STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY CLERKS' ASSOCIATION, Complainant,	)	CASE 20074-U-06-5105
vs.	)	DECISION 9834-B - PECB
SNOHOMISH COUNTY, Respondent.	)	DECISION OF COMMISSION

Cogdill Nichols Rein Wartelle Andrews, by *Douglas M. Wartelle*, Attorney at Law, for the union.

Perkins Coie, LLC, by *Lawrence B. Hannah*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by Snohomish County (employer) seeking review and reversal of the Findings of Fact, Conclusions of Law, and Order issued by Examiner Starr Knutson.[1] The Snohomish County Clerks' Association supports the Examiner's decision.

ISSUES PRESENTED

1. Did the employer's conduct during its negotiations with the union for a first collective bargaining agreement violate its obligation to bargain in good faith under Chapter 41.56 RCW?

[1] *Snohomish County*, Decision 9834 (PECB, 2007).

2. Did the employer interfere with protected employee rights through statements made by the County Executive during a conversation with a bargaining unit employee at an ice hockey game?

3. If this Commission sustains the Examiner's findings and conclusions that the employer refused to bargain in good faith, was the Examiner's remedial order that sends the parties directly to interest arbitration to establish the terms and conditions of the collective bargaining agreement appropriate?

For the reasons set forth below, we affirm the Examiner's findings and conclusions that the employer violated its good faith bargaining obligation through its conduct. This record demonstrates that the employer failed to bargain from the status quo, employed a strategy designed to intentionally frustrate and delay bargaining, and regressively bargained by withdrawing certain proposals. We also affirm the Examiner's decision that the statements made by the County Executive during a conversation with a bargaining unit employee interfered with protected employee rights.

Although we affirm the Examiner's findings and conclusions that the employer committed an unfair labor practice, we amend the Examiner's order to provide for a twenty-one calendar day period to allow the employer and union the opportunity to reach a mutually satisfactory collective bargaining agreement before sending the parties to interest arbitration, and include the possibility for employer reimbursement of expenses paid by employees for health insurance benefits under the pre-existing contract.

ANALYSIS

Standard of Review

This 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*, Decision 7088-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. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

FACTUAL SITUATION

The general facts of this case are straight forward. In 2005, the Snohomish County Clerks' Association (union) filed a petition for investigation of a question concerning representation, seeking to represent the bargaining unit employees at the Snohomish County Clerks Office. The Washington Council of County and City Employees (Council 2) had previously represented those employees for purposes of collective bargaining. Following a representation election, the union was certified as the exclusive bargaining representative of the employees. *Snohomish County*, Decision 8864 (PECB, 2005).

Following the election, the union and the employer commenced negotiations for their first collective bargaining agreement. At best, contract negotiations were slow and contentious. The employer based its initial proposal on the county personnel code,

while the union modified the collective bargaining agreement that had previously been in effect when Council 2 represented the employees. The employer and union spent a considerable amount of time dissecting the union's initial proposal.

In its complaint, the union alleged that the employer deliberately employed tactics designed to frustrate and prolong bargaining. The union also alleged that the employer was punishing the employees because the employees had decided to change their bargaining representative. At the time the union filed its complaint, a period of approximately ten months, the parties had not agreed to any ground rules regarding the negotiations, and had not reached a tentative agreement regarding any mandatory subject of bargaining. The union subsequently amended its complaint to include additional refusal to bargain allegations and an independent interference violation.

ISSUE 1 - BARGAINING IN GOOD FAITH

Applicable Legal Standard

We first examine whether the record supports the Examiner's findings and conclusions that the employer violated its good faith bargaining obligation. Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as the mandatory subjects of bargaining under *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on

a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); 41.56.150(1) and (4).

A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. While the parties' collective bargaining obligation under RCW 41.56.030(4) does not compel them to agree to proposals or make concessions, a party is not entitled to reduce collective bargaining to an exercise in futility. *Mason County*, Decision 3706-A (PECB, 1991)(totality of the evidence demonstrated that employer entered negotiations with a predetermined outcome); *see also Flight Attendants v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992)(making contract proposals that employer knew were consistently and predictably unpalatable to the union and failing to exert every reasonable effort to reach agreement violated the Railway Labor Act).

