Lincoln County (Teamsters Local 690), Decision 12844 (PECB, 2018)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LINCOLN COUNTY, Complainant, vs. TEAMSTERS LOCAL 690, Respondent.	CASE 128814-U-17 DECISION 12844 - PECB CASE 128815-U-17 DECISION 12845 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
TEAMSTERS LOCAL 690, Complainant, vs. LINCOLN COUNTY, Respondent.	CASE 128818-U-17 DECISION 12846 - PECB CASE 128819-U-17 DECISION 12847 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Teamsters Local 690 (union) represents two bargaining units of workers employed by Lincoln County (employer): a unit of approximately 12 commissioned law enforcement officers and a unit of approximately eight non-commissioned jail/dispatch employees. Three commissioners

constitute the employer's governing body. The employer and each bargaining unit are parties to a collective bargaining agreement (CBA) with a duration through December 31, 2016.

These cases involve employer and union complaints that essentially mirror each other. Both allege the other refused to bargain by conditioning bargaining on a nonmandatory subject of bargaining. The employer insisted that the parties bargain in meetings open to the public, and the union insisted that the parties bargain in private meetings.

On February 27, 2017, the employer filed unfair labor practice complaints against each bargaining unit alleging union refusal to bargain. On March 23, 2017, the Commission's unfair labor practice manager consolidated these two cases and issued a preliminary ruling finding a cause of action for refusal to bargain.

On February 28, 2017, the union filed unfair labor practice complaints on behalf of each bargaining unit against the employer alleging employer refusal to bargain. On March 23, 2017, the unfair labor practice manager consolidated these two cases and issued a notice of partial deficiency. On April 13, 2017, the union filed an amended complaint. On May 15, 2017, the unfair labor practice manager issued a preliminary ruling finding a cause of action for refusal to bargain.

The four complaints were consolidated for hearing. On September 19 and 20, 2017, I held a hearing in these matters. The parties submitted post-hearing briefs on November 27, 2017, and reply briefs on January 5, 2018.

ISSUES

The preliminary rulings framed the following two issues for hearing:

> Did the union refuse to bargain in violation of RCW 41.56.150(4) [and if so, derivative interference in violation of RCW 41.56.150(1)] on February 27, 2017, by refusing to meet and negotiate with the employer?

> Did the employer refuse to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation RCW 41.56.140(1)] on February 27, 2017, by failing to bargain in good faith and stating the employer was not willing to bargain with the union, unless the union capitulated to the county's position on a permissive subject of bargaining, whether collective bargaining sessions should occur in public or private?

I find that both the union and the employer refused to bargain on February 27, 2017, by conditioning their willingness to meet and bargain on a nonmandatory subject of bargaining. The employer conditioned its willingness to bargain on bargaining in a meeting open to the public. The union conditioned its willingness to bargain on bargaining in a private meeting. By conditioning their willingness to bargain on a nonmandatory subject, the employer and the union each refused to bargain in good faith and committed unfair labor practices.

BACKGROUND

The Employer's Resolution

On September 6, 2016, the employer adopted Resolution 16-22 entitled "In the Matter of Improving Transparency by Negotiating Collective Bargaining Contracts in a Manner Open to the Public" (the resolution). The resolution stated, in pertinent part, the following:

> From this day forward, Lincoln County shall conduct all collective bargaining contract negotiations in a manner that is open to the public; and
>
> Lincoln County shall provide public notice of all collective bargaining negotiations in accordance with the Open Public Meetings Act (RCW 42.30.060-42.30.080); and
>
> This resolution does not include meetings related to any activity conducted pursuant to the enforcement of a collective bargaining agreement (CBA) after the CBA is negotiated and executed, including but not limited to grievance proceedings; and
>
> That Lincoln County send a copy of this resolution to all Department Heads, to all union representatives, and all others deemed appropriate by the Board of Lincoln County Commissioners.

The resolution clarified that the parties were not precluded from meeting privately to discuss "negotiating tactics, goals, and methods."

The day after passing the resolution, Commission Chairperson Rob Coffman informed department heads and elected officials of the resolution and asked that they forward information on the resolution to employees. The employer did not discuss the resolution with Joe Kuhn, the union's bargaining representative, prior to adopting the resolution. The employer did not provide Kuhn with notice of the resolution after passing it. According to Coffman, "We didn't feel we had to contact Joe, or anybody else. This is well within our wheelhouse, to pass resolutions on how we conduct all of our policies in the county."

