Supreme Court No. 99280-1

COA No. 37054-2-III

IN THE SUPREME COURT OF WASHINGTON

LINCOLN COUNTY,
Appellant/Cross-Respondent

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION of the State of Washington; OFFICE OF THE ATTORNEY GENERAL
Respondents

and

TEAMSTERS LOCAL 690
Respondent/Cross-Appellant

ON APPEAL FROM COURT OF APPEALS, DIVISION III

The Honorable Judges Lawrence-Berry (opinion), Korsmo (concurring opinion) and Siddoway

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TEAMSTERS LOCAL 690'S PETITION FOR REVIEW OF DECISION TERMINATING REVIEW OF ADMINISTRATIVE DECISION

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IDENTITY OF PETITIONER

Teamsters Local 690: Respondent and Cross-Appellant in the Court of Appeals and Respondent and Complainant in the PERC proceedings reviewed by the Court of Appeals.

CITATION TO COURT OF APPEALS DECISION

Lincoln County v. Public Employment Relations Commission; Office of the Attorney General; and Teamsters Local 690, Division III, Nov. 3, 2020, 2020 Wash. App. LEXIS 2852. There were no motions for reconsideration. The decision affirmed in part and reversed and remanded in part Public Employment Relations Commission, Decision 12844-A.

ISSUES PRESENTED FOR REVIEW

1. Where collective bargaining parties cannot agree whether negotiations should occur in private or public, whose position should prevail?

    a) What role should past practice play in determining who prevails?

    b) What other factors, if any, are to be considered in determining who prevails?

2. Did Division III of the Court of Appeals err when it overturned the Public Employment Relations Commission's order that, absent contrary agreement between the bargaining parties, collective bargaining

should take place in compliance with the parties' long and successful practice of bargaining in private?

3. Did Division III of the Court of Appeals err when it affirmed PERC's holding that Teamsters Local 690 breached its duty to bargain, thereby committing an unfair labor practice?

4. Do PERC's decision and order (affirmed by the Court of Appeals), which purport to enforce a legal duty to bargain permissive subjects of bargaining, erroneously interpret and apply the law, in that they disregard uniform and longstanding Washington Supreme Court and PERC precedent holding that bargaining parties have no such duty?

5. Did PERC (as affirmed by the Court of Appeals) erroneously interpret and apply the law and act arbitrarily and capriciously when it concluded that Local 690 committed an unfair labor practice when it insisted upon the same result that PERC ultimately ordered: i.e., that, absent agreement to the contrary, negotiations be conducted in private?

6. Did PERC and the Court of Appeals err when they held that the Open Public Meetings Act does not preempt a Lincoln County resolution requiring that collective bargaining be conducted in compliance with the OPMA, when the OPMA explicitly exempts collective bargaining from coverage?

7. Where unrebutted documentary and other evidence establishes

that the County's public-bargaining resolution was written, marketed to the County and defended by the Freedom Foundation at its sole expense, did PERC err when it failed to consider (as affirmed by the Court of Appeals), as part of its determination of good faith, evidence offered by the Union establishing that the Foundation exists to destroy labor unions and burden public sector collective bargaining?

STATEMENT OF THE CASE

Summary of Procedural History

Following an evidentiary hearing and briefing, PERC Hearing Examiner Jamie Siegel held that both parties had breached their duties to bargain. Both parties appealed to the Public Employment Relations Commission (PERC), which affirmed those holdings, but significantly revised the remedy, in a decision dated August 29, 2018. Lincoln County ("the County" or "the Employer") filed a petition for review in Lincoln County Superior Court, while Teamsters Local 690 ("the Union" or "Local 690") filed its petition in Thurston County. After much procedural wrangling, both petitions were adjudicated in Whitman County Superior Court, which affirmed PERC in all respects.

The County appealed to Division III and the Union cross-appealed. Division III issued its decision on November 3, 2020 affirming PERC's holding that both parties had breached their duties to bargain, but

overturning the remedy ordered by PERC and remanding to PERC to "reconsider the appropriate remedy:" *See,* Court of Appeals, Decision, p. 18, App. 18.

