STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC,	)	
Complainant,	)	CASE 13081-U-97-3163
vs.	)	DECISION 6348-A - PECB
SKAGIT COUNTY,	)	
Respondent.	)	DECISION OF COMMISSION

Schwerin, Campbell, Barnard, by Elizabeth Ford and Jason S. Kelly, Attorneys at Law, appeared for the complainant.

Summit Law Group, by Bruce L. Schroeder, Attorney at Law, appeared for the respondent.

This case comes before the Commission on a petition for review filed by Skagit County, seeking to overturn a decision issued by Examiner J. Martin Smith.[1]

BACKGROUND

Skagit County (employer) and the Inlandboatmen's Union of the Pacific (union) have had a collective bargaining relationship for about 33 years. All employees in the bargaining unit work on a ferry operating between Anacortes and Guemes Island (Guemes ferry). A collective bargaining agreement between the employer and union was in effect January 1, 1994 through December 31, 1996, covering

[1] Skagit County, Decision 6348 (PECB, 1998).

the classifications of purser deckhand I, II, and III, mechanic/ deckhand, and master.

Meetings to negotiate a successor collective bargaining agreement took place on December 9th and 10th of 1996, and on January 9th and 16th of 1997. No meetings occurred between January 16th and March 28th of 1997, because of the filing and processing of a unit clarification petition. The parties then agreed not to proceed with the unit clarification, and to continue negotiations.

A negotiation session was held on March 28, 1997. Scott Braymer, who negotiates and helps to administer labor agreements for the union, served as its chief negotiator. The employer's attorney, Bruce Schroeder, served as its spokesperson. What was specifically stated at the meeting was disputed by the parties.

It is clear that Schroeder announced on March 28th that the Board of County Commissioners would be distributing requests for proposals (RFP) to solicit private carriers who might take over operation of the Guemes ferry.[2] Braymer interpreted Schroeder's comments to mean that the employer was getting out of the ferry business, and he indicated he was not prepared to respond until he talked with his bargaining unit. Employer witnesses testified that the employer was not certain of private interest in the ferry operation at the time of the March 28th meeting, and that the employer did not indicate that a decision had definitely been reached. No other issues were discussed at the March 28 meeting.

---

[2] The public works director and the ferry manager visited Pierce County in January of 1997, to inspect a privatized ferry operation. Interest in privatizing the Guemes ferry developed because of cost considerations. Contracting out the operation had been considered several years prior to this, but did not materialize.

Stephanie Wood, the employer's personnel director, talked to the sheriff on March 28th, and a deputy sheriff was assigned to ride aboard the Guemes ferry that day. The deputy sheriff was instructed to watch for possible problems such as vandalism, damage, and/or verbal altercations with patrons related to the employer's announcement of its interest in contracting out the operation.[3] Employees were congenial, and no incidents occurred. The first deputy assigned was later relieved by another deputy sheriff, who also rode on the vessel that day.[4] The initial plan was to continue these assignments over the weekend, but the assignments were ended after one day, because no problem surfaced.

On the same day of its announcement to the union, the employer issued a press release which stated, in part:

> **The Skagit County Public Works Department will be issuing a Request for Proposals for the operation of the County's Ferry "Guemes"**, which carries automobile and passenger traffic from the County's Ferry Terminal at 6th and I Avenue in Anacortes to Guemes Island. **The scope of the RFP would include provision of personnel to operate the ferry** and performance of some routine maintenance of the vessel.
>
> This decision was made in order to obtain information regarding the ability of a private sector company specializing in water transport to operate the ferry. Proposals will be

---

[3] There had never been an incident involving a physical altercation or violence between a ferry worker and a ferry passenger. This was the first time the employer assigned a deputy sheriff to watch over the ferry.

[4] Wood did not inform the union that deputy sheriffs would be assigned to the Guemes ferry. Braymer traveled to Anacortes immediately after the bargaining session, to talk with crew members, and noticed the sheriff's car when he arrived there.

> evaluated and a decision on whether or not to outsource the operations based on factors such as service quality, cost, and ability to comply with safety provisions.
>
> **The decision to seek proposals was prompted by continued escalation in the cost of operating the ferry, as well as the increasing complexity of Coast Guard and other regulations which may better be addressed by a private company specializing in water transport.**
>
> Proposals will be accepted for a period of 30 days. Following the receipt of proposals, the Public Works Department will spend at least 30 days studying the issue and determining a course of action. During this period, the Guemes Ferry will continue to provide transportation services to Guemes Island without change in schedule.

