STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Complainant, vs. SPOKANE COUNTY, Respondent.	CASES 133084-U-20 and 133085-U-20 DECISION 13435 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Ed Stemler, General Counsel, for the Washington State Council of County and City Employees.

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On October 14, 2020, the Washington State Council of County and City Employees (union) filed two unfair labor practice (ULP) complaints against Spokane County (employer). The union asserted that the employer interfered with employee rights by insisting that collective bargaining sessions occur in public. A Public Employment Relations Commission (PERC) Unfair Labor Practice Manager issued a preliminary ruling on October 19, 2020, stating a cause of action existed. On January 25, 2021, the union filed a motion for summary judgment. The motion was fully briefed on February 8, 2021. The motion for summary judgment was denied on March 30, 2021, by the undersigned, who then held a hearing conducted by videoconference on June 7 and June 8, 2021. The parties submitted post-hearing briefs by August 16, 2021, to complete the record.

ISSUE

Did the employer interfere with employee rights in violation of RCW 41.56.140(4) [and, if so, derivative interference in violation of RCW 41.56.140(1)] by failing to bargain in good faith by insisting that collective bargaining sessions occur in public without agreement of the union?

BACKGROUND

The union represents the two bargaining units involved in the instant case, the first bargaining unit consists of approximately 220 corrections officers, Local 492 (492) and the second bargaining unit consists of corrections lieutenants, Local 492-CL (492-CL).[1] The employer and each bargaining unit had agreed to collective bargaining agreements (CBAs) effective January 1, 2016, through December 31, 2019. The allegations in this complaint arise from the parties' attempts to bargain a successor agreement in light of a resolution passed by the Board of County Commissioners of Spokane County (county commissioners) requiring several measures be taken that would make public the previously private collective bargaining sessions between the employer and the unions representing employees of the employer.

On December 11, 2018, the county commissioners passed Resolution 18-0892, entitled: "IN THE MATTER OF IMPROVING TRANSPARENCY BY NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS IN A MANNER OPEN TO THE PUBLIC."[2] In this resolution, in relevant part, the county commissioners resolved that all collective bargaining contract negotiations be conducted publicly and in real time, either in person or by video; that negotiation sessions would be audio recorded; that members of the public would not be allowed to participate or comment during the negotiations; that the employer would provide public notice of all negotiations in accordance with the Open Public Meetings Act, chapters 42.30.060–42.30.080 RCW; and that the employer would post copies of all proposals provided or received on its website within two business days. On December 13, 2018, the county

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[1] The union also represents a bargaining unit of corrections sergeants, 492-CS, who are not party to this case; however, this unit was also engaged in collective bargaining during the same time period of the allegation and was often included in discussions and correspondence by the parties.

Throughout the hearing and in documents presented as evidence, the parties used different titles to refer to these bargaining units. The designations of 492, 492-CS, and 492-CL are used throughout this decision in order to mitigate confusion.

[2] The union identified that two of the three county commissioners were present when the resolution was passed.

commissioners passed Resolution 18-0950 (the resolution), replacing and superseding Resolution 18-0892, which included the same requirements.

After passage of the resolution, Randy Withrow, the former Human Resources manager who served as the employer's chief negotiator, sent copies of the resolution to all unions representing county employees. Withrow served in this role from December 2015 until his retirement in January 2021.

On December 14, 2018, Gordon Smith and Natalie Hilderbrand, union staff representatives, sent a letter to Withrow objecting to the requirements outlined in the resolution and demanding to negotiate the impacts of its passage. Smith represents several bargaining units of county employees including 492. Smith has been a staff representative for approximately 22 years. Hilderbrand also represents several bargaining units of county employees including 492-CL and 492-CS. In response to this letter, Withrow spoke with the union several times by phone about the resolution.

On July 9, 2019, Withrow sent an email to Smith wherein he identified that CBAs for 492, 492-CS, and 492-CL would expire at the end of the calendar year and that he wished to meet with Smith to develop a calendar of meeting dates and discuss ground rules for the upcoming negotiation sessions for successor agreements.[3] Withrow also wrote, "We will be functioning under the recently passed resolution regarding open meetings for negotiations and will need to address any concerns or questions the Unions may have."

On July 25, 2019, Smith responded to Withrow indicating that he would be happy to identify dates for negotiations but that the union did not agree with the resolution. Smith also shared the union's belief that in accordance with *Lincoln County (Teamsters Local 690)*, Decision 12844-A (PECB,

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[3] Hilderbrand was not included in this initial email.

2018),[4] parties must mutually agree to open negotiation meetings to the public and that, while ground rules are not mandatory subjects of bargaining, Smith was open to discussing ground rules with Withrow.

On August 16, 2019, Hilderbrand sent two letters to Withrow asking to begin negotiations for successor CBAs—one on behalf of 492-CL and one on behalf of 492-CS.

