City of Spokane, Decision 11263 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE POLICE GUILD, Complainant, vs. CITY OF SPOKANE, Respondent.	CASE 23584-U-10-6009 DECISION 11263 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Keller W. Allen, Attorney at Law, for the employer.

The Spokane Police Guild (Guild) filed a complaint charging unfair labor practices against the City of Spokane (employer) on October 18, 2010. The preliminary ruling, issued October 25, 2010, found that the complaint stated three causes of action. First, a cause of action was found to exist for an independent interference claim, in violation of RCW 41.56.140(1), based on how the employer dealt with the proposed severance of sergeants from the existing bargaining unit. A second cause of action was found for employer domination of or assistance to a union, and the derivative interference, in violation of RCW 41.56.140(2) and (1), by the employer giving, or allowing sergeants to use, employer resources for the purposes of severance, and giving greater disciplinary responsibilities to sergeants for the purposes of severance. The third cause of action was found to exist for employer refusal to bargain, and the derivative interference, in violation of RCW 41.56.140(4) and (1), by the employer making unilateral changes in sergeants' disciplinary authority, refusing to provide relevant information requested by the Guild, and circumventing the Guild through direct dealing with employees represented by the Guild.

The Guild filed an amended complaint March 11, 2011. The amended preliminary ruling, issued March 21, 2011, stated two additional causes of action. One cause of action was found to exist for employer refusal to bargain, and the derivative interference, in violation of RCW

41.56.140(4) and (1), by breach of its good faith bargaining obligations involving a settlement agreement, its course of conduct in negotiating that agreement, and its circumvention of the Guild. The other cause of action was found for an independent interference claim, as a violation of RCW 41.56.140(1), because of employer threats of reprisal or force, or promises of benefit.

Examiner Katrina I. Boedecker held a hearing on the amended complaint October 4, 2011. The parties filed post-hearing briefs by November 30, 2011.

ISSUES

1. Did the employer interfere with employee rights in connection with a proposed severance of sergeants from an existing bargaining unit, through creating the impression of surveillance of bargaining unit members and making arrangements for the Chief of Police to attend a meeting about severance?

2. Did the employer dominate or assist a union by providing legal resources to sergeants for the purposes of severance; giving greater disciplinary responsibilities to sergeants for the purposes of severance; permitting sergeants to use employer facilities and e-mail for purposes of severance; and showing a preference for severance?

3. Did the employer refuse to bargain by making unilateral changes in sergeants' disciplinary authority; refusing to provide relevant information requested by the Guild; and circumventing the Guild through direct dealing with employees represented by the Guild?

4. Did the employer refuse to bargain and breach its good faith bargaining obligations by regressively bargaining and/or escalating demands regarding a settlement agreement of a grievance involving Brad Thoma; and by circumventing the Guild through direct dealing with employees?

5. Did the employer interfere with employee rights by issuing threats of reprisal or force, or promises of benefit, to bargaining unit members in connection with their union activities?

After examining the testimony of the witnesses, the documents admitted into evidence, the parties' legal arguments, and the record as a whole, I find that:

- The employer did not interfere with employee rights by how it dealt with the proposed severance of sergeants from the existing bargaining unit. The chief's attendance, by invitation, at a meeting of the sergeants did not reasonably create an impression of surveillance.

- The employer did not assist the sergeants' association by allowing it to use employer facilities and e-mail or by providing legal services. However, the employer did show a preference for severance by granting disciplinary authority to sergeants.

- The employer did refuse to bargain with the Guild when it unilaterally gave the sergeants, who were still Guild members, disciplinary authority without bargaining with the Guild; when it did not give relevant information requested by the Guild; and when it dealt directly with the sergeants about the disciplinary authority thus circumventing the Guild.

- The employer did not refuse to bargain or breach its good faith bargaining obligations concerning a settlement of a grievance because it did not bargain regressively. However, the employer did refuse to bargain when it circumvented the Guild.

- The employer did interfere with employee rights by issuing promises of benefit to bargaining unit members that could influence their union activities.

ISSUE 1: Did the employer interfere with employee rights through creating the impression of surveillance of bargaining unit members and making arrangements for the Chief of Police to attend a meeting about severance?

APPLICABLE LEGAL STANDARDS

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW states at RCW 41.56.040: "No public employer . . . shall . . . interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter."

RCW 41.56.140(1) provides for the enforcement for this right by stating that an employer who interferes with the collective bargaining rights of its employees is guilty of an unfair labor practice.

The complainant, in this case the Guild, has the burden of proof in these unfair labor practice proceedings. WAC 391-45-270(1)(a).

ANALYSIS

The Spokane Police Guild is the exclusive bargaining representative for all commissioned police employees, up to and including sergeants, employed by the City of Spokane. There are approximately 260 employees in the bargaining unit, 36 of whom are sergeants. The Guild and the employer are parties to a collective bargaining agreement in effect from January 1, 2010, through December 31, 2011. The parties have a bargaining history of over 20 years. Lieutenants, captains, majors, assistant police chiefs, and the Chief of Police are all outside of the Guild's bargaining unit.

The Police Chief is Anne Kirkpatrick. She began as chief in 2006; she came from the police department of the City of Federal Way, Washington. After she became chief in Spokane, Kirkpatrick instituted certain changes. She determined that in an officer-involved shooting, an outside agency should do the investigation. This was a change from the department investigating its "own." She announced five types of conduct that for the first time would be subject to termination. Finally, she incorporated "best practices" into the policy and procedure manual. She wanted to instill confidence in the community about their police department.

