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-A - PECB DECISION OF COMMISSION

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

Devon Shannon, Senior Deputy Prosecuting Attorney, King County Prosecuting Attorney Leesa Manion, for King County.

STATEMENT OF THE CASE

The King County Regional AFIS Guild (guild) appealed the decision of the Hearing Examiner in this matter, and King County (county) filed a cross-appeal. After considering each party's arguments and the record, we affirm the Examiner's conclusion that the county did not refuse to bargain in good faith during negotiations for a successor agreement. We affirm in part and reverse in part the Examiner's conclusions that the county breached its good faith bargaining obligation in its responses to the guild's requests for information. We remand the case to the Examiner to determine whether the county unilaterally changed the practice of allowing guild attorneys to attend *Loudermill* hearings without providing the guild an opportunity for bargaining.

ANALYSIS

Standard of Review Applicable to All Issues

On appeal, the Commission reviews challenged findings of fact to determine if they are supported by substantial evidence, and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB,

2002). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006). Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Brinnon School District*, Decision 7210-A (PECB, 2001).[1]

Substantial evidence exists if the entire record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B*; Wapato School District*, Decision 12894-A (PECB, 2019). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its Examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Did the County Breach Its Good Faith Bargaining Obligation During Negotiations for a Successor Collective Bargaining Agreement?

Applicable Legal Standards – Duty to Bargain in Good Faith

Public employers and unions representing public employees have a duty to bargain in good faith over mandatory subjects of bargaining. RCW 41.56.030(4). This includes the duty to meet at reasonable times, to negotiate in good faith, and to execute a written agreement with respect to wages, hours, and working conditions. *See State ex rel. Bain v. Clallam County Board of County Commissioners*, 77 Wn.2d 542 (1970).

Whether a party has failed to negotiate in good faith is a mixed question of fact and law. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 469 (1997). Distinguishing between good faith and bad faith can be difficult. *Mansfield School District*, Decision 4552-B (EDUC, 1995). This difficulty arises from the tension between the obligation to bargain in good faith and the statutory mandate that there is no requirement that parties make concessions or reach an agreement. RCW 41.56.030(4); *Walla Walla County*, Decision 2932-A (PECB, 1988);

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[1] The guild has challenged only findings of fact 31 and 46. We have determined that these findings of fact are supported by substantial evidence in the record and affirm them. Accordingly, we rely on all of the Hearing Examiner's findings of fact.

Mansfield School District, Decision 4552-B. There is no required choreography to the dance of negotiations; parties may take firm positions, may decline to make counterproposals to each proposal, and may ask for a process that best suits their interests. However, both employers and unions must demonstrate through the negotiations that they desire an agreement and that they do not have a closed mind to the other party's interests. *Pasco Police Officers' Association,* 132 Wn.2d at 460 (finding that a refusal to bargain in good faith is the absence of a sincere desire to reach agreement).

Application of Legal Standards

The county negotiates a master collective bargaining agreement with several unions, known as the coalition labor agreement. These coalition negotiations are referred to as the "big table." The county and each union then negotiate individual appendices for issues specific to the bargaining unit at the "small table." The guild participates in the coalition. When the county and the guild began small table negotiations in 2020 for a successor appendix, the county and the coalition were still bargaining at the big table for the master labor agreement. Unable to reach an agreement on the appendix, the guild requested the county engage in mediation. Although the county thought mediation was premature and initially resisted the guild's request, once a formal mediation request was made to the agency, the county cooperated in scheduling and participated in mediation.

During mediation, the guild made proposals regarding hazard pay and parking. The county pointed out that those two subjects had been raised by the coalition of unions and remained firm on the positions on those issues that it took during the coalition negotiations. The county did not make counterproposals on those subjects. Those subjects were not included in the final coalition agreement.

The Examiner concluded that the county did not breach its good faith bargaining obligation because mediation is a voluntary process, and nevertheless, the county participated in mediation.[2]

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[2] Findings of fact (FF) 37-41.

The county did not breach its good faith bargaining obligations by maintaining its positions and not making counter proposals during its appendix negotiations with the guild.