On August 19, 2019, Withrow emailed Smith and Hilderbrand the employer's proposed ground rules. On August 26, 2019, Smith replied to Withrow by email, copying Hilderbrand and others, in which Smith restated his understanding that ground rules are not a mandatory subject of bargaining. Smith also argued that ground rules add "little value to the process though [he was] not saying that the Union [would] not consider some variety of ground rules;" that the union did not agree to employer's proposed ground rule eight regarding open bargaining; and that the union considered "County resolution #18-0950 invalid in its entirety due to the Lincoln County (Teamsters Local 690), (Decision 12844-A)." Smith then offered potential meeting dates and times for 492. The employer's proposed ground rule eight stated:

> Negotiation sessions shall be open to the public. This is based on the County Commissioner's passage of Resolution 18-0950 titled "In The Matter Of Improving Transparency By Negotiating Collective Bargaining Agreements In A Manner Open To The Public["] passed on December 13, 2018. A copy of the Resolution is attached to these Ground Rules and incorporated by reference.

On August 29, 2019, Withrow responded to Smith's email by outlining two arguments in response to the union's objection to ground rule eight. The first argument was that PERC found both parties at fault in *Lincoln County* as both had issued "unacceptable pre-conditions." Withrow also wrote, "PERC did not find that public negotiations sessions were per se bad faith bargaining—only that mandating public negotiations outright was an unfair labor practice under Chapter 41.56 RCW."

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[4] During the time period relevant to this allegation, the most recent ruling in *Lincoln County* was the above identified Commission decision that vacated and substituted a new order in place of that ordered by the Examiner in *Lincoln County (Teamsters Local 690)*, Decision 12844 (PECB, 2018). The multiple decisions by the Examiner, the Commission, and the courts are germane to the instant case and are discussed in detail below.

The second argument was that the resolution was a declaration of policy subject to the employer's "obligations to negotiate in good faith" and that the employer wished to discuss circumstances when negotiations could be held in public and when they could be held in "closed session." Withrow closed the email by saying, "The County is hopeful that Council 2's obstinacy on this narrow issue does not preempt the efficient progress of bargaining in a manner acceptable to both sides."

On August 30, 2019, Hilderbrand responded to Withrow's email of August 19, copying Smith, with language identical to that used by Smith in his August 26 email, regarding the union's position on open bargaining and offering potential meeting dates and times for both 492-CS and 492-CL.

On September 6, 2019, Withrow emailed Smith and Hilderbrand confirming that he and Smith were attempting to arrange a meeting for September 25, 2019, regarding 492 and inquiring whether Hilderbrand would participate in this conversation about the union's objection to the resolution or whether 492-CS and 492-CL planned to discuss the union's objection separately.

On September 20, 2019, Withrow and Hilderbrand exchanged emails about potential meeting dates and times for 492-CS and 492-CL negotiations. Also on September 20, 2019, Withrow emailed Smith what he believed was a confirmation of a discussion the two held earlier that day. Specifically, Withrow stated that "the Union [was] postponing negotiations for [] Wednesday (09/25)," that the "Union [could not] meet until [they resolved] the open meeting issue," and that the union wished "to postpone the meeting so the Union [could] provide the County with a counter on the Ground Rules." Withrow also indicated that the employer had proposals ready to present to the union, and he asked Smith to advise him if his summary of the discussion was correct.

On September 23, 2019, Smith stated that he didn't believe the union was postponing negotiations as he was not expecting a meeting on September 25, 2019, and attached the union's counterproposal on ground rules. The attachment indicated an agreement by the union on all ground rules except eight, which had been struck through in its entirety. On September 24, 2019, Hilderbrand emailed Withrow a copy of the union's counterproposal on ground rules on behalf of 492-CS and 492-CL. Also on September 24, 2019, Withrow emailed Smith and Hilderbrand

suggesting that they "meet in a closed session initially to discuss the conditions as to which portions of the negotiations meeting will be public and which will not."

Contract Negotiations, Fall 2019

Simultaneously during their negotiation of ground rules, the parties discussed a possible one-year contract. Withrow sought permission from the county commissioners to offer the union a one-year "what if" proposal in the hope that an additional year would allow the court to rule on the *Lincoln County* case. The proposal was emailed to the union on October 11, 2019. This multipage document included proposed language on a variety of subjects and included a signature line for tentative agreements on each page. The proposal did not include article numbers for most of the proposals but dealt with the following subjects: methods of payment, paid family and medical leave, medical benefits and life insurance, bereavement leave, union security, submission of grievances, discipline, removal of documents from personnel files, information requests, management rights, and sick leave. As the employer's proposal was a one-year extension of the existing CBA, Withrow testified that the parties could discuss this extension in private without violating the resolution.

Initially all three units, 492, 492-CS, and 492-CL, rejected the proposal; however, the employer submitted a new offer with a higher wage increase, which 492-CS accepted. On December 31, 2019, the union emailed Withrow "opening contract proposals" for both 492 and 492-CL bargaining units. The proposals were not "what if" proposals and identified changes from the existing CBA through use of track changes. In addressing the ongoing discussion of ground rules, Hilderbrand included the following language in her email:

> While Council 2 remains willing to continue to work with the County in attempts to reach mutually agreeable negotiation Ground Rules, given the parties have yet to reach an agreement on open -vs.- closed meetings, it is Council 2's position that the attached negotiation proposals are not to be subject to any sort of publication or dissemination outside of your immediate County bargaining team.

