STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY REGIONAL AFIS GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 135058-U-22 DECISION 13874 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jim Cline, Attorney at Law, Cline & Associates, for the King County Regional AFIS Guild.

Barbara Flemming and Devon Shannon, Senior Deputy Prosecuting Attorneys, for King County.

On April 26, 2022, the King County Regional Automated Fingerprint Identification System (AFIS) Guild (union or guild) filed an unfair labor practice (ULP) complaint against King County (employer or county) with the Public Employment Relations Commission (Commission). A hearing was conducted at King County offices on August 22 and 24, 2023, October 18, 2023, and January 18, 2024. The parties filed timely post-hearing briefs on March 13, 2024, to complete the record.[1]

ISSUES

The issues, as framed by the preliminary ruling[2], include,

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[1] On the last hearing date, both parties requested additional time to file post-hearing briefs. In addition, union counsel requested a 35-page brief limit, and the employer did not object. Both parties were afforded extensions for their post-hearing brief submission and limited to 35-page briefs.

[2] At the time that the ULP Administrator issued the cause of action statement, this document type was referred to as a preliminary ruling. The Commission has since adopted rules identifying this document type as a cause of action statement. This change became effective on January 1, 2023.

> Did the employer refuse to bargain in violation of RCW 41.56.140(4) [and if so commit derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed by:
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> 1. Breaching its good faith bargaining obligation during negotiations for a successor collective bargaining agreement?
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> 2. Refusing to provide relevant information requested by the union that was necessary for contract administration?
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> 3. Unilaterally changing the practice of allowing employees legal representation at *Loudermill* hearings without providing the union an opportunity for bargaining?

Based on the totality of the evidence, the complainant failed to meet its burden of proof to establish that the employer breached its good faith bargaining obligations during negotiations for a successor collective bargaining agreement. This allegation is denied.

The employer violated RCW 41.56.140(4) by unilaterally narrowing the scope to its initial information request response in November 2021 without conferring with the union , by failing to communicate updates or a timeline for nearly three months, and by delivering the final installment of responsive documents on the eve of a step 3 grievance hearing.

The rules and procedures for *Loudermill* hearings are outside the scope of this agency's jurisdiction. Therefore, the allegation that the employer unilaterally changed representation practices at *Loudermill* hearings without providing the union an opportunity to bargain these changes is denied.

BACKGROUND

Since 2013, the union has served as the exclusive bargaining representative for non-commissioned Latent-Print Examiners and Identification Technicians working for the King County Sheriff's Office.[3] Latent-Print Examiners comprise approximately two-thirds of the bargaining unit and

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[3] *King County (Public Safety Employees Union)*, Decision 11697 (PECB, 2013).

work outside of the county jail; the latter group comprises approximately one-third of the bargaining unit and works in the jail conducting identification of inmates.

At the time of the 2022 ULP filing, the parties were in successor collective bargaining agreement (CBA) negotiations, which had begun in late 2020. The parties' most recent agreement was effective January 1, 2018, through December 31, 2020. For several contract bargaining cycles, the employer had engaged in bargaining a master labor agreement with a coalition of unions. Bargaining for the master labor agreement concluded in November of 2021, and the coalition and the employer ultimately agreed to rename the agreement as the coalition labor agreement (CLA). Ultimately, the coalition and the employer revisited their November 2021 tentative agreement, and the employer made a new package proposal on April 23, 2022, that gave coalition members an additional wage increase from its previous offer.[4]

The union had been a member of the coalition since the coalition's first contract cycle with the employer. At the time that the instant ULP was filed, the employer and the coalition were engaged in bargaining for their third coalition labor agreement. The coalition and the employer had agreed to bargain terms and conditions that are common among the member bargaining units, such as parking, vacation, jury duty leave, and other various leave types. Like several other coalition members, the union and the employer bargained an individual appendix to the coalition CLA that had specific provisions related to the union's bargaining unit employees. The record established that there were no bylaws, charters, or ground rules governing the bargaining between the employer and the coalition, nor was the relationship between the coalition and the member unions

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[4] At the time that the employer offered its exhibit 3, timelines of bargaining with both the coalition and the union, the Examiner noted that there were dates listed beyond the ULP complaint filing period. The Examiner had previously rejected several union exhibits that extended from April 27 to July of 2022 (post-complaint filing date evidence) based on *Ben Franklin Transit,* Decision 13409-A (PECB, 2022) (finding that background evidence outside the statute of limitations is not evidence of bad faith bargaining). Union counsel argued that the "last bullet point" on employer exhibit 3 was "pivotal" to show that the employer's intent was to engage in surface bargaining and use a "take-it-or-leave it" approach. The last bullet point of employer exhibit 3 reads, "5/18/22 County sent Guild and mediator a comprehensive 'what-if' proposal to Appendix and a 'what if' MOA proposal." However, had the union wished to amend its complaint for this "pivotal" evidence, it could have done so any time after filing the instant ULP complaint on April 26, 2022. Even if the union amended its complaint at the hearing, per WAC 391-45-070(2)(c), the statute of limitations had run well beyond the six-month period.

memorialized in written documents. The parties' common vernacular for the individual CLA unit bargaining groups, such as the union, referred to them as "small tables," while the larger CLA and coalition were referred to as the "big table."

Around the same time that the successor contract negotiations took place, the parties were also addressing the mandatory COVID vaccine requirement, King County's Executive Health Emergency Order ACO-8-27-EO, that had been issued on August 10, 2021. This order required all King County employees to be fully vaccinated for COVID by October 18, 2021, or to be found exempt and accommodated based on a medical disability or sincerely held religious belief.

The employer and the coalition bargained a memorandum of agreement (MOA) related to the COVID vaccine mandate. The union filed a demand to bargain the vaccine mandate on August 13, 2021, but ultimately consented to the MOA's application to its bargaining unit employees. Pursuant to the MOA, those employees claiming a sincerely held religious belief who were denied an exemption, or found exempt but with no reasonable accommodation, were given until December 2, 2021, to begin the vaccination process. If not fully vaccinated within 14 days of denial of an exemption or accommodation, the employee would be involuntarily separated.

Successor Bargaining

The record establishes as background information that the parties had exchanged several comprehensive and "what-if" proposals leading up to the six-month statute of limitations preceding the April 26, 2022, ULP filing, or October 26, 2021.[5] At the hearing the union offered testimony from Cynthia McNabb, a former union counsel, Mark Roberts, the union president, and Marquel Allen, the union's second vice president, indicating that, prior to October 26, 2021, the

[5] During its opening statement and upon objection by the employer, the union attempted to make a motion to bifurcate the hearing so that the adjudication of the refusal to bargain in good faith allegation would be postponed and the hearing would continue with the other two allegations in the cause of action statement. The employer objected to the use of background information from events occurring prior to the six-month statute of limitations and the use of any post-filing evidence. The Examiner denied the motion to bifurcate and advised the union that it may make a motion to amend in compliance with WAC 391-45-070(2)(c) going forward. The union did not make such a motion later in the hearing.

employer had advised the union that the CLA superseded several of the union's proposals for its bargaining unit's provisions.

The parties met several times and exchanged "what-if" proposals for their appendix after the CLA was resolved. At the end of January 2022, the union believed the parties were at impasse and indicated it wanted to engage an agency mediator. Angela Marshall, Labor Relations Negotiator, asked if McNabb and Roberts would be willing to engage in a sidebar discussion about "small table bargaining" prior to reaching out to the agency. McNabb responded the same day, January 27, 2022, and indicated, "I think my paralegal may have already sent the request in. I asked her to prioritize it for today. . . ." McNabb also agreed to a sidebar conversation. Later that same day, Marshall advised McNabb that the employer was not agreeable to moving forward in mediation. Marshall further responded,

> We don't feel it would be a productive use of either parties' time, as the unresolved issues (such as hazard pay and parking) are those which have been fully bargained with the Coalition and, further, the County stands firm in those positions.
>
> We haven't seen any of your wage data, and are open to reviewing and discussing what you have. We can chat more about that in our sidebar, but we fail to see how a mediator is appropriate at this time, especially given the types of issues we are working through currently.

McNabb replied later on January 27, "In that case, I don't see how a sidebar conversation is productive given your firm stance on the open issues." She added, "We will let PERC decide whether they agree to accept the request for mediation against your objection. Given the long length of time we have been in bargaining without reaching agreement, I am confident that they will take up the opportunity to help get us to agreement."

