Benton County, Decision 6035 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, COUNCIL 2, AFSCME, LOCAL 874-HC,	)	CASE 12290-U-96-2903
Complainant,	)	
vs.	)	DECISION 6035 - PECB
BENTON COUNTY,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Audrey B. Eide, General Counsel, appeared on behalf of the union.

Menke, Jackson, Beyer & Elofson, by Anthony F. Menke, Attorney at Law, appeared on behalf of the employer.

On January 24, 1996, Local 874-HC of Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO (WSCCCE) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Benton County had violated RCW 41.56.140(1), (2), and (4) during and following collective bargaining negotiations between the parties. A hearing was held on September 25 and 26, 1996, before Examiner Jack T. Cowan. The parties filed post-hearing briefs.

BACKGROUND

Benton County is governed by three elected commissioners: Ray Isaacson, Max E. Benitz, Jr., and Sandi Straun.

The WSCCCE represents approximately 105 Benton County employees in a bargaining unit described as follows:

> INCLUDED: All full-time and part-time employees of the following offices and departments: Auditor, Assessor, Treasurer, Clerk, Central Services, and clerical employees in the Cooperative Extension Services, Road and Engineering, Prosecuting Attorney, District Courts, Superior Court, Planning and Building Department, and Facilities and Parks Department except as provided below.

This bargaining unit has been in existence for several years, and is one of several units organized among Benton County employees.

The WSCCCE and the employer are currently parties to a collective bargaining agreement for the calendar years 1995 through 1997. They had a previous collective bargaining agreement for calendar years 1992 through 1994.

At the parties' first bargaining session for the current contract, held on July 19, 1994, the union proposed language changes and other economic benefits, including: Longevity pay, increased medical insurance premiums paid by the employer, and increases in vacation accrual, overtime compensation, and out-of-class pay. With regard to wages, the union proposed a step plan change to convert "merit step I" to a regular step, and it requested a wage increase equal to 100% of the Seattle CPI-W or 5%, whichever was greater, for each year of a multi-year term of agreement. The union also proposed reclassifications for some positions.

The employer responded at the next meeting, held on August 22, 1994. The employer offered no wage increase for 1995-1996, based on a two-fold rationale: First, it asserted that a "Kinney study"

had provided step increases for the job classifications, which the employer equated to cost-of-living increases; second, the employer asserted there was no money available for a wage increase, since anticipated downsizing in the Hanford area would impact the employer's future revenues.[1] The employer further expressed a concern about its ability to downsize if needed during the three-year period of the agreement, stating, "If the county were to give wage increases, this could result in layoffs." Responding to the employer's reference to the "Kinney study", the union argued that all employees (including exempt employees) were put on steps provided in that study, and that the study established parity for Benton County positions with their counterparts in similar-sized counties, but that the increases given were not cost-of-living increases.

At a meeting on September 14, 1994, the union received an employer proposal which rejected any wage increases for the 1995 - 1997 period. During a negotiation session held on September 16, 1994, the employer's representatives took the position that,

> The Kinney pay plan provides a three and one-half percent increase each year for steps. The county proposes no increase for 1995, 80% of the Seattle CPI-W July 1994 with a 2.5% minimum and 4.5% maximum for 1996, and 80% of the Seattle CPI-W July 1995-1996 with a 2.5% minimum and a 4.5% maximum for 1997.

In addition, the employer's proposal included language changes and a proposed reduction in accrual rates for sick leave and vacation payoff. Although the record does not expressly establish the union's response, the union must have rejected it at that time.

---

[1] The Hanford area, located in Benton County near Richland, Washington, is a federal enclave.

The parties met again on October 17, 1994. They did not reach agreement, but the union asked for a proposal to take back to its members, to determine whether the parties were at impasse.

The employer submitted a written proposal to the union under date of November 18, 1994. It provided no change from the wage proposal of September 16, and no increase in insurance contributions for 1995. The union membership rejected that employer proposal.

The parties met again on December 15, 1994, and determined that they were at impasse. Mediation was requested, and the parties had their initial mediation session with Commission staff Mediator Vincent M. Helm on March 6, 1995.

At a mediation session held on May 11, 1995, the employer offered a 1.5% wage increase for 1995, and it again offered the CPI-based formula for wage increases in 1996 and 1997. It also offered a $4.00 per month increase in employer-paid insurance premiums for 1995, with a 50/50 split of premium increases in 1996 and 1997. The union agreed to provide a counter-proposal, which the employer's negotiators were to review with the elected commissioners for further direction. The employer also agreed to provide a written proposal before the parties' next meeting.

The employer's next proposal was received by the union on August 8, 1995. It reflected no change from the employer's May 11 position on wages, but included a $.94 per month increase in insurance contributions for 1995. When the parties met again on August 10, 1995, the union offered a counter-proposal which included no wage increase for 1995 and the wages and insurance proposed by the employer for 1996 and 1997, but a $50.00 per month increase of insurance to be effective on the date of ratification. The mediator presented the package to the employer's team, which

indicated they would respond after they had an opportunity to cost out the proposal and present it to the elected commissioners.

In September of 1995, the employer responded with a so-called "final offer" in which it agreed to the union's August proposal. The union membership ratified the settlement.

The Current Controversy

In October of 1995, within two weeks after the parties signed their 1995-1997 collective bargaining agreement, the employer gave its unrepresented employees a 3% wage increase retroactive to January 1, 1995, and announced that they would receive an additional 3% wage increase for 1996. The employer also provided its unrepresented employees with a $25.12 per month increase of employer-paid insurance premiums. The elected commissioners also granted themselves a 5% wage increase.