Bargain From the Status Quo

Good faith bargaining is never from scratch; rather, good faith bargaining occurs when the parties begin from the status quo. *Shelton School District*, Decision 579-B (EDUC, 1984). In *Shelton School District*, which was one of the earliest complaints ever filed with this Commission, a school district and a newly certified bargaining unit of teachers were negotiating an initial collective bargaining agreement. As part of its initial offer, the employer proposed a longer school year than what was previously in effect, and saw any shortening of that year as a concession made by the employer. In effect, the employer arbitrarily raised the pre-

existing standard for purposes of bargaining. In finding the employer's proposal in violation of its good faith bargaining obligation, the Commission clearly stated that pre-existing terms and conditions are the starting point for any negotiations between the parties.

Similarly, where employees in a bargaining unit vote to change their exclusive bargaining representative, the terms and conditions of employment contained within the previously negotiated collective bargaining agreement delineate the starting point or status quo for any subsequent negotiations. Bargaining from the status quo does not mean that the previous contract must be re-adopted as the new agreement, but the terms and conditions of employment that were previously in place become the starting point for negotiations and the standard for determining personnel practices until a new agreement can be reached. *See City of Kalama*, Decision 6739 (PECB, 1999).[2] This is not to say that an employer is somehow prohibited from making proposals that negatively impact the terms and conditions of employment, provided, however, that the employer communicates valid reasons for such proposals or can provide supporting evidence for the need for such an impact. Absent evidence of such communications, an employer could very well be found to have violated its good faith bargaining obligation.

Hard Bargaining vs. Surface Bargaining

Differentiating between lawful "hard bargaining" and unlawful "surface bargaining" can be difficult in close cases. This fine line in differentiating the two reflects a natural tension between the obligation to bargain in good faith and the statutory mandate

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[2] However, *Cf. Asotin County*, Decision 9549-A (PECB, 2007)(questioning, but not deciding, whether a grievance arbitration clause is not a term or condition of employment).

that there be no requirement that concessions be made or an agreement be reached. *Walla Walla County*, Decision 2932-A (PECB, 1988). An adamant insistence on a bargaining position is not, by itself, a refusal to bargain. *Mansfield School District*, Decision 4552-B (EDUC, 1995), *citing Atlanta Hilton and Tower*, 271 NLRB 1600 (1984). However, good faith is inconsistent with a predetermined resolve not to budge from an initial position. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Totality of the Circumstances

In *Shelton School District*, Decision 579-B, this Commission adopted a totality of circumstances approach when analyzing conduct during negotiations. The Commission found that the employer committed an unfair labor practice, specifically noting:

> [t]he [employer] created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation. A position taken by a party in a context of good faith bargaining may be perfectly lawful, while the same position if adopted as part of an overall plan to frustrate agreement, and to penalize employees for trying to exercise their statutory right to bargain collectively, cannot be given agency imprimatur.

Thus, a party may violate its duty to bargain in good faith either by one per se violation, such as refusal to make counter proposals, or through a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining, but by themselves would not be a per se violation. It is important to stress, however, the evidence must support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989). Because this standard permits an examiner the flexibility to subjectively examine a party's otherwise lawful conduct in relation

to its other conduct to find an unfair labor practice, an examiner must explain his or her reasoning as to why the totality of the employer's conduct constitutes an unfair labor practice.

Application of Standards

We find ample evidence in this record to support specific findings that the employer violated its good faith bargaining obligation by refusing to bargain from the status quo and engaging in surface bargaining.

Failure to Bargain from the Status Quo

From the outset of contract negotiations, the employer insisted on utilizing its own personnel rules as a basis for its contract proposal. In fact, the employer's first "proposal" was simply a recognition clause, an hours of work clause, a management rights clause, a clause giving the employer the unfettered right to contract out bargaining unit work, a no strike clause, and a provision that all other terms and conditions of employment were controlled by the employer's personnel rules, Title 3A of the Snohomish County Code. That proposal removed significant terms and conditions of employment, including agency shop, compensatory time, job sharing, deferred compensation, just cause for discipline,[3] and provision for grievances to be heard by a neutral arbitrator.

At hearing, the employer's chief negotiator testified that the employer viewed the employees' repudiation of their previous bargaining representative, Council 2, as a repudiation of the contract that Council 2 negotiated on the employees' behalf. Furthermore, when pressed to explain why the employer sought the county personnel code as the basis for its proposal, the employer

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[3] Personnel Rule 3A.02.130 provides that *discharge* of an employee had to be for cause, but the personnel rules are silent as to discipline.

testified that it viewed the bargaining unit employees as having more in common with its non-represented employees.