Marshall responded to McNabb on January 30, 2022, indicating that the union hadn't met with the employer "with much frequency" and that the employer felt it had not received "reasoning and justification" or adequate wage data to consider the union's proposed wage increases. Marshall reiterated the employer's request to meet in bargaining discussions without the assistance of a mediator.

McNabb responded the same day and again declined the employer's offer to engage in direct bargaining. She shared the union's perspective that the justifications for issues such as hazard pay and paid parking had been explained to the employer "at least three times." McNabb reasoned that the employer's only response was "No" to "almost every item that [had] even been briefly discussed at Coalition, despite the unique nature of [the] bargaining unit and despite the fact that those Coalition discussions did not result in specific terms in the CLA." McNabb's January 30 email also admits that the union had yet to produce its own external position comparators.

On February 2, 2022, the union filed a unilateral contract mediation request with the agency and courtesy copied Marshall. The agency's appointed mediator contacted the parties for scheduling, and the employer provided its availability on February 14, 2022. The parties met with an agency staff mediator on March 15 and 24, and May 13, 2022,[6] and also exchanged various "what-if" proposals during this time.

During a March 15, 2022, mediation meeting, the union made a comprehensive "what-if" package proposal to the employer. During the March 24, 2022, mediation hearing, the employer did not make a counterproposal to the union's March 15 proposal and only referred to its pre-mediation position.

On April 23, 2022, the employer, through CLA negotiations, made a comprehensive "what-if" proposal that included a wage increase to the coalition and provided this proposal to the union. This proposal was also sent directly to the union president.

Requests for Information

The First Union Request for Information

On September 17, 2021, Roberts sent an email to Marshall and Lacey O'Connell, another Labor Relations Negotiator for the employer. The request asked the employer to provide the following:

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6 *See FN 5.*

> Pursuant to RCW 41.56, the Guild is requesting the following information, scrubbed of personally identifiable information:
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> 1. A spreadsheet illustrating all COVID-related religious exemption requests, organized by: (1) date received; (2) date or dates reviewed; (3) participants on the review panel or in the review meeting; (4) date decision regarding exemption made; (5) basis for the decision made regarding the religious exemption. Please also include any exemption requests that were returned for additional follow-up and the follow-up requested.
>
> 2. All accommodations made by the County for any granted religious exemption.
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> 3. A spreadsheet illustrated [sic] all COVID-related medical exemption requests, organized by: (1) date received; (2) date or dates reviewed; (3) participants on the review panel or in the review meeting; (4) date decision regarding exemption made; (5) basis for the decision made regarding the medical exemption. Please also include any exemption requests that were returned for additional follow-up and the follow-up requested, such as a medical certification from a doctor.
>
> 4. All accommodations made by the County for any granted medical exemptions.

Within an hour, O'Connell responded to Roberts asking if the union's request was limited to "religious/medical exemption requests specific to AFIS employees." Roberts replied shortly thereafter advising, "[W]e are looking for information for the whole County as we are told the two County boards are handling all requests, regardless of department. And the relevant comparables for us will be [the] larger group."

On October 8, 2021, O'Connell advised Roberts,

> The information you request doesn't necessarily exist in the formats you've requested and there's some question being evaluated about the level of detail we can legally disclose. To be clear, this message is not a denial of your request for information. I will let you know as soon as some, or all, of this information becomes available.

On November 3, 2021, O'Connell sent a follow-up email to Roberts and provided responses to some of the inquiries that had been made in the union's September 17, 2021, information request. The employer advised that it did not have a duty to prepare some of the requested documents (regarding the "spreadsheet" listed as item 1 of the information request) or did not have documents responsive to the request. Responding to items 1 and 3, the employer narrowed the scope of the

response and provided the names of two bargaining unit employees with pending religious exemption requests. One of those employees was Alexander Burich. The record does not reflect the parties having any discussion or agreement to narrow the scope of the response to the universe of the union's bargaining unit employees. Unlike the October 8, 2021, email, O'Connell's November 3 email did not indicate that the county's response was a denial for a request for information or that O'Connell would let the union know if some, or all, of this information became available. McNabb and Allen were courtesy copied on the email.

The Second Union Request for Information

After O'Connell's November 3, 2021, email, the parties did not communicate, and the employer did not provide any further responsive documentation to the union for nearly three months, nor did the employer communicate any updates or a timeline to the union. On January 25, 2022, Roberts emailed O'Connell and advised that, regarding the union's previous request, all of the union's exemption and accommodation applicants provided at the time of O'Connell's response were no longer an issue, either through their compliance or separation. Roberts added, "So in order to save your effort, I let our request go stale." Along with several employer representatives, Roberts courtesy copied McNabb and union Attorney Jim Cline. Roberts then submitted an "amended request" to ensure a "fair process" for a member seeking representation. The amended request stated the following:

> Pursuant to RCW 41.56, the Guild is requesting the following information, scrubbed of personally identifiable information.
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> 1. A spreadsheet illustrating all COVID-related religious exemption requests *throughout King County*, organized by: (1) date received; (2) date or dates reviewed; (3) participants on the review panel or in the review meeting; (4) date decision regarding exemption made; (5) basis for the decision made regarding the religious exemption. Please also include any exemption requests that were returned for additional follow-up and the follow-up requested.
>
> 2. All accommodations made for *King* County *Employees who requested an exemption and/or accommodation from the COVID Vaccine Mandate.*
>
> *3. The basis for each of those accommodation decisions.*
>
> We understand that some of the information may not exist in the format requested, or may not legally be disclosed. But, we expect every effort to provide the

> information that is responsive to either the exact question or the spirit or intent of the question. If some discussion about the intent of the question or the format of the information available is needed, we can discuss posthaste.
>
> Time is of the essence and we would need the response to this request at least a few days before the Loudermill hearing.

(emphasis added to reflect differences from the union's September 2021 information request).

Later in the day on January 25, 2022, the employer provided a partial response. The employer responded to the union's request for the basis for decisions made regarding all COVID-related religious exemption requests throughout King County, "item 1.5," stating that it was "overbroad, ambiguous, and subject to interpretation." The employer advised that it did not have a duty to prepare a document and reserved the right to prepare additional documents once it became aware of them. The employer also provided further background for how the committee evaluated exemption requestors' sincerely held religious beliefs and why those beliefs conflicted with the mandatory COVID-19 vaccination. The employer attached a document to the email listing the union's bargaining unit employees that had participated in the religious accommodation process and offered that the union could contact the employer if it was seeking records related to specific employees not included in the attachment.

Regarding item 2 of the union's January 25, 2022, request, the employer provided a general synopsis of the types of religious and medical accommodations afforded to employees requesting an exemption from the COVID vaccine requirement.

In response to item 3 of the union's January 25, 2022, request, the employer stated that it was also "overbroad, ambiguous, and subject to interpretation." The employer again advised that it did not have a duty to prepare a document and reserved the right to prepare additional documents once it became aware of them.

The employer's January 25, 2022, email response ended with offering the union the opportunity to contact the employer's labor relations office with any questions.

On January 31, 2022, O'Connell reshared this January 25, 2022, partial employer response with Roberts and advised that if the employer did not hear from Roberts by February 8, 2022, the request would be considered fulfilled and closed.

The Second Request for Information, Amended

On February 7, 2022, McNabb responded to the employer and reasserted the union's January 25, 2022, request for information, as well as five additional requests for information, as follows:

> Please provide any and all of the underlying information, data, memorandum, letters, emails, or documents that relate to the following:
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> 1. Date of any and all religious accommodation requests by or on behalf of any King County employee;
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> 2. Date of any and all meetings of the any [sic] King County Committee to review or approve religious accommodation requests;
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> 3. Any and all documented decisions, in whatever form, made regarding religious accommodation requests
>
> 4. Any and all email, documents, memorandum, correspondence, in whatever form, documenting requests for additional information or follow-up for any religious accommodation request made by a King County employee;
>
> 5. Any and all email, documents, letter, memorandum, or correspondence documenting approval of a religious accommodation request in the form of telecommuting.

McNabb's February 7 email also advises that the requested information was relevant to the union's ability to represent Burich for a February 10, 2022, *Loudermill* hearing and in determining whether the union would pursue a grievance on Burich's behalf. The union advised that, should the employer not provide the information in a "*timely* manner pursuant to [RCW] 41.56," it would pursue the information through the Public Records Act. McNabb's email also advised the employer, "It should be noted that applicable PERC case law requires the County to engage the Guild in clarifying communication regarding 41.56 requests instead of simply noting the request is vague, over-broad or subject to interpretation."