[Emphasis by **bold** supplied.]

The employer also sent a letter to property owners and residents of Guemes Island on March 28, 1997, stating in part as follows:

> Recognizing the importance of access to the service of the Guemes Ferry to residents of Guemes Island, **we are providing this special mailing to Island residents to notify you of an important decision about the Guemes Ferry that will be made in the near future.**
>
> **The Skagit County Public Works Department will be issuing a Request for Proposals for the operation of the County's Ferry "Guemes" by a private company within the next few weeks.** The scope of the RFP would include provision of personnel to operate the ferry and performance of some routine maintenance of the vessel. As you know, the County currently owns and operates the site using County workers. **However, the continued escalation in the cost of operating the ferry, as well as the increasing complexity of Coast Guard and other regulations has caused us to question whether**

> **the service can be better provided by a private company specializing in water transport.**
>
> The decision to accept proposals will allow the County to obtain information regarding the ability of a private sector company to operate the ferry. Proposals will be compared and a decision on whether or not to outsource the operations based on factors such as service quality, cost, and ability to comply with safety provisions.
>
> Proposals will be accepted for a period of 30 days. Following the receipt of proposals, the Public Works Department will spend at least 30 days studying the issue and determining a course of action. During this period, the Guemes Ferry will continue to provide transportation services to Guemes Island without change in schedule.
>
> We plan to involve the Ferry Advisory Committee, which consists of Guemes Island residents, in the decision-making process. **We are also committed to keeping Guemes Island residents informed on the progress of this process through periodic mailings.** Letters of comment or questions regarding this matter should be directed to ... .
>
> [Emphasis by **bold** supplied.]

On March 31, 1997, the employer issued a 24-page RFP titled "Specifications for Operation of the Skagit County Ferry System", in which the employer sought "proposals from qualified parties who are interested in a Personal Services Agreement ('PSA') to operate the 'M/V Guemes'". The RFP described the scope of services to be rendered, minimum qualifications, the requirements for submitting a proposal, and terms and conditions describing the rights and responsibilities of the parties. The RFP also outlined criteria on which proposals would "be evaluated", and on which "selection of a Contractor" would be based. Sections concerning the execution of a contract, notice to proceed, method of payment, contract time

limits, price escalation, amendments, termination, assignment, and subcontracting were included. By the wording of the RFP, the employer reserved the right to accept or reject any proposal.

The union filed a complaint charging unfair labor practices on April 9, 1997. The union alleged that the employer interfered with employee rights in violation of RCW 41.56.140(1), and refused to bargain in violation of RCW 41.56.140(4). The union amended its complaint on June 6 and 19, 1997. Taken together, the union's allegations are summarized as follows:

- The parties were in negotiations for a successor agreement during the winter and spring of 1997, and had not yet reached an agreement.
- The employer repeatedly stalled and obstructed the negotiations by, among other things, seeking to remove part-time employees from the bargaining unit.
- At a bargaining session on March 28, 1997, the employer announced that it intended to "get out of the ferry business" and had sent out an RFP for private operators to operate the Guemes ferry. The union had no prior notice of the employer's plans.
- The employer's assignment of deputy sheriffs to ride the ferry and watch the bargaining unit employees during the course of negotiations, after the employer announced its intention to contract out all of the bargaining unit work, interfered with employees' exercise of their collective bargaining rights.
- The employer's conduct, along with the employer's other actions during the course of bargaining, was evidence of overall bad faith bargaining.

- On or about April 10, the union sent a letter to the employer, reiterating the union's demand to bargain the decision to contract out the work and demanding that the employer withdraw its RFP.

- The employer agreed to meet, but refused to withdraw its RFP and refused to agree that it had a duty to bargain the issue of contracting out.

- The union met with the employer on April 22, 1997, and requested the employer to withdraw its RFP, but the employer refused.

- The employer repeatedly referred to the "decision" as having been made.

- The union learned, on or about May 12, 1997, that the employer formed a committee to select the successful bidder.

- The union learned, on or about June 2, 1997, that the employer had narrowed the applicant field to two companies.

- The employer's intention to contract out the work of the bargaining unit was made clear in the March 28th press release, by its indication that the work was to be "outsourced";

- The employer will be compensating the contractor on an hourly basis for the operation of the ferry.