The idea for the resolution originated several years earlier when Coffman received information from the Freedom Foundation[1] about opening bargaining to the public. Coffman testified that he and the other commissioners did not know if they wanted to "fight the fight" at that time. The employer developed the resolution using a template e-mailed to Coffman from the Freedom Foundation on August 12, 2016.

Coffman testified about the relationship between the resolution and the employer's interest in increasing taxes. In 2016, the employer responded to budget concerns by reducing the total workforce by about 10 percent. In 2017, the employer decided to seek increased revenue by placing a public safety sales tax proposition on the ballot. Coffman testified that the employer decided to show the public they would be "open and transparent" with the funds by passing the resolution. The resolution noted that collective bargaining agreements were among the employer's most expensive contracts.

[1] The Freedom Foundation describes itself on its website as a non-profit think and action tank with the mission of advancing "individual liberty, free enterprise, and limited, accountable government." It further describes that it is "working to reverse the stranglehold public-sector unions have on our government." https://www.freedomfoundation.com/about/. Last visited 3/14/2018 7:56 a.m.

On September 26, 2016, three union representatives, including Kuhn, attended a commission meeting and asked the employer to rescind the resolution. The employer did not rescind the resolution.

On September 29, 2016, the union filed unfair labor practice complaints against the employer on behalf of each bargaining unit concerning the resolution. The union alleged the employer refused to bargain by unilaterally passing a resolution making collective bargaining contract negotiations open to the public without providing the union with an opportunity to bargain. In a letter dated October 28, 2016, the unfair labor practice manager consolidated the cases and found the complaint deficient, characterizing the public bargaining topic as bargaining guidelines or ground rules which are nonmandatory subjects of bargaining.

On November 18 and December 8, 2016, the union filed amended complaints asserting discrimination in addition to unilateral change and refusal to bargain. By Order of Dismissal dated January 10, 2017, the unfair labor practice manager dismissed the union's complaints, concluding that the complaints lacked the necessary elements to qualify for further case processing. *Lincoln County*, Decision 12648 (PECB, 2017). The union appealed the Order of Dismissal on January 30, 2017, but then withdrew the appeal by letter dated February 13, 2017. The Commission officially closed the cases on February 15, 2017.

<u>Bargaining</u>

While the unfair labor practice manager was processing the union's complaints, the parties worked to schedule bargaining. By letter dated October 31, 2016, the employer indicated that while it had no desire to modify the collective bargaining agreements, the employer was "entirely open to entering collective bargaining negotiations should the Sheriff's Deputies and employees, by and through their Union, wish to do so." In response to the letter, Kuhn contacted the employer asking if it was seeking to extend the agreement for another three years. By letter dated November 2, 2016, the employer clarified its letter, first noting: "To be clear, we do not consider this correspondence 'negotiations' or 'collective bargaining.'" The employer further explained its

intent that if they were to extend the agreement another year, provisions that, by their own terms, expired on dates certain would not continue into 2017.

Marci Patterson, the employer's deputy clerk, initiated e-mails with Kuhn offering potential bargaining dates. Eventually the parties agreed to bargain on January 17, 2017. By e-mail on December 27, 2016, to Coffman and Patterson, Kuhn confirmed his availability to meet on January 17 and noted: "If this is going to be a public meeting we will meet however we are not giving up our position regarding the resolution that was passed and the subsequent ULP charge that was filed."

The first formal bargaining meeting for both bargaining units took place on January 17, 2017, in a public meeting. The Commissioners sat in their designated name-plated spaces at their dais which is elevated approximately six inches above the floor. Kuhn sat at a table pushed up to the edge of the dais with his bargaining team members seated behind him. At the beginning of the meeting, Kuhn affirmed that the union disagreed with the employer's position on bargaining in public and was not waiving its position. The managing editor/reporter for the *Davenport Times* attended the meeting and published a story about it that ran in the newspaper's January 19 edition.

At the bargaining meeting, the parties reached agreement on several issues, including longevity for the non-commissioned bargaining unit and per diem rates for both bargaining units. According to Kuhn, because a reporter was at the bargaining meeting, he held back on discussing some of the proposals in any detail, including proposals involving performance evaluations, light duty for employees with medical conditions, and new safety language. Those proposals were driven by specific individuals who cited specific situations. When they got to those issues, the employer's sheriff spoke up and asked to engage in a separate conversation away from the bargaining table. On another day, the sheriff, undersheriff, and Kuhn discussed the issues away from the open bargaining meeting and planned to have a follow-up conversation. That conversation did not occur due to this litigation.