Bargaining unit employees were incensed by the wage increases given to the unrepresented employees, and they pointed to the employer's insistence in bargaining that there was no money available for wage increases. Employee perception that union members had been treated unfairly was escalated by a conversation which occurred soon thereafter, when one of the elected commissioners discussed the situation with several bargaining unit employees during an impromptu meeting in a county office.

In addition to employer actions during and after the contract negotiations which created discord among union members and appeared to some as an attempt to undermine the union, the employer continued to cut departmental budgets after the conclusion of the negotiations. That resulted in layoffs of both bargaining unit employees and unrepresented employees.

POSITIONS OF THE PARTIES

The union alleges that the employer failed to negotiate in good faith. Characterizing this as "a case of GOTCHA", it claims the employer's actions of: (1) Rejecting all of the union's wage and benefit proposals based on a lack of funds and the Kinney study, and then (2) providing its unrepresented employees with a wage increase and improved benefits after the negotiations with the union had been completed, constituted discrimination against the union. The union contends that the employer offered proposals during the negotiations which were unusually harsh, vindictive and unreasonable, and that the elected official denigrated the union in his post-ratification discussion with bargaining unit employees. The union alleges the employer thereby interfered with employee rights, and "dominated" the union.

The employer stands on the collective bargaining agreement signed by the parties. It contends the union was aware of different settlements made with other bargaining units, and that the WSCCCE did not inquire about the status of wages for the unrepresented employees during the negotiations and mediation for the 1995-1997 bargaining agreement. Additionally, the employer questions whether it had any obligation to reveal its goals or intentions regarding its unrepresented employees, or whether it is obliged to treat all county employees the same.

DISCUSSION

The Duty to Bargain in Good Faith

The duty to bargain and the "good faith" test for evaluating employer and union tactics both arise out of RCW 41.56.030(4):

> RCW 41.56.030 Definitions. As used in this chapter:
>
> ...
>
> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ...

The "refusal to bargain" unfair labor practices in RCW 41.56.140(4) and RCW 41.56.150(5) protect the collective bargaining *process*, rather than prescribing the outcomes to be negotiated by parties. Parties are entitled to insist to impasse on mandatory subjects of collective bargaining (i.e., "wages, hours and working conditions"), and have the right to look at the world around them when deciding whether to make concessions or accept proposals advanced by the opposite party in negotiations. Important in this case, the "peculiar to ... bargaining unit" language contained in that definition has been interpreted to mean that an exclusive bargaining representative only has the right to bargain for wages, hours and working conditions of the employees in the bargaining unit that it represents, and is not in a position to negotiate for what will or will not be granted to employees outside of the bargaining unit.[2]

---

[2] See, City of Wenatchee, Decision 2216 (PECB, 1985) and City of Pasco v. PERC, Decision 3368-A (PECB, 1990), affirmed 119 Wn.2d 504 (1992).

Alleged Breach of Good Faith During Negotiations

It is undisputed that the employer took a "hard bargaining" stance early in the parties' negotiations for 1995 - 1997. David Sparks, who was the chief accountant in the county auditor's office and a member of the employer's negotiating team, testified about what occurred behind the scenes on the employer side of the bargaining table during those negotiations:

> A. After receiving the proposal from the union [on July 19, 1994], I went back and costed out all the economic impacts on the requests and changes and different articles that the union had requested. And I have them by section -- article, section and the calculations thereof.
>
> Q. And is this inclusive of or exclusive of the reclassification requests that came in?
>
> A. It did not include the reclass because at that time we did not know who or how many or what was being reclassed.
>
> Q. So at the opening, the union was requesting in your opinion the bottom line here, that was the total impact on '95?
>
> A. Right. $384,718.
>
> Transcript, page 123.

While it appears that Exhibit 25 was never shown to the union during the negotiations, Sparks' testimony continued:

> Q. Can you identify what's been marked as [exhibit] 26?
>
> A. Yes. This is a request from Mr. Dunkirk for our office to calculate reclassification request(s).
>
> Q. And what was the ultimate conclusion with regard to you costing out of the initial packet of reclassification requests?

A. The 1995 impact would be $48,637.43. And in '96 it would turn out to be $64,614.06.

Transcript, page 124.

While it also appears that Exhibit 26 was also not shared with the union during the negotiations, the information contained in both Exhibit 25 and Exhibit 26 was used in forming the employer's strategy. Sparks' testimony continued:

Q. David, can you identify [exhibit 27]?

A. This is a document that I put together for the Board of County Commissioners in mid 1995. I'm trying to figure out what the impacts would be for the rest of '95 and going into '96 before budgeting process started.

Q. What is this based on? Proposals? Or how does it relate?

A. What they wanted -- the board wanted to accomplish was to find out what the impacts would be for step increases and things of that nature and keeping revenues flat because at that time we were anticipating revenues decreasing still with the continued downsizing of Hanford, which is a major reflection of sales tax. You know, money you get from sales tax is Hanford generated. We kept revenues the same and the impacts of the step increases for '96 and what impacts would be.

Q. Okay.

A. Yes.

Q. And normally what is considered to be reasonably prudent in an accounting sense in terms of a reserve or a carry-over fund balance?