On appeal, the guild raises both procedural and substantive challenges to the Examiner's decision. Regarding procedure, the guild argues that the Examiner erred by not admitting post-complaint evidence about the parties' negotiations and specifically about the conclusion of the coalition bargaining. Further, the guild alleges that the Examiner misstated the pleading requirements and that it was not required to allege every fact that would form the basis of the violation, merely enough to place the county on notice of the allegations against it. On the merits, the guild contends that the Examiner's conclusion that the county did not engage in surface bargaining was erroneous because the evidence, considering the totality of the circumstances, demonstrated that the county had a fixed position.

In response, the county asserts that the guild has not met its burden of either identifying or explaining errors in the Examiner's findings of fact. The county contends that the guild focused on actions that occurred in coalition bargaining, which the guild did not allege in its unfair labor practice complaint. The county supports the Examiner's conclusion of law number 3, which found that the county did not refuse to bargain.

The guild argues that the Examiner erred in not considering post-complaint evidence and evidence outside of the scope of the unfair labor practice complaint.[3] In this case, the Examiner's rejection of post-complaint evidence might suggest a *per se* rule that post-complaint evidence is inadmissible. The Commission's precedent is more nuanced. "Post-complaint evidence is neither inherently inadmissible nor inherently admissible. Evidence of events occurring after a complaint has been filed with the agency may be relevant to the case." *SNOPAC*, Decision 12342-A (PECB, 2016). Post-complaint evidence may not, however, form the basis of a violation unless the complainant has properly amended the unfair labor practice complaint. *Central Washington*

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[3] Despite the ruling, the Examiner appears to have evaluated the evidence about the parties' negotiations through the coalition and broader evidence about the parties' negotiations. The Examiner appropriately confined rulings to the issue framed by the cause of action statement and the allegations of the unfair labor practice complaint.

University, Decision 12588-C (PSRA, 2017); WAC 391-45-070; *Washington State Department of Children, Youth, and Families*, Decision 13329-C (PSRA, 2023) (basing the decision on the evidence that existed at the time the employer terminated the complainant's employment and when the complainant filed the unfair labor practice complaint).

Here, the guild argues that its evidence of post-complaint conduct (conduct during the coalition bargaining) shows that the county had an earlier fixed mind and intent not to bargain in good faith. We reject this contention for two reasons. First, the guild's argument asks us to draw a distinction that ignores the dynamic nature of negotiations. A negotiating party may have firm positions early in negotiations that eventually change as the conversation develops. The key consideration regarding whether a party has bargained in bad faith is the party's conduct throughout the process, not just in a snapshot at one point during the negotiations. *See Mansfield School District*, Decision 4552-B (stating that the totality of the circumstances must be considered). Accordingly, we could not find, even if we were inclined to do so, that the county engaged in bad faith bargaining without concluding that it acted in bad faith during the post-complaint period. The Hearing Examiner cannot find a violation without an amendment or complaint alleging a violation during that time period.

Second, even if the Hearing Examiner had erred in excluding post-complaint conduct, the error would be harmless. The guild appropriately made an offer of proof about its post-complaint evidence after the Hearing Examiner's exclusion of the post-complaint evidence. If the Commission accepted the guild's offer of proof concerning post-complaint evidence, which we do not, the totality of the evidence still would not support finding that the county breached its good faith bargaining obligation. The gravamen of the guild's theory is that the county first declined mediation and thereafter refused to discuss issues at the small table that were raised at the coalition table. The guild also argues that when the county set a deadline for agreement to its coalition proposal, it demonstrated that it earlier had an intent not to bargain in good faith.

Even with the offer of proof, the guild would not have proven that the county bargained in bad faith. The county's unwillingness to discuss the same topics at both the big table and the small table does not show an unlawful intent. There is no allegation, complaint, or proof that the county

did not bargain about parking and hazard pay in good faith at the big table.[4] The guild contends that it did not waive its rights to bargain about these issues at the small table and retained its rights to bargain about issues that impact its members. These arguments misperceive the county's obligations. The guild was present at the coalition table, never withdrew from the coalition bargaining, and accepted whatever tradeoffs were made there. The county was not obligated to give the guild multiple bites at the apple. There is also nothing inherently wrong with setting a deadline for acceptance of a proposal, and it does not imply the earlier existence of bad faith. And, as was aptly expressed by the Hearing Officer, mediation is a voluntary process and a refusal to participate is not a *per se* violation. Decision 13874 at 24.