The Union and the Collective Bargaining Agreements

Teamsters Local 690 is the exclusive bargaining representative for two bargaining units of commissioned and non-commissioned employees of the Lincoln County sheriff's office.[1] There are approximately twelve sheriff's deputies in the commissioned bargaining unit and approximately eight corrections and communications employees in the non-commissioned unit.[2]

Prior to Teamsters Local 690 becoming the exclusive bargaining representative for the units, they were represented by the Lincoln County Deputy Sheriffs' Guild ("the Guild").[3] Historically, contract negotiations between the County and the Guild were always conducted in a private setting.[4]

On January 7, 2014, Local 690 succeeded the Guild as the certified bargaining representative for the commissioned bargaining unit, following

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[1] Employer Exhibit ("EX")-1 (Commissioned CBA, '14-'16); EX-2 (Non-Commissioned CBA, '14-'16). PERC Administrative Record ("AR") 529, 545.
[2] TR. 158: 14-17 (Note: Citations to the transcript will designate page and lines in the following form: Tr. [page number]:[line number]-[line number].). AR 818.
[3] EX-1AR 529; Union Exhibit ("UX")-3 AR 458; UX-4 AR 463; Tr. 79: 21-25; Tr. 80: 1-10 AR 739, 740.
[4] Tr. 78: 2-4 (County Commissioner and Lead Negotiator Robert Coffman) AR 738; Tr. 241: 3-7 (Bargaining Unit Dispatcher and Guild and Teamster Negotiator Brad Sweet) AR 901.

a PERC-supervised election.[5] On November 19, 2015, Local 690 similarly became the bargaining representative for the non-commissioned bargaining unit.[6]

Following the transitions from the Guild to Local 690, the County worked cooperatively with the Union to amend the Guild's labor agreements to reflect Local 690's successorship.[7] Accordingly, on July 22, 2014, the County and Local 690 executed a labor agreement for the commissioned bargaining unit,[8] and, on July 5, 2016, another one for the non-commissioned unit, both in effect from January 1, 2014 to December 31, 2016.[9] The renegotiation process for the new labor agreements was private.[10]

The Freedom Foundation successfully markets its agenda to the County.

On August 12, 2016, Matthew Heyward of the so-called "Freedom Foundation" emailed Lincoln County Commissioner Rob Coffman a document the Foundation had written, titled "Collective Bargaining

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[5] EX-1 AR 529; UX-3 (PERC Certification, 1/7/14) AR 458; Tr. 156; 11-16 (The Commissioned bargaining unit is eligible for interest arbitration under RCW 41.56.430—490) AR 816.
[6] Tr. 79: 21-25 AR 739; 80: 1-10 AR 740; UX-4 (PERC Order of Affiliation, 11/19/15) AR463.
[7] Tr. 80: 6-15 (Coffman) AR740; Tr. 154:9-12 (Teamster Rep and Lead Negotiator Joe Kuhn) AR 814.
[8] Tr. 157: 1-25 (Kuhn) AR 817; Tr. 158:1-3 AR 818; EX-1 AR 529.
[9] Tr. 158: 4-11 (Kuhn) AR 818; EX-2 AR 545.
[10] Tr. 80: 1-25 (Coffman) AR740; Tr. 157: 11-25 AR 817; Tr. 158; 1-17 (Kuhn) AR 818.

Transparency Model Resolution."[11] On its face, the document appears to be a generic form for use by any Washington municipality, with non-specific statements of policy interspersed with blank fields, designated "city/county," for the municipality to fill in. Using this generic form as a template to draft what became Resolution 16-22, Lincoln County Commissioner and lead contract negotiator Rob Coffman did insert "Lincoln County" into the fields, but a comparison of the Foundation's Model (UX-19) with the County Resolution as passed (EX-3) discloses that he made no substantive changes.[12] Coffman would later testify that although he knew there would be "pushback" from Local 690 regarding the effect of Resolution 16-22, he nevertheless did not contact Union representative Joe Kuhn (or Local 690) to notify him of the County's desire to conduct collective bargaining in public, nor of its intent to pass a Resolution as the means to accomplish this.[13]

On September 6, 2016, the Lincoln County Commissioners passed Resolution 16-22, requiring that all collective bargaining negotiations be conducted "in a manner that is open to the public" and in accordance with

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[11] UX-19 AR 515; Tr. 82: 9-10 (Coffman: "The resolution was originally drafted by the Freedom Foundation…") AR 742.

[12] The only evident change was to eliminate a paragraph from the Foundation's form, at page 2, that permitted bargaining representatives to "meet [ ] separately and privately to discuss negotiating tactics, goals, and methods."

[13] Tr. 91:21 (Coffman expected "pushback") AR 751; Tr. 89: 1-17 (Coffman: never notified the Union) AR 819.

the notice requirements of the Open Public Meetings Act (RCW 42.30.060—42.30.080).[14] Although Coffman ensured that copies went to all County Department Heads and Heyward (along with a cover note thanking the Foundation "for all [its] help"), he again did not inform Kuhn.[15]

As bargaining commences, the Union expressly reserves its position.