For several years sergeants have discussed severing from the Guild bargaining unit. The sergeants were concerned about the resistance they perceived from patrol officers about certain personnel decisions that the sergeants were making. During or about March 2007, two sergeants reported a domestic violence incident that involved a detective. Sergeants believed that there was a lack of support from the Guild for the two sergeants involved. In 2007, the sergeants asked the Guild leadership if they would agree to release the sergeants; the leadership denied the request.

On or about March 15, 2010, the Guild conducted a no-confidence vote among its members regarding the Office of the Chief of Police. The vote was generated by concerns certain members had about changes that the chief was making to hours and working conditions. Members perceived that she was making these changes without bargaining with the Guild. Generally, the sergeants in the bargaining unit were very much against conducting the vote. The vote resulted in an endorsement of no-confidence in the Office of the Chief. Sometime in April, the chief as well as Mayor Mary Verner publicly expressed their displeasure with the vote. Shortly after the release of the results of the vote, the sergeants gave more attention to exploring ways to sever from the Guild, in order to form their own bargaining unit. During or about the end of April, Sergeant Troy Teigen sent an e-mail to the chief asking if the employer would support a separate unit of sergeants. He sent the e-mail through the employer's e-mail system. The chief answered back, using the office e-mail, that she and the Mayor did not oppose having another bargaining unit in the city. She stated that the sergeants could not use the employer's labor attorney, but she did give the name of a private attorney that the sergeants' group might want to consult. The private attorney had represented the employer in an action brought by the Guild in the past. Teigen ended up contacting that attorney and several other attorneys about potentially representing the sergeants.

The chief also advised in her e-mail that she was willing to give the sergeants "consequential discipline" that "should minimize any challenge [to the severance] if it doesn't stop a challenge in its tracks." Based on her experience in Federal Way, granting consequential discipline was enough to have the rank above patrol officer seen as supervising the patrol officers. Granting this type of disciplinary authority in Federal Way caused that supervising level to be put into a bargaining unit separate from the police officer unit.[1]

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[1] Commission records show that the Federal Way Police Guild was certified on March 18, 1997 in *City of Federal Way*, Decision 5875 (PECB, 1997), to represent a bargaining unit of "All full-time and regular part-time commissioned police officers of the City of Federal Way, excluding supervisors, confidential employees, and all other employees of the employer." The certification does not list what ranks are included in the bargaining unit. There is a later Commission certification for the Federal Way Lieutenants Association to represent a bargaining unit of commissioned lieutenants. *City of Federal Way*, Decision 8825, (PECB, 2005). The record is unclear whether the supervisors who were granted consequential discipline to be separated from the police officers held the rank of sergeant or lieutenant. If the rank involved sergeants, it appears that the supervisors were severed from the unit by agreement among the parties.

Throughout the month of May, Teigen and Sergeant Anthony Giannetto sent e-mails to the Mayor and the chief apprizing them of how the severance process was progressing. At one point, the chief e-mailed back, in part: "I support ya'll as sergeants whatever you decide but after talking with [private legal counsel] she explained by taking these steps [extending consequential discipline] the sergeants would become true management and I'd love to have ya'll on the management team! We together can rebuild the pride of this department by getting on the same bus!"

On June 10, 2010, Teigen e-mailed the chief that the sergeants were in the process of voting to separate from the Guild. He advised that due to vacations, it might take up to two weeks to complete the vote, but that he would let her know the final results. The chief replied, "Troy, I am pleased!"

On June 13th, Guild President Ernie Wuthrich e-mailed the chief that he had heard that she was going to give "some type of disciplinary authority" to the sergeants so that they could apply to the Public Employment Relations Commission (Commission) to become their own union. He asked what type of authority she had promised the sergeants. The chief responded to Wuthrich that she had forwarded his e-mail on to be handled by the employer's attorney. Wuthrich never received any additional response.

The sergeants invited Wuthrich to attend a meeting that they were having to consider separating from the Guild bargaining unit. The meeting was held at the Monroe Court Building, which the employer was renting to house its detective unit. The employer also rented conference room space there. Wuthrich did attend to answer questions and address the sergeants' concerns. He wanted to keep the sergeants in the unit. At the meeting, Wuthrich learned that the chief had also been invited to speak to the sergeants after Wuthrich was through. As he was leaving the meeting, Wuthrich saw the chief come into the building. The chief spoke to the sergeants about the direction she wanted to take the department. She identified the core values she wanted in the department. She addressed a division that she saw about what was acceptable misconduct and what was acceptable discipline.

On July 1st, the chief granted sergeants, lieutenants, captains, and civilian first line supervisors authority as her designees to administer discipline up to and including a written reprimand.

In approximately September 2010, the Sergeants Association was formally organized. Its president was Sergeant Reisenauer and its vice president was Sergeant McCabe. The Chief sent certain "group" e-mails to department management employees that recognized Reisenauer and McCabe as leaders of the Sergeants Association. Wuthrich challenged in an e-mail to the chief that neither men were leaders of any recognized labor group.

LEGAL ANALYSIS

On their own initiative, the sergeants were exploring whether or not they should break away from the Guild. The employer was not initiating the formation of a "company union." The sergeants' motivation was in keeping with the concerns in WAC 391-35-340 which provides that it shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees from bargaining units containing their rank-and-file subordinates, in order to avoid a potential for conflicts of interest and to include supervisors in separate bargaining units. Here, the sergeants were acting to protect what they saw as their own best interests.