- The ferry will continue to be owned by the employer, which will retain control over the schedule, the method of operation, major repairs, and the provision of diesel fuel and lubricating oils.

- The decision to proceed with contracting out was a fait accompli.

The union sought an order requiring the employer: To cease and desist from threatening and coercive conduct; to bargain in good faith; and to pay attorneys fees and costs. The union further sought an order requiring the employer to withdraw its RFP and cease its implementation of its contracting-out decision until the parties have negotiated.[5]

A hearing was held and Examiner J. Martin Smith issued a decision on July 2, 1998. The Examiner held that the law enforcement officers assigned to monitor the Guemes ferry operation were instructed to watch for employee misconduct that would not have been protected activity under Chapter 41.56 RCW, so the employer did not thereby commit an unfair labor practice. The Examiner held that the union's concerns over "successorship" and saving the jobs of bargaining unit members raised concerns about tenure of employment which were mandatory subjects of collective bargaining under RCW 41.56.030(4), that the employer failed to bargain in good faith under RCW 41.56.030(4). The Examiner ruled that the employer violated RCW 41.56.140(4) by issuing an RFP which prejudiced the union's concerns about tenure of employment, without having provided adequate opportunity for bargaining the contracting out decision; by demanding that the exclusive representative make proposals outside of the context of the parties' collective bargaining relationship; by treating the contracting out issue as a separate track for negotiations, without the consent of the union; by failing and refusing to ratify the tentative agreement reached by the parties; and by escalating its demands for concessions after the tentative agreement was reached, but without having made specific demands for such concessions. The Examiner imposed interest arbitration as an extraordinary remedy, if the employer

---

[5] The union filed a motion for temporary relief on June 6, 1997, but later withdrew the motion.

should fail to ratify the tentative agreement and an impasse should result after further mediation.

The employer petitioned for review, thus bringing the case before the Commission. Based upon comments made in the parties' initial briefs, the Commission requested a stipulation from the parties as to the status of the tentative agreement after the close of the hearing. Both parties responded in writing, and both indicated that the parties had executed a collective bargaining agreement.

POSITIONS OF THE PARTIES

The employer argues: It had not made a decision to contract out the ferry operation when it issued its RFP and informed patrons it was considering alternatives to operating the ferry; the purpose of the RFP was only to see if there were private parties interested in the operation; there was no fait accompli; the union clearly understood that the contracting out issue had been separated from the collective bargaining agreement for purposes of bargaining, and the parties treated the contracting out issue as separate; and the Examiner made improper conclusions that the employer refused to execute the tentative agreement and escalated its demands for concessions after the tentative agreement was reached. The employer argues that an extraordinary remedy is not warranted, even if it violated the collective bargaining law.

The union argues: The employer failed to bargain in good faith by demanding additional concessions after a tentative agreement was reached; the employer sought additional concessions and threatened to privatize after the July 1 conclusion of negotiations; the employer unilaterally decided to privatize Guemes ferry in

violation of the tentative agreement and despite the fact that privatization is a mandatory subject of bargaining; the Examiner's decision that the employer presented the union with a fait accompli was based on a credibility determination and thus deserves deference from the Commission; later actions of the employer support the Examiner's conclusion; there was no agreement to bargain separately over the privatization discussion, as alleged by the employer; privatization was a central part of the bargaining process; the employer put the issue of privatization on the table and agreed to a contract that did not allow it to privatize; throughout the negotiations, the parties repeatedly discussed the issue of privatization; the employer failed to bargain in good faith by unilaterally issuing its RFP without bargaining or intending to bargain the issue of successorship with the union; the union requested bargaining on the issue of successorship, which is a mandatory subject of bargaining; and the remedy imposed by the Examiner was proper.

DISCUSSION

The Duty to Bargain

The duty to bargain is defined in the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, as follows:

> RCW 41.56.030 Definitions.
>
> ...
>
> (4) "Collective bargaining" means ... 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 ...
>
> [Emphasis by **bold** supplied.]

That definition is patterned after the definition found in the National Labor Relations Act (NLRA). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA are persuasive in interpreting state labor relations acts which are similar to the NLRA. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

The potential subjects for bargaining between an employer and union are commonly divided into categories of "mandatory", "permissive" and "illegal". See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, WPERR CD-57 (King County Superior Court, 1978). Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or which are regarded as a prerogative of employers or of unions have been categorized as "nonmandatory" or "permissive". Klauder v. San Juan County Deputy Sheriff's Guild, 107 Wn.2d 338 (1986).