As the parties worked to schedule negotiations for January 17, 2017, Kuhn reserved in writing the Union's position that the County could not unilaterally require that negotiations be public, saying in an email to the County, "[i]f 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."[16]

On January 17, 2017, Local 690 and the County met in the Commissioners' room of the County Courthouse for their scheduled bargaining session.[17] The bargaining session was an agenda item of a regularly-scheduled Commissioners meeting and was open to the public.[18] The County's bargaining team consisted of Commissioners Coffman,

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[14] EX-3 AR 560.
[15] Tr. 97: 9-20 AR 757; See also, UX-20 (Coffman to Hayward, 9/6/16: "Thank you guys for all of your help…") AR 518.
[16] EX-14 (Kuhn email to County Clerk Marci Patterson, cc Coffman, 12/27/16) AR 636. The Union had filed a ULP regarding the County's resolution, which was pending at the time.
[17] EX-17 (Mark Smith, *'Cordial' Discussions Open County's First Collective Bargaining in Public,* Davenport Times, January 19, 2017) AR642.
[18] EX-16 AR 640; Tr. 106:22 (Coffman) AR 766.

Hutsell and Steadman, Sheriff Wade Magers and Undersheriff Kelly Watkins.[19] The Union's bargaining team consisted of Joe Kuhn, road deputies Gabe Gants and Mike Stauffer (both commissioned unit shop stewards) and corrections deputies Brad Sweet and Tom Sherbon (both non-commissioned shop stewards).[20] The Commissioners stationed themselves behind an elevated dais in stuffed chairs, while Kuhn was consigned to a wire chair at a table on the floor below, with his bargaining team behind him in the gallery.[21] Also present was a member of the public, a reporter from the *Davenport Times* newspaper.

The first thing Kuhn told the Commissioners was that, although the Union was willing to negotiate, it reserved its position that it disagreed with the County's demand to bargain in public and that the Union was not "giving up [its] ability to challenge the resolution."[22] Kuhn stated that the Union was nonetheless willing to "proceed forward with negotiations in good faith."[23] The County recognized Kuhn's reservation and the parties proceeded to bargain.[24]

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[19] Tr. 163:20-25 (Kuhn) AR 823; 164:1-25 (Kuhn) AR 824; Tr. 165: 1-3 (Kuhn) AR 825.
[20] Tr. 164: 7-11 (Kuhn) AR 824.
[21] Tr. 164: 13-16 (Kuhn) AR 824; EX-17 (Mark Smith, *'Cordial' Discussions Open County's First Collective Bargaining in Public,* Davenport Times, January 19, 2017, at ¶20) AR642;
[22] Tr. 164:22-25 (Kuhn) AR 824; Tr. 165: 1-3 (Kuhn) AR 825; Tr.106: 10-14 (Coffman acknowledging Kuhn's reservation) AR 766.
[23] Tr. 106:10-25 AR 766; 107: 1-4 (Coffman acknowledging Kuhn's reservation) AR 767; EX-17 (newspaper article) AR 642.
[24] *Id.*

Kuhn then shared the Union's initial proposal for the non-commissioned bargaining unit,[25] which included items carried forward from the Guild contract, together with new items developed during an employees-only demands meeting.[26] In addition to economic proposals, the Union proposed new language regarding performance evaluations, light duty accommodations, and safety standards that would obligate the Employer to comply with accepted safety practices established by the Washington State Department of Labor and Industries' Safety and Health Program.[27] Kuhn, himself a former corrections officer with eleven years' experience as a lead negotiator for corrections officers at the Washington State Department of Corrections, included the safety proposal at the request of non-commissioned employees following reports of jail overcrowding and a recent incident in which an inmate escaped as a direct result of the County's failure to comply with its own policies.[28]

Despite Resolution 16-22, the County demands to bargain in private.

When Kuhn sought to explain the Union's safety proposal to the Commissioners, he was abruptly cut off by Sheriff Magers, who indicated that he would rather discuss the safety and performance evaluation issues

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[25] Tr. 168: 1-4 (Kuhn) AR 828.
[26] Tr. 167: 1-13 (Kuhn) AR 827.
[27] UX-7 (Teamsters' mark-up) AR 471; Tr. 168: 24-25 (Kuhn) AR 828; Tr. 169:1-25 (Kuhn) AR 829.
[28] Tr. 169: 13-21 (Kuhn) AR 829; Tr. 170: 10-17 (Kuhn) AR 830.

