Examiner identified the correct legal standard. Substantial evidence supports the Examiner's findings of fact, which in turn support the conclusions of law.

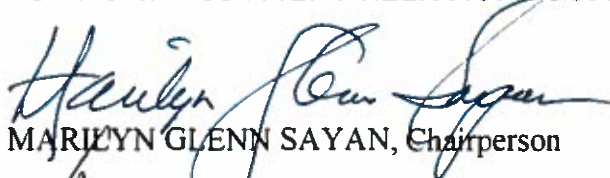
We affirm the Examiner.

ORDER

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

ISSUED at Olympia, Washington, this 7th day of November, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



MARK BUSTO, Commissioner



KENNETH J. PEDERSEN, Commissioner



# RECORD OF SERVICE

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ISSUED ON 11/07/2019

DECISION 13023-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 130576-U-18

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