The parties scheduled their next formal bargaining meeting for February 27, 2017. On February 10, Kuhn e-mailed the employer the union's updated proposals. The proposals included tentative agreements reached during the January meeting, modifications to some of the union's prior proposals, and some of the same proposals. The union modified the light duty proposal based on Kuhn's conversation with the sheriff and undersheriff after the first bargaining meeting.

On February 16, 2017, Teamsters Local 690's executive board adopted its "Integrity in Bargaining Resolution." The resolution stated that all collective bargaining "shall be performed in a private atmosphere." The record includes no evidence that the employer was aware of the union's resolution until the union introduced it as an exhibit at the hearing.[2]

On February 27, 2017, the same parties met in the same physical configuration as the January meeting. Union attorney Jack Holland accompanied Kuhn. After Coffman started the meeting, Kuhn expressed that the union was ready, willing, and able to bargain and introduced Holland. Holland communicated the same message, adding that the union preferred to follow the long-standing practice of bargaining in private. Holland then requested that those not directly involved in the negotiations leave. Coffman expressed that the employer was ready, willing, and able to bargain and would bargain in public, consistent with the employer's resolution. Coffman and Holland restated their respective positions several times.

During the restatement of positions, Commissioner Scott Hutsell questioned, "I guess we are not going to bargain today?" The meeting ended with Holland communicating that it looked like there would not be any negotiations. The union team left the meeting and went into the break room. The employer kept the meeting open until the union team left the building.

The same managing editor/reporter for the *Davenport Times* attended the February 27 meeting and published a story about it that ran in the newspaper's March 2, 2017, edition.

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2 The employer did not object to the admission of the resolution. Neither party sought to amend its complaints or answers.

ANALYSIS

Applicable Legal Standards

Bargaining Obligation

RCW 41.56.010 declares the purpose of the Public Employees' Collective Bargaining Act as follows:

> The intent and purpose of this chapter is to 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.

To achieve this purpose, Chapter 41.56 RCW imposes a mutual obligation on public employers and exclusive bargaining representatives to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to mandatory subjects of bargaining. RCW 41.56.030(4). Mandatory subjects of bargaining include wages, hours, and working conditions. Permissive or nonmandatory subjects of bargaining include managerial and union prerogatives, and procedures for bargaining mandatory subjects. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342 (1986).

The Commission determines whether a particular subject is a mandatory subject of bargaining. WAC 391-45-550. To make the determination, the Commission applies a balancing test on a case-by-case basis. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The Commission balances the subject's relationship to employee wages, hours, and working conditions against the extent to which the subject is a management or union prerogative. *City of Seattle*, Decision 11588-A (PECB, 2013). The decision focuses on which characteristic predominates. *Id.*

Parties do not waive the characterization of subjects as nonmandatory by their actions or inactions. WAC 391-45-550. Agreements on nonmandatory subjects of bargaining "must be a product of renewed mutual consent." *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338.

While the Commission encourages parties to discuss all matters in dispute between them, parties are not required to bargain over nonmandatory subjects. *Cowlitz County*, Decision 12483-A (PECB, 2016). A party commits an unfair labor practice when it bargains to impasse over a nonmandatory subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338. Similarly, a party commits an unfair labor practice when it conditions its willingness to bargain on a nonmandatory subject. *Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989), *review denied*, 116 Wn.2d 1015 (1991); *City of Sumner*, Decision 6210, *corrected* Decision 6210-A (PECB, 1998); *Taylor Warehouse Corp. v. National Labor Relations Board*, 98 F.3d 892 (6th Cir. 1996); *Quality Roofing Supply Co.*, 357 NLRB 789 (2011); *Nabisco Brands, Inc.*, 272 NLRB 1362 (1984); *Adrian Daily Telegram*, 214 NLRB 1103 (1974).

In *City of Sumner*, Decision 6210, for example, the examiner concluded that the employer committed an unfair labor practice by conditioning the bargaining of mandatory topics on developing ground rules for the collective bargaining process. In *Nabisco Brands, Inc.*, the union would only bargain with the employer if the union could continue its past practice of tape recording the bargaining meetings. The National Labor Relations Board (Board) affirmed the administrative law judge's conclusion that the union unlawfully refused to bargain by insisting on a nonmandatory subject of bargaining as a condition for bargaining.[3]

Parties are free to make proposals on nonmandatory subjects. They cannot, however, condition their willingness to bargain on them.