The duty to bargain includes a duty to give notice and provide opportunity for bargaining prior to changing employee wages, hours or working conditions. Federal Way School District, supra.[6] A party to a bargaining relationship commits an unfair labor practice if it fails to give notice of a change affecting a mandatory subject of bargaining (i.e., presents the other party with a fait

---

[6] See, also, NLRB v. Katz, 369 U.S. 736 (1962); Green River Community College, Decision 4008-A (CCOL, 1993); City of Brier, Decision 5089-A (PECB, 1995).

accompli), or fails to bargain in good faith upon request. Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. Washington Public Power Supply System, Decision 6058-A (PECB, 1998),[7] where we said:

> If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a fait accompli should not be found.

Thus, in those instances where an employer contemplates a change and takes action toward the goal of introducing the change, without allowing the union an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior seems inconsistent with a willingness to bargain, a fait accompli could be found.

The Employer's Request for Proposals

Contracting Out -

The employer's RFP clearly contemplated a transfer of the work historically done by bargaining unit employees to a contractor. In a long line of precedents, the Commission has held that contracting out of bargaining unit work is a mandatory subject of bargaining. See, for example, City of Kennewick, Decision 482-B (PECB, 1980), City of Vancouver, Decision 808 (PECB, 1980), City of Kelso, Decision 2120-A (PECB, 1985), and North Franklin School District,

---

[7] A petition for judicial review filed by the employer in that case was dismissed by stipulation of the parties. Benton County Superior Court, WPERR CD - 989 (1998).

Decision 3980-A (PECB, 1993). Generally, reducing work opportunities for bargaining unit personnel in any way is a mandatory subject of bargaining. City of Centralia, Decision 5282-A (PECB, 1996). See, also, City of Seattle, Decision 4163 (PECB, 1992), affirmed, Decision 4163-A (PECB, 1993).

Fait Accompli -

The employer argues that it had not made the decision to contract out the ferry operation at the time it issued the RFP, and that its notice and press release expressly indicated that a decision had not yet been made. In support of that position, the employer points to Braymer's testimony that he understood no decision had been made when he read the press release and notice. In Washington Public Power Supply System, supra, our conclusion that the union had been presented with a fait accompli was based, in part, because that employer had approached the disputed issue from the beginning as if its policies were outside the collective bargaining process, and as if a tobacco policy was not a mandatory subject of bargaining. In that case, the employer characterized a policy document as a "draft", while the evidence showed the employer actually considered the union's expressions of interest in bargaining to be "too little and too late". Likewise in the case at hand, the employer's claim that issuance of the RFP did not constitute a final decision is severely undermined by the fact that the employer's actions were inconsistent with any willingness to bargain the terms of the RFP in advance of its issuance.

The employer nevertheless claims here that it has consistently recognized its obligation to negotiate both the decision and effects of contracting out the ferry operation, and it cites the minutes of the April 22nd negotiating session in support of its contention. Those minutes state:

> The County is going out on an RFP – it is not a competitive bid. This is not a decision that the County is leaving the ferry business. The county put out a proposal in early April to see if there are people interested in furnishing proposals to the County. No decision has been made and no proposals have been received back. It is premature to perform cost calculations. When the proposals come in they will be reviewed, looking at the cost and whether or not this is a good course of action. The county may proceed on that course and may not. At the present time, the status quo has not changed.
>
> We are willing to negotiate both the decision as well as the effects of a decision on bargaining unit personnel. **It was our intention to let the Union know that this was going out on the street. We will not withdraw the RFP, but will bargain with the Union regarding the effects of the County's decision.**

[Emphasis by **bold** supplied.]

While those minutes recite that the employer stated the RFP was not a decision to contract out the ferry operation and that it was willing to negotiate both the decision and effects, the last two sentences indicate ambiguity as to the employer's intentions and essentially contradict its stated willingness to bargain **the decision.** The employer in Washington Public Power Supply System had maintained it was always willing to discuss the effects of the disputed smoking policy, but we said that a willingness to bargain the effects of a management decision is insufficient as a defense for a failure to bargain the decision itself. In the case at hand, the employer kept telling the union it recognized its duty to bargain, but it kept pursuing and taking action on its decision to contract out without bargaining the issue.[8] It is clear from the

---

[8] The employer's actions were only consistent with bargaining the **effects** of the contracting-out idea.

minutes of the April 22nd meeting that the purpose of its March 28th notice to the union had been more to let the union know what was going on, than to allow a meaningful discussion to take place about the issue. Where an employer acts to impose a change, rather than put forth a proposal for discussion, a fait accompli is generally found. See, King County, Decision 5810-A (PECB, 1997).