Not only is the employer's assumption regarding the motivation of the employees misplaced, but the employer also ignores the fact that its obligation was to bargain from the status quo.[4] The employer's initial proposals, which were based upon the county personnel code, rolled back most, if not all, of the terms and conditions of employment that the employees had previously secured through bargaining. For example, section 3A.01.040 of the personnel code reserved to the employer the right to take any disciplinary action. This represents a substantial change from the discipline "for cause" standard that previously applied to these employees. Additionally, the employer's proposals completely eliminated the union security provision and a grievance process with review by a neutral arbitrator.

In effect, the employer negotiated with the union as if a blank slate existed, other than the county personnel code, with respect to mandatory subjects of bargaining.[5] The employer committed an unfair labor practice by not bargaining from the status quo.

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[4] Employers should never attempt to second guess the motives behind their employees' desire to change bargaining representatives. Under Chapter 41.56 RCW, employees own the right to organize and designate a collective bargaining representative of their choosing. An employer who pries or questions into the motives or wisdom of their employees' selection of a bargaining representative does so at its own peril.

[5] This is not to say that an employer is not permitted to attempt to "win back" certain concessions that it previously gave away through bargaining, provided any attempt to do so begins from the status quo of the terms and conditions of employment in place at the time bargaining commences.

Surface Bargaining

The Examiner also found that the employer demonstrated that it had engaged in a pattern of conduct designed to frustrate and delay bargaining in order to avoid reaching an agreement. We agree, and examine each instance as it related to the totality of the employer's conduct.

The Line-by-line Examination of the Union's Proposal

Shortly after the employer offered its first proposal, the union also opened with an initial proposal. The union based its proposals on the 2002-2004 collective bargaining agreement that Council 2 had negotiated on behalf of the employees, but made some changes and additions to that contract, including an employee bill of rights clause, a sick leave incentive program, and a tuition reimbursement program. Neither proposal contained a wage provision. In July 2005 the union presented its first wage increase proposal, which included a cap on employee contributions to employee health benefit premiums.

Following the union's submission of its first proposal, the parties spent the next eight negotiation sessions going over the union's proposal line-by-line to track the changes. The employer's negotiator testified that because the union did not track all of the changes in its proposal, he needed an explanation of each change to the contract so he could better understand the union's position, and the only way to accomplish this was a thorough examination of the document.

We begin by noting that when the employer requested a copy of the collective bargaining agreement that tracked all of the changes that the union had made to the status quo, the union should have

provided the employer its proposal in such a format.[6] While there is no obligation for either an employer or bargaining representative to create a document in situations such as this, parties should take appropriate steps to assist the bargaining process. *See City of Anacortes*, Decision 7768 (PECB, 2002)(parties are not compelled to create documents).

A line-by-line examination of a complete proposal can be a useful bargaining tool, so long as the process is intended to be productive to the negotiating process and not part of an overall strategy to frustrate or delay negotiations. Here, while the employer may have used this type of analysis to help understand the union's position, we agree with the Examiner's findings and conclusions that, in this case, the amount of time the employer spent going over a proposal that for the most part should have been familiar, contributed to an overall intent on the part of the employer to frustrate and delay the process.[7] The employer's chief negotiator testified that he was familiar with the basis for the union proposal, the 2002-2004 contract negotiated between the employer and Council 2, because he had negotiated for the employer with Council 2 since 1999. An examination of the union's proposal and this previous contract demonstrates that the pertinent parts of both agreements were not that different. Thus, any claim that eight sessions were needed to review the proposal stains credibility.

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[6] However, it was not a per se violation of the statute for the union not to do so.

[7] On appeal, the employer argues that the three union witnesses did not attend all eight of the negotiating sessions, and thus could not substantiate that the majority of time was spent going over the agreement line by line. However, even the employer's chief negotiator testified that the time was spent trying to "plow through [the] proposal and discover what was behind it".

Failure to Explain Proposals

The Examiner found that employer's failure to explain its proposals contributed to the finding that the totality of the employer's conduct demonstrated a failure to bargain in good faith. We agree.