"away from the bargaining table."[29] Kuhn acquiesced to Sheriff Magers's request and, upon conclusion of the meeting, he, Magers and Undersheriff Watkins met privately to bargain the Union's safety, performance evaluation and light duty proposals.[30] Kuhn testified that, like the Sheriff, he actually preferred to discuss these proposals privately because the basis for each of them implicated specific bargaining unit employees, who would not want their names, medical information, or performance evaluations to be publicly disclosed. Similarly, the details regarding jail overcrowding and the escape of a jail inmate as a result of the County's negligence were likely to cause community controversy if they appeared on the front page of the newspaper.[31]

Bargaining Breaks Down

On February 27, 2017, Local 690 and the County met in the Commissioner's room to bargain.[32] In particular, wages and benefits remained outstanding for both bargaining units.[33] In anticipation of the

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[29] Tr. 171: 14-24 (Kuhn) AR 831; Tr. 62: 8-22 (Coffman acknowledging Kuhn's proposal) AR 722; EX-17 (newspaper article, "A provision desired by the union to conduct employee evaluations in accordance with an existing sheriff's department policy prompted a request from Sheriff Wade Magers to have a separate, private conversation with Kuhn that Magers suggested the concern behind the request "could be resolved through the policy rather than including this in the contract.'") AR 642.
[30] Tr. 171:14-25 AR 831; Tr. 172:1-19 AR 832; Tr. 174: 15-23 (Kuhn) AR 834.
[31] Tr. 173:7-25 AR 833; 174:1-25 AR 834; Tr. 175:1-17 (Kuhn) AR 835.
[32] UX-18 (Kuhn's bargaining notes) 514; EX-18 (Mark Smith, *Contract Talks Stall When Union Reps Fail to Persuade Commissioners to Bar Public*, Davenport Times, March 2, 2017) AR 644.
[33] Tr. 67:8-18 (Coffman) AR 727; Tr. 72:1-9 (Coffman) AR 732.

February 27 bargaining session, Kuhn had emailed the County marked-up counterproposals on February 10, 2017.[34] Also in the interim the Union Executive Board passed its own resolution, requiring that all bargaining occur in private.

The contents of the February 27th meeting are not materially disputed. Both parties repeatedly expressed a willingness to bargain mandatory terms, but each also stuck to its previously-stated position on the public/private disagreement. The Commissioners stated that they would bargain only in public, while the Union said it would bargain only in compliance with the parties' successful practice of bargaining privately. When neither would relent, bargaining ended.

Both parties filed PERC unfair labor practice complaints against the other.

Salient Elements of Decisions Below

PERC Hearing Examiner

Examiner Siegel found both parties committed unfair labor practices when they conditioned bargaining of mandatory subjects on the other side's capitulation on a permissive subject. *See*, Decision No. 12844, p. 14-15, App. p. 52-54. However, while she ordered that the parties cease and desist, she neither ordered them to bargain the

[34] EX-16 (Kuhn cover email, 2/10/17); EX-20 (Union markup non-comm.) AR 640; EX-21 (Union markup comm.) AR 650.

public/private issue nor announced whose position would prevail in the event they bargained but could not agree. *See*, *Id.* This omission left both parties in an uncertain legal position.

PERC Commissioners

On appeal, the Commissioners affirmed findings of ULPs by both parties. They found that bargaining ground rules, including whether negotiations were to occur in private or public, were permissive subjects of bargaining which neither side had a duty to bargain. Both parties broke the law, however, when they refused to bargain mandatory terms unless the other side capitulated on this issue.

However, the Commissioners took an important additional step. They noted with apparent approval the Union's contention that the Hearing Examiner's decision "begs the question, 'What do we do now?'" *See*, PERC Decision No. 12844-A, p. 9, App. p. 32. The Commissioners answered that question by ordering that the parties bargain and mediate the public/private issue and, failing agreement, bargain in private:

> We order the parties to negotiate in good faith over the method by which the parties will conduct their negotiations....
>
> * * *
>
> **If after two good-faith negotiation sessions the parties are unable to reach an agreement** on how to conduct their negotiations, the Commission will appoint a mediator to assist the parties. If after engaging in good-faith negotiations and mediation the parties cannot reach

> agreement, to best effectuate the purposes of Chapter 41.56 RCW, ...**the parties will negotiate from the status quo – that is, private meetings.**

See, PERC Decision No. 12944-A, p. 10, App. p. 33 (emphases added).

Superior Court

On appeal Whitman County Superior Court affirmed PERC in all respects.

Court of Appeals, Division III

The Court of Appeals affirmed PERC's holding that both sides had committed unfair labor practices and its finding that bargaining ground rules, including the public/private issue, are nonmandatory subjects of bargaining. However, it overturned the Commissioners' remedy and remanded to the Commission to reconsider. The Court failed to note or discuss that its remand returned the Commissioners and the parties to the very same logical trap to which the Hearing Examiner had consigned them and from which the Commissioners had labored to release them. What happens if the parties fail to agree? Which side gets their way? In addition, Judge Korsmo lodged a concurring opinion in which he called the County's (i.e., the Freedom Foundation's) resolution "one of the most cynical political documents drafted in modern times." *See*, Court of Appeals Decision (concurring opinion), p. 1, App. p. 19.