The record in this case clearly indicates that the RFP itself set in motion a process that would affect the wages, hours, and working conditions of bargaining unit employees. The employer continued with the RFP process, and moved forward with privatization, despite the union's request for bargaining. Its failure to withdraw the RFP until the union examined it indicates an unwillingness to negotiate all the parameters of the decision. The employer's actions after the issuance of the RFP thus reinforce a conclusion that it had no intention of providing the union an opportunity to influence the employer's planned course of action. The employer's behavior was inconsistent with its statutory duty to bargain.

The RFP Requirement for a List of Employees -

The employer argues that a change must actually be implemented in order to constitute a fait accompli,[9] and takes issue with the Examiner's conclusion that the RFP was a decision about which the union was entitled to bargain. We agree with the Examiner on this point. Even if the RFP was to be considered a request for information, the issuance would still constitute an unfair labor practice.

---

[9] The employer cites North Franklin School District, Decision 3980-A (PECB, 1993) in support of its position, but a union need not wait to file an unfair labor practice in a case such as this, where the RFP and other employer actions gave rise to a refusal to bargain cause of action prior to any actual implementation.

The RFP required applicants to list names of the specific employees they would use in operating the Guemes ferry, and the Examiner found that effectively precluded the possibility that existing employees would be an ongoing part of the ferry operation, and that the employer thus prejudiced any bargaining on the union's demand for "successorship".[10] The employer argues that at the time the proposal was submitted, there was no requirement to list which employees would be operating the vessel, and that there was nothing in the proposal that would have precluded a company from having discussions with existing employees about their willingness to continue with the private provider if it was awarded the contract. We see nothing in the RFP, however, that informs potential applicants to disregard those portions of the RFP. In fact, the requirement is included under a section which states, "The Respondent's Proposal must contain the following minimum elements. Failure to submit any of the following forms and information will result in rejection of the Proposal as nonresponsive".

The issue of successorship has been held to be a mandatory subject of bargaining. City of Richland, Decision 2486-A (PECB, 1986). When the entire business is transferred to another employer, employees have a clear interest in effectively assuring the preservation of their jobs and their previously negotiated wages, hours and working conditions. A successor employer may have a duty to recognize and to bargain with the exclusive bargaining representative of the employees within the bargaining unit. Spokane Airport Board, Decision 919 (PECB, 1980). Successorship relations are created by law, and are not dependent upon agreement of the successor employer. See, Kennewick Public Hospital District,

---

[10] The Examiner reasoned that none of the existing employees were out of work at the time, and there was no evidence that any of them were already moonlighting for any potential private contractors.

Decision 4815-A (PECB, 1996), affirmed, Decision 4815-B (PECB, 1996), and cases cited therein. The chain of liability would have continued upon a private operation taking over the ferry operation.

Braymer mentioned successorship during the March 28th meeting where the union was first advised the employer was considering contracting out the ferry operation. Braymer reiterated on April 22nd that the union desired successorship if the operation was contracted out. Schroeder's statement to the union that the collective bargaining agreement would be "moot" if the employer decided to contract out the service inherently foreclosed the possibility of successorship. The union again specifically requested bargaining on the successorship issue on July 1 and August 28, 1997. The employer never did address the issue of successorship, despite the union's repeated attempts to keep the jobs intact. We thus agree that both the RFP and the employer's subsequent actions effectively foreclosed bargaining on successorship and job security issues, and prejudiced the union's efforts on behalf of the bargaining unit.

Policy Considerations -

The purpose of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is set forth in RCW 41.56.010, as follows:

> [T]o **promote the continued improvement of the relationship between public employers and their employees** by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

[Emphasis by **bold** supplied.]

Healthy labor-management relations depend upon communication between the parties. Thus, the collective bargaining act is best served when communication between the parties is promoted. In cases involving a variety of issues, the Commission has referred to the statutory mandate to promote continual improvement of the employer-employee relationship.[11] In this case, the employer did not foster the communication process with the exclusive bargaining representative of bargaining unit employees when it sent out its RFP prior to bargaining with the union on what is clearly a mandatory subject of bargaining, and then refused to withdraw that RFP when the union made a timely request for bargaining. Communication between an employer and exclusive bargaining representative is not promoted when the employer announces to the public that it is thinking of eliminating bargaining unit jobs.