Between February 10, 2022, and March 16, 2022, the parties engaged in back-and-forth email communications regarding the union's information request, as amended. On February 10, 2022,

the employer sought clarification on the relevancy of the requested documents and maintained that the request was "overbroad, ambiguous, and subject to interpretation." The employer further attempted clarification of the relevancy of non-union (i.e. non-guild) employee religious accommodation information. O'Connell asked that McNabb contact her to discuss "the [union's] definitions of 'documented' 'decisions' 'in whatever form' 'made' and by whom such decisions the [union] believes were made, whether the [union] is seeking email, documents, memorandum."

The union replied on February 11, 2022, and characterized the employer's response as "unnecessary gamesmanship," reiterated it was not requesting any particular form be used to produce the data, and further clarified that the requested information could be in "essentially any medium," such as existing emails, outlook calendar notifications, or handwritten notes. The union clarified that the relevancy under chapter 41.56 RCW was to "(1) determine the sufficiency and legality of the religious accommodation process used to terminate Alexander Burich and (2) [determine] whether the [employer's] response to Mr. Burich's religious accommodation request was proportional to other similarly-situated County employees." The union advised that "[t]he Guild is not required to speculate as to who the universe would apply to" and that the employer "should be aware of whether its own employees have sought a religious accommodation and which accommodations have been granted and in what form." The union wrote that it was expecting a response no later than March 15, 2022, in order to pursue its grievance rights.

On March 8, 2022, O'Connell advised the union that 750 county employees had "sought an exemption and accommodation from the vaccine mandate" and that the employer had a tracking sheet to address the data requests that the union had made in items 1 and 2 of its amended information request. O'Connell requested clarification on whether the union sought correspondence from the committee level or the department level and explained that, for each employee accommodation request, the employer estimated "approximately 6000 email messages . . . plus attached documents." O'Connell explained that it would take considerable resources and time to track down department-level correspondence and files as they are not stored centrally. O'Connell also advised that after gathering the documents, the employer would need to redact and verify them before providing them to the union.

On March 15, 2022, McNabb responded and clarified that she had asked for information specific to religious accommodations. She opined that this clarification should limit the pool of requestees down from the original 750 requestees. McNabb asked that the employer provide the information by March 30, 2022, and stated that the employer's delay in producing documents was compromising the union's ability to effectively represent its member through the grievance process. The email references a step 2 grievance meeting to be held on March 17, 2022.

O'Connell responded the same day and advised there were a total of 617 religious accommodation requests and again asked that the union sort through the spreadsheets to narrow its search for "similarly situated employees" by department, position, or even for those whose accommodations were granted. O'Connell provided examples of other position types within the county that the union might find relevant to its grievance and again sought for the union to narrow the parameters of requested information stating, "Again, this is not a refusal to provide you with information relevant to the processing of a potential grievance. Instead, and again, this is an effort to help identify what additional information you seek and to provide it in the most manageable way possible."

O'Connell's March 15, 2022, response also included the five requests that had been made in McNabb's February 7, 2022, amended request for information, and pointed out either dates the information was previously provided or reiterated the employer's request for the union to sort through the positions of the 617 religious accommodation requests and advise which positions the union sought further information about. This email also repeated the inquiry as to whether the union sought committee or department level correspondence in the instances where the employer had requested follow-up information for an accommodation request (item 4). Similarly, the employer asked the union to sort through the 80 accommodations where telecommuting was granted and advise which ones the union wanted to review. O'Connell finished her email by offering to meet with McNabb to review the spreadsheets and identify which documents the union wanted to review.

On March 16, 2022, McNabb responded to O'Connell's email and advised that the union, " in an effort to be collaborative and to finally compel some form of compliance," had narrowed the scope

of the union's request to three departments to be supplied to the union on a rolling submission. McNabb advised that once those departmental documents were reviewed, the union might be able to narrow the field of the request and noted that the union sought both committee and department level information for item 4. McNabb did not address O'Connell's offer to meet and review the employer's spreadsheets.

Between March 23 and April 16, 2022, the employer provided installments of documentation it believed to be responsive to the union's request for information. On April 16, 2022, O'Connell wrote, "I believe the County has provided all documents responsive to your request for information – but I will confirm that for you early next week."

On April 19, 2022, at 6:22 p.m., O'Connell sent the union the "final installment" to its information request. The employer advised that it reserved "the right to supplement with additional documents if and when [it] become[s] aware of them." The employer also advised it would consider the union's information request fulfilled if it did not hear from the union by April 26, 2022.

The union filed a grievance in early March 2022 on behalf of Burich under the parties' collective bargaining agreement. The grievance was first heard at the step 2 level of the CBA on March 17, 2022, by the employer's sheriff's office. Ultimately, the grievance was denied at the step 3 level after it was heard by the employer's office of labor relations on April 20, 2022.[7]

The *Loudermill* Hearing

On October 19, 2021, Megan Pedersen, Director of the King County Office of Labor Relations, sent an email addressed to "Labor Partners" to a multitude of email addresses, including that of Roberts. Pedersen advised the labor partners that compliance with the executive order to be fully vaccinated against COVID-19 for covered employees was due October 18, 2021. Employees who were covered by the order but had not completed the COVID-19 vaccine verification process and did not have a pending medical or religious exemption request were to receive notices of "proposed

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[7] On direct examination, McNabb testified that the grievance had been referred for arbitration, but she was on family leave at that time and unsure of the grievance's status.

involuntary non-disciplinary separation." Such employees were offered *Loudermill* meetings and alternatives to *Loudermill* meetings. The email advised that the *Loudermill* meetings were expected to be held November 1 through 10, 2021. Roberts shared Pedersen's email with McNabb that same day.

Burich had refused to get the COVID vaccine and sought an accommodation on grounds of a sincerely held religious belief. Burich engaged in the accommodation interactive process with the employer, and it was ultimately determined that the employer could not find a suitable accommodation based on the employee's position.

On January 25, 2022, Kimberly Johnson, Executive Assistant to the Sheriff, sent Burich's separation notice and *Loudermill* information to Roberts and apologized for not including Roberts in the original notification.

On January 27, 2022, Roberts emailed Johnson and courtesy copied Allen, McNabb, and Cline, as well as several employer representatives, including O'Connell. Roberts advised the employer that Burich had received his *Loudermill* hearing notice on January 21, but Roberts had only received a copy of the notice on January 25. Due to the loss of four days, per Roberts, the union had requested, in a January 25, 2022, email to O'Connell, to reschedule the *Loudermill* meeting "to a mutually agreeable date after February 14th, or within a reasonable period after the meaningful response to this request, whichever is later."

On January 31, 2022, O'Connell responded on behalf of the employer and declined the request to postpone the *Loudermill* hearing, which was scheduled for February 10, 2022, based on the parties' COVID MOA. O'Connell advised that the MOA allowed for employees to provide proof of initiating the COVID vaccination process within 14 days of an accommodation denial but did not provide a 14-day period in which to prepare for a *Loudermill* hearing. O'Connell also advised in the email that a response to the January 25, 2022, information request had been sent to Roberts the same day.

The employer proceeded with Burich's *Loudermill* hearing on February 10, 2022. Prior to the hearing, Johnson advised the other planned county attendees that the Microsoft Teams meeting invitation had been forwarded to the union's attorney, McNabb.

McNabb and Roberts joined Burich on the Teams meeting as the *Loudermill* hearing started at 2:30 p.m. on February 10, 2022. At 2:38 p.m., Erin Overbey, King County Sheriff's Office Legal Advisor, sent an email to several employer representatives, as well as Roberts and McNabb. Overbey's email stated that when McNabb had appeared at Burich's *Loudermill* hearing on Teams, Overbey had told McNabb that the county was not permitting attorneys to appear at the "vaccine mandate *Loudermills*." Overbey's email also stated that the county had advised they could proceed in the meeting with the guild's business agent and without McNabb, or the county could accept written materials which could incorporate their discussions with McNabb. The email ends with Overbey stating that McNabb was appearing as the union's legal counsel and that McNabb contended that not allowing her to join the meeting was contrary to past practice. McNabb also asked that Overbey document the county's "request" in the email. Roberts remained at the February 10, 2022, *Loudermill* hearing with Burich as a union representative.

ANALYSIS

Applicable Legal Standard(s)

Refusal to Bargain Allegations

Generally, there are six different types of employer refusal to bargain allegations that this Commission hears: (1) failure to meet; (2) failure to bargain in good faith; (3) failure to provide information; (4) circumvention; (5) unilateral change; and (6) unilateral transfer of bargaining unit work. *King County*, Decision 9075-A (PECB, 2007). Each one of these allegations has its own individual elements of proof, and each claim has its own separate identity. *Id.*

Breach of Good Faith Bargaining Obligations

A public employer and a union representing public employees have an obligation to bargain in good faith over mandatory subjects of bargaining. RCW 41.56.030(4). The obligation to bargain in good faith is enforced through RCW 41.56.140(4) (employers) and RCW 41.56.150(4) (unions).