ARGUMENT

I.

THIS IS A CASE OF FIRST IMPRESSION WHICH RAISES ISSUES CRITICAL TO THE HEALTH AND SUCCESS OF PUBLIC SECTOR COLLECTIVE BARGAINING.

This case is about whether collective bargaining negotiations should be in public or private and how disagreements with respect to that issue should be resolved. PERC had never addressed the issue until this case, and the Washington Supreme Court has never done so. The need for authoritative guidance has recently become urgent, as a result of a statewide campaign by the vociferously anti-union Freedom Foundation to force bargaining parties to abandon their long, successful and legally-preferred tradition of bargaining privately.

A. This Case Presents Issues of "Substantial Public Interest That Should Be Determined by the Supreme Court."[35]

Logically, of course, bargaining parties cannot proceed to bargain substantive terms and conditions of employment until they reach a mutual understanding, tacit or explicit, with respect to the ground rules for bargaining, including whether it should occur in public or private (or some combination of the two). Thus, in this very case, because the parties have been unable to resolve their dispute regarding the public/private issue,

[35] RAP 13.4(b).

bargaining of substantive terms and conditions of employment at Lincoln County has been at a complete standstill for nearly four years.

The problem is exploding statewide. As detailed in the "Statement of the Case" above, the resolution requiring compliance with the OPMA was foisted upon Lincoln County by the so-called Freedom Foundation, an organization that exists to "expose, defund, and discredit" labor unions. *See, Service Employees International Union 925 v. Freedom Foundation*, 197 Wash. App. 203, 209 (2016). As the Foundation accurately pointed out in its briefing below, it has succeeded in marketing an identical public-bargaining resolution to several small jurisdictions and, more recently, Spokane County.[36]

B. The Court of Appeals's Decision Leaves Hundreds of Negotiating Parties Throughout the State in Legal Limbo.

As explained in the "Statement of the Case," the Court of Appeals overturned PERCs order that, failing agreement to bargain in public, Lincoln County and Teamsters Local 690 were required to continue to bargain according to their historical practice, i.e. in private. PERC issued its order for the purpose of addressing a glaring omission in the order of its Hearing Examiner, namely, that she had ordered the parties to bargain about the public/private issue, but gave no guidance as to what they were

[36] AR 152, 183.

to do in the event they could not agree. Thus, as PERC explained, its order was intended to fill this hole and answer the question posed by the Union in its briefing to PERC: "What do we do now?" By rejecting PERCs answer, yet providing none of its own, the Court of Appeals has returned the parties and PERC to the legal limbo in which the Hearing Examiner had left them. In short, the parties and PERC are now no more certain as to what the law requires than when the whole process began nearly four years ago.

The Union therefore requests that the Court accept review and tell PERC, the courts and bargaining parties across the state "What (they should) do now."

II.

THE PERC AND COURT OF APPEALS DECISIONS CONFLICT WITH DECISIONS OF THE SUPREME COURT.

PERC and the Court of Appeals both held that collective bargaining ground rules, including the public/private issue, are "permissive" subjects of bargaining. *See*, Court of Appeals Decision, p. 2, App. p. 2 ("we further hold that procedures for collective bargaining are permissive subjects of bargaining"); PERC Decision No. 12844-A, p. 6, App. p. 29 ("procedures for bargaining are permissive subjects of bargaining;" p. 8, App. p. 31 ("we see no reason to treat the question of

whether negotiations should be held in open public meetings differently than other procedures for how bargaining will be conducted"). PERC nonetheless ordered the parties to bargain regarding this permissive subject and the Court of Appeals affirmed on this point.[37] *See* Commission Order, *infra* p 12.

However, the Washington State Supreme Court has stated, and PERC has repeatedly held, "the parties need not bargain on.... matters which are referred to as permissive or non-mandatory issues including those that address the procedures by which wages, hours and the other terms and conditions of employment are established." *Pasco Police Officers Association v. City of Pasco*, 132 Wn.2d. 450, 460 (1997) quoting *Klauder v. San Juan County Deputy Sheriffs Guild*, 107 Wn.2d. 338, 341 (1986). Ironically, PERC and the Court of Appeals both rely upon this passage from the *Pasco Police Officers Association* opinion, with the Court of Appeals paraphrasing as follows:

> If the subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not bargain and to agree or not agree.