Ground Rule Negotiations

The parties met several times to address ground rules: October 11, 2019; October 22, 2019; November 5, 2019; and January 15, 2020. On February 26, 2020, Smith and Hilderbrand filed

requests with PERC for mediation, specifying that the union was requesting assistance about ground rules. The parties met once more about ground rules, after the mediation request was filed but prior to the start of mediation, on March 5, 2020. Between April and September 2020, the parties met multiple times with the assistance of a PERC Mediator to further discuss ground rules.

On June 24, 2020, the union submitted new contract mediation requests to PERC for both 492 and 492-CL. These requests made no mention of ground rules and identified that the parties had met five times thus far. Per PERC's normal process, the mediation requests generated case numbers (Case 132857-M-20 and Case 132858-M-20), and a mediator was assigned.

On July 2, 2020, Withrow sent an email to the Mediator, Smith, and Hilderbrand identifying multiple concerns with the union's new requests for mediation. While there is no salutation on the email, it appears to be addressed to the mediator as Withrow uses the pronoun "you" when identifying actions taken by the Mediator. Withrow argued that the parties had been working with the Mediator for some time and a "Mediator's proposal" had been made, which the employer accepted and the union, after a two-month delay, rejected, and thus mediation of the CBA was inappropriate. Specifically, Withrow stated, "It is our position the mediation process cannot be merely rejected by the Union (who originally asked for the process) and then force a contract mediation when the initial mediation is left unsettled." Withrow further argued that, contrary to the information provided by the union on the mediation request, the parties had not held any meetings about the CBA, only about ground rules, about which the parties had yet to reach agreement. Withrow further added:

> We believe the Union is getting ahead of themselves by asking PERC to mediate a contract absent any negotiations ever taking place. This maneuver has all the signs of calculated sabotage to the legal and good faith process of collective bargaining. The Union's desire to negotiate in secret is accomplished by forcing PERC and Spokane County into mediation knowing full well mediation sessions with your agency are done in closed session.

The parties continued to meet with the PERC Mediator to discuss ground rules after this July 2, 2020, letter. On September 2, 2020, Hilderbrand sent a letter to Withrow asking to bargain the impacts of a total compensation study and referencing a letter from October 7, 2019, where she

had made a similar request. Smith sent a similar email the same day, copying Hilderbrand, wherein he also requested compensation study-related bargaining. In his September 4, 2020, response, Withrow reiterated that the employer had engaged in mediation, per the union's request, and through the mediation process had made several concessions regarding ground rules, despite the union not making similar concessions.

Withrow also stated:

> I find it ironic you would send another request to commence bargaining when we are in the process you petitioned for in the first place. The County is more than willing to commence negotiations under the current legal requirements requiring Open Meetings for negotiations. If we had a response to our last concessions, I would be pleased to draft the Ground Rules for signature so we could commence negotiations. Until such time as we conclude the mediation process and the Union responds with an effort to settle, the County will continue to be open to address any further concerns raised by the Union.

Smith responded later that same day and reiterated that the parties had negotiated ground rules "per the direction provided by PERC's Lincoln County ruling" but had not reached agreement. Smith further stated:

> Both you and I know that grounds rules (sic) are a permissive subject of bargaining. You and the County have created a precondition to substantive negotiations. This in the Union's opinion is a clear refusal to bargain over the substantive issues. Given this, the Union no longer has an interest in ground rules and requests the commencement of negotiations over the substantive issues. The Union is ready to meet <u>on Tuesday, 9/8</u>.

Hilderbrand sent the same email on September 8, 2020, and offered to begin bargaining the next day.

The parties proceeded to schedule a bargaining session to be held on October 15, 2020. On October 13, 2020, Withrow emailed Smith an invitation to a Zoom meeting, which included a Notice of Open Meeting in line with the resolution. The union did not participate in the Zoom meeting.

ANALYSIS

Applicable Legal Standards

Chapter 41.56 RCW imposes a mutual obligation on public employers and exclusive bargaining representatives to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to mandatory subjects of bargaining. RCW 41.56.030(4). Mandatory subjects of bargaining include wages, hours, and working conditions. Permissive or nonmandatory subjects of bargaining include managerial and union prerogatives, and procedures for bargaining mandatory subjects. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342 (1986).

PERC determines whether a particular subject is a mandatory subject of bargaining. WAC 391-45-550. To make the determination, a balancing test is applied on a case-by-case basis. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 203 (1989). The subject's relationship to employee wages, hours, and working conditions is balanced against the extent to which the subject is a management or union prerogative. *City of Seattle*, Decision 11588-A (PECB, 2013). The decision focuses on which characteristic predominates. *Id.*

Parties do not waive the characterization of subjects as nonmandatory by their actions or inactions. WAC 391-45-550. Agreements on nonmandatory subjects of bargaining "must be a product of renewed mutual consent." *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 344.