A. The county has maintained around a 2.3, 2.4 cash balance in order to maintain cash flow.

Q. 2.3 or 2.4 million?

A. Million. In order to get through the tax collection in April of each year.

Q. And in this document which apparently you indicated was issued in mid '95; is that correct?

A. Correct.

Q. This indicated that even if there were no increases but there was continuity of the step increases in the pay plan and the other expenses that it would reduce that balance down to $485,000; correct?

A. Correct.

...

Q. The question was, if expenditures remained the same and you brought the funding balance from 2 million 20 thousand down to 485,000, in your opinion does that put the county at a perilous position from a fiscal standpoint?

A. It puts us in the point where we would not be able to make the February 5th payroll.

Q. And this information was supplied to the management team; is that correct?

A. I faxed it to Dave Dunkirk.

Q. And the commissioners were also made aware of the situation?

A. Yes. I made this presentation to the board in a public hearing.

Q. Okay. Now, I noticed in the bottom of the right hand corner there is a reference to 1996?

A. Uh-huh.

Q. Salary steps increased at 1.5 percent?

A. Uh-huh.

Q. What does that relate to?

A. That relates to the overall county average step increase because we do have a lot of positions that are at the I-step and that includes nonbargaining and all union contracts.

...

Q. Do you have an idea of how many people are within the pay plan in the bargaining unit? In other words, not I-steppers?

A. Approximately 20 percent are at the "I" maybe. That would be my guess.

Q. Okay. So that would mean that 75 or 80 percent are in fact receiving steps?

A. Yes. At that time.

Q. Would that change a little bit for '96?

A. Yes. Every year as more and more people progress, they get closer to the I-step.

Transcript, page 129.

Under voir dire examination, Sparks testified as follows:

Q. ... Tell me how the numbers work.

A. What I did is the first column is the '95 budget. ... And what we have is our beginning fund balance of 3.2 million. Our revenues and expenses is 1.2 million round. At the end of '95, we would end up with 2 million dollars. Carry that over to 2 million. Revenues we kept the same as a general purpose because revenues at that point were declining. We figured what impact would be, step increases only, to '96, leaving everything else constant. What that would do, you obviously have a 1.2 million dollar deficit -- it would increase to 1.5 which would leave at the end of '96, approximately half a million dollars to the county.

Q. What are these notations down here on the bottom?

A. These -- I prepared this document for the county commissioners, and since January 1, 1995, changes to the budget had been implemented and these reflect changes to the '95 budget.

Q. So in the '95 budget in May of '95, you've already taken into consideration this issue on the ballot of the jail contract? Is that what that is?

A. What that was was a reopener with the cities to pay their usage of the jail. And we generated an extra $350,000. And so I added that into the revenue source up here, showing the difference from what was the originally adopted budget to where we were now.

Q. What's the transfer from nondepartmental to patrol?

A. That was the settlement of the road deputies, the contract for '95.

Q. And [what] does that mean?

A. They settled on a six and one-half percent cost of living for '95 and that was the effect of the six and one-half percent.

Q. $122,000?

A. Yes.

Q. How many road deputies are there?

A. Approximately 40 to 45. ...

Transcript, page 135.

From the foregoing, it is apparent that the employer's early offer of "no wage increase" had a rational basis rooted in economic considerations. In the opinion of the elected officials, the step system and reclassifications amounted to a wage increase. Although the reality of the situation was that about 20% of the employees in the bargaining unit would receive no step increases because they were at the top step, that would be among the facts to be weighed by the union in assessing whether to accept the employer's proposal. Similarly, while only a few bargaining unit members would benefit, the value of the reclassification process was for the union, not the Public Employment Relations Commission, to evaluate and decide. The union did not controvert or impeach the testimony quoted above, and the record suggests that the employer's bargainers merely adhered to the direction they had been given.

The evidence does not sustain the union's implication that the wage increase given to the unrepresented employees was part of some grand plan. Under cross-examination, Sparks testified as follows:

> Q. I want to go back to exhibit 27. Now, ... I heard you say I thought was that in all of 1995 this financial picture did not change; is that correct?
>
> A. In my opinion, yes.
>
> Q. Okay. Now, this projection does not include the 3 percent retroactive that was eventually given to the nonbargaining unit members, does it?
>
> A. No, because this was done in May.
>
> Q. Okay. Do you know how much, what the financial impact of that 3 percent increase retroactive to January 1, '95, was for the nonbargaining, I mean an estimation if you remember?
>
> A. Approximately 60,000. I believe 68.
>
> Q. For 95?
>
> A. Yes.
>
> Q. And do you know what it was for '96?
>
> A. No, I do not. I don't recall.
>
> Q. Now, you said that in 1996 that being left with $485,000 would be an unacceptable level; is that correct?
>
> A. That's correct.
>
> Q. Okay. And you said that this didn't change from 1995; is that correct?
>
> A. That is correct.
>
> Q. But even though in your opinion you said that this is an unacceptable level?
>
> A. Uh-huh.
>
> Q. ... You said that would break the county by February of '96?
>
> A. Right, we would not be able to make the February 5th payroll.

Q. Did you make the February 5th payroll?

A. Yes, we did.

Q. And in addition to this budget that you have here you added at least another -- well, more than $68,000?

A. That would be correct.

Q. So in actuality by February -- well, by January of '96, I guess, that's what this figure is the $485,000?

A. Right. December of '96.

...