See, Court of Appeals Decision, p. 8, App. p. 8.

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[37] The Court of Appeals decision is unclear with respect to whether it is affirming or reversing PERCs plenary bargaining order. Although the Court clearly overturns PERCs order that, failing contrary agreement, the parties must bargain in private, it does not announce an unambiguous disposition of PERC's more general bargaining order. *See,* Court of Appeals Decision, p. 16 App. 16.

Thus, on their face, the PERC and Court of Appeals decisions directly contravene opinions of this Court. Specifically, PERC expressly and the Court of Appeals implicitly find the Union guilty of an unfair labor practice for refusing to bargain regarding a permissive subject, subjects which are, according to this Court, not required to be bargained. The Union therefore requests that the Court grant review in order to address these contradictions.

III.

THE COURT OF APPEALS's DECISION IS INTERNALLY CONTRADICTORY.

The Court of Appeals affirmed PERCs findings of unfair labor practices by both the County and the Union by applying principles applicable only to mandatory subjects. In a passage essential to its affirmance the court stated:

> Neither party offered to bargain the disputed procedures in good faith. Rather, each insisted that their procedure be used.

See, Court of Appeals Decision, p. 16, App. p. 16. Without these sentences both parties can credibly argue that they were simply standing on their right not to bargain a permissive subject.[38] Yet, as PERC and the Court of Appeals both state, bargaining parties have no legal obligation to

[38] This is a large part of the reason why the Supreme Court needs to analyze, decide and announce which party was required to capitulate in the circumstances of this case.

"offer to bargain" permissive subjects such as bargaining ground rules. Thus, the legal principle the Court of Appeals used to justify its affirmance of PERC's ruling that the Union committed a ULP applies exclusively to *mandatory* subjects.

Yet, the Court of Appeals overturns PERC's remedial order on the basis of an argument that the agency wrongly applied to a permissive subject a "doctrine" that is applicable only to mandatory subjects. The court states:

> The County contends PERC erred by applying the status quo doctrine to the case. It argues the doctrine does not apply to permissive subjects of bargaining such as procedures for bargaining, only mandatory subjects. We agree.

See, Court of Appeals Decision, p. 16, App. p. 16.

Thus, the court's affirmance of PERC's finding that the Union committed a ULP shares the identical defect that led the court to overturn PERCs remedy; the finding, even more so than the order, results from the application to permissive subjects of legal principles that apply only to mandatory subjects.

The Union therefore requests that the Court grant review in order to address the contradictions inherent in the decision below.

CONCLUSION

For all of these reasons Teamsters Local 690 requests that the Court grant review of the Court of Appeals decision below.

DATED this 2nd day of December, 2020.

Respectfully submitted,

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Supreme Court No. _____

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APPENDIX

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NOVEMBER 3, 2020
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LINCOLN COUNTY, Appellant, v. PUBLIC EMPLOYMENT RELATIONS COMMISSION of the State of Washington; OFFICE OF THE ATTORNEY GENERAL; and TEAMSTERS LOCAL 690, a labor organization, Respondents.	)	No. 37054-2-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — Public employers are adopting resolutions requiring collective bargaining to be conducted in public. Bargaining representatives, believing private collective bargaining to be more effective in the give and take process for resolving differences, often push back on these resolutions. Here, Lincoln County (County) adopted a resolution requiring collective bargaining to be conducted in public. In response, Teamsters Local 690 (Teamsters) adopted a resolution requiring collective bargaining to be conducted in private.

This case answers the question of what must be done when a public employer and a bargaining representative cannot agree on the procedure for collective bargaining and no collective bargaining, thus, takes place. We hold that a public employer and a bargaining representative each commit an unfair labor practice (ULP) when they refuse to bargain on mandatory subjects of bargaining unless the other agrees to a procedure that it lacks the prerogative to unilaterally decide. To this extent, we affirm PERC's[1] decision.

We further hold that procedures for collective bargaining are permissive subjects of bargaining. As such, the inability of the parties to agree on procedures for bargaining does not result in the return to status quo. To this extent, we reverse PERC's decision. We remand this case to PERC for it to order appropriate relief.

FACTS

Teamsters Local 690 represents two bargaining units of workers employed in Lincoln County. *Lincoln County v. Teamsters Local 690*, No. 128814-U-17 (Wash. Pub. Emp't Relations Comm'n Apr. 3, 2018) . The County is governed by three elected commissioners. The commissioners serve as the County's representative for collective bargaining. Teamsters and the County had two collective bargaining agreements, one for each unit. Those agreements expired after December 31, 2016.

[1] Public Employment Relations Commission.