There is no evidence that the chief was seeking out information regarding the activities of sergeants, or other Guild members, about who supported or did not support the severance. The sergeants volunteered information to the employer about their concerns. The sergeants also voluntarily kept the chief apprised of the progress of forming their association.

The Guild argues that merely by attending a meeting where severance was discussed, the chief's presence would reasonably be perceived as a threat to sergeants who wanted to remain with the Guild. Given the facts in the record, the Guild's argument is too big a jump for a logical conclusion. The chief attended the meeting by invitation of the Sergeants Association, as did the Guild president. She did not take notes on who was present or absent. She repeatedly stated that she would support the sergeants in *whatever* their decision was. The chief testified strongly and consistently that she saw the decision of whether or not to sever from the Guild as a decision for the sergeants alone to make; she would support the result, either way. The record supports a finding that the meeting was an information gathering session, not a propaganda rally.

The Guild has the burden of proving that a typical employee, in the same circumstances, could reasonably conclude that the chief was encouraging or discouraging union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). Having just been at the meeting himself, Wuthrich knew what information the sergeants were seeking. He might not have liked that the sergeants were meeting about severing from the Guild, but the sergeants are public employees, too. As such, they have the protection of RCW 41.56.040 which guarantees them "free exercise of their right to organize and designate representatives of their own choosing. . . ." The Guild president learned when he spoke at the sergeants' meeting that the chief was coming to speak to them, also. He then saw the chief enter the building. It is reasonable to expect the Guild president to perceive that the sergeants were seeking information from both he and the chief, not that the chief was there to spy. The employer did not interfere with employee rights by attending a meeting of the sergeants, by their invitation.

ISSUE 2: Did the employer dominate or assist a union by providing legal resources to sergeants for the purposes of severance; giving greater disciplinary responsibilities to sergeants for the purposes of severance; permitting sergeants to use employer facilities and e-mail for purposes of severance; and showing a preference for severance?

APPLICABLE LEGAL STANDARDS

A domination violation under RCW 41.56.140(2) occurs when "an employer involves itself in the internal affairs or finances of the union, shows a preference between two unions or groups that are competing for the same bargaining unit, or attempts to create, fund or control a 'company union.'" *State – Office of Financial Management*, Decision 9955 (PECB, 2008), citing *State - Labor and Industries*, Decision 9348 (PSRA, 2006) and string citations therein.

"History suggests that situations of 'unlawful assistance' and 'employer-dominated unions' should be taken quite seriously." *Washington State Patrol*, Decision 2900 (PECB, 1988).[2] *Washington State Patrol* reminds that, "It remains a violation for an employer to recognize or bargain with a union that has not established majority status in an appropriate bargaining unit, or to recognize one union while it is in competition with another in representation proceedings."

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[2] That decision also contains a detailed recitation of the legislative history of the federal law pertaining to a "domination" unfair labor practice.

The Commission has acknowledged the "precarious position" that an employer is in when faced with two unions competing for the same employees: "[The employer] must recognize the statutory and contractual rights of the incumbent union as the exclusive bargaining representative of the employees, while at the same time maintaining a stance as close to neutral as possible with respect to showing favoritism to one union over another . . . ." *Whatcom County*, Decision 8245-A (PECB, 2004).

LEGAL ANALYSIS

The Guild advances four different areas where it contends that the employer's acts lead to a finding of a domination violation.

Legal resources –

The extent to which the employer provided legal resources, in this record, is tenuous. The chief specifically told Teigen that the Sergeants Association could not use the employer's labor attorney. She did supply the name of a private sector labor attorney, but that was the same attorney that had represented the city in a previous action with the Guild. Her name and the fact that she represented management is a public record. The chief just advanced the name without comments about strategy. Teigen contacted other attorneys, also. The employer did not pay for any legal services as a result of any of Teigen's contacts. The employer was not involved in domination of the Sergeants Association as far as legal services are involved.

Disciplinary authority –

The chief granted greater disciplinary authority to the sergeants specifically to enhance their claim that they should not be co-mingled with the rank and file officers. She readily admitted that she was trying to head off any challenge to the severance. The chief's own e-mail is her confession that she gave the consequential discipline in order to minimize or stop a challenge "in its tracks."

The chief was aware from her experience in Federal Way that granting disciplinary authority to a group of employees would allow that group to argue it would be a conflict of interest to be in the same bargaining unit with the employees that they could now discipline. The severance was not a cooperative joint venture shared in by the Guild.

The timing of the grant of disciplinary authority to sergeants to write reprimands supports the conclusion that the employer was trying to assist the sergeants in their organizing efforts. In *King County*, Decision 2553-A (PECB, 1987), the Commission held that a domination violation requires proof of employer intent to assist one union to the detriment of others. In the instant case, the employer did commit a domination violation when it gave sergeants new disciplinary authority since it did so to assist the Association's formation to the detriment of the Guild.

Use of facilities –

The Guild established that e-mails from certain sergeants to the chief concerning the severance were sent through the employer's e-mail system. The sergeants held their meeting to gather information about severing from the Guild in an employer facility. Since the chief was involved in both the e-mails and the meeting, the employer obviously knew that the sergeants were using its resources.

In *Whatcom County*, Decision 8245-A (PECB, 2004) the Commission reiterated that "Chapter 41.56 RCW does not give public employees an independent right to use employer's facilities for union business." Citing *City of Seattle*, Decision 1355 (PECB, 1982). In *Whatcom County*, the employees were seeking a change in their union representative. The Commission held that, "an employer that permits the incumbent union to use its facilities for communication with employees during the representation election must then grant any rival union or competing labor organization the same benefit of use it granted to the incumbent union." The Commission reasoned that this "naturally stems from the employer's requirement to remain neutral, and to not render 'aid' to any incumbent or competing labor organization." Citing *Renton School District*, Decision 1501-A (PECB, 1982).