Ground Rules/Bargaining Procedures

Parties often begin negotiations for a new or successor collective bargaining agreement by jointly developing what are referred to as ground rules or bargaining procedures. Ground rules typically include commitments about how the parties will work together to negotiate the CBA consistent with their statutory obligations. Ground rules rarely address the substance of bargaining topics and, instead, focus on the procedures and protocols for bargaining. This agency has consistently

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[3] Decisions construing the National Labor Relations Act (NLRA) are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984).

ruled that ground rules or bargaining procedures are a nonmandatory subject of bargaining about which parties are not required to bargain. *State – Fish and Wildlife*, Decision 11394-A (PSRA, 2012), *aff'd*, *State – Fish and Wildlife*, Decision 11394-B (PSRA, 2013), *aff'd*, *Fish and Wildlife Officers' Guild v. Washington Department of Fish and Wildlife*, 191 Wn. App. 569 (2015); *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012); *City of Sumner*, Decision 6210, *corrected* Decision 6210-A (PECB, 1998).

Application of Standards

Bargaining in private or public meetings is classified as a ground rule or bargaining procedure and is a nonmandatory subject of bargaining.

The record includes no evidence that there is a relationship between the subject of bargaining in private or public meetings, and wages, hours, or working conditions. The subject of bargaining in private or public meetings addresses no substantive bargaining issue and does not impact terms or conditions of employment. The subject of bargaining in private or public meetings is properly classified as a procedural matter; it constitutes a ground rule addressing the process or protocol for bargaining. *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012).

Applying the *City of Richland* balancing test to determine whether the subject of bargaining in private or public meetings is a mandatory subject of bargaining, the scale unequivocally tips in favor of it being a nonmandatory subject of bargaining.

The past practice of bargaining prior collective bargaining agreements in private meetings is not relevant. Parties do not waive the characterization of subjects as nonmandatory by their actions or inactions. WAC 391-45-550.

Neither party has the prerogative to impose its preference to bargain in private or public meetings.

Some nonmandatory subjects of bargaining constitute either a management or union prerogative. In such cases, the party that maintains the particular prerogative may take unilateral action consistent with its prerogative, potentially having an obligation to bargain the impacts of its action. Whether parties bargain in private or public meetings is neither a management nor a union

prerogative. In this case, neither party has the prerogative to independently determine and impose its preference to bargain in private or public meetings. The subject in this case is nonmandatory because it falls into the category of bargaining procedures or ground rules, not because it is the prerogative of one of the parties.

As a result, neither party can avoid its obligations under Chapter 41.56 RCW by passing local resolutions or ordinances that dictate that the parties will bargain in private or public meetings. The employer's resolution to open bargaining to the public does not absolve it of its good faith bargaining obligations. The union's resolution to hold bargaining in private does not absolve it of its good faith bargaining obligations.

Both the employer and the union refused to bargain.

The parties dispute few facts in this case, and the facts they dispute are not material to the outcome. The parties do not dispute any material facts about what occurred on February 27, 2017, the date at issue.

On February 27, 2017, both the employer and the union unequivocally conditioned their willingness to bargain on a nonmandatory subject: whether bargaining would take place in a meeting open to the public or in a private meeting. The employer conditioned its willingness to bargain on bargaining in a meeting open to the public. The union conditioned its willingness to bargain on bargaining in a private meeting. By conditioning their willingness to bargain on a nonmandatory subject, the employer and the union refused to bargain and each committed unfair labor practices.

It was lawful for the employer to propose to bargain in public meetings and for the union to propose to bargain in private meetings. It was unlawful, however, on February 27, 2017, when the employer and the union conditioned their willingness to bargain on a nonmandatory subject.[4]

[4] In addition to the employer's resolution, a November 30, 2016, e-mail exchange between Commissioner Coffman and Freedom Foundation attorney David Dewhirst demonstrated the employer's intent to condition bargaining on doing so in public meetings. In the exchange, Dewhirst commented that if the union wanted to bargain in the future, it would have to bargain in public. Coffman responded: "Yep, they're [the union] kinda between a rock and a really hard place aren't they?!"

This case is similar to *City of Sumner*, Decision 6210-A, in which the employer proposed ground rules as the parties began bargaining a successor CBA. The union initially expressed disinterest in bargaining ground rules and then briefly discussed and accepted two of the employer's six proposed ground rules. The union discussed its objection to the other proposed ground rules and then communicated that it wished to move forward to bargain the substantive issues. After caucusing, the employer team requested a private meeting between the city manager and the union's attorneys. The union refused and the employer reported it was done bargaining for the day. The examiner concluded that the employer unlawfully conditioned the bargaining of mandatory subjects on bargaining nonmandatory subjects.