The employer's May 3, 2005 proposal simply cross-referenced the county's personnel code for the terms and conditions of employment. The employer later submitted a proposal that incorporated certain sections of the personnel code. The union expressed its displeasure to the employer regarding its first proposal, and argued that by simply referencing the county personnel code, the employer could change the personnel code, and therefore the agreement, at any time. When the employer returned with an updated proposal in September 2005, instead of bargaining from the status quo, the employer simply replaced the cross-reference to the county code with the actual language of the different code sections as they related to each subject of employment, as if this represented some substantive change in its position. Following the union's review and rejection of the employer's September 2005 proposal, it asked the employer to explain its reasoning for removal of many of the terms and conditions of employment. Despite the union's request for an explanation, the only response that the employer offered was "sorry, that is the way it is".

In the subsequent bargaining sessions in late 2005 and early 2006, the parties continued to negotiate. In November 2005, the employer provided the union with a comprehensive proposal that included a compensation package. In December 2005, the union provided the employer with a side-by-side comparison of its proposal and the employer's September 2005 proposal. However, it was only on April 27, 2006, *after* the union filed its unfair labor practice complaint, that the employer finally provided the union with a document outlining the reasons for its proposal.

On appeal, the employer argues that the Examiner not only erred in second-guessing the employer's rationale, but also erred by imposing a requirement that rationales have to be provided in written form upon request of the opposing party. While we agree with the employer that rationales need only be communicated, and there is no obligation to provide written rationales, we disagree with the employer's argument that the Examiner committed any error in her finding that the employer's behavior contributed to its unfair labor practices. Based upon the facts of this case, the employer's failure to provide any timely rationale for its proposal contributed to its unfair labor practices. Furthermore, we find nothing wrong with the employer asking the union to explain its proposals, and we encourage open communication between the parties during negotiations.

Here, the employer breached its own good faith bargaining obligation by failing to adequately explain its own bargaining proposals when pressed by the union for its rationale. The employer response during the negotiations of "that is the way it is" was inadequate, particularly in light of the employer's insistence on spending numerous sessions dissecting every nuance of the union's proposal.

While the employer's April 26, 2006 explanation memorandum provided the union with insight regarding the rationale, this document came several months and several negotiating sessions after the union asked the employer for its reasoning, and after the union filed its complaint. Had the employer provided this document in a timely manner, it might have mitigated, but not necessarily cured, this violation of its good faith bargaining obligation.[8]

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[8] Even where an offending party takes corrective action to cure its unfair labor practice prior to the hearing on the matter, that party can still be found in violation of the law for the underlying act.

Cancellation of Bargaining Session

The employer canceled the March 15, 2006 bargaining session based upon a newspaper article that appeared in the *Everett Herald* regarding the progress of negotiations, including a letter from Snohomish County Clerk Pam Daniels to County Executive Aaron Reardon expressing concern regarding the employer's health benefit offer to the union, particularly in light of the fact that the employer was not making similar demands of any other represented Snohomish County employees. The employer's chief negotiator testified that Deputy County Executive Mark Soine instructed him to cancel the meeting because Soine thought that going to the press was inappropriate.

The employer argues that it was justified in canceling the bargaining session to allow its bargaining team to regroup in light of the union's attempts to utilize the press to leverage negotiations. We disagree.

There is no indication that the union was responsible for the content of the article or for forwarding a copy of Daniels' letter to the press. Rather, the Examiner found, and this record supports, a finding that Soine canceled the meeting based upon his anger over the article itself, whatever the source.[9] Furthermore, even if the union had contacted the press, the parties did not have any ground rules in place prohibiting such conduct.[10] The union had expressed its concern numerous times to the employer that it wanted

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[9] This Commission is not in a position to question the Examiner's credibility finding that Soine was, and remained, angry regarding the newspaper article.

[10] An employer agent who interjects himself into the bargaining process in the manner that Soine did here must be available to the exclusive bargaining representative to communicate the reasons for her or his actions.

to have health benefits in place because the open enrollment for medical benefits was imminent and health benefit costs were increasing. This unwarranted delay demonstrated yet another example of how the employer's conduct frustrated bargaining. Thus, we agree with the Examiner that the employer's canceling of the March 15, 2007 negotiating session was another example of a pattern on the part of the employer designed to frustrate and delay bargaining with the union in violation of its good faith bargaining obligation.

Other Violations of the Good Faith Obligation:

Regressive Bargaining

Regressive bargaining occurs when one party in some manner evidences an attempt to make a proposal less attractive. In order for a party to regressively bargain in violation of RCW 41.56.140(1), the bad faith element must infect the collective bargaining process. For example, a party bargaining in a manner to avoid reaching an agreement violates its statutory duty to bargain in good faith. RCW 41.56.140(4); RCW 41.56.150(4); *City of Redmond*, Decision 8879-A (PECB, 2006); *City of Redmond*, Decision 8863-A (PECB, 2006).