Q. That would have been - -

A. (Interposing) See, 'cause what I meant by the 400,000 it would be January or February 5th of '97. I'm sorry.

Q. **Has this picture changed since 1996?**

A. Yes. The board made significant changes to the '96 budget. We cut over a million dollars in expenses our of the '96 budget.

Q. And when did that occur?

A. In the budgeting process, which would be November, December '95.

Q. So but the 3 percent increase was granted prior to that; isn't that true?

A. It was granted during our budgetary process for '96, yes.

Q. And we have testimony here that it was done within two weeks of signing the contract, which would put it right at the first of November?

A. What do you mean?

...

Q. You said that the budgeting process ends November, December?

A. It's, like, a two month process. You know, the auditor's office does preliminary budget, presents it to the commissioners the first part of October. They hold preliminary hearings on that. The actual adoption of the

budget and opened to the public is in November and December.

Q. **So in this preliminary presentation to the commissioners in October the 3 percent must have been there; is that correct?**

A. No, it was not.

Q. It magically appeared November 1. Is that how it happened?

A. No. It was plugged in -- put into the line item budgets after the 3 percent was granted.

Q. So there wasn't even a budget for it when it was granted?

A. No, there wasn't.

Transcript, page 146 [emphasis by **bold** supplied].

On redirect examination, Sparks further testified as follows:

Q. Commissioners even in light of this exhibit 27 in the end, meaning in the fall of 1995, allowed us to propose a 1.5 percent increase which would have exacerbated this position; correct?

A. Correct.

Q. And they allowed us to commit to a 1995 formula which we now know to be, what, 2.5, 2.6 percent?

A. Right. That's correct.

Q. And that was not structured in this?

A. No. There is no COLA structured into that.

Q. So there is no difference in your opinion between **the 3 percent that was granted to nonbargs** in terms of the timing of that as opposed to the board committing to 1.5 in '95. an increase in -- or the increase in the medical contribution, and the implementation of the second year of the contract, the 2.5 per cent; is that right? It **wasn't in this document?**

A. No, it was not.

Q. Just like the nonbargs was not in this document.

A. That is correct.

Transcript, page 148 [emphasis by **bold** supplied].

In re-cross examination, Sparks responded as follows:

Q. I just have one clarification. I asked you what the 3 percent increase, what impact that was for the 1995 for the nonbargaining people. Do you know what the entire financial package for 1995 was because there were other financial impacts on the county as a result of that?

A. The only impacts to -- well, you're talking county. We've had impacts to the road department which is a totally separate issue than the general fund. Those are paid on separate dedicated sources. And the only ones we had at that time was the road deputies settling their contract and then I believe in November we had the nonbargaining.

Q. But if you looked at their 3 percent and the other economic, you know, indicators -- the contribution to the medical -- there were a couple of other things that we got that would be actually money given to them somehow?

A. For nonbarg?

Q. Yeah. For nonbargaining.

A. That was done in November. You had one month of premium because that wasn't retroactive. So you only had to budget in one month of premium.

Q. So the total impact would be greater than $68,000?

A. I factored in the total impact including social security and everything else that the county would pay.

Transcript, page 149.

The uncontroverted evidence thus supports a conclusion that the wage increase given to the unrepresented employees was a last-minute decision, perhaps entirely made after the parties signed their collective bargaining agreement in 1995. On this record, the union has failed to sustain its burden of proof as to a breach of the employer's "good faith" obligation during the bargaining for the parties' 1995-1997 contract.

Breach of Good Faith by Pay Increase for Unrepresented

It is perhaps understandable that the union and its members felt resentment toward the pay increase granted to the unrepresented employees. The union had persevered over an extended period of negotiations to reach a compromise. Given the employer's ongoing insistence that money was not available, the union eventually capitulated, and accepted the employer's so-called last, best and final offer: A first year medical increase and other benefits to be effective the last three months of 1995, and CPI-based wage adjustments in the final two years of the agreement. Approximately two weeks later, however, the union's view of the world changed dramatically when the employer granted its unrepresented employees a substantially better wage and benefit package, and the Commissioners gave themselves a wage increase.

A situation such as this may tend to frustrate the overall purpose of the statute,[3] but still does not rise to a per se unfair labor practice. The negotiations at issue here were being conducted in parallel with negotiations in several other bargaining units. The employer had a separate duty to bargain in good faith with each of the unions representing those units. Absent coalition bargaining

---

[3] RCW 41.56.010 promotes "improvement of the relationship between public employers and their employees ..."

agreed upon by the employer and all of the unions,[4] logic dictates that one of the units had to be the first to settle, and one had to be the last to settle. It was up to each pair of parties to decide whether they would be leaders (risk-takers) or followers. The law does not require that all units be treated alike.

The employer's actions were predictably greeted by the union and its members with something akin to a sibling rivalry of the "mom likes you best" variety. Preferential wage treatment for a group of employees without adequate rational basis would seem to be short-sighted in the public sector, where a union and its members can easily bring the public disclosure law to bear to discover what

---

[4] Notice is taken of the docket records of the Commission, which disclose the following mediation cases:

- Case 11079-M-94-4141, for an Assessors unit represented by the WSCCCE, was opened 4/94 and closed 1/95 as "agreement reached";
- Case 11432-M-95-4239, for a law enforcement unit represented by Teamsters Local 839, was opened 11/94 and closed 5/95 by an agreement which must have been for a shorter term than the 1995-1997 period agreed upon by these parties, inasmuch as Case 12687-M-96-4285 opened 9/96 for a total contract opener in that unit was closed 12/96.
- Case 11525-M-95-4285, for an operations/maintenance unit represented by Teamsters Local 839, was opened 1/95 and closed 12/95 as "agreement reached".
- Case 11526-M-95-4286, for another operations/maintenance unit represented by Local 839, was opened 1/95 and closed 11/95 as "agreement reached".
- Case 11527-M-95-4287, for a clerical unit represented by Local 839, was opened 1/95 and closed 12/95 as "agreement reached".
- Case 11537-M-95-4291, for a corrections unit represented by a Benton County Corrections Assn., was opened 1/95 and closed 10/95 by an agreement which must have been for a shorter term than the 1995-1997 period agreed upon by these parties, inasmuch as Case 12974-M-97-4688 opened 2/97 remains open at this time.

is being paid to unrepresented employees.[5] At a minimum, an increase perceived as unfair or unjustified is likely to become the minimum proposal advanced by the union in subsequent negotiations. Such an experience will almost certainly make the union wary of the employer, and cause the union to hold out longer in future contract negotiations. The fact that the union felt as if it had been lied to or "taken in" is not determinative, however. Instead, this case turns on whether the employer actually induced the union to accept the contract by actions that breached its duty of good faith.

The testimony of Sparks, quoted above, suggests that neither funding for the insurance increase offered to the WSCCCE nor funding for the wage and insurance increases given to the unrepresented employees existed in October of 1995. The general fund budget figures prepared in May of 1995 had projected a severe reduction of the employer's ending balance (from $2,020,830 to $485,744), and that continued to be the information used by the employer even after the employer's offer in May of 1995. The budgeting process started in the county auditor's office in August of 1995, and a preliminary budget was presented to the commissioners in early October. The money in question was put into the budget after the increases had been granted. The actual adoption of the budget occurred after public hearings, in November or December.[6] The testimony of Max Benitz, quoted below, indicates the funds used to grant the increases to the unrepresented employees were freed up by passage of a sales tax earmarked for

---

[5] See, RCW 42.17.250 et seq. In contrast, the wages paid to unrepresented employees of private employers may be more difficult for a union to ascertain, given the lack of public disclosure requirements.

[6] It must also be remembered that at least part of the 3% wage increase was offset by granting an insurance increase only half as large as negotiated by the union.

juvenile justice. Other evidence indicates that money came from a reserve fund the employer had for negotiations with a bargaining unit of uniformed personnel (law enforcement officers) eligible for interest arbitration under RCW 41.56.430 et seq.[7] Either way, the WSCCCE had no particular claim to those funds.[8]

Questions arise here, but answers are not to be found in this record:

---

[7] Scott Holt, formerly an unrepresented administrative accountant, testified as follows:

> Q. Do you have personal knowledge of that raise or when it came about?
>
> A. Yes, I do.
>
> Q. How do you have that personal knowledge?
>
> A. There was a subsequent meeting where the information was discussed which I was in the audience in this room, and it was affirmed that they were giving a 3% retroactive to 1995 and also a 3% to the nonbargaining units in 1996.
>
> Q. Did you have an understanding of where that money came from?
>
> A. It came from a reserve fund or contingency fund that the county had established.
>
> Q. Do you remember about what the size of that fund was? Did you know?
>
> A. No, I did not. I know the monies were set aside for the sheriff contract negotiations; the bargaining units' negotiations, whatever money they use there, and whatever was needed out of the fund to satisfy those because I think they were working from a prior year standpoint.

[8] This does not constitute a ruling that the wage increase given in October retroactive to January of 1995 was in conformity with Article II, Section 25 of the Constitution of the State of Washington, which generally precludes retroactive pay increases for public employees. See, Christie v. Port of Olympia, 27 Wn.2d 534 (1947). Even if the issue were to be raised by the WSCCCE, however, that would be for the State Auditor, the state Attorney General and/or a court to decide.

- Did the auditor's preliminary budget presented to the commissioners on a date not in evidence (but presumably some time in or around October of 1995) offer a brighter-than-expected forecast of such magnitude that the commissioners could become more generous in their expenditures for employee benefits?

- If the employer's revenue picture was improved, did the unit represented by the WSCCCE have any reasonable claim to a share of those funds?

- What gave the elected officials the confidence necessary to proceed with wage and benefit expenditures improvements without knowing the final, bottom line outcome of the budget-making process?[9]

- Were transferred funds known and anticipated some time in advance, but simply withheld until the signing of the agreement to avoid any distribution of such funds to the union?[10]

The relevancy of the signing of the collective bargaining agreement in October is inescapable, however. The union didn't call "foul" or file an unfair labor practice complaint during the negotiations. Without any evidence that the union was misled, the Examiner must conclude that the union merely picked October as its time to accept

---

[9] Even if the employer's action were terribly imprudent, that would not be for this Examiner to decide.

[10] It is interesting to note that, while the employer complains the union never reduced its demands during the course of bargaining, one of its elected officials is accused of having said the union negotiators didn't bargain hard enough. If the funds had been available all along, that might give new meaning to an alleged comment by Benitz, discussed below, that the union could have had what they wanted if they had bargained harder.

an offer which had been on the bargaining table for months by that time. The offer was not without benefits; all was not lost. Although disappointed with the settlement, the bargaining unit was sufficiently satisfied to ratify the agreement.