I find the employer's efforts to distinguish *City of Sumner* from this case unpersuasive. *City of Sumner* stands for the clear and uncomplicated proposition that parties cannot condition bargaining on nonmandatory subjects, including ground rules. Based on the facts of this case, I need not address other issues identified by the employer such as whether the parties were at impasse, or whether their proposals about bargaining in public or private meetings were unreasonable, onerous, burdensome, or designed to frustrate the bargaining process. In this case, similar to the employer in *City of Sumner*, the parties' positions on bargaining in public or private meetings were procedural proposals; for bargaining to continue, each expected the other to capitulate to a nonmandatory subject of bargaining.

The merits of the underlining nonmandatory subject of bargaining are not material to the outcome of this case. For example, in *Caribe Staple Co.*, 313 NLRB 877 (1994), the NLRB concluded that the employer committed an unfair labor practice by insisting that the union submit a proposed agenda that the parties would discuss, modify, and agree upon in advance of bargaining meetings. The administrative law judge explained that the concern with the employer's actions had nothing to do with the wisdom of developing agendas for bargaining meetings:

> I have no quarrel with the wisdom of this approach. However, matters of this kind are to be discussed and not imposed by one party on the other. Once again, the vice lies in the attempt to force capitulation by declining to agree to any future bargaining session unless the Union acceded to this nonsubstantive, procedural demand.

Similarly in this case, the parties tried to force capitulation; each side was unwilling to agree to bargain unless the other acceded to its nonsubstantive, procedural demand. This case, along with the above-referenced cases, highlights the basis for prohibiting parties from conditioning their willingness to bargain on nonmandatory subjects. It would effectively hold the negotiations of mandatory subjects hostage to allow a party to condition its willingness to bargain on first addressing nonmandatory subjects. Doing so would undermine the collective bargaining laws and cannot be sanctioned. As the 10th Circuit Court of Appeals explained in *National Labor Relations Board v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir. 1981), *cert. denied*, 452 U.S. 961 (1981):

> It would undermine the policy of the Act to allow negotiations to break down over a threshold procedural issue such as this one [recording bargaining meetings]. *See Latrobe Steel Corp.*, 630 F.2d at 177. It would create a tool of avoidance for those who wish to impede or vitiate the collective bargaining process. *See St. Louis Typographical Union*, 149 N.L.R.B. 750, 57 L.R.R.M. 1370, 1371 (1964) (Fanning and Brown, concurring). Too often negotiations would flounder before their true inception. *Id.*

Parties are encouraged to discuss all matters in dispute.

While recognizing parties are not required to bargain over nonmandatory subjects, the Commission encourages parties to discuss all matters in dispute between them. *Cowlitz County*, Decision 12483-A. Parties often wish to resolve nonmandatory subjects, such as ground rules or bargaining procedures, prior to bargaining mandatory subjects in order to more effectively and efficiently negotiate CBAs.

In this case, the record includes no evidence that the parties discussed in meaningful detail their needs and concerns about bargaining in private and public meetings. The record indicates that the parties bargained both publicly and privately and made progress. At the January 17, 2017, public bargaining meeting, the parties reached tentative agreements on several provisions of a successor CBA. The parties also encountered some obstacles.

The evidence demonstrated that the parties' ability to engage in full and frank discussions, part of their obligation to bargain in good faith, was impaired by having a person not party to the

negotiations observe.[5] Kuhn testified that because a reporter was at the bargaining meeting, he held back on discussing some of the proposals in any detail. When the parties got to those issues, the employer's sheriff spoke up and asked to engage in a separate conversation away from the public bargaining meeting.[6] The separate, private conversation away from the public bargaining meeting constituted bargaining and caused the union to revise one of its proposals.

Washington courts and the NLRB have recognized the importance of protecting the collective bargaining process from factors inhibiting full and frank discussions and the free exchange of information between parties. In *American Civil Liberties Union v. City of Seattle*, 121 Wn. App. 544 (2004), a case brought under the predecessor to the current Public Records Act, the American Civil Liberties Union sought disclosure of the City of Seattle's and the Seattle Police Officers Guild's lists of issues for bargaining a successor collective bargaining agreement while the bargaining was occurring. The Washington State Court of Appeals ruled against the disclosure, concluding, among other things, that the disclosure of the requested bargaining information would inhibit the negotiations process.