In *Whatcom County*, the Commission defined when an employer's duty to remain neutral is triggered. The Commission pointed to the "filing of a valid petition [as] the operative event for the imposition of strict neutrality on the part of the employer." It reasoned that "Having a clearly-defined rule of conduct was thought to encourage both employee free choice and industrial stability." The Commission wrote, "Therefore, we now hold that once a valid petition has been filed with the Commission, an employer must remain strictly neutral in rival union organizing situations. Exclusive use of employer facilities by one union cannot be permitted during the pendency of a representation proceeding . . . ."

The record shows that during the March through June 2010 time period, the sergeants were discussing whether or not to sever from the Guild. Commission records show that the Spokane Police Department Sergeants Association filed its petition for a question concerning representation on November 1, 2011, but it did not file the supporting showing of interest until November 3, 2011. The Commission issued a deficiency notion to the Association since the showing of interest was untimely under WAC 391-25-110 since it was filed outside of the window period of October 3, 2011 through November 1, 2011, created by the parties' collective bargaining agreement. Specifically, 60 to 90 days prior to the expiration of their contract. The Association subsequently withdrew its petition. See, *City of Spokane*, Decision 11225 (PECB, 2011).

The sergeants' use of the employer's facilities and e-mails was prior to their representation petition being filed. The employer's duty to remain strictly neutral had not yet been triggered when the sergeants used the e-mail system and the conference room in the spring and summer of 2011. The employer did not commit an assistance violation regarding the sergeants' use of its facilities.

Demonstrated preference for severance –

The Guild cites *Valley Communications Center*, Decision 4145, (PECB, 1992), *aff'd*, Decision 4145-A (PECB, 1993) for the precedent that: "The prohibition on assisting rival unions logically extends to assisting the formation of a rival union. Promoting efforts of a rival union undercuts the incumbent union's certification as the exclusive bargaining representative and, thereby, disrupts labor peace." That quote is from the Examiner's decision. It is important to recognize what the Commission found in affirming the Examiner's decision. The Commission wrote:

> We concur as well with the Examiner's ruling that the complainant's [incumbent union, Teamsters Local 763] burden of proof was not met on the "interference" allegations [in] this case. The Examiner noted at one point that the acts of: (1) meeting on the employer's premises with a law firm whose purpose is to discuss replacement of an incumbent union, and (2) using the employer's mailboxes to distribute notices of the meeting, may tend to give the appearance of unlawful employer assistance to a rival union. We read that remark as simply indicating that a violation could conceivably be found in such instances. As far as the actual circumstances of this case are concerned, the Examiner made the following specific finding:
>
> > The record fails to establish that employees would reasonably have perceived that the employer was showing a preference for the association over Teamsters Union Local 763.

> That finding of fact by the Examiner is fully supported by the record, and we find it dispositive on the "interference" claim advanced by Local 763.

The chief e-mailed that she was "pleased" with the progress that the sergeants were making in forming their association. She welcomed the sergeants on her "bus." The employer gave the sergeants new disciplinary authority. The chief demonstrated a preference for the rival Sergeants Association to the detriment of the Guild. The employer illegally assisted the sergeants to achieve their goal to form their own bargaining unit.

ISSUE 3: Did the employer refuse to bargain by making unilateral changes in sergeants' disciplinary authority, refusing to provide relevant information requested by the Guild and circumventing the Guild through direct dealing with employees represented by the Guild?

APPLICABLE LEGAL STANDARDS

Before making any changes to wages, hours or working conditions, an employer must first give notice and an opportunity to bargain to the union. *Spokane County Fire District 9*, Decision 2860 (PECB, 1988), citing *City of Bremerton*, Decision 2733-A (PECB, 1987).

A party to a collective bargaining relationship has the duty to provide relevant information requested by the other party in order to properly perform its collective bargaining duties. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, 119 Wn.2d 373 (1992).

Once employees have chosen an exclusive bargaining representative to speak for them during negotiations and the duration of the collective bargaining agreement, the employer must not evade the representative by dealing directly with employees about mandatory bargaining subjects. *City of Seattle*, Decision 3566-A (PECB, 1991).

LEGAL ANALYSIS

The Guild advances three different areas where it contends that the employer's acts lead to a finding of refusal to bargaining violations.

Changing sergeants' authority –

When the chief gave the sergeants disciplinary authority on July 1, 2010, she did so without giving the Guild any notice. When the Guild president earlier had asked the chief about the rumor he had heard that she was going to give some sort of disciplinary authority to the sergeants, she passed his inquiry on to the legal department.

Disciplinary procedures are working conditions; as such, they are a mandatory subject of bargaining. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991). In *City of Pasco*, Decision 4197-A (PECB, 1994) the procedures of a citizen's review board that related to employee discipline were held to be a mandatory subject of bargaining. The Guild points to the Commission's statement in *Pasco*, cited in *City of Seattle*, Decision 6662 (PECB, 1999), "[d]iscipline can affect tenure of employment, which is the ultimate 'working condition' within the traditional scope of 'wages, hours and working conditions.'"