In September 2016, the County passed Resolution 16-22. The resolution, which was passed without notice to Teamsters, required all collective bargaining to be done in public. The idea for the resolution originated several years earlier when the County received information from the Freedom Foundation about opening bargaining to the public. The County used a template, e-mailed to it from the Freedom Foundation, as the basis for its resolution. The County hoped that by making collective bargaining transparent, voters would more likely pass a tax increase on the November ballot.

Teamsters promptly met with the County and asked it to rescind its recent resolution. The County refused. *Id.* (Finding of Fact 5).

Over the next few months, Teamsters filed with PERC two ULP complaints against the County. A PERC hearing examiner dismissed both complaints.

In January 2017, Teamsters and the County began bargaining in public a new collective bargaining agreement. *Id.* (Finding of Fact 7). Teamsters stated it disagreed with holding the meetings in public and was not waiving its position. *Id.* The parties reached agreement on several issues, but because a reporter was present, they did not discuss others. *Id.* (Finding of Fact 8). When they got to those issues, Lincoln County's sheriff asked to engage in private discussions. Sometime later, the sheriff, the undersheriff, and Teamsters discussed those issues privately.

In February 2017, Teamsters passed its own resolution. The resolution, passed without notice to the County, required all collective bargaining to be done in private. *Id.* (Finding of Fact 10).

Later in February, the parties reconvened for additional collective bargaining. *Id.* (Finding of Fact 11). Teamsters stated it preferred the longstanding practice of bargaining in private. The County stated it was ready, willing, and able to bargain in public, consistent with its resolution. The two repeated their positions on how they would proceed several times before the County questioned whether any bargaining would be done that day. *Id.* (Findings of Fact 11-12). Teamsters left the meeting and went into the breakroom. *Id.* (Finding of Fact 12). The County kept the meeting open until Teamsters left the building. The parties do not dispute that bargaining in private or public is classified as a ground rule or bargaining procedure and is a permissive subject of bargaining. *Id.* (Finding of Fact 13).

The County filed a ULP complaint against Teamsters, alleging the union refused to bargain on mandatory subjects of bargaining unless the County acquiesced on a permissive subject of bargaining. In turn, Teamsters filed a ULP complaint against the County, alleging it was the County that refused to bargain. The complaints were consolidated into a single hearing.

The case was heard before a hearing examiner. The hearing examiner issued a decision that included findings of fact and conclusions of law. The examiner concluded both parties committed ULPs. Both parties appealed to the PERC board. *Lincoln County v. Teamsters Local 690*, No. 128814-U-17 (Wash. Pub. Emp't Relations Comm'n Aug. 29, 2018).

PERC adopted the findings of fact and conclusions of law of the hearing examiner and concluded both parties committed ULPs by refusing to negotiate mandatory subjects of bargaining unless they first agreed on a bargaining procedure, a permissive subject of bargaining. As a remedy, PERC ordered the parties to bargain in good faith over the procedure for collective bargaining. If the parties could not agree on the procedure after two sessions of good faith bargaining, PERC would appoint a mediator to assist the parties. If mediation failed, PERC concluded the parties must return to status quo, which it found was private collective bargaining.

Both parties appealed this decision to the Lincoln County Superior Court, which affirmed PERC's order. The County timely filed this appeal, and Teamsters timely cross appealed.

ANALYSIS

The arguments raised in the appeal and cross-appeal require us to address three broad issues: (1) does the preemption doctrine either validate or invalidate the County's resolution, (2) did PERC correctly conclude that both parties committed ULPs, and (3) did PERC err in applying the status quo doctrine to bargaining procedures, a permissive subject of bargaining.[2]

STANDARDS OF REVIEW

We review an appeal from a PERC decision involving a ULP in accordance with the Administrative Procedure Act (APA), chapter 34.05 RCW. *Amalgamated Transit Union, Local 1384 v. Kitsap Transit*, 187 Wn. App. 113, 123, 349 P.3d 1 (2015); *City of Vancouver v. Pub. Emp't Relations Comm'n*, 107 Wn. App. 694, 702, 33 P.3d 74 (2001).

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[2] Teamsters also argues PERC committed reversible error by not considering evidence excluded by the hearing examiner. The excluded evidence consists of proposed exhibits showing the connection between the County's resolution and the Freedom Foundation. Teamsters sought to have the exhibits admitted to support its argument that the County passed the resolution in bad faith.