The NLRB determined decades ago that recording a bargaining meeting (by tape recorder or court reporter) inhibits the free flow of ideas in bargaining. *Nabisco Brands, Inc.*, 272 NLRB 1362. The 10th Circuit Court of Appeals in *National Labor Relations Board v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir.), *cert. denied*, 452 U.S. 961, supported the NLRB's concerns about inhibiting bargaining, noting the following:

> The Board and numerous experts in the field of labor relations believe that the presence of a court reporter "has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." *Bartlett-Collins Co.*, 99

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5 A fundamental element of the obligation to bargain in good faith is the duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives to achieve a mutually satisfactory resolution of the interests of both the employer and employees. *Snohomish County*, Decision 9834-B (PECB, 2008).

6 To the extent the employer implies that the sheriff's actions do not bind the employer, I disagree. The sheriff, at a minimum, had apparent authority to negotiate on behalf of the employer. The commissioners witnessed the sheriff's request to discuss the issues with the union outside of the public meeting. The employer had the opportunity to correct the reasonable perception that the sheriff had the authority to negotiate on behalf of the employer. *Kitsap County*, Decision 11675-A (PECB, 2013). The record includes no evidence that the employer did so.

> L.R.R.M. 1034, 1036 n. 9. See also *Reed & Prince Manufacturing Co.*, 96 N.L.R.B. 850, 28 L.R.R.M. 1608, 1610 (1951), *enforced on other grounds*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887, 74 S.Ct. 139, 98 L.Ed. 391 (1953). It may cause parties to talk for the record rather than to advance toward an agreement. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1036 n.9. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations. *See Id.*

The record in this case shows that the parties have needs and concerns about bargaining in private and public meetings that they have not fully shared and explored with each other. While "transparency" and "privacy" may be important issues for the parties, the employer's and the union's resolutions on bargaining in public and private, respectively, offer singular definitions of "transparency" and "privacy." Engaging in the collective bargaining process envisioned by the law should help the parties to broaden their definitions and to expand the options available to meet their needs and concerns.

As the parties move forward to negotiate the remaining terms of their successor CBAs, I encourage them to engage in meaningful discussions about their needs and concerns and to be mindful of their obligation to bargain in good faith concerning mandatory subjects.

The union's argument that the Open Public Meetings Act preempts the resolution fails.

The Open Public Meetings Act (OPMA) requires that all meetings of public agency governing bodies be open to the public. The OPMA sanctions public agencies for actions taken in violation of the law. Since the OPMA's enactment in 1971, the Legislature has modified how it addresses collective bargaining. Since 1990, the OPMA has specifically excluded collective bargaining from its application. RCW 42.30.140(4)(a) states that the OPMA shall not apply to:

> Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress.

The union argues that the OPMA preempts the employer's resolution, addressing two types of preemption: field preemption and conflict preemption. *See Watson v. City of Seattle*, 189 Wn.2d 149 (2017); *Brown v. City of Yakima*, 116 Wn.2d 556 (1991); *Lawson v. City of Pasco*, 168 Wn.2d 675 (2010). I conclude that the OMPA does not preempt the employer's resolution.[7]
Because the OPMA exempts collective bargaining from its application, public agencies need not follow the law with respect to bargaining meetings. Nothing in the OPMA requires collective bargaining to take place in public or private meetings; the law simply does not apply.

I find nothing explicit or implied in the OPMA indicating that the OPMA occupies the field concerning when bargaining meetings can be open to the public. Additionally, I find no conflict between the OPMA and the employer's resolution because the OPMA does not apply to collective bargaining and does not require collective bargaining to take place in public or private meetings.

The union did not waive its right to contest the employer's implementation of the resolution.
To the extent the employer argues that the union waived its objection to the employer's resolution by withdrawing its appeal of the Order of Dismissal or by bargaining in public on January 17, 2017, I disagree.

The unfair labor practice manager made clear in the Order of Dismissal that the union's allegations in its initial complaints failed to allege that the employer had taken actions based upon its resolution and, as such, the complaints may have been prematurely filed, explaining as follows:

> To state a cause of action for refusal to bargain similar to the cases cited in the amended complaints, the union would have needed to describe specific incidents where the employer actually refused to meet and bargain at reasonable times and places. None of the facts alleged in the present cases demonstrate such conduct. Rather, the complaints seem to make arguments about the potential impacts of Resolution 16-22 on future collective bargaining—specifically, the union's ability to schedule and hold future bargaining meetings. Absent examples of specific conduct by the employer that could constitute a refusal to bargain, these types of arguments appear to be speculative and prematurely filed. The Commission has

[7] This conclusion does not impact the determination that the employer refused to bargain by conditioning its willingness to bargain on bargaining in a public meeting. The employer's resolution to open bargaining to the public does not absolve it of its bargaining obligations.