Even if the purpose of the RFP was, as the employer contends, merely to see if private parties might be interested in taking over the operation, we question the employer's motives in refusing to bargain the idea of contracting out the ferry operation with the union upon request.[12] The time for bargaining was prior to the issuance of an RFP: What better time to negotiate the decision to contract out than while there would still be full and unfettered discussion of all issues that might be raised? Discussions between the employer and union might have resulted in concessions that alleviated the need for any RFP; might have resulted in changes of the terms or format of the RFP in regard to the job security concerns of the bargaining unit employees; might have addressed the union's concerns about continuity of the bargaining relationship;

---

[11] See, City of Puyallup, Decision 5460-A (PECB, 1996), and King County, Decision 5595-A (PECB, 1996).

[12] To find out if there was interest, a simple form letter to private carriers could have begun the inquiry.

might have provided the employer with ideas that could have contributed to a more inclusive RFP; or might even have resulted in a resolution of the matter or at least obviated the need for unfair labor practice proceedings. In other words, bargaining in conformity with the statute might have taken almost any turn.

We reject the employer's contention that upholding the Examiner's decision would require all public agencies to bargain before exploring ideas or gathering information about any activity that could result in a contract or trigger a bargaining obligation. We are making the decision here strictly based on the facts of this case, and this record indicates this employer was much further along in the decisionmaking process than it claims to have been. It was not only "exploring ideas and gathering information".[13]

The "Not Competitive Bidding" Defense -

The employer urges the Commission to distinguish between an RFP and competitive bidding, and indicates that a decision will only have been made where the competitive bidding process is used. In a case of this nature, the Commission seeks to determine the intent of the employer at the time of its actions, and distinguishing between the statutes cited by the employer does not lend itself to serving our purpose under the collective bargaining law. The employer's arguments regarding the difference between an RFP and a competitive bid are unpersuasive.

- RCW 36.58.090 is inapplicable since, on its face, it is limited to solid waste systems.

---

[13] The employer seems to suggest that the Commission would be prohibiting it from issuing an RFP, but that also is not the case. We only insist that the employer bargain with a union prior to issuing an RFP such as the one at issue here.

- While RCW 36.32.245 might cover contracts for ferry service, we note that the employer does not even claim it was following the requirements imposed by that statute when it issued the RFP at issue here.[14]

Further, both the terms of the disputed RFP and the employer's behavior after receiving responses indicate the employer was making no such distinction in 1997. The minutes of the August 28th negotiation session include the following:

> [Employer official] **Mike Woodmansee** reviewed the history of this issue. He **stated that the County has short-listed two proposals for the operation of the Guemes Ferry**, both of whom are less expensive than the current ferry operation performed by County workers. In addition, other comparators between our operation and the two proposals such as safety and customer service are at least equivalent to our current operation. Mike stated that the County is now trying to determine whether or not **to accept the proposal of one of the private entities** or to continue to use county forces to operate the ferry.
>
> [Emphasis by **bold** supplied.]

The tone of the statements being recorded in those minutes supports a conclusion that the employer was then working on an assumption that it had the authority to accept one of the proposals received in response to the RFP, and let a contract entirely on the basis of the RFP procedure it put in motion on March 28, 1997. The employer now attempts to argue that its actions or inactions can be

---

[14] RCW 36.32.245(1) specifically requires a procedure whereby advertisements are published in a county newspaper stating the time of bid opening. No evidence is in the record showing this either took place or was planned to take place.

justified by statutory authority, but it only asserted a difference between an RFP and a competitive bid in arguments advanced long after the fact. There is nothing in this record that shows the employer used the statutes or was considering a difference between an RFP and competitive bidding when it issued the RFP or during its negotiations with the firms that responded.[15] The statutory arguments of the employer are thus irrelevant to the inquiry.