The statute "regulates the subjective conduct and motivations of the parties in a collective bargaining situation, but expressly refrains from mandating any result or procedure for achieving final resolution of an intractable bargaining dispute." *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 459–60 (1997) (quoting Stuart S. Mukamal, *Unilateral Employer Action Under Public Sector Binding Interest Arbitration*, 6 J.L. & Com. 107 (113–14) (1986)). The parties are left to resolve disputes themselves, "subject to intervention by PERC or the courts only when the conduct of a party indicates a refusal to bargain in good faith, which . . . [is] 'an absence of a sincere desire to reach agreement.'" *Id*. at 460. Whether a party has failed to negotiate in good faith is a mixed question of fact and law. *Id. at* 469.

A public employer and a union representing public employees have a duty to bargain over mandatory subjects. RCW 41.56.030(4). As an element of good faith, a party is required to make proposals on mandatory subjects of bargaining. *Spokane County*, Decision 13510-B (PECB, 2022) (citing *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d at 460). "[N]either party shall be compelled to agree to a proposal or be required to make a concession. . . ." RCW 41.56.030(4). Thus, a balance must be struck to reflect the natural tension between the parties' obligations to bargain in good faith and the statutory admonition that parties are not required to make concessions or reach agreements. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017); *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Snohomish*, Decision 1661-A (PECB, 1984).

If a subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not bargain and to agree or not agree. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d at 460; *Lincoln County v. Public Employment Relations Commission*, 15 Wn. App. 2d 143, 152 (2020), *review denied*, 197 Wn.2d 1003 (2021). "[Parties] *may* bargain on permissive subjects, but they are not obliged to bargain to impasse." *Kitsap County v. Kitsap County Correctional Officers' Guild*, 193 Wn. App. 40, 45 (2016). Agreements on permissive subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 344. A party commits an unfair labor practice when it bargains to impasse over a permissive subject. *Id*. at 342.

Whether a particular subject of bargaining is mandatory is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989).

Permissive subjects fall into different categories. Some permissive subjects, such as an employer's authority to determine its budget, are managerial prerogatives. *Spokane Education Association v. Barnes*, 83 Wn.2d 366, 376 (1974). When a permissive subject of bargaining is a managerial prerogative, the employer is free to make a change before bargaining the effects of its decision. *Lincoln County (Teamsters Local 690)*, Decision 12844-A (PECB, 2018), *aff'd*, *Lincoln County v. Public Employment Relations Commission*, 15 Wn. App. 2d 143; *Port of Seattle*, Decision 11763-A (PORT, 2014); *Central Washington University*, Decision 10413-A (PSRA, 2011). Similarly, if the permissive subject is a union prerogative, the union would be free to make a change before bargaining. *Lincoln County (Teamsters Local 690)*, Decision 12844-A. "[W]here a permissive subject of bargaining is neither a managerial prerogative nor a union prerogative, neither party may unilaterally impose on the other its decision on the subject." *Lincoln County v. Public Employment Relations Commission*, 15 Wn. App. 2d at 152 (citing *Kent School District*, Decision 595-A (EDUC, 1979)).

"In order to resolve their contractual differences through negotiations, parties to the collective bargaining agreement must meet in a timely fashion." *Vancouver School District*, 11791-A (PECB, 2013) (citing *Seattle School District*, Decision 10732-A (PECB, 2012)). To prove that an employer refused to meet in a timely fashion, the union must establish that it is the exclusive bargaining representative of the employees involved and that the union 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 prove that the employer either failed or refused to meet with the complainant or imposed unreasonable conditions or limitations that frustrated the collective

bargaining process. *Id.* (citing *City of Clarkston (International Association of Fire Fighters, Local 2299)*, Decision 3246 (PECB, 1989)).

"[P]arties are expected to negotiate in good faith, and a breach of good faith can lead to the finding of an unfair labor practice." *Entiat School District*, Decision 1361 (PECB, 1982), *remedy aff'd*, Decision 1361-A (PECB, 1982). Less-than-commendable conduct does not automatically lead to the conclusion that a party has refused to bargain. *City of Snohomish*, Decision 1661-A. However, engaging in tactics evidencing an intent to frustrate or stall an agreement will result in a finding of refusal to bargain. *Id*. The Commission evaluates the totality of the circumstances, including considering evidence of good faith bargaining along with evidence of bad faith bargaining. *Id*. (citing *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); *Island County (Teamsters Union Local No. 411)*, Decision 857 (PECB, 1980)).

Duty to Provide Relevant Information

The duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *Central Washington University*, Decision 12305 (PSRA, 2015), *aff'd in relevant part*, Decision 12305-A (PSRA, 2016). *See also City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). This obligation extends not only to information that is useful and relevant to the collective bargaining process but also encompasses information necessary to the administration of the parties' collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999). Failure to provide relevant information upon request constitutes a refusal to bargain unfair labor practice. *University of Washington*, Decision 11414-A (PSRA, 2013).

Upon receiving a relevant information request, the receiving party must provide the requested information or notify the other party if it does not believe the information is relevant to collective bargaining activities. *Seattle School District*, Decision 9628-A (PECB, 2008). If a party perceives that a particular request is irrelevant or unclear, the party is obligated to communicate its concerns to the other party in a timely manner. *Pasco School District*, Decision 5384-A (PECB, 1996). If the requesting party does not believe the provided information sufficiently responds to the intent

and purpose of the original request, the requesting party has a duty to contact the responding party and engage in meaningful discussions about what type of information the requestor is seeking. *Kitsap County*, Decision 9326-B (PECB, 2010). The parties are expected to negotiate any difficulties they encounter with information requests. *Port of Seattle*, Decision 7000-A (PECB, 2000); *City of Yakima*, Decision 10270-B (PECB, 2011).

Parties must be prompt in providing relevant information. Unreasonable delay in providing necessary information may constitute an unfair labor practice. *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988).

When responding to an information request, an employer has an obligation to make a reasonable, good faith effort to locate the requested information. *Seattle School District*, Decision 9628-A.

Unilateral Change to Mandatory Subject(s) of Bargaining

The parties' collective bargaining obligation requires that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or a term of a collective bargaining agreement. *City of Yakima*, 3503-A (PECB, 1990), *aff'd*, *City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith; and bargains to agreement or a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010) (citing *Skagit County*, Decision 8746-A (PECB, 2006)).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). A complainant alleging a unilateral change must establish the existence of a relevant status quo or past practice and that a meaningful change to a mandatory subject of bargaining occurred. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated*

Transit Union, Local 587), Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007) (citing *King County*, Decision 4893-A (PECB, 1995)).

Whether a particular subject is mandatory or nonmandatory is a question of law and fact to be determined by the Commission and is not subject to waiver by the parties by their action or inaction. A party which engages in collective bargaining with respect to a particular issue does not and cannot confer the status of a mandatory subject on a nonmandatory subject. WAC 391-45-550; *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A. As previously noted, the Commission applies the *City of Richland* balancing test to decide whether an issue is a mandatory subject of bargaining. *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197 at 203. The actual application of this test is nuanced and is not strictly black and white. Subjects of bargaining fall along a continuum. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. The decision depends on which characteristic predominates. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A.

Past Practice

A past practice is a course of dealing acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (citing *City of Pasco*, Decision 4197-A (PECB, 1994)). To be an established past practice, the practice must be consistent, known to all parties, and mutually accepted. *Whatcom County*, Decision 7288-A; *Snohomish County*, Decision 8852-A (PECB, 2007).

Representation Rights

An employee has a right to union representation at an "investigatory" interview which the employee reasonably believes could result in discipline. *City of Bellevue*, Decision 4324-A (PECB,

1994) (citing *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975)); *Okanogan County*, Decision 2252-A (PECB, 1986). Those rights are not without limitation. *Seattle School District,* Decision 10732-A.

A *Loudermill* hearing enforces the employee's due process rights stemming from the federal and state constitutions. *Loudermill* requires a pre-termination hearing prior to the discharge of an employee possessing a constitutionally protected property interest in their employment. *City of Mountlake Terrace,* Decision 11702-A (PECB, 2014) (citing *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 542 (1985)).