The union only complained about its contractual agreement after the unrepresented employees were given an increase and an elected official made comments on the subject, as discussed below. This bargaining unit was not the sole recipient of conservative management practices, but received a settlement comparable to what was accepted by other county bargaining units after the wage and benefit increases for unrepresented employees were made known and implemented. The employer considered its actions to be hard, smart bargaining. If the employer was motivated by union animus, or exercised a purposeful subterfuge, no substantiation appears in the evidence. Suspicion of unlawful conduct is not evidence, nor is the fact that the union did not receive all of what it wanted a basis for finding an unfair labor practice. At the same time, if this was a "win" in the minds of employer officials (i.e., because token amounts offered were accepted, or the negotiations resulted in labor costs less than anticipated) it was only a short-term gain. The long-term results of the employer's actions may be less desirable, including decreased morale, lack of trust and very difficult negotiations in the future.

Comments of Employer Official

The feeling of discrimination among bargaining unit members was aggravated by the statements of Commissioner Max Benitz. Several witnesses testified about that conversation:

Pamela Wample, senior secretary to the county treasurer, testified as follows:

Q. Do you remember a conversation that you had in your office with one of the commissioners regarding that [wage] increase [for unrepresented employees]?

A. Yes, I do.

Q. Can you tell us about when that was?

A. It was only a few days after the non-bargs' [sic] contract, or whatever you would call their contract, was approved by the commissioners.

Q. And how did it come about that you had this conversation with this commissioner?

A. Well, he came into our office and ... was sitting, talking with several employees, the union members. And I definitely had a question to ask him regarding the funds available.

Q. And who was this commissioner?

A. Max Benitz.

Q. What was your question for Mr. Benitz?

A. Basically I asked, and I can almost quote it, if the county's checkbook is in a zero balance, how can the commissioners possibly give an increase to the nonbargaining unit unit [sic] when the bargaining unit was told there was no money there?

Q. What was his response?

A. That funds were found to give this increase to the nonbargs.

Transcript, page 95.

Shirley Steelman, an accounting clerk for the treasurer's office, testified as follows:

Q. You heard Ms. Wample talk about a conversation that occurred in your office with a commissioner Benitz. Were you involved in that conversation?

A. I was.

...

Q. What was your concern with commissioner Benitz?

A. The main concern I had was the 3 percent. Why supervisors, elected officials, and commissioners received the raises that they received retro through '95 to include increases -- at the time I understood it was a double death policy -- and all the benefits we received but in addition to, why that was happening.

Q. And what was commissioner Benitz' response to your concern about the raises for the nonbargaining unit members?

A. He informed us very casually that the money had been found and that was the reason for the outside unit getting the raises.

Q. Did you question him further about finding this money?

A. We did.

Q. Did he have a further response about that?

A. He did. He indicated that -- he indicated that the sales tax increase that had just previously been passed was a part of this raise package.

Q. Did you know about that sales tax increase on the ballot?

A. We did.

Q. And did you have an understanding of whether or not that was for a specific purpose?

A. I did.

Q. And what was that for?

A. I understood that was to be for the juvenile justice center to build.

Q. Were they building a new one?

A. Right, they are.

Q. Did Commissioner Benitz have anything to say about the union?

A. Yes. He in fact told us that our union was weak and that we should never have stopped negotiating. We should have continued to come back and hammer even though we were told there was no money for raises.

Q. Did he give you any indication as to whether or not that would have been successful for the union?

A. He indicated that it would be had we continued the negotiations. He indicated we would have received the same raise.

Transcript, page 105. [emphasis by **bold** supplied].]

Ann Bolander, another clerk in the treasurer's office, testified:

Q. We heard earlier about a conversation that was held in your office with commissioner Benitz and a number of employees in your office. Were you a part of that conversation?

A. Yes, I was.

...

Q. And what was his response?"

A. His response was, "We found some money." He was asked, how do you - - I said to him, "how do you find money that you said adamantly that you did not have?" He said, "The one tenth of one percent sales tax was responsible for that." And another person in the office said, "But that was earmarked for juvenile justice." And he said, "But that frees-up money increase was for expense, and so then we could do this". **And then he smiled and he said, "Your union is weak. You should not have accepted the 'no money' statement". And I said to him, "Then you're saying that we should have gone into the negotiation saying you are lying, you are lying, you are lying". And he just kind of laughed.** And I said, "This upsets me because we were told that there was no money and two weeks later, there's a six percent raise."

Q. Do you have an understanding of what general expense he's talking about, the account, what would that be for?

A. He told us that we didn't understand the way the budgeting process works, and I do not work with the budgeting process, so I accepted that, that we did not understand. Later on in the conversation it came to my attention that the money for the nonbargs was in place in a line item contingency fund.

Transcript, page 112 [emphasis by **bold** supplied].

Sandy Schneuder, another employee in the treasurer's office, testified as follows:

Q. We've heard other people testify about a conversation with commissioner Benitz in your office right after knowledge of this increase for the nonbargaining employees. Were you present for that conversation?

A. Yes, I was.

...

Q. And what is your recollection of that conversation?

A. What I remember is I remember Ann [Bolander] asking Max, like, two or three times, "We were told there was no money." **And Max said, "You should have went" meaning the union should have went back and asked for it. And several times that was stated, and Max said after the third time of that he said, "Well, your union's weak".** And then I specifically asked him where they found the money and he told me that when the commissioners -- and it was my understanding that he was talking about the tenth of percent that was passed by the commissioners in July -- that once they passed that, that's where the money came from. And I said, "Well, no. I know they can't use that money for salary increases". He told me I didn't understand and that because of that passage ... that in turn freed up for an expense money. So I asked

> him, "Then once that was passed, why didn't they tell the union that they had this money freed up?" Again, I was told that I didn't understand the negotiation process. And he said that once negotiations starts, you can't bring anything new to the table.
>
> Transcript, page 135 [emphasis by **bold** supplied].]