Oral Proposals

Throughout the negotiating process, the employer's chief negotiator informed the union that he believed that the union would receive the same compensation package that other bargaining units would receive. However, when the employer actually presented the union with a compensation package, the employer's proposal was substantially less than other unions received. Because the employer's chief negotiator never informed the union of the possibility that the employer could propose a wage package that was substantially

lower than those that other unions received, the employer created a false impression and expectation for the union.[11]

Additionally, bargaining unit employees expressed concern with the employer's grievance proposal numerous times, specifically objecting to the lack of neutral arbitration for settlement of disputes. Not only did the employer's proposal eliminate the right to have grievances heard by a neutral arbitrator, it arguably eliminated the right to appeal adverse grievance decisions to a superior court. While the employer stated at hearing that it believed that the union could file a court action to review any adverse decision, the language of the employer's proposal never stated so.

These examples of regressive and inconsistent bargaining proposals demonstrate and support the Examiner's findings that the totality of the employer's conduct demonstrated a lack of good faith and an intent to frustrate and delay bargaining. With respect to the wage package, the inconsistencies between the employer's oral statements and proposal, without explanation, created a moving target which made it difficult, if not impossible, for the union to make legitimate counter proposals. With respect to the employer's statement that adverse grievances could be appealed to superior court, it is axiomatic that collective bargaining agreements be reduced to written document, and the employer's failure to reduce its total proposal to writing further demonstrates its lack of good faith.

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[11] Even if the economic circumstances dictated that the employer needed to propose a wage package that was lower than what it initially indicated, the employer never expressed that possibility to the union.

Evidence Does Not Support Other Regressive Bargaining Finding

The Examiner found that the employer committed an unfair labor practice when its March 31, 2006 proposals lacked job sharing, a salary survey, and deferred compensation that had been included in its December 21, 2005 offer. Specifically, the Examiner found that the employer "struck out" the above-mentioned provisions, while other provisions that it was satisfied with were marked as "okay", and failed to explain the reasons for its change of position. According to the Examiner, the employer's failure to explain its reasons for deleting the provisions made its proposal less attractive on its face, and constituted regressive bargaining.

On appeal, the employer argues that the Examiner misinterpreted the evidence by confusing the intent of the December 21, 2005 proposal with the employer's March 31, 2006 proposal. We agree. We find that substantial evidence fails to support the Examiner's conclusion that the employer regressively bargained in this instance. The problem here is that the December 21, 2005 proposal combined the parties' proposals, and we are unable to discern which proposal belongs to which party. Compounding the problem is the employer's March 31, 2006 proposal, which only covered certain provisions and was not a "complete" proposal. While we agree with the Examiner that the employer should have explained the purpose of the document, we cannot say that the omission of certain provisions from the March 31, 2006 proposal, without explanation, constitutes a per se regressive bargaining violation.

ISSUE 2 - Certain Communications Interfered With Protected Rights

Totality of Employer's Conduct Interfered With Protected Rights

Employer interference with protected rights in violation of RCW 41.56.140(1) may be found where a typical employee could reasonably

perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant is not required to show intent or motive for interference, or that the employee involved was actually coerced, or that the respondent had union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

Communications to bargaining unit employees can also interfere with protected employee rights in violation of RCW 41.56.140(1) under one, any combination, or all of the following criteria:

- Is the communication, in tone, coercive as a whole?
- Are the employer's comments substantially factual or materially misleading?
- Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?
- Did the union object to such communication during prior negotiations?
- Does the communication appear to have placed the employer in a position from which it cannot retreat?

Grant County Public Hospital District 1, Decision 8378-A (PECB, 2004).

When this Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights. *See Battle Ground School District*, Decision 2449-A (PECB, 1986). Although derivative interference violations "automatically" attach to any refusal to

bargain violation, it is generally unnecessary for an examiner to explain her or his reasoning for finding the derivative interference violation.

That standard applies here, and to the extent that they are consistent with the analysis outlined above, substantial evidence supports the Examiner's findings and conclusions that when the employer refused to bargain in good faith with the union, it interfered with protected employee rights.