The Examiner also appropriately focused on the factual allegations in the guild's complaint. Had the guild wanted the allegations to include the county's conduct during the coalition negotiations, the guild should have included some allegations related to that conduct in its unfair labor practice complaint. It did not. Thus, the county could not have been on notice that it was necessary to defend the allegation that it breached its good faith bargaining obligation on the basis of the coalition negotiations.

We agree with the county; the guild did not identify findings of fact to be in error or explain how the appealed findings of fact were in error or did not support the Examiner's conclusions of law. The findings of fact support the Examiner's conclusions of law that the county did not breach its good faith bargaining obligation with respect to the successor agreement. Therefore, we affirm the Examiner's conclusions.

Did the County Refuse to Bargain by Not Providing Information Requested by the Guild?

Applicable Legal Standard – Duty to Provide Information

The duty to bargain in good faith prescribed by RCW 41.56.030(4) includes an obligation to provide relevant information needed by the other party to carry out its collective bargaining

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[4] We also note that it would ordinarily be difficult to show, absent an outright refusal to discuss a mandatory subject, that a party bargained in bad faith about one or a few subjects in multi-subject negotiations. The analysis focuses on whether the conduct displays an intent to avoid reaching an overall agreement based on the totality of circumstances.

responsibilities. *Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373, 383 (1992); *Island County*, Decision 11946-A (PECB, 2014). In evaluating whether an employer was obligated to supply information, the Commission determines whether the requested information appears reasonably necessary for the performance of the union's function as a bargaining representative. *City of Bellevue*, Decision 4324-A (PECB, 1994). 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 responding party must provide the requested information or engage in negotiations about the information request. *City of Yakima*, Decision 10270-B (PECB, 2011); *Seattle School District*, Decision 9628-A (PECB, 2008); *Port of Seattle*, Decision 7000-A (PECB, 2000). When information requests are potentially ambiguous or overbroad, good faith demands that both parties communicate. *Island County*, Decision 11946-A. A party may not refuse to respond to an ambiguous or overbroad request, but rather that party is required to request clarification and/or comply to the extent that the request for information clearly asks for necessary and relevant information. *Kitsap County*, Decision 9326-B (PECB, 2010).

The obligation to communicate about the information request continues once the responding party begins gathering and providing responsive information. *Island County*, Decision 11946-A. If there is doubt, the responding party must communicate with the requesting party to ensure that the information being gathered is the type of information that has been requested. *Kitsap County*, Decision 9326-B (citing *City of Seattle*, Decision 10249 (PECB, 2008), *remedy aff'd*, Decision 10249-A (PECB, 2009)). After receiving a response, if the requesting party does not believe the information provided sufficiently responds to 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.

Application of Legal Standards

Three incidents form the basis of the Examiner's conclusion that the county failed to provide requested information. First, the Examiner concluded that on November 3, 2021, the county impermissibly narrowed the scope of the guild's September 17, 2021, request without the

guild's agreement. Decision 13874 at 29. Second, the Examiner concluded that the county failed to communicate updates about the request between November 3, 2021, and January 25, 2022. Decision 13874 at 30. Third, the Examiner concluded that by delivering the requested information on the eve of the parties' grievance hearing, the county failed to timely provide the guild with relevant information. Decision 13874 at 30-31.

On appeal, the county argues that it did not narrow the scope of the guild's information request. The county asserts that the Examiner imposed a duty on the county to continue communicating with the guild when the guild did not respond to the county's questions and request to negotiate. The county asserts that the Examiner erred in considering only the information provided the day before the grievance hearing and ignored the county's other responses. In response, the guild argues that the county did not provide relevant information in a timely manner. We reverse in part and affirm in part.