There is no reason to discredit the testimony of Steelman, Bolander and Schneuder, who all appear to be credible witnesses.

Commissioner Benitz testified, in part, as follows:

> Q. Now, you've heard a lot of testimony ... about a meeting you had or a discussion you had with a number of employees in the treasurer's office I believe it was.
>
> A. That's correct.
>
> Q. Can you explain to us to the best of your recollection when that was, and obviously we know who was there at least within reason from yesterday, and what your recollection of the remarks were?
>
> A. Okay. I believe it was in October, November. ... Lori [Campbell] asked a question, "Why did the nonbargs get a 3% raise and the union people didn't get a comparable raise?" I said to Lori that the union negotiating team presented a contract to the Board of County Commissioners that was tentatively ratified and we accepted that. She asked, "Why was it the [unrepresented employees] could get more money? And I said, "The issue of the negotiation that the Board of Commissioners had instructed the negotiation team was for zero increase and for pay. We let the negotiating team do the negotiating for us and the union's come back with a contract, and we signed the contract".
>
> ...

Q. Let me ask you this: Do you recall telling any of these courthouse members that their union was "weak"?

A. No, sir.

Q. Do you remember telling any of them that if their union had asked for 3% they would have gotten it?

A. No, sir.

Transcript, page 104.

On cross-examination, Benitz responded in a circular, if not evasive, manner, as follows:

Q. We'll just stick to the four employees, current **employees, who testified and said that the union was weak. Are you saying that you did not make that statement?**

A. I did not.

...

Q. Does that mean that these four women all heard you say something you didn't say?

A. I think the record can speak for itself. **They said what they thought was heard, and I'm not going to refute their testimony.**

Q. So you won't deny you said that; is that correct?

A. I said that I did not say that.

Q. So that refutes their testimony?

A. I didn't say that.

Q. Well, I guess I'd like a definitive answer whether or not you are saying that what they said basically isn't true, refuting their testimony, or is it that you just don't recall?

A. I recall what I said. But you're asking me to come to a judgement call and I don't think that my testimony or their testimony should

> have to be clarified by a statement. **My testimony is, I didn't say that.**
>
> Transcript, page 116 [emphasis by **bold** supplied].

Scott Holt, formerly an unrepresented administrative accountant, testified concerning the conversation between Benitz and the bargaining unit employees, but ultimately did not shed any light on the critical comments concerning the union. He testified:

> Q. Do you have personal knowledge of that raise or when it came about?
>
> A. Yes, I do.
>
> Q. How do you have that personal knowledge?
>
> A. There was a subsequent meeting where the information was discussed which I was in the audience in this room, and it was affirmed that they were giving a 3% retroactive to 1995 and also a 3% to the nonbargaining units in 1996.
>
> Q. Did you have an understanding of where that money came from?
>
> A. It came from a reserve fund or contingency fund that the county had established.
>
> Q. Do you remember about what the size of that fund was? Did you know?
>
> A. No, I did not. I know the monies were set aside for the sheriff contract negotiations; the bargaining units' negotiations, whatever money they use there, and whatever was needed out of the fund to satisfy those because I think they were working from a prior year standpoint.
>
> Q. You were here when Ms. Bolander testified that there was a conversation in your office shortly after the 3% became known, with commissioner Benitz and some of the employees. Were you present for that?
>
> A. Yes, I was.
>
> ...

> Q. What was his response?
>
> A. He tried to explain how they came about and the girls questioned him as to why they said that -- why the county had said they had no money. **And he said, "Well, that was our strategy and it was up to the union to dispute that or negotiate it out".**
>
> Q. What was his attitude?
>
> A. He was trying to be conciliatory, but he was also trying to defend what the county's actions were.
>
> Q. **Do you remember Commissioner Benitz make any specific statements about the union?**
>
> A. He said it was up to the union to negotiate out the contract if that was their responsibility. **I don't recall any specific words. I was trying to stay out of it** because I didn't feel it was my responsibility, but I could definitely overhear.
>
> Transcript, page 129 [emphasis by **bold** supplied].

What is clear from the foregoing is that, despite conflicting testimony as to the precise statements and his oblique denial of having denigrated the union, Benitz placed himself in a situation of dealing directly with bargaining unit employees on a question critical to the collective bargaining relationship between the employer and union. Benitz and the employer must take responsibility for the fact that at least some bargaining unit employees were left with the feeling that they had been lied to about the money available, that more would have been available if the union's bargainers had pushed hard enough, that the union's negotiating team had misrepresented the employer's position, that the union's team had not aggressively pursued a fair settlement, and/or that the employer had not bargained in good faith. The employer thereby committed an "interference" violation under RCW 41.56.140(1).

MOTIONS

At the end of the hearing, the employer made three motions. The first was to conform the pleadings to the evidence presented. The second was to amend the factual allegations contained in the answer and affirmative defenses to conform to the evidence by way of documents and testimony which occurred during the hearing. The last motion was to keep the record open to obtain a deposition of Jill Sandberg, a newspaper reporter whose writings appeared in two of the exhibits accepted into evidence. Sandberg was in attendance at the hearing and could have been called to testify.