> consistently held that it will not take action on speculative or prematurely filed allegations. *See Kitsap County*, Decision 11611-A (PECB, 2013); *State – Office of the Governor*, Decision 10948-A (PSRA, 2011).

Lincoln County, Decision 12648.

The union's withdrawal of its appeal of the Order does not bar the union from alleging violations based upon the employer's implementation of its resolution.
In the January 17, 2017, public bargaining meeting and in his December 27, 2016, email, Kuhn made it clear that the union was not waiving its objection to the resolution. Furthermore, the employer did not assert waiver as an affirmative defense in its answers.

EVIDENTIARY ISSUES

Several evidentiary issues were raised at the hearing and in the post-hearing briefs. None impact the outcome of this case.[8]

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[8] Union Exhibits Nine through 14: At hearing the union introduced exhibits nine through 14 which relate to citizen-sponsored initiatives in three cities. The proposed initiatives sought to require, in part, public collective bargaining. Superior Court judges in three different counties dismissed the initiatives. I provisionally admitted the documents inviting the parties to address the relevancy of the exhibits in their post-hearing briefs. Having considered the issue, I reject union exhibits nine through 14. The superior court decisions involving the proposed initiatives are not binding precedent and not relevant to the matters before me.

Rejected Exhibits Concerning the Freedom Foundation: At hearing, the union sought to admit documents from the Freedom Foundation's website, pointing to the Freedom Foundation's advocacy against public sector unions as evidence that the employer acted in bad faith when it adopted its resolution. I rejected admission of the documents as not relevant to the matters before me. It is undisputed that the Freedom Foundation played a significant role in drafting the resolution the employer adopted and in defending the employer's actions in the present litigation. The Freedom Foundation's role is not, however, relevant to the matters before me.

Materials Appended to the Employer's Post-Hearing Brief: The employer's post-hearing brief states that other Washington jurisdictions have enacted measures similar to the employer's resolution in this case. The employer attached resolutions from other Washington jurisdictions and requested that I take official notice of them. In its reply brief, the union objected. I decline to consider resolutions adopted by other Washington jurisdictions or laws enacted in other states; they are not relevant to the matters before me.

MRSC's Information on Open Public Meetings Act: The employer's post-hearing brief references information available on the Municipal Research and Services Center's (MRSC) website as support for the proposition that the OPMA's exclusion of collective bargaining is a "permissive exception." In its reply brief, the union objected. I did not consider any information from the MRSC's website in reaching this decision.

CONCLUSION

The union and the employer refused to bargain on February 27, 2017, by conditioning their willingness to meet and bargain on a nonmandatory subject of bargaining.

FINDINGS OF FACT

1. Lincoln County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Teamsters Local 690 (union) is a bargaining representative within the meaning of RCW 41.56.030(2). The union represents two bargaining units of workers employed by Lincoln County (employer), a unit of approximately 12 commissioned law enforcement officers and a unit of approximately eight non-commissioned jail/dispatch employees.

3. The employer and each bargaining unit are parties to a collective bargaining agreement (CBA) with a duration through December 31, 2016.

4. On September 6, 2016, the employer adopted Resolution 16-22 entitled "In the Matter of Improving Transparency by Negotiating Collective Bargaining Contracts in a Manner Open to the Public" (the resolution). The resolution requires all collective bargaining contract negotiations be open to the public. The employer did not discuss the resolution with Joe Kuhn, the union's bargaining representative, prior to adopting the resolution. The employer did not provide Kuhn with notice of the resolution after passing it.

5. On September 26, 2016, several union representatives, including Kuhn, attended a commission meeting and asked the employer to rescind the resolution. The employer did not rescind the resolution.

6. The parties agreed to bargain on January 17, 2017. By e-mail on December 27, 2016, to Commission Chairperson Rob Coffman and Marci Patterson, the employer's deputy clerk, Kuhn confirmed his availability to meet on January 17 and noted: "If this is going to be a public meeting we will meet however we are not giving up our position regarding the resolution that was passed and the subsequent ULP charge that was filed."