There was no opportunity for meaningful bargaining by the Guild about this change to the working conditions of the sergeants who were, at the time, still in the Guild. Given the additional duty, and the need now to know and apply just cause standards, the Guild might have proposed a wage increase for the sergeants to compensate for the new assignment. The addition of duties can cause the employer to have to bargain with the union for "wages commensurate with the changes. . . ." *City of Richland*, Decision 1997 (PECB, 1984).

On July 1, 2010, the employer presented the change in duties as a fait accompli. A union does not have to request bargaining if the employer presents the change as a fait accompli. *Val Vue Sewer District*, Decision 8963 (PECB, 2005), cited in *City of Tukwila*, Decision 10536-A (PECB, 2010). The employer did refuse to bargain with the Guild about the increase in the sergeants duties.

Providing information –

The Guild, in its post-hearing brief, quotes "the duty to bargain includes the duty to provide relevant, necessary information that is requested by the opposite party for the proper performance of its duties in the collective bargaining process." *Seattle School District*, Decision 8976 (PECB, 2005), citing *Port of Seattle*, Decision 7000-A (PECB, 2000). In *Seattle School*

District, the obligation was put on the employer to contact the union, who was the requesting party, to explain that the employer had an objection to, or was confused about, the information request. The employer was directed to negotiate with the union to come to a mutual agreement about the scope of the request.

Although an employer may initially claim that an information request is difficult to comply with or is not warranted, it must explain its concerns to the union and make a good faith effort to reach a resolution. *Port of Seattle.*

When Guild President Wuthrich e-mailed the chief about the rumor of disciplinary authority being given to the sergeants, he was seeking relevant information to determine if the Guild should make a demand to bargain. The chief answered him by saying she was forwarding his e-mail to the legal department. Wuthrich received no other follow up. The employer did not tell him that it objected to the request or that it was confused by the request.

The employer did refuse to bargain with the Guild by failing to provide requested, relevant information to the Guild.

Circumvention of the bargaining representative –
The chief e-mailed Teigen and other sergeants about giving them new and greater disciplinary authority at the time the sergeants were still in the Guild's bargaining unit. She did not include Wuthrich in the e-mails. The employer was evading the Guild.

By circumventing an exclusive bargaining representative, an employer undermines the representative's ability to effectively protect the wages, hours and working conditions it has achieved through bargaining. An employer is not allowed to engage in direct negotiations with one or more bargaining unit employees concerning one or more mandatory subjects of bargaining. *City of Wenatchee*, Decision 2216 (PECB, 1985). The employer acted illegally when it communicated with the sergeants who were still bargaining unit members about changing their duties but did not communicate that to the Guild as the exclusive bargaining representative.

ISSUE 4: Did the employer refuse to bargain and breach its good faith bargaining obligations by regressively bargaining and/or escalating demands regarding a settlement agreement of a grievance involving Brad Thoma, and by circumventing the Guild through direct dealing with employees?

APPLICABLE LEGAL STANDARDS

The examiner in *Skagit County*, Decision 9329 (PECB, 2006) stated: "As a general rule, whether parties in labor bargaining have reached a meeting of the minds is an issue of fact when there is no contract to show it. *Ben Franklin National Bank*, 278 NLRB 986 (1986). The parties are deemed to reach a meeting of the minds when the evidence shows that a party 'understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon' by the party who made the offer. *City of Yakima*, Decision 3564-A (PECB, 1991)." "[T]here was never a meeting of the minds, because the subjective understanding of each party varied significantly from the other . . . ." *City of Richland*, Decision 5459 (PECB, 1996).

An employer may communicate factually accurate information to its employees about collective bargaining matters as long as the communication is: 1) truthful; 2) not purposefully misleading; and 3) the same information as that offered to the union. *Vancouver School District*, Decision 10561 (EDUC, 2009), *aff'd*, Decision 10561-A (EDUC, 2011). These three standards preserve the employer's constitutional free speech and freedom of expression rights, while at the same time preventing coercion and interference in the collective bargaining process.

ANALYSIS

Sergeant Brad Thoma was criminally charged for an off-duty incident involving driving his car. At his Loudermill hearing on or about December 17, 2009, where he was represented by the Guild, the employer offered to put him in a non-commissioned position until the criminal charges were cleared and he obtained an unencumbered driver's license. The settlement offer was rejected. The employer made another offer of settlement in 2010: Thoma would be on layoff status for the time that he had an encumbered driver's license; when he received an unencumbered license, he would be restored to a demoted status as a detective. That offer was rejected. The employer then terminated Thoma for conduct unbecoming that would result in a

lack of trust in the police department. An arbitration hearing was scheduled for January 6 and 7, 2011, to hear the grievance about his termination.

On January 5, 2011, Guild Attorney Chris Vick met with Assistant City Attorney Erin Jacobson. Guild President Wuthrich was also present. They agreed that recent legislation would allow Thoma to have an unrestricted driver's license. The parties went on to discuss the terms for settling the grievance and returning Thoma to work. The two agreed that Jacobson would notify the arbitrator that the arbitration hearing should be canceled. They also agreed that she would draft up the settlement agreement. Jacobson sent the settlement letter to Vick for signature on January 6, 2011. The settlement set forth that Thoma would return to work the week of January 10th. It also included that the Guild would "withdraw its pending grievance" and be able to "submit a new grievance related to Thoma's discipline, subject to the following modified grievance procedure" which was then detailed.

In anticipation of scheduling Thoma for work, and since she had not received the signed settlement agreement, the chief contacted Wuthrich sometime between January 6th – 10th. During this conversation, Wuthrich conveyed that he wanted Thoma's past to be considered a suspension, not a termination. The chief believed that this was a material change to the settlement agreement, so she concluded that the agreement was void.