However, the Examiner went beyond finding a derivative interference violation based upon the employer's conduct at the bargaining table. Specifically, the Examiner noted that the totality of the employer's conduct surrounding bargaining, as well as statements made by County Executive Aaron Reardon to bargaining unit employees away from the table, also independently interfered with protected employee rights because an employee in the same situation could reasonably view the employer's actions as retaliation for changing bargaining representatives. We agree with the Examiner that the employer's conduct, tactics, and statements during the entire course of bargaining demonstrate a gross failure to live up to its statutory requirement to bargain in good faith with the employees' bargaining representative.

Application of Standard

The Examiner found that during a conversation between Reardon and bargaining unit employee Kendra Mooney[12] at an Everett Silvertips hockey game, that Reardon made inappropriate comments concerning the union's attorney and his bargaining tactics, and that Reardon stated that as long as SCCA chose to be represented by the law firm

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[12] There is no relationship between Commissioner Douglas G. Mooney and Kendra Mooney.

it selected, the county negotiations would not progress. Although the testimony of the four witnesses to the conversation differs, the Examiner found Mooney's testimony credible, and therefore found an independent interference violation based on the negative impact these comments had on the employees' exercise of their protected rights.

We begin by noting that this Commission attaches considerable weight to the credibility determination of our examiners, and we will not disturb a credibility finding unless it is not supported by the evidence. While the testimony of Reardon and Mooney differ on several accounts, including the specific details of the conversation, as well as the tone and temperament of the conversation, the Examiner's credibility determination is nevertheless supported by substantial evidence.

Furthermore, Reardon's statement regarding the employer's unwillingness to negotiate with the union's chosen bargaining representative also reinforces the Examiner's finding that the employer engaged in dilatory tactics in an effort to delay or frustrate agreement.[13] We affirm the Examiner's findings and conclusions that the employer independently interfered with protected employee rights.

ISSUE 3 - The Examiner's Interest Arbitration Remedy

As a threshold matter, regardless of the appropriateness of the Examiner's interest arbitration remedy, we must discuss the impact of Council 2 representation case on this proceeding. Council 2

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[13] Employers always have been free under the statutes this Commission administers to file unfair labor practice complaints against unions who may be violating their own obligation to bargain in good faith.

filed Case 20896-E-07-3220 seeking to once again become the exclusive bargaining representative of the employees at issue in the instant case. Here, the Commission certified the union as the exclusive bargaining representative of the employees on February 8, 2005, and Council 2 filed its petition on February 6, 2007, well after the one-year certification bar expired, but also well after the union filed its complaint.

In *Lewis County*, Decision 645 (PECB, 1979), the Commission extended the one-year certification bar in instances where the exclusive bargaining representative had not enjoyed the benefit of at least one full of recognition and good faith bargaining that it is entitled to. The Commission found that because the employer's conduct tended to undermine a union's status as exclusive bargaining representative, the appropriate remedy was to re-compute the "certification bar year" from the date on which good faith bargaining commenced pursuant to the Commission's order. *Lewis County*, Decision 645.[14]

For all of the reasons set forth above, we find these previously announced principles to be applicable to this case, and afford this union the opportunity to enjoy a one-year period where they negotiate with it in good faith. As such, we extend the certification bar applicable to the union for one-year from the date that the employer commences to bargain in good faith. Furthermore, because the certification bar is extended, we direct the Executive Director to dismiss Case 20896-E-07-3220 as being untimely.

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[14] In *Morton General Hospital*, Decision 2276-A (PECB, 1985), the Commission extended this principle to unfair labor practice complaints filed after the certification bar expired to provide for a reasonable period of bargaining.

We next turn to the Examiner's remedy of interest arbitration.

Applicable Legal Standard

The Legislature empowered this Commission to prevent and remedy unfair labor practices. RCW 41.56.160. The fashioning of remedies is a discretionary action of the Commission. *City of Seattle*, Decision 8313-B (PECB, 2004). When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish its purpose. *METRO v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). With that purpose in mind, the Supreme Court interpreted the statutory phrase "appropriate remedial orders" as including those remedies necessary to effectuate the purposes of the collective bargaining statute and to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d at 633. The Commission's expertise in resolving labor-management disputes was also recognized and accorded deference. *METRO*, 118 Wn.2d at 634 (*citing Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983)).