Reliance on Inapposite Michigan Precedent -

The employer cites Pinckney Community Schools, 9 Mich. Pub. Employee Rep. Section 27085 (1996) for the proposition that Commission precedent allows a public employer to explore the concept of contracting out without bargaining. The case was cited in a footnote in Seattle School District, Decision 5542-B (PECB, 1997), where an Examiner only used it for the limited purpose of showing that the employer was not required to provide information to the union about a contract which never came into existence. The Examiner did not cite the Michigan case as precedent on any unilateral change issues, and it mischaracterizes the footnote for the employer to now cite it as authority on unilateral changes.[16]

---

[15] The employer's new spin on this situation equates with the attempt of the employer in Washington Public Power Supply System, supra, to rely upon data that was given to the union only *after* a disputed decision had been made. The Commission found that record was unclear as to whether the specific data had been used in the decision, and stated, "[I]nformation provided and bargaining offered after the fact cannot justify or excuse an unlawful action previously taken."

[16] Even if Pinckney had been cited as precedent on a unilateral change issue, it does not support the employer's contentions here. A school board directed its superintendent to begin discussions about an early retirement plan, but the employer took no action to implement the plan. The Michigan Employment Relations Commission viewed the situation "in the context of the

Contract Negotiation and Privatization as Separate Tracks

The Examiner found the employer sought to isolate the contracting out issue as a separate track for negotiations, without the agreement of the union. We concur. The employer's claim that the contracting out issue had been separated from the contract negotiations with the union's consent is not supported by the record.

The employer acknowledges that it repeatedly informed the union that its costs for operating the Guemes ferry were significantly greater than those proposed by private firms in response to the RFP, and that it encouraged the union to provide some mechanism to make the operation by bargaining unit employees more competitive. We concur with the Examiner's conclusion that some of those demands called upon the union to make proposals outside the context of its role as exclusive bargaining representative.

The employer itself interjected the contracting out issue into the negotiations for a successor contract, by choosing the March 28th bargaining session to inform the union about the RFP. Although the parties repeatedly discussed the privatization issue thereafter, the union consistently voiced its opposition and made additional concessions in the context of the negotiation on a successor contract, seeking to avoid the loss of the entire bargaining unit. At the negotiations session on April 22nd, Braymer described the contracting out as, "This is subsidizing union busting. We want successorship. We want to deal here." In response, Schroeder stated:

> ... employer's conduct as a whole". In the case at hand, we find, on the whole, that the employer clearly took action to privatize the ferry operation.

> That is part of what we would be talking about here. What rights do you have. If we do go to another provider, what other options for employment would there be.... [W]e are here to deal with all employees and all categories. **If you are going to have a labor agreement depends on whether we are going to have a private provider. If there is a private provider, the Union contract would be moot....** [I]t seems like inefficient use of time, but if the Union would like to schedule a session to proceed on contract bargaining **while this other issue proceeds on a parallel track**, that would be fine. In a week there should be some information back on the RFP's.

Exhibit 2, Negotiation Minutes, April 22, 1997, pp. 3-4. [Emphasis by **bold** supplied.]

The employer refers to the tentative agreement reached on July 1, 1997, but it was prior to July when the employer treated the contracting out as a separate issue. In April, employer officials began to refer to contracting out as "another matter", and implied that reaching a labor contract would not bar the employer from selecting a private carrier. There is only one statute and only one duty to bargain under RCW 41.56.030(4). The employer was not entitled to have the contracting out treated as "another matter".

Refusal to Execute Tentative Agreement

The employer argues that the Examiner improperly concluded that the employer refused to ratify the tentative agreement. The Examiner could rule, however, only on the record before him. The evidence available to the Examiner indicates the parties reached a tentative agreement on a successor collective bargaining agreement on July 1,

1997, and that no contract had been signed by the time of the hearing in November of 1997.[17]

Close scrutiny of factual details also supports the Examiner's findings. At the meeting of August 28, 1997, Schroeder stated that "simply passing the contract and forgetting about the proposals received is not going to be acceptable to the County." On September 2, 1997, the board of county commissioners wrote a letter to the union stating:

> The Board of Commissioners met to discuss your suggestion of delaying the discussion on the proposals for the operation of the Guemes ferry. **At our last meeting you suggested we sign the new bargaining agreement and either delay or terminate the current talks.**
>
> **The decision of the Board is that we are not willing to delay this process and would prefer to move on with bargaining as soon as possible.** We believe that there has been much effort put into studying the proposals received and the current operation that should allow us to make an informed decision in our meetings with you. ...

[Emphasis by **bold** supplied.]

Finally, on September 19, 1997, Stephanie Wood, Personnel Director for the employer, wrote to the union stating, in part:

> By this letter, I would like to reiterate that the ratification of the tentative bargaining agreement will not resolve the outstanding issue of whether to contract out the operations of the ferry. ... [T]he ratification of the agreement will only serve to fix the Union's position in terms of costs of service,

---

[17] We have received letters from both the union and the employer stating that the collective bargaining agreement was in fact executed in January of 1998.