While PERC encourages parties to discuss all matters in dispute between them, parties are not required to bargain over nonmandatory subjects. *Cowlitz County*, Decision 12483-A (PECB, 2016). A party commits an unfair labor practice when it bargains to impasse over a nonmandatory subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338. Similarly, a party commits an unfair labor practice when it conditions its willingness to bargain on a nonmandatory subject. *Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989), *review denied, Clark Public Utility v. Public Employment Relations Commission*, 116 Wn.2d 1015 (1991); *City of Sumner*, Decision 6210 (PECB, 1998), *corrected*, Decision 6210-A (PECB, 1998);

Taylor Warehouse Corp. v. National Labor Relations Board, 98 F.3d 892 (6th Cir. 1996); *Quality Roofing Supply Co.*, 357 NLRB 789 (2011); *Bakery Workers Local 455 (Nabisco Brands)*, 272 NLRB 1362 (1984); *The Adrian Daily Telegram*, 214 NLRB 1103 (1974).

PERC has consistently ruled that ground rules or bargaining procedures are a nonmandatory subject of bargaining about which parties are not required to bargain. *State – Fish and Wildlife*, Decision 11394-A (PSRA, 2012), *aff'd*, Decision 11394-B (PSRA, 2013), *aff'd, Fish and Wildlife Officers' Guild v. Department of Fish and Wildlife*, 191 Wn. App. 569 (2015); *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012); *City of Sumner*, Decision 6210, *corrected*, Decision 6210-A.

Parties to a collective bargaining agreement must bargain on mandatory subjects. *Kitsap County v. Kitsap County Correctional Officers' Guild*, 193 Wn. App. 40, 45 (2016). "[Parties] *may* bargain on permissive subjects, but they are not obliged to bargain to impasse." *Id*.

Application of Standards

Lincoln County Decisions

As identified numerous times in the facts above, the parties discussed ground rules in the shadow of the evolving case law arising from *Lincoln County (Teamsters Local 690)*, Decision 12844. Accordingly, it is important to review the facts, procedural history, and decisions of *Lincoln County* to provide context for the instant case.

In September 2016, the Board of Lincoln County Commissioners passed Resolution 16-22, which included many of the same requirements regarding public bargaining as the one passed by the Board of County Commissioners of Spokane in December 2018, namely that bargaining sessions occur under the provisions required by the Open Public Meetings Act, chapters 42.30.060−42.30.080 RCW. The union refused to meet in a public meeting, and the employer refused to meet in a private meeting. Both parties filed unfair labor practice complaints alleging that the other party conditioned bargaining on a non-mandatory subject.

On April 3, 2018, a PERC Examiner issued the first decision in this case, wherein she found that each party had unlawfully conditioned bargaining on a permissive subject of bargaining in violation of chapter 41.56 RCW. The Examiner ordered that both parties cease and desist from refusing to meet and that they bargain in good faith without conditioning bargaining on nonmandatory subjects of bargaining. This is the standard order that PERC issues when it has determined that a party refused to bargain. Both parties appealed the Examiner's ruling to the Commission.

On August 29, 2018, the Commission issued decision *Lincoln County (Teamsters Local 690)*, Decision 12844-A, in which it affirmed the Examiner's decision but modified the order. The Commission found that both parties issued unilateral declarations of their positions— the employer insisting that bargaining occur in public and the union insisting that bargaining occur in private— but that the parties had not engaged in discussions regarding how bargaining should be conducted. The Commission issued a remedial order that outlined a process for the parties to hold such discussions:

> We order the parties to negotiate in good faith over the method by which the parties will conduct their negotiations. The policy of Washington State is to allow employees to negotiate with their employer through a representative of their own choosing. RCW 41.56.010. Public employers and the unions selected by the employees must negotiate in good faith. RCW 41.56.030(4). In this case, the parties have not discussed or made proposals about how they will conduct their negotiations.
>
> If after two good-faith negotiation sessions the parties are unable to reach an agreement on how to conduct their negotiations, the Commission will appoint a mediator to assist the parties. If after engaging in good-faith negotiations and mediation the parties cannot reach agreement, to best effectuate the purposes of Chapter 41.56 RCW, we find it would be in the parties' best interest to remove the barrier that prevents them from carrying out their statutory duty. The historic practice of collective bargaining in Washington generally and the practice of this employer and union specifically has been through private negotiations. Thus, if the parties are unable to come to a resolution through good-faith negotiations and mediation, the parties will negotiate from the status quo—that is, in private meetings.

Both parties appealed the Commission's decision to the Lincoln County Superior Court, which affirmed the Commission. The parties then appealed the decision to Division Three of the Court of Appeals, which issued a decision in the case. The parties sought review by the Washington State Supreme Court, who elected not to hear the case. Therefore, the appellate court's decision in *Lincoln County*, 15 Wn. App. 2d 143 (2020), was the final and binding decision. The court issued its decision on November 3, 2020, after the complaint in the instant case was filed.