When reviewing an examiner's decision to grant or deny an extraordinary remedy, this Commission will put itself in the same position as a reviewing court.[15] This Commission will not disturb a discretionary award of an extraordinary remedy unless the exam-

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[15] In cases where a party is found to have violated its good faith bargaining obligation and interfered with protected employee rights, the standard remedy is to issue a cease and desist order, as well as requiring the posting of notices in the workplace that the offending party will not commit the offending action again. Additionally, the typical order also requires a public reading of the posted notice into the record at a formal meeting of the respondent's governing body, and an order to return to bargaining upon the complainant's request.

iner's exercise of discretion was manifestly unreasonable or the decision was based on untenable grounds. *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809 (2000) (citations omitted). However, when this Commission chooses to amend or modify an examiner's remedy, it will explain its reasoning in doing so. *See, e.g., Western Washington University*, Decision 9309-A (PSRA, 2008)(modifying an examiner's remedy where employer's history of recalcitrant behavior warranted extraordinary remedy).

Application of Standard

Here, the Examiner ordered the extraordinary remedy of interest arbitration based upon her finding that the employer's behavior was undertaken in reprisal for the employees' exercise of their fundamental right to select a bargaining representative of their choosing, and the perception that the employer was retaliating against bargaining unit employees for the selection of their bargaining representative that is supported by the independent interference violation. The Examiner also considered the financial impact that the employer's tactics had on employees.

The employer asserts that imposition of interest arbitration is an inappropriate remedy in this case. The employer bases is argument on the *METRO* case, including the fact that in *METRO* the employer had a long history of not only refusing to bargain with the exclusive bargaining representative of the employees at issue, but also refused to comply with previous bargaining orders issued by this Commission. The employer argues that interest arbitration should be reserved only for those situations where there is a clear history of bad faith bargaining and where there is a clear indication such bad behavior will continue despite our order for the employer to bargain in good faith. We agree with the employer that this is the standard to be applied, but disagree that interest arbitration is not appropriate given the facts of this case.

The employer is correct that the Supreme Court explicitly approved interest arbitration for the most extreme cases of recalcitrant behavior. We not only agree with the employer's assertion that interest arbitration should be reserved for extreme cases, we agree with the Examiner that this case presents such extreme dereliction of the employer's good faith obligation warranting an interest arbitration remedy.

Our reasons for ordering this extraordinary remedy are firmly rooted within the evidence which strongly suggests the employer is intentionally punishing these employees for changing representatives, and that these bargaining unit employees will continue to suffer until a collective bargaining agreement is reached.[16] Without a meaningful potential for an end to these negotiations, we see no other way for these employees to exercise their right to collectively bargain with this employer. Our conclusion is also supported by the bargaining unit employees' filing of a change of representation petition from their current bargaining representative back to Council 2 in an attempt to minimize the impact these employees have already suffered based upon the employer's conduct.[17]

Furthermore, we find in cases such as this, where an employer's conduct is a deliberate attempt to undermine the otherwise lawful exercise of employees' rights under Chapter 41.56 RCW, the appropriate extraordinary remedy by this Commission or one of our examiners should reflect a purpose to bring about the most appropriate effectuation of the act. The stated goal of Chapter

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[16] For example, without an agreement, bargaining unit employee health benefit costs have skyrocketed, while other represented employees have not suffered similar cost increases.

[17] Case 20896-E-07-3220.

41.56 RCW is "to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide a uniform basis for implementation of that right." *METRO*, 118 Wn.2d 621, 633, *quoting City of Yakima v. IAFF, Local 469*, 117 Wn.2d 655 (1991). Additionally, remedies granted by this Commission under Chapter 41.56 RCW are to be remedial in nature, not punitive.[18] As such, interest arbitration is the more appropriate extraordinary remedy here, because the ultimate goal is to have a collective bargaining agreement in place for the affected employees.

However, although we agree with the Examiner that interest arbitration is a proper component of the remedial order, we amend the ordered remedy to provide a limited amount of time for the parties to mutually meet and collectively bargain. When crafting any extraordinary remedy in a refusal to bargain case, we must still bear in mind that a respondent should be given an opportunity to correct its behavior. Therefore, where interest arbitration is awarded to a group that traditionally does not enjoy such a right, a brief period of time for bargaining should be granted with hope that the parties can reach a mutually acceptable collective bargaining agreement, and thus avoid interest arbitration. The amount of time for bargaining depends on the circumstances of the case, but factors that should be considered are the history of the respondents conduct with respect to the bargaining unit at issue, the nature of the unfair labor practice that is found to be committed, and the continuing impact that the unfair labor practice has on the affected employees.