In order to quash rumors in the department, the chief sent an e-mail to all employees on January 7th. In it she detailed her offer to bring Thoma back as a detective. In the e-mail, she included:

> I have signed a letter to that offer, but it has not been signed off on the other side yet because it is my understanding that the Guild wants to grieve the demotion.
>
> Jeff Humphreys [a news reporter] was contacted by someone in the department earlier this week and he has had the story for several days but held off until we could finalize the situation. He contacted us today and is running the story regardless. So, I caution you all that the matter is not finalized until the letter is signed.

Vick, Jacobson, and the chief had a conference call January 10th. When Jacobson compared the points of the conference call to the points of the January 5th meeting, she concluded that there was at least confusion, if not outright conflict, in the Guild and employer positions. The next day, the chief reoffered her 2010 settlement proposal to Vick.

Vick sent a letter to Jacobson January 13th where he wrote: "You stated at that meeting [January 5th] that Chief Kirkpatrick intended to reinstate Brad Thoma as a detective without any interference with the pending grievance what so ever." Vick also stated that "The agreement that was sent to me was not the same agreement we discussed. . . ." He concluded that he believed that the employer was engaging in regressive bargaining.

On January 14th, the chief sent an e-mail to the whole department which stated in its entirety: "As you are aware I made an offer to reinstate Thoma at the rank of Detective. After he had an opportunity to consult with the Guild leadership, and others, he has decided to pass on the offer and continue to arbitration." Wuthrich received calls from Guild members questioning what the Guild was doing in this matter. Wuthrich testified that he believed that the chief was trying to undermine him with his own members. He felt she was planting seeds of distrust in the members so they would question his actions on behalf of the Guild.

Regressive Bargaining –

Vick testified that there were several meetings, discussions, and conversations about the Thoma settlement, "and it was a mess." He ended the final discussion on January 5th with asking Jacobson to make the Guild an offer. He testified, "I wanted some kind of a document with what the City was going to do so we had a starting place to see where we were going from there." Vick admitted he did not have any notes from the meeting: "[Notes] can only come back to haunt you in a way you don't want to in labor relations." The record shows that the parties never had a meeting of the minds concerning the employer's settlement offer. If there is no document memorializing a meeting of the minds, the question of whether the parties have reached an agreement in labor bargaining is an issue of fact. *Skagit County*, Decision 9329. A similar issue of fact was discussed by an examiner in *Kitsap County*, Decision 8292-A (PECB, 2005): "While the guild presented evidence that at least some of its members and officers took for granted a liberal release time policy for guild activities, the employer produced persuasive evidence that there was no meeting of the minds between it and the guild over this use of release time."

Regressive bargaining cannot be found if there is no meeting of the minds. The facts in this case show that there was no mutual agreement on the Thoma settlement. Vick's January 13th letter criticizes the employer's recording of the settlement agreement since it "was not the same

agreement we discussed. . . ." In his letter he states that the parties agreed Thoma could be reinstated "without any interference with the pending grievance what so ever." However, the January 6th settlement offer includes that the Guild would withdraw its pending grievance and be able to submit a new grievance under certain new procedures. The Commission has found that, "It is entirely possible that the parties had differing views of the meaning and intent of the changes made, so that 'like ships passing in the night' they had no meeting of the minds . . . ." *City of Yakima*, Decision 3564-A (PECB, 1991). I find that there was no mutual agreement as to the settlement of Thoma's original grievance.

The Guild argues that the employer's second offer went backwards by prohibiting the Guild from grieving the discipline. It claims that the second offer was likely punishment for not signing off on the January 6th settlement offer. "Regressive bargaining occurs when one party at the bargaining table in some manner evidences an attempt to make a proposal less attractive." *City of Redmond*, Decision 8863-A (PECB, 2006). In *Columbia County*, Decision 2322 (PECB, 1985) a violation was found when the employer withdrew its total package proposal that contained a sick leave cash-out and substituted a new package without sick leave cash-out after the union rejected the employer's first total package. In order for a party to bargain regressively, a bad faith element must infect the collective bargaining process. *City of Redmond*, Decision 8879-A (PECB, 2006).

Here, the employer did not engage in regressive bargaining. The employer did not show intent to frustrate the bargaining process. It was Wuthrich who brought up a new proposal for the settlement agreement that led the chief to conclude there was no final agreement. It is easy to see why the chief thought this was a new proposal and that the Guild still wanted to bargain about new details of Thoma's reinstatement. The employer did not have to accept the new proposal from Wuthrich about putting Thoma on layoff status.

Direct dealing –

The employer has a right to communicate directly with represented employees as long as there is no attempt to bargain with one or more employees or as long as there is no other unlawful activity. Unlawful activity would include making statements that undermine the status of the

union as the exclusive bargaining representative of the employees. *University of Washington*, Decision 10490-C (PSRA, 2011). The chief's motive was not to undermine the Guild. She wanted to quell corrosive rumors.

The Guild argues that employer communication to Guild members must be a neutral act, truthful and not purposefully misleading, citing *Spokane County*, Decision 2793 (PECB, 1987). It sees the chief's e-mails as misleading. The Guild claims that the chief's e-mail was factually untrue because Thoma had not rejected the settlement, since the parties were still having discussions about it. The Guild argues that an employer cannot play politics with a union in the safest scenarios. Additionally, it claims that since the chief only wrote about her willingness to bring Thoma back to work, but did not include certain waivers that the employer sought, the e-mail was untruthful. The Guild contends that the chief crafted the e-mails in such a way as to make it appear that the Guild was blocking Thoma from coming back to work. Employees, in fact, did contact Wuthrich expressing confusion and/or displeasure with what the Guild had done, from how they interpreted the chief's e-mails.