The Commission does not assert jurisdiction through the unfair labor practice procedures to enforce "due process" rights guaranteed by the federal and state constitutions. *City of Mountlake Terrace,* Decision 11702-A (citing *Okanogan County*, Decision 2252-A; *City of Tacoma*, Decision 3346 (PECB, 1989)). Indeed, an employee's constitutional property rights protected by a *Loudermill* hearing are a distinct legal issue from an employee's Weingarten rights. *City of Mountlake Terrace,* Decision 11702-A, (citing *Southwest Snohomish County Public Safety Communications Agency*, Decision 11149 (PECB, 2011), *aff'd*, Decision 11149-C (PECB, 2013)).

Application of Standard(s)

Good Faith Bargaining

The union's post-hearing brief argues that its individual bargaining unit's bargaining rights were circumvented by the employer's bargaining with the coalition. Citing RCW 41.56.030 and the statutory definition of "collective bargaining," the union brief emphasizes the phrase "wages, hours, and working conditions, which may *be peculiar to an appropriate bargaining unit."* (emphasis added in brief). The union contrasts this definition with the application of coalition bargaining under 41.80 RCW and avers that 41.56 RCW *requires* collective bargaining with individual bargaining unit configurations approved by the agency.

The employer's approach to bargaining with the coalition at a "big table" versus with the union at a "small table" changed for the successor bargaining agreements, contends the union. Specifically, the union characterized the employer's stance as having already discussed or considered provisions during coalition bargaining, and the union was "foreclosed" from bargaining on those issues separately with the employer.

The union summarized in its brief that the employer "cannot coerce bargaining units into a coalition, recognize only certain labor groups as spokespersons for all units, and the[n] use those coalition agreements as a basis to not engage in good faith with the individual bargaining units." Finally, the union's brief asserts that even if the employer did not refuse to negotiate on certain proposals, its conduct was surface bargaining.

Citing several Commission cases, the employer's post-hearing brief argues that the scope of allegations subject to adjudication are limited to the pleadings in the complaint itself. In particular, it highlights two recent decisions, *Pierce County*, Decision 13371 (PECB, 2021) and *East Valley School District – Spokane (Public School Employees of Washington)*, Decision 13114 (PECB, 2019), and quotes, "Allegations that are arguably within the scope of the preliminary ruling but not alleged in the complaint itself are properly excluded."

While evidence of alleged bad faith bargaining outside the six-month statute of limitations may be relevant and admissible for background information, it is not to be considered in determining whether a party breached its good faith bargaining obligations. *Ben Franklin Transit*, Decision 13409-A (PECB, 2022) (citing *State – Ecology*, Decision 12732-A (PSRA, 2017)).

The Commission is also typically confined to adjudicating cases based on facts alleged within the four corners of a complaint. *Bellevue School Distri*ct, Decision 10868-A (PECB, 2011). The purpose of the notice pleading requirement is to place a respondent party on notice of the specific allegations to which it must respond or defend. *Bethel School District (Public School Employees of Washington)*, Decision 6847-A (PECB, 2000). As highlighted by the employer, the union's complaint does not reference the claim that the coalition bargaining usurped the employer's ability to bargain in good faith with individual bargaining units.

Adopting the *Bellevue School District, Pierce County* and *East Valley School District* holdings, allegations not specified in the complaint (but arguably included in the preliminary ruling) will be excluded from the undersigned's analysis.

Focusing on the union's complaint and the preliminary ruling, there are really three elements forming the basis of the failure to bargain in good faith allegation: 1) the employer's emails

between January 27, 2022, and February 2, 2022, indicating it was "not agreeable" to mediation, that mediation was "premature," and that it would "object" to mediation; 2) the employer advising that it "stands firm" in its proposals and claiming that inviting the agency's presence would "raise expectations that will not be realized if [the union's] belief that the county's position on the core issues will change with PERC being present in the meeting;" 3) the employer not making a counterproposal during the March 24, 2022, mediation meeting in response to the union's March 15 comprehensive "what-if" package proposal and only referring to its pre-mediation position.

Employer's Unwillingness to Engage in Contract Mediation

The parties engaged in "small table" negotiations starting in late 2020 and met approximately six times thereafter until late August of 2021. Three bargaining sessions scheduled during the months of July and September of 2021 were cancelled by the union's request until "more progress was made at the large table bargaining sessions."

The parties resumed "small table" negotiations until late November of 2021 and continued bargaining after the instant complaint was filed.

Both the union's brief and its complaint highlight the employer's objection to engaging in contract mediation. The union's testimony, evidence, and brief, however, carry the allegation further by pointing to Marshall's testimony during cross-examination. Marshall testified that the employer had objected to engaging in mediation because unresolved issues such as hazard pay and parking benefits that the union sought had already been fully bargained with the coalition. This was corroborated, asserts the union, by the January 27, 2022, email from Marshall to McNabb, in which Marshall added, "[A]nd further, the County stands firm in those positions." Again, hazard pay and parking benefits were not specifically plead as mandatory subjects that the employer had failed to engage in bargaining over with the union.

The union's final two sentences of the bad faith allegations in the complaint state, "It was evident that the County was refusing to engage in the mediation process actively and meaningfully. The County's last proposal made in bargaining was predictably unpalatable."

First, while WAC 391-55-010 provides for a party's unilateral filing to request contract mediation, engagement in mediation is a *voluntary* process.[8] Further, the agency rules outline the functions of a mediator, including "assist[ing] the parties in *voluntarily* resolving their differences." (emphasis added). WAC 391-55-070. While the agency encourages parties to engage in mediation, the employer in this case was not *required* to participate based on the union's request.

While the employer remained disinterested in engaging in mediation after the mediation request, it did express a willingness for the two bargaining teams to meet. The union declined, absent the presence of a mediator. Marshall also offered to have a sidebar discussion with McNabb, which McNabb also declined. Ultimately, the employer agreed to mediation and responded with its availability within four days of the mediator's initial scheduling email.

Employer "[S]tands [F]irm" in its Proposals and Positions

Distinguishing between good faith and bad faith bargaining can be difficult. *Mansfield School District*, Decision 4552-B (EDUC, 1995). There is a natural tension between the obligation to bargain in good faith and the statutory mandate that there is no requirement that concessions be made or an agreement be reached. RCW 41.56.030(4). *Walla Walla County*, Decision 2932-A. At the same time, a party is not entitled to reduce collective bargaining to an exercise in futility. *Lewis County*, Decision 10571-A (PECB, 2011) (citing *Mason County*, Decision 3706-A (PECB, 1991)). To avoid a refusal to bargain in good faith allegation, the totality of the evidence should not demonstrate that a party entered negotiations with a predetermined outcome. *Mason County*, Decision 3706-A.

Good faith is inconsistent with a predetermined resolve not to budge from an initial position. *Yakima Valley Community College*, Decision 11326-A (PECB, 2013) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). Parties may remain intransigent if their insistence is genuinely and

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[8] The agency's descriptions of the different types of mediation it offers clearly indicate that "[m]ediation is voluntary and the parties are in control of any agreements that result." Public Employment Relations Commission, "Mediation," accessed May 8, 2024. https://perc.wa.gov/mediation/.

sincerely held and does not constitute a rejection of the principles of collective bargaining. *Pasco Police Officers' Association v. City of Pasco,* 132 Wn.2d 450, 469.

Allen testified that she had attended several (but not all) of the "large table" coalition bargaining sessions as a representative of the union. The coalition co-chairs conducted the majority of the bargaining, but Allen was able to provide input on behalf of the union during caucuses. When Allen did attend, she testified she did not report back to the union after each session. Rather, she stated that she didn't report back "until it was done."

McNabb testified that her role with the union was limited to bargaining their appendix and that she did not participate in the "large table" bargaining. Again, neither party provided bylaws, a charter, or ground rules establishing that a union coalition bargaining team member could *not* discuss coalition bargaining "until it was done," nor is there indication that attorneys were not allowed to attend coalition bargaining sessions.

The union relies heavily on its assertion that the coalition bargaining impeded its ability to bargain issues that were important to its bargaining unit employees for the appendix. The testimony repeatedly reflects that the employer had advised that the particular issues in the union's proposals had already been discussed and considered at the "large table." As such, the employer remained willing to engage in bargaining, just not on those specific topics.

Marshall testified that the "unresolved issues" prior to the union's mediation request were hazard pay and parking and that those issues had been bargained or discussed with the coalition. Roberts testified that the employer "didn't say no and. . . didn't say 'we reject that'" regarding the hazard pay and parking issues. By the union's continued membership and engagement in the "large table" bargaining, the union was implicitly agreeing to issues being bargained at the "large table" or through the CLA. However, the union's complaint did not reference coalition bargaining, the CLA, or otherwise assert that its "small table" bargaining was impeded by the employer and coalition's bargaining.