> and make continued operation of the ferry by County personnel financially unacceptable.

Taken together, the evidence supports the Examiner's conclusions that the employer was refusing to ratify the tentative agreement reached by the parties.

The employer argues that the union did not proceed with ratification, and that it had not, as of October 1, 1997, submitted the contract to its own members for ratification. The employer did not, however, file a complaint alleging the union committed an unfair labor practice.[18] In addition, no statute or rule requires that a tentative agreement be ratified by an exclusive bargaining representative before it is presented to the employer's legislative authority.

The Demand for Additional Concessions

The employer takes issue with the Examiner's holding that the employer escalated its demands for concessions after the tentative agreement was reached. On July 24, 1997, however, the employer demanded "comment on the cost comparisons", demanded concessions in the form of significant savings, and again threatened to privatize the ferry operation. The employer persisted during the next several weeks, demanding a written response from the union describing ways the union could provide significant savings. On August 15, 1997, the employer insisted that the union supply a written response to the proposals made by the private firms.

Despite the employer's assertions that the union did not offer counterproposals, alternatives to subcontracting, or other cost

---

[18] Accordingly, there is no issue before us as to whether the union violated the duty to bargain by its actions in regard to ratification of the tentative agreement.

reductions, a thorough examination of the record shows that the union did make proposals and bargain in good faith. The union was under no requirement to submit proposals in the form of a bid. We agree with the Examiner's conclusion that the employer escalated its demands after reaching a tentative agreement.

Remedies

The employer claims that no remedy is necessary (because no violation occurred), but only specifically argued that the interest arbitration remedy set forth by the Examiner was inappropriate. The employer's brief to the Commission suggested that "this portion of the remedy is moot, given that the parties have executed the contract". With the written statements from both parties indicating that they executed a collective bargaining agreement on January 26, 1998, we have the benefit of information that was unavailable to the Examiner. We thus omit discussion of an interest arbitration remedy in this case, and amend the order accordingly. The employer offers no specific argument on the remaining portion of the Examiner's remedy, and as we affirm the merits of the case, we affirm the remaining portion of the remedy.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner J. Martin Smith in the above-captioned matter on July 2, 1998, are AFFIRMED and adopted as the findings of fact of the Commission.

2. The Conclusions of Law issued by Examiner J. Martin Smith in the above-captioned matter on July 2, 1998, are AFFIRMED and

adopted as the conclusions of law of the Commission except for paragraph 6, which is stricken.

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

a. CEASE AND DESIST from:

i. Presenting proposed changes, and particularly issuing requests for proposals which prejudice the bargaining rights of its employees concerning their job security, without having provided opportunity for good faith collective bargaining, as per RCW 41.56.030(4), on the employment tenure concerns raised by the union.

ii. Failing to negotiate in good faith with the Inlandboatmen's Union, as per RCW 41.56.030(4), with respect to the operation of the *M.V. Guemes*.

iii. Relying upon ground rules for negotiations which are not a mandatory subject of collective bargaining, including ground rules limiting the introduction of new proposals, as a basis for failing to bargain in good faith as per RCW 41.56.030(4).

iv. In any other manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

i. Withdraw the Request for Proposals for operation of the *M.V. Guemes* which was issued on or soon after March 28, 1997, and reject or cancel all bids and contracts resulting from that process.

ii. Give notice to and, upon request, bargain collectively with Inlandboatmen's Union of the Pacific, concerning any decision relating to contracting out the Guemes ferry operation.

iii. 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.

iv. Read the notice required by the preceding paragraph into the record of an open, public meeting of the Board of County Commissioners of Skagit County, and permanently append a copy of that notice to the official minutes of the meeting where the notice is read.

v. Notify the above-named complainant, in writing, within 30 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.

vi. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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 Executive Director with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 20th day of November, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL withdraw the Request for Proposals for operation of the M.V. Guemes issued on March 28, 1997, and will cancel all bids and contracts resulting from that process;

WE WILL NOT fail to negotiate with Inlandboatmen's Union the decision and effects of contracting out the Guemes Island-Anacortes ferry run and operation of the M.V. Guemes, including contracting-out, privatization, successorship, employment tenure concerns, and other forms of the contracting out issue;

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

SKAGIT COUNTY

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.