7. The first formal bargaining meeting for both bargaining units took place on January 17, 2017, in a public meeting. At the beginning of the bargaining meeting, Kuhn affirmed that the union disagreed with the employer's position on bargaining in public and was not waiving its position. The managing editor/reporter for the *Davenport Times* attended the meeting and published a story about it that ran in the newspaper's January 19 edition.

8. At the bargaining meeting, the parties reached agreement on several issues, including longevity for the non-commissioned bargaining unit and per diem rates for both bargaining units. Because a reporter was at the bargaining meeting, Kuhn held back on discussing some of the proposals. Those proposals were driven by specific individuals who cited specific situations. When they got to those issues, the employer's sheriff spoke up and asked to engage in a separate conversation away from the bargaining table. On another day, the sheriff, undersheriff, and Kuhn discussed the issues away from the open bargaining meeting and planned to have a follow-up conversation. That conversation did not occur due to this litigation.

9. The parties scheduled their next formal bargaining meeting for February 27, 2017. On February 10, Kuhn e-mailed the union's updated proposals to the employer. The proposals included tentative agreements reached during the January meeting, modifications to some of the union's prior proposals, and some of the same proposals. The union modified the light duty proposal based on the conversation Kuhn had with the sheriff and undersheriff after the first bargaining meeting.

10. On February 16, 2017, Teamsters Local 690's executive board adopted its "Integrity in Bargaining Resolution." The resolution stated that all collective bargaining "shall be performed in a private atmosphere." The record includes no evidence that the employer was aware of the union's resolution until the union introduced it as an exhibit at the hearing.

11. On February 27, 2017, the same parties met again in a public meeting. Union attorney Jack Holland accompanied Kuhn. After Coffman started the meeting, Kuhn expressed that the union was ready, willing, and able to bargain and introduced Holland. Holland communicated the same message, adding that the union preferred to follow the long-standing practice of bargaining in private. Holland then requested that those not directly involved in the negotiations leave. Coffman expressed that the employer was ready, willing, and able to bargain and would bargain in public, consistent with the employer's resolution. Coffman and Holland restated their respective positions several times.

12. During the restatement of positions, Commissioner Scott Hutsell questioned, "I guess we are not going to bargain today?" The meeting ended with Holland communicating that it looked like there would not be any negotiations. The union team left the meeting and went into the break room. The employer kept the meeting open until the union team left the building.

13. Bargaining in private or public meetings is classified as a ground rule or bargaining procedure and is a nonmandatory subject of bargaining.

CONCLUSIONS OF LAW

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

2. By its actions described in Findings of Fact 11 and 12, the union refused to bargain in violation of RCW 41.56.150(4), and derivatively interfered in violation of RCW

41.56.150(1), on February 27, 2017, by refusing to meet and negotiate with the employer unless the bargaining meeting took place in private.

3. By its actions described in Findings of Fact 11 and 12, the employer refused to bargain in violation of RCW 41.56.140(4), and derivatively interfered in violation RCW 41.56.140(1), on February 27, 2017, by refusing to meet and negotiate with the union unless the bargaining meeting took place in public.

ORDER – LINCOLN COUNTY

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

1. CEASE AND DESIST from:

   a. Refusing to meet and negotiate with the union unless the bargaining meeting takes place in public.

   b. 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. Bargain in good faith without conditioning bargaining on nonmandatory subjects of bargaining.

   b. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice

provided by the Compliance Officer 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.

c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the BOARD OF LINCOLN COUNTY COMMISSIONERS 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.

d. 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.

e. Notify the Compliance Officer, 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 her with a signed copy of the notice she provides.

ORDER – TEAMSTERS LOCAL 690

Teamsters Local 690, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Refusing to meet and negotiate with the employer unless the bargaining meeting takes place in private.

b. 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. Bargain in good faith without conditioning bargaining on nonmandatory subjects of bargaining.

b. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer 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.

c. The union's Secretary-Treasurer shall read the notice provided by the Compliance Officer into the record at a regular meeting of the governing body or board of the union, 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.

d. 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.

e. Notify the Compliance Officer, 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 her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 3rd day of April, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMIE L. SIEGEL, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 04/03/2018

DECISION 12844 – PECB and 12845 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBERS: 128814-U-17 and 128815-U-17

EMPLOYER: LINCOLN COUNTY

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MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 04/03/2018

DECISION 12846 – PECB and 12847 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBERS: 122818-U-17 and 128819-U-17

EMPLOYER: LINCOLN COUNTY

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