On September 17, 2021, guild president Mark Roberts requested COVID-related medical and religious exemption information from the county.[5] Lacey O'Connell, a county labor relations negotiator, responded the same day and asked if the request was specific to AFIS employees. Roberts responded that the guild was requesting information about the entire county. On October 8, 2021, O'Connell responded, stating that the information didn't exist in the format the guild had requested and that the county was evaluating what information it could legally disclose.[6] On November 3, 2021, the county provided some of the requested information and sought further negotiations about the request considering developments between the parties.[7]

Roberts did not respond to O'Connell's email until January 25, 2022, and explained that the reasons for requesting the information had been resolved. Roberts stated, "So in order to save your effort, I let our request go stale."[8] Despite this admission from the guild that it had, in essence,

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5 FF 4-5; Employer (Er.) Ex. 6 at 24.

6 Er. Ex. 6 at 22- 23.

7 Er. Ex. 6 at 21-22.

8 Er. Ex. 6 at 19.

abandoned the September 17, 2021, request because it no longer needed the information, the Examiner found that the county had delayed and failed to communicate about the request. Decision 13874 at 29. We disagree.

The county's October 8 and November 3 responses demonstrated its efforts to both provide information and negotiate any concerns about the requests. As the party requesting the information, the guild had an obligation to continue to communicate with the county if the information provided on November 3, 2021, was inadequate. *See Kitsap County*, Decision 9326-B (finding that the employer did not fail to provide information when the employer notified the union that the specific document the union had requested did not exist and the union did not ask for other documents or attempt to explain the information it was requesting). The guild did not respond or object to the response as too narrow or insufficient. In the absence of such communication from the guild, the county could reasonably conclude that no further action was needed. We reverse the Examiner's conclusions that the county unilaterally narrowed the scope of the guild's September 17 information request and that the county failed to communicate after its November 3, 2021, response in violation of RCW 41.56.140(4).

Next, we turn to the Hearing Examiner's conclusion that the county's communications about the guild's January 25, 2022, information request and the resulting delay in production of information demonstrated a lack of good faith. In the same letter that advised that he had let the earlier request go stale, Roberts made a new information request.[9] Roberts explained that the guild was requesting information to represent an employee. The guild requested information about COVID-related religious exemption requests and accommodations for "King County employees who requested an exemption and/or accommodation."[10] Roberts explained that "time [was] of the essence" and that the guild wanted the information "at least a few days before" the February 10, 2022, *Loudermill* hearing.[11]

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[9] Er. Ex. 6 at 19-20.

[10] Er. Ex. 6 at 19-20.

[11] Er. Ex. 6 at 20.

On January 25, 2022, Keiley Ramseur responded on behalf of the county. The county provided some information in response to the guild's request. That information included a religious accommodation spreadsheet and information about employees represented by the guild. The county asserted that the request for "the basis for each of those accommodation decisions" was overbroad, ambiguous, and subject to interpretation. Further, the county asserted it did not have an obligation to create additional documents.[12]

If the county thought the request was ambiguous or overbroad, it was required to request clarification and/or comply to the extent that the request for information clearly asked for necessary and relevant information. *Kitsap County*, Decision 9326-B. The county's assertion that certain requests were "overbroad, ambiguous, and subject to interpretation" did not satisfy the county's obligation to seek clarification. Roberts had communicated that the guild was requesting information about "King County employees." Nonetheless the county asked the guild to contact it if the guild was seeking records related to all employees. The county had an obligation to engage in a discussion of the portions of the request it thought were "overbroad, ambiguous, and subject to interpretation."

On January 31, 2025, O'Connell sent Roberts a follow up email. O'Connell explained that if she did not hear from Roberts "by Tuesday, February 8, 2022," she would "consider this request fulfilled and closed."[13]

After viewing the county's response, guild attorney Cynthia McNabb responded on February 7, 2022. McNabb reasserted the initial January 25 request and supplemented it. McNabb clarified that the guild was not asking the county to create a document; rather the guild was requesting the information in any form it existed.[14] Responding to the county's assertion that the request was "overbroad," McNabb explained that the information requested was "directly relevant to the Guild's ability to represent" a bargaining unit member in a February 10, *Loudermill* hearing

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12 Er. Ex. 6 at 17-19.