The court considered three arguments raised in the appeal and cross-appeal: whether the preemption doctrine impacts the county's resolution; whether the Commission was correct in its conclusion that the parties committed ULPs; and whether the Commission erred in applying the status quo doctrine to bargaining procedure, which is a permissive subject of bargaining. The court found that the Open Public Meetings Act does not preempt local ordinances from providing greater transparency, such as the resolution passed by the Lincoln County board; agreed with the Examiner and the Commission that both parties had unlawfully refused to bargain; and found the Commission's remedy to be unlawful. The court stated that as bargaining procedures (often referred to as ground rules) are permissive subjects of bargaining, there is no obligation to bargain and no status quo. Therefore, the Commission's remedy—predicating a final conclusion of private bargaining if the parties were unable to reach a settlement through mediated negotiations, because private bargaining was the status quo—was inappropriate. The court remanded the decision to PERC to reconsider an appropriate remedy.

In its new order, the Commission reinstated the Examiner's order of requiring both parties to cease and desist from the unlawful conduct and to engage in good faith bargaining, *Lincoln County (Teamsters Local 690)*, Decision 12844-B (PECB, 2021).

The facts in the instant case differ from those of *Lincoln County* in several important ways. First, only the union filed a complaint alleging that the employer failed to bargain; the employer did not file a cross-complaint. Second, under the guidance of PERC's first *Lincoln County* order, the parties spent months attempting to negotiate ground rules, both on their own and with the aid of a PERC Mediator. And third, the union provided the employer with a contract proposal through email and sought to engage in contract negotiations through mediated sessions.

Arguments by the Parties

In the instant case, the union argues in its brief that the employer cannot require the union to bargain publicly without the union's agreement; that bargaining procedures are a permissive subject of bargaining and therefore the parties are not required to negotiate; that despite this lack of requirement, the union engaged in bargaining with the employer about the resolution but that the parties were unable to reach an agreement.

The employer, in its brief, responds to arguments put forth by the union or its officials at some point during negotiations, including those that were not argued by the union in this unfair labor practice complaint. Specifically, the employer argues that the resolution is lawful and not preempted by other statutes including the Open Public Meetings Act, chapter 42.30 RCW.[5] The employer argues that it bargained in good faith with the union concerning ground rules, including the requirements of the resolution as evidenced by the employer's offer of to rescind or limit parts of the resolution in order to meet the expressed interests of the union. In fact, the employer argues that the union is the party who did not bargain in good faith about ground rules; however, the employer did not file a complaint on that matter.

Ground Rules Are Permissive Subjects of Bargaining

Throughout the bargaining, as well as through evidence and testimony at the hearing, neither party contested the long-held precedent that bargaining procedures, such as open or private meetings, are permissive subjects of bargaining. Given the guidance from PERC at the time of the dispute, the parties engaged in negotiations about this permissive subject. When the court remanded *Lincoln County* to the Commission, it did so with the guidance that the status quo was not an acceptable remedy because bargaining procedures are not mandatory subjects of bargaining. Accordingly, neither party is required to negotiate about permissive subjects. *Cowlitz County*, Decision 12483-A. Thus there can be no requirement that the parties reach agreement. The union,

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[5] This question was resolved in *Lincoln County*, when the court affirmatively stated that the Open Public Meetings Act did not preempt a local ordinance very similar to the one issued by Spokane County. *Lincoln County v. Public Employment Relations Commission*, 15 Wn. App.2d 143.

therefore, was not required to reach an agreement with the employer on ground rules prior to the commencement of substantive contract bargaining.

The Union Attempted to Engage in Substantive Bargaining

While the parties were unable to reach an agreement on private or public bargaining, twice the union sought to engage in negotiations with the employer in a way that would not require agreement. On December 31, 2019, the union emailed Withrow "opening contract proposals" for both 492 and 492-CL bargaining units. The union did not put an expiration date on its proposal, and through testimony, the union stated that it had not received a response to its proposal as of the time of the hearing. The employer could have responded to the union's contract proposal by return of its own contract proposal through a written submission, such as email. Negotiating directly, in-person or via a teleconferencing software, is a bargaining process and thus a permissive subject. By failing to respond to the union's proposal by writing, either at the time the proposal was made or after the parties had been unsuccessful in reaching agreement on ground rules, the employer refused to engage in collective bargaining.

The second opportunity occurred on June 24, 2020, when the union sought to commence mediated negotiations with the employer on successor agreements. The union filed the requisite request form seeking mediation, a PERC Mediator was assigned, and the Mediator attempted to schedule mediated contract negotiation meetings. On July 2, 2020, the employer, through its representative Withrow, indicated that it believed mediation was improper, as the parties had not yet met to negotiate the contract, and that by jumping ahead to mediation, which is conducted in closed sessions, the union was attempting to maneuver around the employer's resolution. Regardless of the union's motivation in making the request, negotiations through mediation would have allowed the parties to meet the mutual obligation on public employers and exclusive bargaining representatives to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to mandatory subjects of bargaining. RCW 41.56.030(4). By refusing to engage in contract mediation without first reaching an agreement on ground rules, the employer clearly conditioned bargaining on a permissive subject of bargaining. As highlighted above, a party commits an unfair labor practice when it conditions its willingness to bargain on a nonmandatory subject. *Public Utility District 1 of Clark County*, Decision 2045-B, *review denied,*

Clark Public Utility District v. Public Employment Relations Commission, 116 Wn.2d 1015; *City of Sumner*, Decision 6210, *corrected* Decision 6210-A; *Taylor Warehouse Corp. v. National Labor Relations Board*, 98 F.3d 892; *Quality Roofing Supply Co.*, 357 NLRB 789; *Bakery Workers Local 455 (Nabisco Brands)*, 272 NLRB 1362; *The Adrian Daily Telegram*, 214 NLRB 1103.