The motions are denied. This decision is based on the evidence of record.

FINDINGS OF FACT

1. Benton County is governed by a board consisting of three elected commissioners.

2. The Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, a bargaining representative within the meaning of of RCW 41.56.030, is the exclusive bargaining representative of certain Benton County employees performing office-clerical and related functions in various Benton County departments and facilities.

3. The union and employer had a collective bargaining agreement for calendar years 1992 through 1994.

4. The union and employer began negotiations for a successor contract on July 19, 1994, at which time the union proposed a

number of language changes and made incomplete proposals on economic improvements.

5. The employer responded on August 22, 1994, by offering no wage increase for 1995-1996. The employer asserted a "Kinney Study" had provided cost-of-living increases, that there was no money available for wage increases, and that there might be a need to downsize during the term of the successor contract. The evidence of record in this matter indicates that the employer's offer had a rational basis rooted in economic considerations, and that the argument based on the "Kinney Study" accurately reflected the opinion of the elected officials that the step system and reclassifications amounted to a wage increase.

6. The employer re-affirmed its position at a meeting on September 14, 1994, but proposed on September 16, 1994 that there be no wage increase for 1995 and wage increases for 1996 and 1997 based on a formula tied to the consumer price index. That proposal included language changes and a reduction in accrual rates for sick leave and vacation.

7. At a meeting held on October 17, 1884, the union requested a written proposal to take back to its members. A written proposal provided by the employer on November 18, 1994 was unchanged from the proposal of September 16, 1994. The union rejected the proposal.

8. The parties met again on December 15, 1994, and agreed they were at impasse. Mediation was requested.

9. At a mediation session on May 11, 1995, the employer offered a 1.5% wage increase for 1995, and again offered the same wage

increases previously offered for 1996 and 1997. It also offered a $4.00 per month increase in employer-paid insurance premiums for 1995, with a 50/50 split of any premium increases for 1996 and 1997. The union did not accept the employer's proposal at that time.

10. The employer's next proposal, which was received by the union on August 8, 1995, reflected no change from the employer's May 11 position on wages. The employer then proposed a $.94 per month increase of insurance contributions for 1995.

11. When the parties met on August 10, 1995, the union offered a counter-proposal which included no wage increase for 1995 and the wages proposed by the employer for 1996 and 1997, but a $50.00 per month increase of insurance to be effective on the date of ratification. The employer responded in September of 1995, with a so-called final offer in which it agreed to the union's proposal of August 10, 1995. The union membership ratified the settlement.

12. In October of 1995, shortly after the employer and union signed their 1995-1997 collective bargaining agreement, the employer gave its unrepresented employees a 3% wage increase retroactive to January 1, 1995, and also provided them with a $25.12 per month increase of insurance premiums paid by the employer. The elected commissioners also granted themselves a 5% wage increase. The evidence does not sustain a finding that the wage increase given to the unrepresented employees was part of some grand plan made or carried out during the parties' negotiations on their 1995-1997 contract, but rather supports a conclusion that the wage increase given to the unrepresented employees was a last-minute decision, perhaps

entirely made after the parties signed their collective bargaining agreement.

13. Based on union members feeling they had been treated unfairly, and that the employer was attempting to undermine the union, the union filed this unfair labor practice case on January 24, 1996. Specifically, the union accused the employer of interference with employee rights, domination, discrimination and refusal to bargain.

14. In an impromptu conversation with a small group of bargaining unit members, Commissioner Benitz made comments which were reasonably perceived by those employees as denigrating the union by indicating: That they had been lied to about the money available; that more money would have been available if the union's bargainers had pushed harder; that the union's negotiating team misrepresented the employer's position; that the union's team had not aggressively pursued a fair settlement, and/or that the employer had not bargained in good faith.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.160.

2. The WSCCCE has failed to sustain its burden of proof that Benton County breached the good faith bargaining obligation imposed upon it by RCW 41.56.030(4) by the events described in paragraphs 5 through 12 of the foregoing Findings of Fact, and so has not established that the employer thereby committed any unfair labor practice under RCW 41.56.140.

3. By placing himself in a situation of dealing directly with bargaining unit employees on a question critical to the collective bargaining relationship between the employer and the union, and by the events described in paragraph 14 of the foregoing Findings of Fact, the employer's elected official bargained directly with bargaining unit employees and thereby committed an interference violation under RCW 41.56.140(1).

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that Benton County, its officers, and agents shall immediately:

1. Cease and desist from:

   a. Bargaining directly with members of the bargaining unit represented by the Washington State Council of County and City Employees, Council 2, AFSCCME, Local 874-HC.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Chapter 41.56 RCW.

2. Take the following affirmative actions to remedy the unfair labor practice and effectuate the policies of the Act:

   a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be

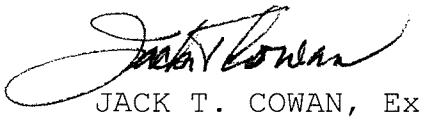
taken by the above-named respondent to ensure that such notices are not removed, altered, defaced or covered by other material.

c. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 11th day of September, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JACK T. COWAN, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION FOUND THAT WE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL refrain from bargaining directly with bargaining unit members of the Washington State Council of County and City Employees, Council 2, AFSCME, Local 874-HC.

DATED:_____

BENTON COUNTY

By:_____
AUTHORIZED REPRESENTATIVE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.