The employer did not establish that the Guild leadership had been consulted in the Thoma settlement, as the chief wrote in her January 14th e-mail. The January 14th e-mail that the chief sent to the entire department does not meet the accuracy standard that direct communication to bargaining unit employees must maintain. However, the Guild failed to show that the chief's January 7th e-mail was not truthful.

ISSUE 5: Did the employer interfere with employee rights by issuing threats of reprisal or force, or promises of benefits, to bargaining unit members in connection with their union activities?

APPLICABLE LEGAL STANDARDS

Employer interference with employee rights will be found where "a typical employee could, in the same circumstances reasonably perceive the employer's actions as discouraging with his or her union activities." *City of Wenatchee*, Decision 8802-A (PECB, 2006), citing *State – Corrections*, Decision 7872-A (PSRA, 2003). Normally, an employer does not need to have an intention to interfere with employee rights; the focus is on the employee's reasonable perception. *Kennewick School District*, Decision 5632-A (PECB, 1996).

The general test for an independent interference claim (versus a derivative interference claim) is whether a reasonable employee in the same situation would perceive the employer's actions to be discouraging to the employee's union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant does not have to prove that the employer intended to interfere. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to employee rights. *City of Wenatchee*, Decision 8802-A.

LEGAL ANALYSIS

When the chief granted disciplinary authority to the sergeants, both the sergeants and the patrol officers represented by the Guild were be impacted by the change. They could both see that the employer was encouraging the severance of the sergeants from the Guild bargaining unit. The patrol officers could reasonably perceive that their right to maintain their bargaining unit was being discouraged by the employer. By granting "consequential discipline" to the sergeants, the employer interfered with employee rights protected by the statute.

FINDINGS OF FACT

1. The City of Spokane is a public employer within the meaning of RCW 41.56.030(12).

2. The Spokane Police Guild is a bargaining representative within the meaning of RCW 41.56.030(2). It is the exclusive bargaining representative for all commissioned police employees, up to and including sergeants.

3. The Guild and the employer are parties to a collective bargaining agreement dated January 1, 2010, through December 31, 2011.

4. During or about the end of April 2010, Sergeant Troy Teigen sent an e-mail, through the employer's e-mail system, to Police Chief Ann Kirkpatrick asking if the employer would support a separate unit of sergeants.

5. The chief e-mailed Teigen back, using the office e-mail, stating that she and the Mayor did not oppose having another bargaining unit in the city. The chief stated that the sergeants could not use the employer's labor attorney; she gave the name of a private attorney, who had represented the employer in an action brought by the Guild in the past and which was a matter of public record. The chief also advised in her e-mail that she was willing to give the sergeants "consequential discipline" that "should minimize any challenge [to the severance] if it doesn't stop a challenge in its tracks."

6. Throughout the month of May 2010, Teigen and Sergeant Anthony Giannetto sent e-mails to the Mayor and the chief apprizing them of how the severance process was progressing. The chief responded that she would support the sergeants in whatever they decided. She also expressed that she would welcome the sergeants being on the management team.

7. On June 13, 2010, Guild President Ernie Wuthrich e-mailed the chief that he had heard that she was going to give "some type of disciplinary authority" to the sergeants. He asked what type of authority she had promised the sergeants. The chief answered that she had forwarded his e-mail on to the employer's attorney for handling. Wuthrich never received any additional response.

8. The sergeants invited Wuthrich to attend a meeting that they were having to consider separating from the Guild bargaining unit. The meeting was held in an employer building. Wuthrich did attend. At the meeting he learned that the chief had also been invited to speak to the sergeants after Wuthrich was through. As he was leaving the meeting, Wuthrich saw the chief come into the building.

9. The chief did attend the meeting. She spoke to the sergeants about the direction she wanted to take the department as well as other matters.

10. On July 1, 2010, the chief granted sergeants, lieutenants, and captains, and civilian first line supervisors, authority as her designee to administer discipline up to and including a written reprimand.

11. On January 5, 2011, Guild Attorney Chris Vick met with Assistant City Attorney Erin Jacobson. Guild President Wuthrich was also present. They discussed the terms for settling a grievance involving Sergeant Brad Thoma and returning him to work. They agreed that Jacobson would draft the settlement agreement.

12. Jacobson sent the settlement letter to Vick for signature on January 6, 2011. The settlement set forth that the Guild would "withdraw its pending grievance" and be able to "submit a new grievance related to Thoma's discipline, subject to the following modified grievance procedure" which was then detailed.

13. In anticipation of scheduling Thoma for work, and since she had not received the signed settlement agreement, the chief contacted Wuthrich sometime between January 6th – 10th. During this conversation, Wuthrich conveyed that he wanted Thoma's past to be considered a suspension, not a termination. The chief believed that this was a material change to the settlement agreement, so she concluded that the agreement was void.

14. The chief sent an e-mail to all employees in the department on January 7th. In it she detailed her offer to bring Thoma back as a detective, but that the settlement agreement was not signed off by the Guild because it was her understanding that the Guild wanted to grieve the demotion.

15. Vick, Jacobson, and the chief had a conference call on January 10th. When Jacobson compared the points of the conference call to the points of the January 5th meeting, she concluded that there was at least confusion, if not outright conflict, in the Guild and the employer positions.