CONCLUSION

The employer refused to bargain, conditioning their willingness to bargain on a nonmandatory subject of bargaining.

REMEDY

The legislature created PERC to provide uniform and impartial adjustment and settlement of disputes arising from employer-employee relations. The legislature intended PERC to provide efficient and expert administration of public labor relations. RCW 41.58.005. To fulfill PERC's mission to adjust disputes, the legislature granted PERC the power to remedy unfair labor practices. RCW 41.56.160(1); *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014). Chapter 41.56 RCW is remedial in nature, and its "provisions should be liberally construed to effect its purpose." *International Association of Firefighters, Local 469 v. City of Yakima*, 91 Wn.2d 101, 109 (1978). "Agencies enjoy substantial freedom in developing remedies." *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621, 634 (1992). PERC has authority to issue appropriate orders that, in its expertise, "believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful." *Id*. at 634–35. See also *Snohomish County*, Decision 9834-B (PECB, 2008).

As of the date of this decision, the Commission had reinstated PERC's standard remedy in *Lincoln County (Teamsters Local 690)*, Decision 12844-B, when it ordered the parties stop refusing and engage in bargaining. Unfortunately, the difficulty with the standard remedy in cases involving public or private bargaining is that there are only two options: to meet privately or to meet publicly. Additionally, the question of meeting privately or publicly is a permissive subject, thus neither

party is required to even discuss the subject, let alone reach agreement. Therefore, because this issue is a permissive subject, the parties are never obligated to determine which of the two options they should follow; as a consequence, the parties never meet.

FINDINGS OF FACT

1. Spokane County (employer) is a public employer with the meaning of RCW 41.56.030(13).

2. The Washington State Council of County and City Employees (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union represents the two bargaining units involved in the instant case, the first bargaining unit consists of approximately 220 corrections officers, Local 492 (492) and the second bargaining unit consists of corrections lieutenants, Local 492-CL (492-CL).

4. The employer and each bargaining unit had agreed to collective bargaining agreements (CBAs) effective January 1, 2016, through December 31, 2019. The allegations in this complaint arise from the parties' attempts to bargain a successor agreement in light of a resolution passed by the Board of County Commissioners of Spokane County (county commissioners) requiring several measures be taken that would make public the previously private collective bargaining sessions between the employer and the unions representing employees of the employer.

5. On December 11, 2018, the county commissioners passed Resolution 18-0892, entitled: "IN THE MATTER OF IMPROVING TRANSPARENCY BY NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS IN A MANNER OPEN TO THE PUBLIC." In this resolution, in relevant part, the county commissioners resolved that all collective bargaining contract negotiations be conducted publicly and in real time, either in person or by video; that negotiation sessions would be audio recorded; that members of the public would not be allowed to participate or comment during the negotiations; that the employer would provide public notice of all negotiations in accordance with the Open Public Meetings Act, chapters 42.30.060–42.30.080 RCW; and that the employer would post copies of all proposals provided or received on its website within two business days.

On December 13, 2018, the county commissioners passed Resolution 18-0950 (the resolution), replacing and superseding Resolution 18-0892, which included the same requirements.

6. On December 14, 2018, Gordon Smith and Natalie Hilderbrand, union staff representatives, sent a letter to Withrow objecting to the requirements outlined in the resolution and demanding to negotiate the impacts of its passage. Smith represents several bargaining units of county employees including 492. Smith has been a staff representative for approximately 22 years. Hilderbrand also represents several bargaining units of county employees including 492-CL and 492-CS. In response to this letter, Withrow spoke with the union several times by phone about the resolution.

7. On July 9, 2019, Withrow sent an email to Smith wherein he identified that CBAs for 492, 492-CS, and 492-CL would expire at the end of the calendar year and that he wished to meet with Smith to develop a calendar of meeting dates and discuss ground rules for the upcoming negotiation sessions for successor agreements. Withrow also wrote, "We will be functioning under the recently passed resolution regarding open meetings for negotiations and will need to address any concerns or questions the Unions may have."

8. On July 25, 2019, Smith responded to Withrow indicating that he would be happy to identify dates for negotiations but that the union did not agree with the resolution. Smith also shared the union's belief that in accordance with *Lincoln County (Teamsters Local 690)*, Decision 12844-A (PECB, 2018), parties must mutually agree to open negotiation meetings to the public and that, while ground rules are not mandatory subjects of bargaining, Smith was open to discussing ground rules with Withrow.

9. On August 16, 2019, Hilderbrand sent two letters to Withrow asking to begin negotiations for successor CBAs—one on behalf of 492-CL and one on behalf of 492-CS.