13 Er. Ex. 6 at 17.

14 Er. Ex. 6 at 15-16.

and to determine whether the guild would file a grievance under the collective bargaining agreement. McNabb went on to state that if the county did "not produce [the] information in a *timely* manner pursuant to 41.56, the Guild [would] move forward to soliciting the information through alternative statutory means."

The county did not provide any additional information before the scheduled date of the *Loudermill* hearing. O'Connell responded on February 10, 2022, the date by which the guild had asked the county to provide the information. While maintaining its position that the guild's request was "overbroad, ambiguous, and subject to interpretation," the county sought clarification of the definition of certain words in the request and other aspects of the request. Further, O'Connell asked how the information requested was relevant to the guild's representation of the employee.

For approximately the next six weeks, the parties exchanged email communications that superficially appear to express interest in agreeing on what information needed to be provided but were more focused on staking out positions than making sure relevant information could be provided. McNabb responded the next day, February 11, accusing the county of "unnecessary gamesmanship." Not for the first time, McNabb explained that the guild wanted the information in its existing form. McNabb explained, again, why the guild wanted the information. The date for the *Loudermill* hearing having passed, McNabb requested the information "no later than March 15, 2022." A response by this time was necessary to allow the guild to pursue a grievance.

On March 8, 2022, O'Connell responded that the county was trying "to help identify what additional information [the guild sought] and to provide it in the most manageable way possible."[15] O'Connell explained that approximately 750 county employees had sought exemptions and accommodations. O'Connell estimated there could be between 2,000 to 6,000 email messages and documents that were not stored centrally. O'Connell offered to have the guild review a spreadsheet and identify which of the exemptions and accommodations it would like to review in detail or explain how it would otherwise narrow the request.

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[15] Er. Ex. 6 at 12.

On March 15, 2022, McNabb responded that the spreadsheet the county provided was not responsive to most of the requested information. McNabb clarified that the request was asking only about religious accommodations. McNabb took issue with the county not providing the information when the guild first requested it on September 17, 2021. McNabb requested the information by March 30, 2022,[16] to allow the guild to prepare for a March 17, 2022, grievance meeting.

On March 15, O'Connell responded that the guild's February 7 request to focus on religious accommodations in lieu of medical accommodations did not greatly reduce the number of responsive documents. O'Connell again offered the rejected suggestion that the guild narrow its search. The county reviewed the information it had provided and sought further clarification.

On March 16, 2022, McNabb responded that it did "not seem productive to identify individual cases and then ask to review them on a one-off basis."[17] To make "an effort to be collaborative and to finally compel some form of compliance," McNabb narrowed the guild's request to documents from the Sheriff's Department, the Department of Adult and Juvenile Detention, and the Department of Natural Resources and Parks. Later that day O'Connell responded that the county would begin identifying responsive documents and provide the first installment early the next week.

The county provided documents on March 23, and April 5, 6, 16, and 19, 2022. The information was not provided until well after the *Loudermill* hearing, and the final batch of information was provided at 6:22 pm on the eve of the scheduled April 20 step 3 grievance meeting.

Collective bargaining, including responding to information requests, "is a process of communication, not a game of hide and seek." *Bellevue v. International Association of Fire*

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16 Er. Ex. 6 at 10. March 30, 2022, was the date identified in the email. Based on the guild's need to have the information before March 17, we can infer the date was a scrivener's error.

17 Er. Ex. 6 at 11.

Fighters, Local 1604, 119 Wn.2d at 384. In this case, both parties engaged in gamesmanship throughout their email exchange. The parties are represented by sophisticated negotiators who understand how the information request process is supposed to work and have proven themselves capable of negotiating resolutions. Here, the protracted email exchange served only to exacerbate their disagreement. While the county's questions might appear to have been designed to narrow the guild's request, they served more to evade responding when the guild had rejected the county's proposed solutions. Each party essentially talked over the other rather than attempting to address the other's interests.

The Commission's discovery type standard for information requests favors open communication to allow parties to gather information to, among other things, assess whether they need to invoke their contractual rights. The communication in this case involved a repetitive cycle of the parties reasserting their positions in what appeared to be an attempt to gain acquiesce without movement toward resolution.

The Commission expects parties to explain their interests, or reasons for a request, and any challenges to responding, including volume of response, early or as soon as known. If the response will be delayed due to the time required to prepare the response, then such a delay must be communicated. *Island County*, Decision 11946-A. The guild had communicated early in the process why and when it needed the information. Nearly six weeks after the guild's request, the county had provided only some information, which the guild had stated was not responsive, and had not explained in the March 8, 2022, email why it took so long to understand the breadth of information being requested. Had the anticipated timeline been unreasonable or difficult to reach, the county should have communicated that to the guild in January, not a week before the guild asked for the information to be provided. Even once the request was narrowed, it took more than a month for all the information to be provided. This delay and the failure to communicate the reason for the delay contributes to finding that the county's response to the January 25, 2022, information request did not satisfy the county's duty to provide requested information.

The standard is not whether the guild was prejudiced or harmed because of the county's failure to provide information. *Yakima County*, Decision 11621-A (PECB, 2013). Rather, the

standard is whether the guild made a request relevant to the performance of its duties in administering the collective bargaining agreement and the county timely responded to the request. *University of Washington*, Decision 11499-A (PSRA, 2013). The guild made a request for information, communicated when it needed the information, and explained the purpose behind its request. The county did not begin gathering the responsive data until after the protracted email exchange. In any event, delivering the last batch of information immediately before the grievance hearing impairs the guild's ability to represent the grievant. We recognize that the county offered to delay the step 3 grievance hearing, but that offer placed the guild in the difficult position of balancing its ability to prepare for the meeting against the grievant's interests in having the case resolved expeditiously. The totality of the county's conduct in responding to the January 25, 2022, information request demonstrates a delay in responding to the request for information. *Fort Vancouver Regional Library (Washington Public Employees Association)*, Decision 2350-C (PECB, 1988) (delaying supplying information necessary to the bargaining process is an unfair labor practice). We affirm this finding of the Examiner.

Did the Examiner Err When She Dismissed the Allegation that the County Unilaterally Changed the Practice of Allowing the Guild's Attorney to Attend *Loudermill* Hearings?

The guild alleged in its complaint that the county had unilaterally changed a past practice of allowing its attorney to attend pre-disciplinary ("*Loudermill*") hearings. Recognizing that the Commission has often stated that it does not have jurisdiction over the constitutional protections provided by the *Loudermill* framework, the Examiner dismissed the allegation, concluding that the rules and procedures for *Loudermill* hearings are outside our scope. Decision 13874 at 33. The guild argues that the Examiner erred when she concluded that the Commission lacked jurisdiction to address unilateral changes in pre-disciplinary procedures. The county supports the Examiner's decision and agrees that the Commission has declined to assert jurisdiction over rights arising out of state and federal constitutions.

The Examiner's conclusion is an interpretation of chapter 41.56 RCW. On appeal, we review conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A. In this narrow context, we disagree with the Examiner and conclude that unilateral changes to mandatory subjects of bargaining, even if they arise in the context of a

Loudermill hearing, are within our statutory jurisdiction. We reverse the Examiner and remand for her to analyze the issue consistent with this decision.

A public employee's right to a pre-disciplinary hearing derives from the constitutional right to due process and any applicable state laws. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *see also, Bullo v. Fife*, 50 Wn. App. 602, 607 (1988) (finding that the Washington State Legislature created a property right in continued employment). The Commission has not asserted jurisdiction through unfair labor practice procedures to enforce due process rights guaranteed by federal and state constitutions. *City of Mountlake Terrace*, Decision 11702-A (PECB, 2014); *Okanogan County*, Decision 2252-A (PECB, 1986). We do not alter that approach here; the Commission is not the forum for defining or protecting constitutional due process rights.[18]

However, employers and labor organizations may bargain to supplement constitutional rights. For instance, assuming, *arguendo,* that constitutional due process rights do not require an employer to allow an employee representative to attend a *Loudermill* hearing, a collective bargaining agreement may provide such a right.

To establish an unlawful unilateral change in past practice, the complainant must show that there has been a material change to an established past practice and that the change concerns a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002). Discipline has long been considered a mandatory subject of bargaining. *City of Seattle*, Decision 9938-A (PECB, 2009) (finding that an employer did not change the status quo when it applied the existing disciplinary standards and appeal process); *City of Yakima*, Decision 3503-A (PECB, 1990) (finding that the employer unilaterally changed discipline by implementing new civil service rules), *aff'd on other grounds*, 117 Wn.2d 665 (1991); *Asotin County*, Decision 9549-A (PECB, 2007) (finding a cause of action when the complaint alleged a unilateral change to the just cause

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[18] Er. Ex. 6 at 11. The Loudermill Court noted that requiring "more than" notice of the charges, an explanation of the evidence, and an opportunity to respond "prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." 470 U.S. at 546. An important component of the court's decision were the rights conferred by the state governing procedures for a public employee's termination.

standard). Discipline, and the procedures an employer uses to impose discipline, have a direct impact on an employee's wages, hours, and working conditions. *City of Mountlake Terrace*, Decision 11702-A. Accordingly, a proposal in collective bargaining to provide rights in a disciplinary process concerns a mandatory subject of bargaining. A past practice on the same issue must also be a mandatory subject. The fact that these rights may be added on top of constitutional rights does not negate their status as mandatory subjects.

Our conclusion does not vary from the Commission's longstanding view that we do not have jurisdiction over the constitutional rights protected by *Loudermill*. However, the existence of those rights does not preclude the Commission from enforcing RCW 41.56 when statutory rights arise in conjunction with constitutional rights.

In light of her dismissal for jurisdictional reasons, the Examiner did not decide whether an established past practice existed and, if so, whether there was a unilateral change in that practice. We remand this issue to the Examiner to determine, using the traditional burdens of proof, whether the county unilaterally changed an established past practice of allowing guild attorneys to attend Loudermill hearings without providing the guild an opportunity to bargain. The Examiner may, in her discretion, either use the existing evidentiary record or request additional evidence and/or argument. The Examiner's decision on the guild's appeal will be subject to appeal consistent with WAC 391-45-350.

CONCLUSION

The county did not breach its good faith bargaining obligations in connection with the successor agreement. We reverse the Examiner's conclusion that the county's response to the September 17, 2021, information request violated RCW 41.56.140(1) and (4). We affirm the Examiner's conclusion that the county's response to the January 25, 2022, information request violated RCW 41.56.140(1) and (4). We reverse the Examiner's conclusion that the Commission did not have jurisdiction to determine whether the county unilaterally changed the practice of allowing guild attorneys to attend *Loudermill* hearings.

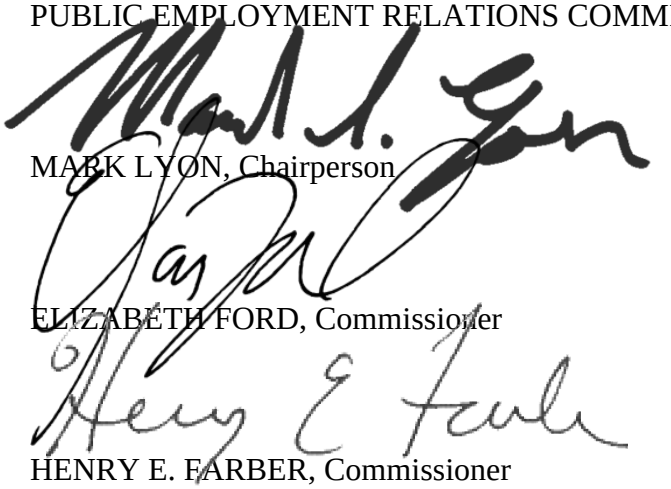
We remand to the Examiner as specified in the order below.

ORDER

We REMAND the case to the Examiner with instructions to rule on whether the county unilaterally changed an established practice of allowing guild attorneys to attend *Loudermill* hearings. With her decision on remand, we instruct the Examiner to issue a new order on all issues consistent with this decision.

ISSUED at Olympia, Washington, this 26th day of March, 2025.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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