16. Vick sent a letter to Jacobson on January 13, 2011, stating that "The agreement that was sent to me was not the same agreement we discussed. . . ."

17. On January 14, 2011, the chief sent an e-mail to the whole department which stated that she had offered to reinstate Thoma at the rank of Detective, but that he decided to continue to arbitration after he had an opportunity to consult with the Guild leadership, and others.

18. Wuthrich received calls from Guild members, in response to receiving the January 14, 2011 e-mail, questioning what the Guild was doing in this matter.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By the chief attending a meeting of the sergeants, at their invitation, to answer questions where the Guild president also spoke and he saw the chief enter the building, as described in Findings of Fact 8 and 9, the employer did not create an impression of surveillance, thus it did not commit an interference violation under RCW 41.56.140(1).

3. By permitting the sergeants to use employer facilities and e-mail system to discuss severance from the Guild, as described in Findings of Fact 4, 5, and 6, prior to the sergeants filing a petition for question concerning representation with the Commission, the employer did not commit a domination or assistance violation, under RCW 41.56.140(2).

4. By supplying the name of a private attorney who had represented the employer in a previous action brought by the Guild, that was a matter of public record, as described in Findings of Fact 5, the employer did not provide legal resources to the sergeants for the purposes of severance, and thus it did not commit a domination or assistance violation under RCW 41.56.140(2).

5. By the chief advising the sergeants that she would give them consequential discipline to help them sever from the Guild and then actually doing so, as described in Findings of Fact 5 and 10, the employer did commit a domination or assistance violation under RCW 41.56.140(2) and (1).

6. By unilaterally granting consequential discipline to the sergeants without bargaining with the Guild about the change in working conditions, as described in Finding of Fact 10, the employer committed a refusal to bargain violation under RCW 41.56.140(4) and (1).

7. By failing to provided requested, relevant information to the Guild about the disciplinary authority of the sergeants, as described in Finding of Fact 7, the employer committed a refusal to bargain violation under RCW 41.56.140(4) and (1).

8. By dealing directly with the sergeants about consequential discipline, and not with the Guild as the exclusive bargaining representative of the sergeants, as described in Finding of Fact 5, the employer committed a refusal to bargain violation under RCW 41.56.140(4) and (1).

9. By negotiating a settlement agreement, but not coming to a meeting of the minds about certain details, as described in Findings of Fact 11, 12, 13, 15 and 16, the employer did not commit a refusal to bargain violation under RCW 41.56.140(4).

10. By e-mailing the entire department an accurate statement of where the parties were in the settlement negotiations as described in Finding of Fact 14, the employer did not commit a refusal to bargain violation under RCW 41.56.140(4).

11. By e-mailing the entire department an inaccurate statement of where the parties were in the settlement negotiations as described in Findings of Fact 17 and 18, the employer did commit a refusal to bargain violation under RCW 41.56.140(4) and (1).

12. By granting disciplinary authority to the sergeants, a described in Finding of Fact 10, the employer committed an interference violation under RCW 41.56.140(1).

ORDER

The City of Spokane, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

    a. Giving greater disciplinary responsibilities to sergeants for the purposes of severance.

b. Unilaterally granting consequential discipline to the sergeants without bargaining with the Guild about the change in working conditions.

c. Failing to provide requested, relevant information to the Guild about the disciplinary authority of the sergeants.

d. Dealing directly with the sergeants about consequential discipline, and not with the Guild as the exclusive bargaining representative of the sergeants.

e. E-mailing the entire department an inaccurate statement of where the parties were in the settlement negotiations.

f. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

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

a. Restore the *status quo ante* by reinstating the wages, hours and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change in the consequential disciplinary authority granted the sergeants found unlawful in this Order.

b. Provide relevant, requested information to the Guild that would allow the Guild to fulfill its role as the exclusive bargaining representative.

c. Give notice to and, upon request, negotiate in good faith to agreement or receipt of an interest arbitration award with the Spokane Police Guild, before making changes in wages, hours and working conditions for bargaining unit employees.

d. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Spokane, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

f. Notify the 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 complainant with a signed copy of the notice provided by the Compliance Officer.

g. Notify the Compliance Officer of the Public Employment Relations Commission, 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 22nd day of December, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

CASE 23584-U-10-6009
DECISION 11263 - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *CITY OF SPOKANE* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY gave greater disciplinary responsibilities to police sergeants to assist their severance from the Spokane Police Guild.

WE UNLAWFULLY granted consequential discipline to the sergeants without bargaining with the Guild about the change in working conditions.

WE UNLAWFULLY failed to provide requested, relevant information to the Guild about the disciplinary authority of the sergeants.

WE UNLAWFULLY dealt directly with the sergeants about adding consequential discipline to their duties, and not with the Guild as the exclusive bargaining representative of the sergeants.

WE UNLAWFULLY e-mailed the entire department an inaccurate statement of where the parties were in the settlement negotiations.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL remove the consequential disciplinary authority granted the sergeants.

WE WILL provide relevant, requested information to the Guild that will allow the Guild to fulfill its role as the exclusive bargaining representative.

WE WILL give notice to and, upon request, negotiate in good faith to agreement or receipt of an interest arbitration award with the Spokane Police Guild, before making changes in wages, hours and working conditions for bargaining unit employees.

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.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 12/22/2011

The attached document identified as: DECISION 11263 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S/ ROBBIE DUFFIELD

CASE NUMBER:	23584-U-10-06009	FILED:	10/18/2010	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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