Amendments to complaints are not allowed after the start of the hearing, except to conform the pleadings to evidence that is received without objection. WAC 391-45-070(2)(c). While the union

filed this case on April 26, 2022, it did not amend its complaint prior to the opening of the hearing. In this case the employer vociferously objected to the union's offers of evidence outside of the six-month statute of limitations related to bad faith bargaining allegations. A party that fails to either properly plead a specific allegation or to properly amend its complaint to add that allegation effectively waives its right to adjudicate that particular claim. *Central Washington University*, Decision 12588-C (PSRA, 2017) (citing *Grays Harbor County*, Decision 8043-A (PECB, 2004))

Between the complaint filing on April 26, 2022, and the first day of the hearing, August 22, 2023, the union had ample time to amend its complaint to add allegations outside of the six-month statute of limitations. In *City of Seattle*, the Commission affirmed the Examiner's finding that had the complainant wanted to amend the violation remedies it sought, it had "ample time" to amend its complaint for the specific instances of "skimming" provided at the hearing but would have needed to do so within six months of the individual incidents. *City of Seattle*, Decision 8313-B (PECB, 2004). In that case, no specific instances of "skimming" were alleged by detailed facts, including times, places, dates, and participants involved, as required by WAC 391-45-050(2), which would have put the employer on notice of any specific skimming incidents. *Id.*

Similarly, the union here did not file timely amended complaints that would put the employer on notice of specific allegations of coercing the bargaining unit into a coalition, recognizing only certain labor groups as spokespersons for all units, and then using those coalition agreements as a basis to not engage in good faith with the individual bargaining units. Nor did the union amend its complaint to reflect any allegations that the nature and scope of coalition bargaining had changed in the successor CLA bargaining.

By the union's continued membership and engagement (or lack thereof) in the "large table" bargaining, the union was implicitly agreeing to issues being bargained at the large table or coalition bargaining. Further, unlike in *Mason County*, the employer here did not enter negotiations with a predetermined outcome. *Mason County*, Decision 3706-A. Rather, the employer engaged in bargaining and discussions on a variety of topics with the coalition, of which the union was a member and had input.

The union's characterization of the employer's proposals during the statute of limitations period, and in particular during mediation, as "unpalatable" does not necessarily rise to the level of bad faith bargaining. *Washington State University,* Decision 11749 (PSRA, 2013). Conduct indicative of bad faith bargaining includes engaging in tactics that evidence an intent to frustrate or stall agreement, setting "forth an 'entire spectrum' of proposals that would be predictably unpalatable to the other party, so that the proposer would know that agreement is impossible." *Kitsap County,* Decision 12163-A (PECB, 2015) (citing *City of Snohomish*, Decision 1661-A; *Mansfield School District*, Decision 4552-B)). Simply because the union did not like the employer's proposals made during the statutory period or during contract mediation does not indicate that the "entire spectrum" of what the employer offered in bargaining was unpalatable or fell to the level of bad faith bargaining.

Employer Failed to Make Counterproposal at the March 24, 2022, Mediation and Remained Firm in its Pre-Mediation Position

A party may stand firm on its bargaining position, and an adamant insistence on a bargaining position, by itself, is not a refusal to bargain. *Mansfield School District*, Decision 4552-B. The union's contention that the employer's failed to make a counterproposal on March 24, 2022, and remained firm in its pre-mediation position is by itself insufficient to establish a good faith bargaining violation. The employer provided its full comparator wage analysis data to the union on January 26, 2022. The union did not provide initial or updated wage data until March 15 and 24, 2022, respectively. McNabb testified that the parties engaged in "comp work" – looking at comparable jurisdictions – on March 24, 2022. As previously discussed, the employer asserted that it remained firm in its positions on hazard pay and parking based on negotiations with the coalition that had run from July 2020 through October 2021. The record is devoid of the union providing notice to the employer that the coalition did not have authority to bargain for them at the "large table."

Based on the totality of the evidence within the six-month statute of limitations, and recognizing the limited pleading in the complaint, the Examiner finds that the employer did not fail to bargain in good faith with the union when it initially refused to engage in contract mediation, stood firm

in its proposals and position, and failed to make a counterproposal at the March 24, 2022, mediation session.

Requests for Information

The union's post-hearing brief argues that the employer's refusal to provide the union's requested records on a complete and timely basis impeded the union in its "fulfill[ment] of responsibilities" to Burich. The union rebuts the employer's assertion that it responded reasonably and avers that the document production occurred well into the grievance process and well after reasonable accommodation discussions occurred. The union described the employer's responses as "unnecessarily slow" with "obfuscation" leading to further delays and a denial of timely records.

The employer's post-hearing brief highlights that it provided all of the union's requested information[9] by April 19, 2022, prior to the union filing the instant ULP complaint on April 26, 2022. Burich's step 3 grievance hearing was scheduled for and held on April 20, 2022. The employer wrote, "These facts alone are adequate to deny the Guild's claim. . . ."

The employer's brief also points to Commission precedent that would preclude the union's right to information in preparation for Burich's February 10, 2022, *Loudermill* hearing. The employer does, however, recognize the union's right to information for grievance processing but argues that the union "creat[ed] [its] own . . . predicament by letting [its] document request go stale" and through its "timing" choices in filing the grievance one week into the 30-day grievance period and skipping step 1 of the grievance process of the parties' CBA to file at step 2. Finally, the employer's brief opines that the union has not established "any harm" that resulted from receiving documents the day before its member's grievance hearing.

The complaining party bears the burden of establishing that the employer failed to provide responsive information. *Island County,* Decision 11946-A (PECB, 2014). The duty to bargain includes a duty to provide relevant information for the performance of collective bargaining

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[9] The employer's request for information portion of its brief later asserts, "[T]he County provided all *relevant* documents by April 19th."

duties. The parties are expected to negotiate any difficulties with information requests. *City of Mountlake Terrace,* Decision 11702-A. In this case, both parties failed to communicate and negotiate over the requested documents. At no point did the union take the employer up on its offer to meet and confer over the scope of the requested data. All communications between the parties transpired with increasingly hostile back-and-forth emails.

Nonetheless, the employer failed to obtain agreement from the union in narrowing the scope of responsive documents to reflect only the union's bargaining unit employees on November 3, 2021. Further the November 3, 2021, email did not succinctly address whether the employer determined it was the complete response to the union's requests or if additional information would be provided once it became available. For nearly three months, until Roberts' January 25, 2022, email, the employer did not communicate any updates or provide any additional information to the union. Delay and failure to communicate any sort of timeline have contributed to a refusal to provide information violation. *Island County,* Decision 11946-A.

The duty to provide information does not compel a party to create records that do not exist; however, a party does have an obligation to make a reasonable good faith effort to locate the information requested. *Seattle School District,* Decision 9628-A.

The employer's arguments repeatedly pointed to Roberts' January 25, 2022, email where he indicated that he had let the September 2021 request "go stale." When asked about the gap between the fall communication between Roberts and O'Connell and the January 25, 2022, email, Roberts testified that the two employees who had sought assistance with exemption accommodations related to the September request had withdrawn their requests. Roberts advised, "[S]o I didn't have any members to represent, so I didn't follow up." Within days of learning of Burich's representation request for a religious accommodation, Roberts testified that he made the January 25, 2022, information request.

Roberts' January 25, 2022, information request clearly articulated that the union needed the response "at least a few days before the *Loudermill* hearing." Though he cited 41.56 RCW, Roberts' January 25, 2022, request pursuant to a *Loudermill* hearing is not within the jurisdiction of this agency. *City of Bellevue,* Decision 4324-A.

McNabb's February 7, 2022, request for information and subsequent emails purported relevancy to both the *Loudermill* hearing and the evaluation of a grievance. As such, McNabb's requests related to evaluating a potential grievance are within the purview of 41.56 RCW. One of the employer's early responses to the request asked McNabb to discuss the union's definitions of the words "documented," "decisions," "in whatever form," and "made," which did not reflect a willingness to discuss in good faith with the union the requested information. Here, the employer repeatedly stated it would provide responsive documents "once we become aware of them." The employer's responses did not reflect a good faith effort to locate the requested information. Collective bargaining is a process of communication, not a game of hide and seek. *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 at 384.

The union ultimately agreed on March 16, 2022, to narrow the scope of its request to information regarding impacted employees in three comparable departments. As such, the employer had approximately one month to provide the narrowed relevant information response to the union. Per McNabb's testimony, union exhibit 15[10] encapsulates the employer's responsive information provided by O'Connell in installments on March 23 and April 5, 6, and 16, 2022. The employer ultimately produced what it deemed the "final installment" of responsive documents to the union's requests at 6:22 p.m. on the eve of Burich's April 20, 2022, step 3 grievance hearing. The employer did offer to delay the step 3 hearing, but the union declined.

By unilaterally narrowing the scope of the inquiry in its initial response in November 2021 without conferring with the union, its failure to communicate updates or a timeline for nearly three months between its November 3, 2021, email and Roberts' January 25, 2022, email, and delivering the

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10 The Examiner notes that union exhibit 15 contains an email dated October 5, 2021, sent from the "DHR Religious Accommodation Committee," addressed to Christine Ynzunza, that includes several attachments. The body of the email indicates, "The Religious Accommodation Committee has completed its review of the exemption/accommodation requests from employees in your department. . . ." The email continues describing a "spreadsheet" listing each employee and their request status, as determined by the Committee. Of the four employer installment dates, it is not clear from the record when this particular document was provided to the union.

final installment of documents on the eve of the step 3 grievance hearing, the employer failed to provide the union relevant information and therefore refused to bargain.

Finally, the employer's argument that the union has not established "any harm" resulting from receiving documents the day before its member's grievance hearing is without merit. The Commission has ruled that an employer's arguments that its failure to provide information was inadvertent and harmless are not defenses for failing to provide information. *University of Washington*, Decision 11499-A (PSRA, 2013) (citing *City of Bremerton*, Decision 5079 (PECB, 1995)).

Representational Rights

Unlike other agency cases where the factfinder had to determine whether the meeting in question was a Weingarten meeting or a *Loudermill* hearing, there is no question that Burich's February 10, 2022, meeting was viewed by both parties as a *Loudermill* hearing. The employer's January 21, 2022, letter to Burich detailed the interactive process that the parties had engaged in for the religious accommodation request and gave notice of the option to initiate a "COVID-19 Vaccination Declaration," or in the alternative, a voluntary election to attend a *Loudermill* hearing for failing to comply.

McNabb testified to her experience as both Counsel for the union and as a former Labor Negotiator for this employer as to the nature of pre-separation meetings, or *Loudermill* hearings. She described the February 10, 2022, meeting as a *Loudermill* hearing for Burich.

The union strongly encourages the Examiner to determine that the scope of the rules and procedures for *Loudermill*, or pre-disciplinary meetings, are bargainable topics under RCW 41.56. It claims that this is a case of first impression for the agency. The union asserts that it established unrefuted evidence that a past practice of allowing legal counsel at *Loudermill* hearings had been

well-established between the parties, and the employer unilaterally changed that practice by not allowing McNabb to attend Burich's *Loudermill* hearing.[11]

The employer argues that the agency lacks jurisdiction over employer decisions at *Loudermill* hearings. This stands true, it asserts, even for "unilateral change" allegations to terms and conditions of employment. Finally, the employer raises that the union's counsel has unsuccessfully raised similar allegations related to *Loudermill* hearings before the agency several times before the instant complaint and should be "well aware" of the jurisdictional limitation.

The union invites the Examiner to make a finding on whether pre-disciplinary procedures constitute bargainable working conditions. The legislature specifically lists "working conditions" in RCW 41.56.030 as mandatory subjects of bargaining. The collective bargaining rights and obligations of both parties flow from the state's statutory guidance. The Commission addressed that *Loudermill* constitutional rights under a due process hearing stem from federal and state constitutions, not from Chapter 41.56 RCW. *City of Mountlake Terrace,* Decision 11702-A.

The Commission has clearly articulated that the "*scope* of bargaining under Chapter 41.56 RCW is 'grievance procedures and . . . personnel matters, including wages, hours, and working conditions.'" (emphasis added). *Whatcom County,* Decision 7244-B (PECB, 2004) (citing RCW 41.56.030(4). The Commission has *also* clearly held that due process hearings conducted under *Loudermill* are "*beyond the scope* of Chapter 41.56 RCW." (emphasis added). *Town of Steilacoom,* Decision 6213 (PECB, 1998)[12] (citing *Snohomish County*, Decision 5231 (PECB, 1995)).). *See also University of Washington,* Decision 10226 (PSRA, 2008).

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[11] While the Examiner has determined that the scope of rules and procedures for *Loudermill* hearings is outside of the agency's jurisdiction, she does note that between December 2021, and January 2022, the employer allowed a legal consultant in addition to a union representative to join impacted employees at several *Loudermill* hearings related to involuntary separation for failure to obtain a COVID vaccine and whose accommodation requests were denied. This information appears to contradict Overbey's February 10, 2022, email.

[12] Absent appeal to the Commission, an Examiner's issued decision is the final order of the agency with the same force and effect as if issued by the Commission. WAC 391-45-310.

The union points to a Marine Employees' Commission (MEC) case which held that a unilateral change in the location of pre-discipline meetings was a mandatory subject of bargaining. *Washington State Ferries,* Decision 253 (MEC, 2000).

The Commission distinguishes mandatory bargaining subjects versus non-mandatory subjects of bargaining differently under the statutory schemes of chapter 47.64 RCW versus chapter 41.56 RCW. *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13318-A (MRNE, 2022). As such, the union's reliance on *Washington State Ferries,* Decision 253 —that how pre-discipline meetings are conducted is a mandatory subject—should be applied to this case is misplaced.

The union also cited to a 1977 NLRB case, *Alfred M. Lewis, Inc.,* affirmed by the Ninth Circuit, where the Board upheld a unilateral change when the employer created a policy denying employees representational rights at a pre-discipline meeting. *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Circuit, 1978). The Commission has long recognized that decisions of the NLRB can be persuasive (though not controlling) in the interpretation of state labor acts that are similar to the National Labor Relations Act. *See State – Washington State Patrol*, Decision 10314-A (citing *Nucleonics Alliance, Local Union No. 1-369 v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984));*see Seattle School District*, Decision 7349-A (PECB, 2001).

Further, the union's unilateral change allegations fall under the wide umbrella of "refusal to bargain" potential employer violations under RCW 41.56.140(4). The union's brief asserts that previous agency case law involving due process rights under *Loudermill* do not address whether pre-discipline procedures constitute bargainable working conditions. In another *City of Bellevue* case, the Commission found no refusal to bargain violation when the employer refused to provide the union information for use at an employee's *Loudermill* hearing. *City of Bellevue,* Decision 4324-A. *See also University of Washington,* Decision 10226 (deeming a request for information pursuant to representation for a *Loudermill* hearing as "beyond the scope" of the Commission's jurisdiction).

The Examiner finds that the "rules and procedures" for *Loudermill* hearings are outside the scope of this agency's jurisdiction and therefore declines to further evaluate the unilateral change of legal

representation at *Loudermill* hearings allegation. As such, the refusal to bargain allegation for making unilateral changes to the representation procedure at *Loudermill* hearings is denied.

CONCLUSION

By unilaterally narrowing the scope to its initial information request response in November 2021 without conferring with the union, its failure to communicate updates or a timeline for nearly three months between its November 3, 2021, email and Roberts' January 25, 2022, email, and delivering the final installment of documents on the eve of the step 3 grievance hearing, the employer failed to provide the union relevant information and therefore refused to bargain.

Based on the totality of the evidence, the Examiner finds that the employer's initial emails objecting to mediation, the employer standing firm in its proposals and claiming that inviting the agency mediator would raise expectations, and the employer's failure to make a counterproposal to the union on March 24, 2022, do not rise to the level of bad faith bargaining.

The Examiner finds that the "rules and procedures" for *Loudermill* hearings is outside the scope of this agency's jurisdiction and therefore declines to further evaluate the unilateral change of legal representation at *Loudermill* hearings allegation. As such, the refusal to bargain allegation for making unilateral changes to the representation procedures at *Loudermill* hearings is denied.

FINDINGS OF FACT

1. King County is a public employer within the meaning of RCW 41.56.030(13).

2. King County AFIS Guild is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of non-commissioned employees in the positions of Latent-Print Examiners and Identification Technicians.

3. At the time of filing the ULP complaint, the employer and union were parties to a collective bargaining agreement effective January 1, 2018, through December 31, 2020.

4. On September 17, 2021, the union sent a request for information to the employer requesting all COVID-related religious and medical exemption requests to be placed on respective spreadsheets and organized by five data points. The union also asked for all accommodations made by the employer for any granted religious or medical exemption.

5. The union sought the September 17, 2021, request for information under the Public Employees' Collective Bargaining Act (chapter 41.56 RCW).

6. On September 17, 2021, the employer inquired whether the union's request for information was limited to its bargaining unit employees. The union advised it was seeking employer-wide information.

7. On October 8, 2021, the employer advised the union,

> The information you request doesn't necessarily exist in the formats you've requested and there's some question being evaluated about the level of detail we can legally disclose. To be clear, this message is not a denial of your request for information. I will let you know as soon as some, or all, of this information becomes available.

8. On November 3, 2021, the employer provided a partial response to the union and, for the remaining items, advised that it did not have a duty to prepare a document (regarding the "spreadsheet" request, item 1) or did not have documents responsive to the request.

9. Responding to items 1 and 3, the employer's November 3, 2021, email narrowed the scope of the response and provided the names of two bargaining unit employees with pending religious exemption requests.

10. The parties did not discuss or come to agreement regarding narrowing the scope of the response to the universe of the union's bargaining unit employees.

11. The employer's November 3, 2021, email did not indicate that the county's response was a denial for a request for information or that it would let the union know if some, or all, of this information became available.

12. Between November 4, 2021, and January 25, 2022, the parties did not communicate for nearly three months, the employer did not provide any further responsive documentation to the union, nor did the employer communicate updates or a timeline to the union.

13. On January 25, 2022, the union made a second request for information to the employer.

14. The January 25, 2022, request for information was pursuant to representing Alexander Burich, a bargaining unit employee, at a February 10, 2022, *Loudermill* hearing.

15. On February 7, 2022, the union made an amended second request for information to the employer pursuant to representing Burich for the February 10, 2022, *Loudermill* hearing and the evaluation of a grievance on Burich's behalf.

16. The union sought the February 7, 2022, request for information for the evaluation of a grievance for Burich pursuant to chapter 41.56 RCW.

17. The union filed a grievance on behalf of Burich under the parties' collective bargaining agreement in early March 2022.

18. The parties exchanged several emails regarding the union's requests for information between January 25 and April 19, 2022.

19. The employer provided installments of responsive documents to the union on January 25, March 23, April 5, 6, 16, and 19, 2022. The "final installment" of responsive documents was sent to the union on April 19, 2022, at 6:22 p.m.

20. The step 3 grievance hearing for Burich was scheduled for April 20, 2022.

21. The employer offered to delay the step 3 hearing, but the union declined.

22. At the time of the 2022 ULP filing, the parties were in successor collective bargaining agreement (CBA) negotiations, which had begun in late 2020.

23. The union had been a member of the coalition since the coalition's first contract cycle with the employer.

24. At the time of the 2022 ULP filing, the employer and coalition were engaged in bargaining for the parties' third coalition labor agreement.

25. The coalition labor agreement (CLA) captures the bargained terms and conditions that are common among the member bargaining units, such as parking, vacation, jury duty leave, and other various leave types.

26. Bargaining between the employer and the coalition is not governed by any bylaws, charters, or ground rules.

27. The relationship between the coalition and member unions was not memorialized in written documents.

28. The union and the employer bargained an individual appendix to the coalition labor agreement that had specific provisions related to the union's bargaining unit employees.

29. The parties' common vernacular for the individual CLA unit bargaining groups, such as the union, referred to them as "small tables," while the larger CLA and coalition were referred to as the "big table."

30. Marquel Allen, the union's second vice president, represented the union at the "large table." Allen testified that she had attended several (but not all) of the "large table" coalition bargaining sessions as a representative of the union.

31. When Allen did attend, she testified she did not report back to the union after each session. Rather, she stated that she didn't report back "until it was done."

32. Cynthia McNabb, former union counsel, testified that her role with the union was limited to bargaining their appendix and that she did not participate in the "large table" bargaining.

33. The parties engaged in "small table" negotiations starting in late 2020 and met approximately six times thereafter until late August of 2021.

34. Three bargaining sessions scheduled during the months of July and September of 2021 were cancelled by the union's request until "more progress was made at the large table bargaining sessions."

35. The parties resumed "small table" negotiations until late November of 2021 and continued bargaining after the instant complaint was filed.

36. At the end of January 2022, the union believed the parties were at impasse and indicated it wanted to engage an agency mediator.

37. The parties exchanged emails between January 27 and 30, 2022, about engaging in contract mediation with an agency mediator.

38. The employer requested to engage in further bargaining discussions without the assistance of a mediator and the union declined.

39. On February 2, 2022, the union filed a unilateral contract mediation request with the agency and courtesy copied the employer.

40. After the agency's appointed mediator contacted the parties for scheduling, the employer provided its availability on February 14, 2022.

41. The parties met with an agency staff mediator on March 15 and 24, and May 13, 2022, and also exchanged various "what-if" proposals during this time.

42. The union made a comprehensive "what-if" package proposal to the employer on March 15, 2022.

43. On March 24, 2022, the employer did not make a counterproposal to the union's March 15 proposal and only referred to its pre-mediation position.

44. McNabb testified that the parties engaged in "comp work" – looking at comparable jurisdictions – on March 24, 2022.

45. The employer asserted that it remained firm in its positions on hazard pay and parking based on negotiations with the coalition that had run from July 2020 through October 2021.

46. The record is devoid of the union providing notice to the employer that the coalition did not have authority to bargain for them at the "large table."

47. On April 23, 2022, the employer, through CLA negotiations, made a comprehensive "what-if" proposal that included a wage increase to the coalition and provided this proposal to the union. This proposal was also sent directly to the union president.

48. Burich had a *Loudermill* hearing scheduled with the employer for February 10, 2022.

49. The union received a copy of Burich's *Loudermill* hearing notice on January 25, 2022.

50. When the *Loudermill* hearing started at 2:30 p.m. on February 10, 2022, McNabb and Mark Roberts, union president, joined Burich on the Teams meeting.

51. On February 10, 2022, at 2:38 p.m., Erin Overbey, King County Sheriff's Office Legal Advisor, sent an email to several employer representatives, as well as Roberts and McNabb. Overbey's email stated that when McNabb had appeared at Burich's *Loudermill* hearing on Teams, Overbey had told McNabb that the County was not permitting attorneys to appear at the "vaccine mandate *Loudermills*."

52. Overbey's February 10, 2022, email also stated that the county had advised they could proceed in the meeting with the guild's business agent and without McNabb, or the county could accept written materials which could incorporate their discussions with McNabb. The email ends with Overbey stating that McNabb was appearing as the union's legal counsel and that McNabb contended that not allowing her to join the meeting was contrary to past practice. McNabb also asked that Overbey document the county's "request" in the email.

53. Roberts remained at the February 10, 2022, *Loudermill* hearing with Burich as a union representative.

CONCLUSIONS OF LAW

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

2. Based on findings of fact 1-12 and 16-21, the employer refused to bargain in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1) by unilaterally narrowing the scope of the union's September 17, 2021, information request without discussion or agreement with the union, failing to provide further responsive documents or communicate updates or a timeline to the union for nearly three months, and delivering the final installment of responsive documents to the February 7, 2022, information request on the eve of a step 3 grievance hearing.

3. Based on findings of fact 1-3 and 22-47, the employer did not refuse to bargain and did not violate RCW 41.56.140(4) when it initially objected to mediation, stood firm in its proposals, and failed to make a counterproposal to the union on March 24, 2022.

4. Based on findings of fact 1-2, and 48-53, the employer did not refuse to bargain and did not violate RCW 41.56.140(4) when it prohibited McNabb, the union's attorney, from attending the February 10, 2022, *Loudermill* hearing.

ORDER

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

1. CEASE AND DESIST from:

    a. Failing or refusing to provide information to the union relevant for grievance processing.

    b. In any 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. Provide the King County AFIS Guild with the complete information as described in the Guild's request for information dated March 16, 2022, unless the employer has already provided such information.

b. Give notice to, and upon request, negotiate in good faith with the King County AFIS Guild before failing to provide relevant information.

c. Upon receipt of a request for information from the union for information relevant to contract administration or grievance processing, provide timely updates of challenges obtaining information and make good faith efforts to locate requested relevant information.

d. 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.

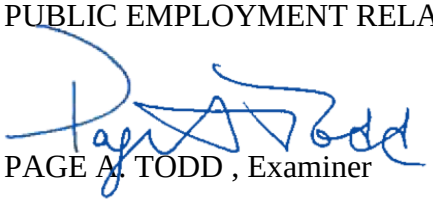
e. Read the notice provided by the compliance officer into the record at a regular public meeting of the King County Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

f. 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.

g. 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 12th day of June, 2024.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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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.