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[18] We note that in *METRO* the superior court, and not this Commission, granted attorney's fees to the complainant.

Here, as explained above, we find that the nature of the employer's conduct, as well as the impact on bargaining unit employees, favors a relatively short bargaining period of twenty-one days.[19] The starting point for negotiations shall be the status quo as it existed on February 8, 2005, and the union shall be free to demand bargaining on all subjects. These employees have been without a collective bargaining agreement since January 1, 2005, and any additional time will only serve to cause greater harm to these employees.

Status Quo Ante for Health Benefit Premiums

Finally, in the ordinary refusal to bargain case, restoring the status quo ante is a typical remedy ordered by this Commission. Although this is not a typical unilateral change case, where the employees would be awarded restitution based upon the employer's action, the employer failed to maintain the status quo with respect to the terms and conditions of employment for at least one year. *See* RCW 41.56.123. Because the employer failed to bargain from the status quo, the employees suffered economic impact based upon rising health benefit cost. As part of its requested remedy, the union asked for an order directing "the employer to pay one-hundred percent of any increase in health benefit premiums that should occur in 2006 and beyond or consistent with the terms of a newly bargained for agreement."

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[19] We take administrative notice of case 19787-M-05-6357, which is a mediation request already on file involving these parties. A staff mediator shall be available to the parties should they require a mediator's assistance. Additionally, if the parties fail to reach a complete agreement within the twenty-one calendar day period, the mediator shall assist the parties in certifying any outstanding issues for interest arbitration under WAC 391-55-200.

This record demonstrates that the employer is self-insured. Article 29 of the parties' collective bargaining agreement discusses insurance benefits, and specifically notes that the employer will pay a specific amount per employee; thus, the employer's contribution is "capped" at a specific amount. Because this term is part of the status quo, we cannot disturb this provision. However, subsection G of article 29 provides that the employer "agrees that any future fund surplus that accrues above the state self insurance recommended guidelines, shall be used to offset employee premium contributions or augment employee benefits in subsequent plan years." This provision is part of the status quo, and had the employer continued to comply with this term of employment, it could have offset some expenses incurred by the affected employees.

Thus, in addition to the remedial order set forth above, we order the employer to honor the terms of Article 29. If, since February 8, 2005, the employer has offset premium contributions or augmented the benefits for other represented employees under the terms of Article 29, the employer must make these bargaining unit employees whole by reimbursing them an amount equivalent to the amounts provided to other represented employees.

NOW, THEREFORE it is

ORDERED

1. The Findings of Fact issued by Examiner Starr H. Knutson are AFFIRMED and ADOPTED as the Findings of Fact of the Commission, except Finding of Fact 25, which is amended to read as follows:

25. At a mediation session on March 31, 2006, the employer presented an incomplete proposal that differed from the December 21, 2005 proposal and did not include language on job sharing, salary survey, or deferred compensation.

2. The Conclusions of Law issued by Examiner Starr H. Knutson are AFFIRMED and ADOPTED as the Conclusions of Law of the Commission, except Conclusion of Law 4, which is amended to read as follows:

4. By withdrawing from agreements, as described in paragraphs 18 and 25 above, on job sharing, salary survey, and deferred compensation, the employer did not bargain regressively in violated RCW 41.56.140(4) and (1).

3. The Order issued by Examiner Starr H. Knutson is AFFIRMED and ADOPTED as the Order of the Commission, except paragraph 2.a., which is amended to read as follows:

2.a. If, after a twenty-one day period of bargaining from the date of this order, the parties are unable to reach a mutually agreeable collective bargaining agreement, they shall submit a request to the Public Employment Relations Commission for interest arbitration under RCW 41.56.450 through RCW 41.56.470, RCW 41.56.480, and RCW 41.56.490.

And paragraph 2.f, which is amended to read as follows:

2.f The starting point for negotiations between the parties shall be the status quo as it existed on February 8, 2005.

The Commission adds to the Order an additional paragraph 2.k., as follows:

2.k. If, since February 8, 2005, the employer has offset premium contributions or augmented the benefits for other represented employees under the terms of Article 29, the employer shall make bargaining unit employees whole by reimbursing them an amount equivalent to the amounts provided to other represented employees.

Issued at Olympia, Washington, the 26th day of March, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner