Kitsap County, Decision 12163-A (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY JUVENILE DETENTION OFFICERS' GUILD, Complainant, vs. KITSAP COUNTY, Respondent.	CASE 25523-U-13-6535 DECISION 12163-A - PECB DECISION OF COMMISSION

Cline & Casillas, by *Christopher J. Casillas*, Attorney at Law, for the Kitsap County Juvenile Detention Officers' Guild.

Prosecuting Attorney Tina R. Robinson, by *Deborah A. Boe*, Deputy Prosecuting Attorney, for Kitsap County.

The Kitsap County Juvenile Detention Officers' Guild (union) filed an unfair labor practice complaint alleging that Kitsap County (employer) breached its good faith bargaining obligation by failing to send representatives to the table with authority to engage in collective bargaining and additionally refusing to provide information. Examiner Dianne Ramerman issued an amended preliminary ruling for employer refusal to bargain, by breach of its good faith bargaining obligations in negotiations over a collective bargaining agreement, and refusal to provide information. Examiner Ramerman conducted a hearing and issued a decision concluding that the employer did not refuse to provide information but that it did refuse to bargain by failing to send representatives to the table with authority to bargain.[1] The employer appealed.

This appeal presents two issues: (1) should the Commission consider the briefs the employer filed on appeal; and (2) did the employer breach its good faith bargaining obligation during negotiations for a collective bargaining agreement?

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1 *Kitsap County*, Decision 12163 (PECB, 2014).

Due to the employer's failure to follow the agency's rules for submission of briefs, we will not consider the employer's untimely appeal brief or the employer's "response brief." After examining all of the evidence, the totality of the circumstances does not support a finding that the employer breached its good faith bargaining obligation or that it sent negotiators to the table with insufficient authority to bargain.

BACKGROUND

Bargaining History

On July 5, 2012, the agency certified the Kitsap County Juvenile Detention Officers' Guild as the representative of juvenile detention officers and food service workers in the employer's Juvenile and Family Court Services Department.[2] The bargaining unit had previously been represented by the Office & Professional Employees International Union. Because the bargaining unit is within the Kitsap County Superior Court, there are two employers. RCW 41.56.030(12). The Superior Court is the employer for non-wage matters, and the Kitsap County Board of County Commissioners (BOCC) is the employer for wage-related matters. RCW 41.56.030(13).

The parties began negotiating their first collective bargaining agreement on September 11, 2012. The union was represented by President Pepe Pedesclaux, Vice President Jack Kissler, and attorney Christopher Casillas. The employer was represented by county Labor Relations Manager Fernando Conill for wage-related matters, and by Director of Services Michael Merringer and Detention Manager William Truemper for non-wage matters. Merringer and Truemper were unable to attend the first bargaining session on September 11, 2012. However, they attended most the other sessions.

Bargaining was slow and little, if any progress was made toward a final agreement. The employer and union met once or twice a month after the initial September 11, 2012, meeting for a total of nine additional meetings, the last of which took place on February 26, 2013.[3] The parties had an

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2 *Kitsap County*, Decision 11361-A (PECB, 2012).

3 Tr. 55:9-10.

agenda for each meeting that they discussed at the beginning of each meeting.[4] The parties also exchanged e-mails between meetings and after their last meeting on February 26, 2013.

Briefing on Appeal

Following the examiner's decision, the employer filed a timely appeal on October 27, 2014. The employer's appeal brief was due on November 10, 2014. WAC 391-45-350(6). The employer did not file a timely appeal brief. Rather, on November 13, 2014, the employer simultaneously filed its appeal brief and a motion for an extension of time to file its brief until November 13, 2014. The Executive Director granted the union until November 21, 2014, to respond to the employer's motion. On November 20, 2014, the union responded in opposition to the motion.

The Commission considered the employer's motion and the union's response. On November 26, 2014, the Executive Director, on behalf of the Commission, denied the employer's motion and notified the parties the Commission would not consider the employer's untimely appeal brief. The Executive Director gave the union until December 10, 2014, "to file an appeal brief." On December 10, 2014, the union filed a "Brief in Reply to County's Appeal."

On December 23, 2014, the employer filed a "Response to Guild's 'Reply to Appeal.'" The employer asserted that this response was its responsive brief under WAC 391-45-350(7). On December 24, 2014, the Executive Director, on behalf of the Commission, notified the parties that the Commission would not consider the employer's brief, as the rules do not provide for reply briefs to response briefs. It was further noted that the employer did not request permission to file this brief.

Later on December 24, 2014, the employer filed a motion to file a response to the union's "Reply to Appeal." On January 7, 2015, the Executive Director notified the parties that, after considering the motion, the Commission denied the employer's motion.

ISSUE 1: Should the Commission consider the briefs the employer filed on appeal?

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[4] Tr. 82:14-17. None of the agendas were offered into evidence.

ANALYSIS

Legal Standards

"The due date for any appeal brief which the party filing an appeal or cross-appeal desires to have considered by the commission shall be fourteen days following the filing of its notice of appeal or notice of cross-appeal." WAC 391-45-350(6). "The due date for any responsive brief which a party desires to have considered by the commission shall be fourteen days following the date on which that party is served with an appeal brief." WAC 391-45-350(7).

"The executive director or designee may extend the due date for an appeal brief or responsive brief. Such requests shall only be considered if made on or before the date the brief is due . . . ." WAC 391-45-350(8).

Application of Legal Standards

There is no dispute that the employer did not file its appeal brief within the time allotted by the rules. In its motion for an extension of time to file its appeal brief, filed with its brief, the employer asserted good cause because it mistakenly computed the time for filing the appeal brief.

The due date for a brief may be extended. The applicable rule requires any request for an extension to be filed "on or before the date the brief" was due. *Id.* That did not occur in this case and we denied the employer's motion.

The employer also attempted to file a brief in response to the union's appeal brief. The employer argued that the rules "allow timely submission for *any* responsive brief. WAC 391-45-350(7) . . . ." No reasonable reading of the rules supports this argument.

The employer raised two additional arguments. First, it argued that by responding to the employer's stricken appeal brief, the union waived any objection to the timeliness of the brief and it would only be fair for the Commission to consider arguments on both sides. Second, the employer argued that because the issues it raised were important, the Commission should nonetheless allow it to file a brief.

The rules provide for appeal briefs filed by the appealing party and response briefs filed by the party responding to the appeal. WAC 391-45-350(6) and (7). The rule states that an appeal brief is due "fourteen days following the filing of [the appealing party's] notice of appeal or notice of cross-appeal." WAC 391-45-350(6). The rule is clear that the due date for a response brief a party wants to have considered is "fourteen days *following* the date on which that party is served with an *appeal brief*." WAC 391-45-350(7) (emphasis added).

As the appealing party, not the party responding to the appeal, the employer was not served with an appeal brief but with a response brief. A response brief is filed by the party responding to the appeal who in this case was the union. Thus, even in the absence of an appeal brief filed by the employer, the union's brief is a response brief under the rules.

The union was entitled by the rules to file its brief in response to the employer's notice of appeal. By doing so it did not waive objection to the employer's late-filed appeal brief.

The Commission has not considered the employer's untimely appeal brief. To the extent that the union's brief responded to arguments made in the employer's untimely appeal brief, we are unable to identify any such responses from reviewing the union's response brief.

We also reject the employer's argument that, based upon "fairness," both parties should be allowed to submit briefing, even if one of the parties, as here, acts in complete disregard of our procedural rules. Adoption of such an argument would completely eviscerate our procedural rules. Those rules are adopted and followed to ensure the fair and orderly processing of matters coming before the Commission.

The employer cannot assert that it lacked full knowledge of the Commission's expectation that Commission rules are meant to be followed. We previously cautioned the employer that it disregards the Commission's rules at its own peril. *Kitsap County*, Decision 11675-A (PECB, 2013). In *Kitsap County*, Decision 11675 (PECB, 2013), the examiner struck and did not consider the overlength portion of the employer's post-hearing brief. The employer appealed the decision. In that case, while ignoring the Commission's rules, the employer pointed to rules in other

jurisdictions governing the length of briefs. As the Commission pointed out, the Commission has adopted rules governing the practice before it.

We expect that all parties bring issues to the Commission that are important. The Commission carefully reviews evidence and argument *properly* placed before it. In this case, we have considered the pleadings, all the evidence presented at hearing, the briefing before the examiner, and the union's response brief. We have not considered the employer's untimely appeal brief or "response" brief because neither was filed in compliance with the rules.

ISSUE 2: Did the employer breach its good faith bargaining obligation during negotiations for a collective bargaining agreement?

ANALYSIS

Legal Standards

Standard of Review

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review 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). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* 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).

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). "[N]either party shall be compelled to agree to a proposal or be required to make a concession . . . ." *Id.* While neither party is required to make a concession, neither party is entitled to reduce collective bargaining to an exercise in futility. *City of Snohomish*, Decision 1661-A (PECB, 1984). Parties must negotiate

with the goal of reaching an agreement, if possible. *Id., citing NLRB v. Highland Park Mfg.*, 110 F.2d 632 (4th Cir., 1940).

Thus, a balance must be struck between the obligation of the parties to bargain in good faith and the requirement that parties not be forced to make concessions. *City of Snohomish*, Decision 1661-A. This fine line reflects the 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. *Walla Walla County*, Decision 2932-A (PECB, 1988).

Distinguishing between good faith and bad faith bargaining can be difficult in close cases. *Mansfield School District*, Decision 4552-B (EDUC, 1995); *Spokane County*, Decision 2167-A (PECB, 1985). A party may violate its duty to bargain in good faith by one per se violation, such as a refusal to meet at reasonable times and places or refusing to make counterproposals. *Snohomish County*, Decision 9834-B (PECB, 2008). A party may also violate its duty to bargain in good faith through a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining, but none of which by themselves would be per se violations. *Id.* When analyzing conduct during negotiations, the Commission examines the totality of the circumstances to determine whether an unfair labor practice has occurred. *Shelton School District*, Decision 579-B (EDUC, 1984).

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;" not explaining a position or untenable explanations of a position; increasing demands during bargaining or adding new demands; entering negotiations with a take-it-or-leave-it attitude; or approaching bargaining with an attitude that bargaining is from scratch. *City of Snohomish*, Decision 1661-A; *Mansfield School District*, Decision 4552-B.

Good faith is inconsistent with a predetermined resolve not to budge from an initial position. However, a party may stand firm on a position, and an adamant insistence on a bargaining position

is not, by itself, a refusal to bargain. *Mansfield School District*, Decision 4552-B, *citing Atlanta Hilton and Tower*, 271 NLRB 1600 (1984).

Authority of Bargaining Agent

Employer representatives with final authority to ratify an agreement are not required to sit at the bargaining table. *See Sultan School District*, Decisions 1930 and 1930-A (PECB, 1984); *Kitsap County*, Decision 11675-A. Employers and employees may designate representatives to negotiate on their behalf. Both unions and employers are required to vest their representatives with sufficient authority to engage in meaningful negotiations and enter tentative agreements. *See Western Washington University*, Decision 9309-A (PSRA, 2008); *Western Washington University*, Decision 9309 (PSRA, 2006); and *Kitsap County*, Decision 11675-A.

A tentative agreement is an agreement reached by negotiators that must be ratified by their constituents. Agreements are ratified by individuals not present at the bargaining table, thus discussions necessarily must be had with constituents not present during bargaining. *Washington State University*, Decision 11749 (PSRA, 2013), *aff'd*, Decision 11749-A (PSRA, 2013).

In the public sector, parties at the bargaining table commonly need to consult with individuals not present during negotiations. If a negotiator foresees problems with agreements that are being entered into, those problems should be communicated to the other party. *Kitsap County*, Decision 11675-A.

Application of Legal Standards

To determine whether the employer had authority to bargain, we must evaluate the behavior over the course of bargaining, including the four issues on which the parties did not reach agreement – (1) ground rules, (2) non-discrimination, (3) overtime, and (4) the grievance procedure – and the termination of bargaining. Before examining those issues, we note that the parties reached agreement on other issues, including pat downs and transports, at the November 20, 2012, meeting.[5]

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[5] Tr. 98.

Ground Rules

Bargaining procedures such as ground rules are permissive subjects of bargaining. *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012). Parties are not required to reach agreement on ground rules.

The union proposed ground rules at the September 11, 2012, meeting. Conill, the only member of the employer's bargaining team present at the initial meeting, told the union he would have to discuss the proposal with unidentified individuals before agreeing to them.[6] Conill was the only member of the employer's bargaining team present at that meeting and was the employer's representative for only wage-related matters. So, it is not unreasonable that he could not agree to ground rules at the meeting and needed to review the proposal with individuals who were not present.

It was not until the fifth meeting on November 20, 2012, that the employer made a counterproposal on ground rules.[7] That counterproposal contained significant changes to the union's proposal. The parties discussed ground rules briefly then set the issue aside. No agreement was reached on ground rules. In union Vice President Kissler's opinion, no agreement was reached because the person who needed to make the decision was not at the table.[8] Other than this opinion, there is no record evidence concerning why the parties were unable to reach agreement or who the employer's negotiators were consulting.

Absent evidence that the employer's negotiators needed to consult with individuals outside of the bargaining team, we are unable to find that the inability to reach agreement on ground rules, a permissive subject of bargaining, was in bad faith or because the employer's negotiating team lacked authority to engage in meaningful bargaining.

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6 Tr. 31:12-13.

7 Exhibit 3.

8 Tr. 34:17-24.

Nondiscrimination

On October 9, 2012, the employer and union discussed their comprehensive proposals, both of which included changes to nondiscrimination language. The parties did not further negotiate concerning the nondiscrimination article until December 4, 2012.[9] There is no evidence that the issue was discussed at any later meeting.

The parties agreed to include a nondiscrimination article in the collective bargaining agreement but did not agree on language.[10] Merringer's testimony on the discussion of the nondiscrimination language is more credible than Kissler's.[11] According to Kissler, "[t]hey had to go talk to somebody about the language, I assume their legal department, but I don't know who."[12] In contrast, Merringer offered more details about why the employer wanted to review the language: the employer was redrafting nondiscrimination language and Conill wanted to compare the proposed language with what the employer had been drafting to cover its non-represented workforce.[13]

Because the employer was re-drafting other nondiscrimination language at the same time, it was reasonable for the employer to not immediately agree to changes and ask to review the language. The parties agreed, in concept, that nondiscrimination language should be included in their collective bargaining agreement. The details still needed to be worked out. In this case, the employer's reason for not agreeing to the union's proposed language at the table was reasonable and does not support a finding that the employer's negotiators lacked authority to bargain or were bargaining in bad faith.

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9 Kissler testified that the discussion occurred at some point in time, while Merringer testified the discussion occurred on December 4, 2012. We find Merringer's testimony to be more reliable on this point. Tr. 51:10-14; 152-153.

10 Tr. 152:24-25; 51:12-14, 18.

11 The examiner did not enter a credibility determination. This determination is based on the quality of the testimony available in the record.

12 Tr. 51:23-24.

13 Tr. 152:24-153:3.

Overtime

The employer proposed substantial changes to overtime on September 11, 2012. After this introductory conversation, the proposal was not discussed again until November 6, 2012, when Conill explained the proposal.[14] According to Conill, the employer's proposal was consistent with what it applied countywide.[15]

On November 26, 2012, the BOCC adopted a resolution on overtime.[16] The resolution was significantly different from the overtime proposal the employer had advanced to the union in negotiations.

After learning about the BOCC resolution, the union raised the issue at the December 4, 2012, meeting.[17] Unaware of the resolution, Conill said he would have to look into it and get back to the union.[18] The employer subsequently changed its proposal.

The employer did not keep its labor relations manager apprised of actions the BOCC took that were relevant to bargaining. While troubling, a lack of knowledge about an action taken by the governing body does not mean the employer's negotiators lacked authority to bargain.

The course of action taken by the employer's negotiator was reasonable: when presented with information about which he was unaware, the negotiator sought to verify the information. As a result of the union confronting the employer with the BOCC resolution, the employer changed its position in negotiations. The employer appears to have made a good faith effort to investigate the discrepancy between its bargaining position and the resolution and changed its position as a result. There is no evidence that Conill's lack of knowledge was because the employer sent its negotiator

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14 Tr. 100:6-12; 99:6-10; Exhibit 20.

15 Tr. 101:24-102:3.

16 Exhibit 7.

17 Tr. 102:4-5.

18 Tr. 102:21-22.

to the table without authority to bargain. It is merely evidence that there were breakdowns in communication at this employer.

Grievance Procedure

An important issue for the union was Article 10, regarding the grievance procedure. The collective bargaining agreement from the prior representative contained a bifurcated grievance procedure. At the second step, non-wage grievances were presented in writing to the presiding superior court judge. The judge's decision on the grievance was "binding for non-wage related matters." In contrast, the union could advance wage-related grievances to arbitration.

The union proposed changes to the grievance procedure, including the ability to advance non-wage related grievances to arbitration, in its initial proposal on October 9, 2012. The issue was not discussed in detail until December 4, 2012.[19]

When the parties began discussing the grievance procedure in earnest on December 4, 2012, the employer listened but did not change its proposal.[20] The union wanted arbitration for non-wage related grievances.[21] Merringer committed to discuss the proposal with the superior court judges.[22] The issue was left open.

After the December 4, 2012, meeting Merringer discussed the grievance proposal with the presiding judge. The presiding judge wanted to discuss the issue with all of the judges.[23] The union and employer met for negotiations on December 17, 2012. Merringer was scheduled to meet with all of the superior court judges on December 18, 2012, and told the union he would discuss

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19 Tr. 148:22-23; 52:19-20; 151:19-22.

20 Tr. 53:8-12.

21 Tr. 151:23-152:4.

22 Tr. 53:17-21.

23 Tr. 154:1-8.

the issue with them.[24] While Merringer was, at that time, unable to provide a more detailed rationale, he was making efforts to obtain information.

At the next negotiation meeting on January 25, 2013, both sides explained their grievance procedure proposals.[25] Casillas asked the employer's team what the word "binding" in the employer's proposal meant and whether the language would preclude the union from filing a lawsuit.[26] Merringer thought Casillas was asking a legal question that he could not answer[27] and asked Casillas to put the question in writing.[28]

The employer was required to fully explain its proposals, but it was not required to offer legal opinions. Between meetings, the parties engaged in an extensive e-mail exchange about the union's questions. Merringer also met with the superior court judges and reviewed legal analysis.[29] Merringer prepared a script of talking points explaining the judges' reasons for not wanting grievance arbitration so that he could provide the union with an accurate response on this issue at the next negotiation session.

At the next session on February 26, 2013, Casillas asked why the judges were uncomfortable with a grievance arbitration process.[30] Merringer read from his prepared notes.[31] Casillas told Merringer that he was not answering the questions. Casillas asked the same question again. Merringer provided the same answer. They engaged in this exchange at least three times.[32] The union contends the employer did not answer its questions. However, under cross-examination,

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24 Tr. 154:1-8; 54:15-21.

25 Tr. 114:6-115:2. Kissler could not remember the details of the discussion.

26 Tr. 155:22-156:1; 185:12-16.

27 Tr. 156:1-5.

28 Tr. 156:3-5; 57:2-6.

29 Tr. 161:3-16.

30 Tr. 162:5-7, 14-15.

31 Tr. 161:12-16.

32 Tr. 162:4-11.

Kissler testified that the employer later provided a detailed response explaining its rationale for the grievance proposal.[33]

While Kissler interpreted Merringer to be unwilling to engage in further discussion of the employer's rationale, the employer provided a rationale that would have allowed the union to explore alternative language. Explanations of bargaining positions are integral to good faith collective bargaining. Parties are expected to explain both their own proposals and their reasons for rejecting the proposals of the other party so that their rationale may be properly understood and new proposals formulated. In this case, the employer provided the union with the rationale for its grievance proposal. The employer was not obligated to change its rationale because the union found the rationale to be unsatisfactory.

At the meeting the union made "what if" proposals. Merringer asked the union to put forward a proposal for the employer to consider.[34] Merringer's request indicates that, while the employer was taking a hard line on the grievance proposal, the employer would consider a more formal proposal.

There is no evidence that the employer's proposal or rationale was presented in bad faith or that the employer's reasons were designed to frustrate bargaining. The employer was proposing language from the existing collective bargaining agreement. There is nothing to indicate that the employer knew such a proposal would be predictably unpalatable to the union. The record does not demonstrate a lack of authority to bargain the grievance procedure. It does demonstrate that the employer set firm parameters and explained its reasoning.

Termination of Bargaining

On February 26, 2013, the parties met at 9:00 a.m.[35] The meeting was scheduled to last until noon.[36] The parties planned to discuss the on-calls, grievance procedure, ground rules, and

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33 Tr. 117-119.

34 Exhibits 27 and 28.

35 Tr. 69:17.

36 Exhibit 13.

personnel changes with Conill departing.[37] The parties began discussing on-calls and the union's unfair labor practice on the issue.[38]

Next, the parties again discussed the grievance procedure for approximately an hour.[39] As explained above, the parties discussed the meaning of the word "binding," whether a lawsuit was precluded, and the employer's rationale.[40] The union asked questions and made what-if proposals to remove the word "binding."[41]

Merringer became frustrated with the exchange[42] and asked Conill if they could take a break. Merringer wanted to collect his thoughts and figure out how to proceed.[43] After a "blow-up," the parties took a break.[44] During the break, Merringer called his legal representative for advice.[45] Upon returning from the break, Merringer followed the advice of his legal counsel.[46]

Merringer told the union they "would beat the grievance process to death" and "were not going to make any headway."[47] Merringer was willing to discuss any other topic on the agenda, but if the union was not willing to move on, then he was finished negotiating for the day.[48] The union

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37 Tr. 69:18-23; 151:13-18; 175:16-176:10.

38 Tr. 70:2-15; 160:15-161:2.

39 Tr. 162:3.

40 Tr. 71:2-9; 136:13-17.

41 Tr. 71:17-23.

42 Tr. 162:21.

43 Tr. 162:22-25.

44 Tr. 73:3-11.

45 Tr. 163:4-6.

46 Tr. 163:11-12.

47 Tr. 163:12-13.

48 Tr. 163:13-16.

wanted to continue to discuss the grievance proposal.[49] Merringer told the union he was finished negotiating for the day and ended the meeting sometime between 10:00 and 11:00 a.m.[50] Merringer asked Conill to schedule a future meeting.[51]

The union argued that the employer unilaterally terminated bargaining and attempted to dictate the topics for discussion, thereby breaching its good faith bargaining obligation. The events of February 26, 2013, cannot be looked at in isolation and must be considered in the totality of circumstances.

Parties are not required to engage in fruitless marathon discussions. Here, the parties had discussed the grievance procedure on December 4 and 17, 2012, January 25, 2013, and February 26, 2013. The union asked at the two later meetings for the employer's rationale and to discuss the meaning of the word "binding." By February 26, 2013, the parties had discussed the employer's rationale and had enough discussion of the word "binding" for Kissler to understand the employer's position. After an hour of discussion Merringer called for a break. At times, parties will need to break from discussions to allow tempers to cool and individuals to collect their thoughts.

The employer did not terminate bargaining in bad faith or attempt to dictate topics for discussion. On February 26, 2013, the parties had an agenda that included topics other than the grievance procedure. Under the circumstances Merringer's suggestion to move on to another topic was reasonable.

After the fruitless discussion regarding the grievance procedure and the union's unwillingness to discuss another item on the agenda, Merringer's decision to end bargaining for the day was not unreasonable and not a unilateral termination of all bargaining. Merringer asked Conill to schedule another meeting with the union. This action is evidence that the employer was willing to continue

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49 Tr. 73:13-15; 163:18-20.

50 Exhibit 15; Tr. 73:14-15, 18-20; 163:18-20.

51 Exhibit 15; Tr. 164:6-11.

bargaining but that it would not continue to engage in a discussion that was going nowhere. Based on the facts of this case we cannot conclude that Merringer terminated bargaining in bad faith.

Conclusion

When many negotiation sessions have been held, looking at any one action or inaction by the parties in isolation cannot be the basis for a determination that a party breached its good faith bargaining obligation. Bargaining, in this case, was taking time. This is, in part, because the parties had a new relationship.

While this was a long standing bargaining unit, the change of representation created a new dynamic that altered the parties' relationship. This is not a situation in which the parties had years of experience working together and trust in each other and in the process. From the record we can deduce that there was a lack of trust and, as bargaining progressed, the relationship became strained.

The parties engaged in ten negotiation sessions and reached few agreements. However, the parties did reach some agreements. Initially, the parties met regularly, but meetings began to be more spread out in 2013. The length of time between meetings must be considered when evaluating the delay in some of the responses. Face-to-face negotiations are best suited to resolution of disputes, especially on tough issues requiring detailed discussions.

We cannot ignore that the time between negotiation sessions began to stretch and the parties began to engage in written back-and-forth communication rather than coming to the table to discuss their differences. We cannot conclude that the delay in the employer providing its changed positions on overtime and nondiscrimination and its rationale on the grievance procedure was due to a lack of authority on the part of the employer's bargaining team. Rather, when negotiation sessions lapse for six weeks the delay in response to proposals must also be attributed to the amount of time between meetings.

The time it took the employer to provide its rationale for its grievance procedure must be viewed in context of all of the negotiations. In December the parties began discussing the issue. Over a

month passed between each of their meetings. In written correspondence, the employer was unable to answer the union's questions. While the employer's rationale may have been delivered months after Merringer met with the judges, there was a long delay in meetings. Ultimately, by Kissler's testimony, the rationale provided answered the union's questions.

In collective bargaining it is not uncommon for a party to need to review a proposal and be unable to immediately respond, enter agreement, or change its proposal. Stakeholders may need to be consulted for change to be effected.

The evidence in this case persuades us that the employer was taking back information to be able to develop new proposals, gather information, and look at internal consistency, not that the employer was consulting with individuals, other than the superior court judges or BOCC, who were not present for bargaining but that maintained veto power and authority to bargain. The employer's efforts to gather information were made in good faith.

Authority to bargain comes in various forms. Each party must vest its negotiators with the authority to engage in meaningful collective bargaining, which includes the ability to explain proposals, respond to proposals, and enter agreements. A governing body may set parameters. A party may choose to take a firm position and instruct its negotiator to maintain that position. That does not mean that the negotiator has not been vested with the authority necessary to engage in collective bargaining if that decision is made in good faith.

Merringer and Conill explained the employer's proposals and, when they could not, took appropriate steps to gather additional information. Here, there is no evidence that the employer was attempting to frustrate the negotiation process by maintaining a firm position on the grievance procedure.

In this case, the employer's negotiators had authority to enter tentative agreements and did so; listened and engaged in meaningful discussion; and, when necessary, consulted with individuals not at the table to further develop proposals. The employer's team was able to change its positions.

NOW, THEREFORE, it is

ORDERED

Findings of Fact 1 through 9 and 16 through 21, issued by Examiner Dianne Ramerman, are AFFIRMED and adopted as the Findings of Fact of the Commission. Findings of Fact 16 through 21 are incorporated below and renumbered as Findings of Fact 19 through 24. Findings of Fact 10 through 15 and 22 through 26 are vacated and the following Findings of Fact are substituted:

10. On October 9, 2012, the parties discussed shift bidding, pat downs, and transportation. The union presented a full proposal, and the employer presented a second full proposal.

11. On November 6, 2012, the parties met. Conill provided the union with the employer's revised proposal on economic issues including medical benefits and wages.

12. On November 20, 2012, the parties met and discussed ground rules, on-calls, pat downs, bus transports, and a personnel issue. The employer provided the union a written position on the on-call issue. The employer explained its position during discussions. The parties were able to reach agreement on pat downs and bus transports.

13. On December 4, 2012, the parties met and discussed nondiscrimination, the grievance procedure article, and overtime.

14. The parties agreed to include a nondiscrimination article in the collective bargaining agreement but did not agree on language. Merringer's testimony on the discussion of the nondiscrimination language is more credible than Kissler's. The employer wanted to review the language: the employer was redrafting nondiscrimination language and Conill wanted to compare the proposed language with what the employer had been drafting.

15. The union raised the BOCC overtime resolution at the December 4, 2012, meeting. Unaware of the resolution, Conill said he would have to look into it and get back to the

union. As a result of the union raising the resolution as an issue, the employer changed its proposal.

16. Between the December 4 and 17, 2012, meetings, Merringer discussed the grievance proposal with the presiding judge.

17. On December 17, 2012, the parties met and discussed the grievance procedure. Merringer was scheduled to meet with all of the superior court judges on December 18, 2012, and told the union he would discuss the issue with them.

18. At the January 25, 2013, meeting, both sides explained their grievance procedure proposals. The union asked what the word "binding" in the employer's proposal meant and if the language precluded the union from filing a lawsuit. Merringer asked Casillas to put the union's question in writing.

19. As requested, Casillas sent an e-mail to Conill and Merringer on February 7, 2013, stating, "I had asked whether it was the [employer's] position that, should the [union] ever agree to this provision, that it would constitute a waiver of its bargaining rights to, for example, file a lawsuit against the [employer] and Superior Court .... Also, irrespective of whether it is intended to be a waiver or not, can you please explain the [employer's] rationale for such a provision.... It's incumbent upon the [employer] to explain ... what that seeks to accomplish...."

20. On February 8, 2013, the employer's legal counsel, responded to the union's February 7, 2013, e-mail. First, the employer's legal counsel's letter restated Casillas's questions. Then, it cited the statute stating that a collective bargaining agreement may provide for binding arbitration. It concluded by adding that the superior courts have original jurisdiction in all cases in equity and in law.

21. On February 8, 2013, Casillas wrote to Merringer stating that the employer's February 8, 2013, letter was in no way responsive to either of the questions he had asked. He wrote, "I

was not asking for an explanation of what is mandated in the collective bargaining statute or how the superior court's general jurisdiction operates." He added that the employer has a duty to bring to the table those individuals who can explain its proposals, consider responses from the union and make counterproposals.

22. On February 14, 2013, Merringer responded to Casillas's objections by stating that he believed the employer's legal counsel answered the union's questions, and stating that he believed the members at the table can and have explained their positions, but were not prepared to offer legal opinions or give legal advice. Nevertheless, on cross-examination, Merringer admitted that in comparing the union's questions in its February 7, 2013, e-mail with the employer's legal counsel's response, the employer did "[n]ot specifically" respond to the union's question about waiver and that the employer did not respond to the union's question asking the employer to explain its rationale for its grievance procedure proposal.

23. On February 14, 2013, Casillas responded to Merringer's e-mail stating that he did not consider Aufderheide's letter as in any way responsive to what he had asked on February 7, 2013. Casillas added that the letter did not articulate the employer's rationale for its proposal, but instead took a position about whether arbitration is statutorily required. Further, he added that he was not asking for a legal opinion, but rather for an explanation of the employer's position and its intent behind a specific proposal so that the union could understand and thereby make a counterproposal.

24. On February 15, 2013, Merringer thanked Casillas for his e-mails and stated that he "look[ed] forward to continuing the discussion at [their] next scheduled meeting . . . ."

25. On February 26, 2013, the parties met. They discussed on-call employees, an unfair labor practice filed by the union, and the grievance procedure. The meeting ended abruptly after the discussion of the grievance procedure.

26. At the February 26, 2013, meeting, Casillas asked why the judges were uncomfortable with a grievance arbitration process. Merringer read from his prepared notes. Casillas told

Merringer that he was not answering the questions. Casillas asked the same question again. Merringer provided the same answer. They engaged in this exchange at least three times. The union contends the employer did not answer its questions. However, under cross-examination, Kissler testified that the employer later provided a detailed response explaining its rationale for the grievance proposal.

27. At the meeting the union made "what if" proposals. Merringer asked the union to put forward a proposal for the employer to consider. Merringer's request indicates that, while the employer was taking a hard line on the grievance proposal, the employer would consider a more formal proposal.

28. Merringer became frustrated with the discussion regarding the grievance procedure. Merringer requested a break, and the parties took a break. Merringer consulted legal counsel during the break.

29. Upon returning from the break, Merringer told the union they "would beat the grievance process to death" and "were not going to make any headway." Merringer was willing to discuss any other topic on the agenda, but if the union was not willing to move on, then he was finished negotiating for the day. The union wanted to continue to discuss the grievance proposal. Merringer told the union he was finished negotiating for the day and ended the meeting sometime between 10:00 and 11:00 a.m. Merringer asked Conill to schedule a future meeting.

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. As described in Findings of Fact 4 through 29, the employer did not breach its good faith bargaining obligations in violation of RCW 41.56.140(4) and (1).

ORDER

The Order issued by Examiner Dianne Ramerman is VACATED. The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 2nd day of June, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ VANESSA SMITH

CASE NUMBER:	25523-U-13-06535	FILED:	03/11/2013	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	COURT SUPPORT				
DETAILS:	25706-S-13-0353				
COMMENTS:					

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