10. On August 19, 2019, Withrow emailed Smith and Hilderbrand the employer's proposed ground rules. On August 26, 2019, Smith replied to Withrow by email, copying Hilderbrand and others, in which Smith restated his understanding that ground rules are not a mandatory subject of bargaining. Smith also argued that ground rules add "little value

to the process though [he was] not saying that the Union [would] not consider some variety of ground rules;" that the union did not agree to employer's proposed ground rule eight regarding open bargaining; and that the union considered "County resolution #18-0950 invalid in its entirety due to the Lincoln County (Teamsters Local 690), (Decision 12844-A)." Smith then offered potential meeting dates and times for 492. The employer's proposed ground rule eight stated:

> Negotiation sessions shall be open to the public. This is based on the County Commissioner's passage of Resolution 18-0950 titled "In The Matter Of Improving Transparency By Negotiating Collective Bargaining Agreements In A Manner Open To The Public["] passed on December 13, 2018. A copy of the Resolution is attached to these Ground Rules and incorporated by reference.

11. On August 29, 2019, Withrow responded to Smith's email by outlining two arguments in response to the union's objection to ground rule eight. The first argument was that PERC found both parties at fault in *Lincoln County* as both had issued "unacceptable pre-conditions." Withrow also wrote, "PERC did not find that public negotiations sessions were per se bad faith bargaining—only that mandating public negotiations outright was an unfair labor practice under Chapter 41.56 RCW." The second argument was that the resolution was a declaration of policy subject to the employer's "obligations to negotiate in good faith" and that the employer wished to discuss circumstances when negotiations could be held in public and when they could be held in "closed session." Withrow closed the email by saying, "The County is hopeful that Council 2's obstinacy on this narrow issue does not preempt the efficient progress of bargaining in a manner acceptable to both sides."

12. On August 30, 2019, Hilderbrand responded to Withrow's email of August 19, copying Smith, with language identical to that used by Smith in his August 26 email, regarding the union's position on open bargaining and offering potential meeting dates and times for both 492-CS and 492-CL.

13. On September 6, 2019, Withrow emailed Smith and Hilderbrand confirming that he and Smith were attempting to arrange a meeting for September 25, 2019, regarding 492 and inquiring whether Hilderbrand would participate in this conversation about the union's

objection to the resolution or whether 492-CS and 492-CL planned to discuss the union's objection separately.

14. On September 20, 2019, Withrow and Hilderbrand exchanged emails about potential meeting dates and times for 492-CS and 492-CL negotiations. Also on September 20, 2019, Withrow emailed Smith what he believed was a confirmation of a discussion the two held earlier that day. Specifically, Withrow stated that "the Union [was] postponing negotiations for [] Wednesday (09/25)," that the "Union [could not] meet until [they resolved] the open meeting issue," and that the union wished "to postpone the meeting so the Union [could] provide the County with a counter on the Ground Rules." Withrow also indicated that the employer had proposals ready to present to the union, and he asked Smith to advise him if his summary of the discussion was correct.

15. On September 23, 2019, Smith stated that he didn't believe the union was postponing negotiations as he was not expecting a meeting on September 25, 2019, and attached the union's counterproposal on ground rules. The attachment indicated an agreement by the union on all ground rules except eight, which had been struck through in its entirety. On September 24, 2019, Hilderbrand emailed Withrow a copy of the union's counterproposal on ground rules on behalf of 492-CS and 492-CL. Also on September 24, 2019, Withrow emailed Smith and Hilderbrand suggesting that they "meet in a closed session initially to discuss the conditions as to which portions of the negotiations meeting will be public and which will not."

16. Simultaneously during their negotiation of ground rules, the parties discussed a possible one-year contract. Withrow sought permission from the county commissioners to offer the union a one-year "what if" proposal in the hope that an additional year would allow the court to rule on the *Lincoln County* case. The proposal was emailed to the union on October 11, 2019. This multipage document included proposed language on a variety of subjects and included a signature line for tentative agreements on each page. The proposal did not include article numbers for most of the proposals but dealt with the following subjects: methods of payment, paid family and medical leave, medical benefits and life insurance, bereavement leave, union security, submission of grievances, discipline,

removal of documents from personnel files, information requests, management rights, and sick leave. As the employer's proposal was a one-year extension of the existing CBA, Withrow testified that the parties could discuss this extension in private without violating the resolution.

17. Initially all three units, 492, 492-CS, and 492-CL, rejected the proposal; however, the employer submitted a new offer with a higher wage increase, which 492-CS accepted. On December 31, 2019, the union emailed Withrow "opening contract proposals" for both 492 and 492-CL bargaining units. The proposals were not "what if" proposals and identified changes from the existing CBA through use of track changes. In addressing the ongoing discussion of ground rules, Hilderbrand included the following language in her email:

> While Council 2 remains willing to continue to work with the County in attempts to reach mutually agreeable negotiation Ground Rules, given the parties have yet to reach an agreement on open -vs.- closed meetings, it is Council 2's position that the attached negotiation proposals are not to be subject to any sort of publication or dissemination outside of your immediate County bargaining team.

18. The parties met several times to address ground rules: October 11, 2019; October 22, 2019; November 5, 2019; and January 15, 2020. On February 26, 2020, Smith and Hilderbrand filed requests with PERC for mediation, specifying that union was requesting assistance about ground rules. The parties met once more about ground rules, after the mediation request was filed but prior to the start of mediation, on March 5, 2020. Between April and September 2020, the parties met multiple times with the assistance of a PERC Mediator to further discuss ground rules.

19. On June 24, 2020, the union submitted new contract mediation requests to PERC for both 492 and 492-CL. These requests made no mention of ground rules and identified that the parties had met five times thus far. Per PERC's normal process, the mediation requests generated case numbers (Case 132857-M-20 and Case 132858-M-20), and a mediator was assigned.

20. On July 2, 2020, Withrow sent an email to the Mediator, Smith, and Hilderbrand identifying multiple concerns with the union's new requests for mediation. While there is no salutation on the email, it appears to be addressed to the mediator as Withrow uses the pronoun "you" when identifying actions taken by the Mediator. Withrow argued that the parties had been working with the Mediator for some time and a "Mediator's proposal" had been made, which the employer accepted and the union, after a two-month delay, rejected, and thus mediation of the CBA was inappropriate. Specifically, Withrow stated, "It is our position the mediation process cannot be merely rejected by the Union (who originally asked for the process) and then force a contract mediation when the initial mediation is left unsettled." Withrow further argued that, contrary to the information provided by the union on the mediation request, the parties had not held any meetings about the CBA, only about ground rules, about which the parties had yet to reach agreement. Withrow further added:

> We believe the Union is getting ahead of themselves by asking PERC to mediate a contract absent any negotiations ever taking place. This maneuver has all the signs of calculated sabotage to the legal and good faith process of collective bargaining. The Union's desire to negotiate in secret is accomplished by forcing PERC and Spokane County into mediation knowing full well mediation sessions with your agency are done in closed session.

21. The parties continued to meet with the PERC Mediator to discuss ground rules after this July 2, 2020, letter. On September 2, 2020, Hilderbrand sent a letter to Withrow asking to bargain the impacts of a total compensation study and referencing a letter from October 7, 2019, where she had made a similar request. Smith sent a similar email the same day, copying Hilderbrand, wherein he also requested compensation study-related bargaining. In his September 4, 2020, response, Withrow reiterated that the employer had engaged in mediation, per the union's request, and through the mediation process had made several concessions regarding ground rules, despite the union not making similar concessions.

Withrow also stated:

> I find it ironic you would send another request to commence bargaining when we are in the process you petitioned for in the first place. The County is more than willing to commence negotiations under the current legal requirements requiring Open Meetings for negotiations. If we had a response to our last concessions, I would be pleased to draft the Ground Rules for signature so we could commence negotiations. Until such time as we conclude the mediation process and the Union responds with an effort to settle, the County will continue to be open to address any further concerns raised by the Union.

22. Smith responded later that same day and reiterated that the parties had negotiated ground rules "per the direction provided by PERC's Lincoln County ruling" but had not reached agreement. Smith further stated:

> Both you and I know that grounds rules (sic) are a permissive subject of bargaining. You and the County have created a precondition to substantive negotiations. This in the Union's opinion is a clear refusal to bargain over the substantive issues. Given this, the Union no longer has an interest in ground rules and requests the commencement of negotiations over the substantive issues. The Union is ready to meet on Tuesday, 9/8.

23. Hilderbrand sent the same email on September 8, 2020, and offered to begin bargaining the next day.

24. The parties proceeded to schedule a bargaining session to be held on October 15, 2020. On October 13, 2020, Withrow emailed Smith an invitation to a Zoom meeting, which included a Notice of Open Meeting in line with the resolution. The union did not participate in the Zoom meeting.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has statutory jurisdiction in this matter pursuant to chapter 41.56 RCW and chapter 391-45 WAC.

2. By the actions described in findings of fact 4 through 24, the employer refused to bargain in violation of RCW 41.56.140(4), and derivatively interfered with employee rights RCW 41.56.140(1), by conditioning bargaining on a permissive subject.

ORDER

Spokane County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

    a. Refusing to meet and negotiate with the union unless the bargaining meeting takes place in public.

    b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.56 RCW:

    a. Bargain in good faith without conditioning bargaining on nonmandatory subjects of bargaining.

    b. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the Compliance Officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

    c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of County Commissioners of Spokane County, and

permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, 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 complainant with a signed copy of the notice provided by the compliance officer.

e. Notify the Compliance Officer, 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 the Compliance Officer provides.

ISSUED at Olympia, Washington, this 15th day of November, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

ERIN J. SLONE-GOMEZ, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

RECORD OF SERVICE

ISSUED ON 11/15/2021

DECISION 13435 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASES 133084-U-20

EMPLOYER: SPOKANE COUNTY

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RECORD OF SERVICE

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BY: AMY RIGGS

CASE 133085-U-20

EMPLOYER: SPOKANE COUNTY

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