Here, the hearing examiner permitted sufficient evidence to understand the connection between the resolution and the Freedom Foundation. It rejected the exhibits because they were irrelevant. *Lincoln County*, No. 128814-U-17 at n.8 (filed Apr. 3, 2018). Nothing in the hearing examiner's decision, PERC's decision, or ours, requires us to decide whether the County passed the resolution in bad faith. Because the proposed exhibits have no tendency to make the existence of any fact of consequence more probable or less probable, we conclude the hearing examiner did not abuse its discretion. ER 401.

Under the APA, we may grant relief from an agency order for any one of nine reasons set forth in RCW 34.05.570(3). Of these, the one relevant to our disposition is whether PERC erred in interpreting or applying the law. RCW 34.05.570(3)(d).

When reviewing questions of law, an appellate court may substitute its determination for that of PERC, although PERC's interpretation of the Public Employees' Collective Bargaining Act (PECBA), chapter 41.56 RCW, is entitled to great weight and substantial deference, given PERC's expertise in administering this law. RCW 34.05.570; *City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 382, 831 P.2d 738 (1992); *Amalgamated Transit Union*, 187 Wn. App. at 123. In addition to Washington law, we rely on federal decisions construing the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, because decisions construing the NLRA are persuasive when construing similar provisions of the PECBA. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

RELEVANT LEGAL PRINCIPLES

The PECBA "'regulates the subjective conduct and motivations of the parties in a collective bargaining situation, but expressly refrains from mandating any result or procedure for achieving final resolution of an intractable bargaining dispute.'" *Id.* at 460 (quoting Stuart S. Mukamal, *Unilateral Employer Action Under Public-Sector Binding*

Interest Arbitration, 6 J.L. & COM. 107, 113-14 (1986). PERC intervenes "only in those limited circumstances where the conduct of one party or the other indicates a refusal to bargain in good faith," which is defined as "an absence of a sincere desire to reach agreement." *Id.* at 114.

If a subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not bargain and to agree or not agree. *Pasco Police Officers' Ass'n*, 132 Wn.2d at 460-61. Agreements on permissive subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 344, 728 P.2d 1044 (1986). A party commits an unfair labor practice when it bargains to impasse over a permissive subject of bargaining. *Id.* at 342.

Permissive subjects fall into different categories. Some authorities, such as the employer's authority to determine its budget, are managerial prerogatives. *Spokane Educ. Ass'n v. Barnes*, 83 Wn.2d 366, 376, 517 P.2d 1362 (1974). When a permissive subject is a managerial prerogative, the employer is free to unilaterally decide the subject. *See Int'l Bhd. of Elec. Workers, Local 21 v. Nat'l Labor Relations Bd.*, 563 F.3d 418, 422 (9th Cir. 2009). Similarly, if the permissive subject is a union prerogative, the union is free to unilaterally decide the subject. *See, e.g.*, *Ramada Plaza Hotel*, 341 N.L.R.B. 310, 310 n.2

(2004). This follows, where a permissive subject of bargaining is neither a managerial prerogative nor a union prerogative; neither party may unilaterally impose on the other its decision on the subject. *See, e.g., Kent Educ. Ass'n v. Kent Sch. Dist. No. 415*, No. 438-U-76-49 (Wash. Pub. Emp't Relations Comm'n June 26, 1979).

PREEMPTION ARGUMENTS

The County's contention

The County contends PERC erred by effectively ruling that the PECBA preempted its resolution. We do not construe PERC's decision in this manner. Nevertheless, we briefly discuss the County's preemption argument.

The County concedes that preemption is appropriate to the extent its resolution thwarts a legislative purpose of the PECBA. *See Emerald Enter., LLC v. Clark County*, 2 Wn. App. 2d 794, 804, 413 P.3d 92, *review denied*, 190 Wn.2d 1030, 421 P.3d 445 (2018). An important legislative purpose of the PECBA is that public employers and the bargaining representatives collectively bargain mandatory subjects such as wages, hours, and terms or conditions of employment. *See* RCW 41.56.030(4) (defining "collective bargaining"); RCW 41.56.140(4) (making it a ULP for a public employer to refuse to collectively bargain with a certified bargaining representative); RCW 41.56.150(4)

(making it a ULP for a bargaining representative to refuse to engage in collective bargaining).

If we conclude the County lacks unilateral authority to insist on public collective bargaining and if we conclude the County's insistence on abiding by its resolution resulted in its refusal to collectively bargain mandatory subjects, the County's resolution thwarted the legislative purpose of the PECBA. We discuss these two issues elsewhere in this opinion.

Teamster's contention

Teamsters argues the legislature intended for the Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, to occupy the field with respect to open meetings when, in RCW 42.30.030, it declared "all" meetings of the governing body of a public agency must be open and public. It argues that the legislature, by exempting collective bargaining from the OPMA,[3] impliedly preempted resolutions such as the County's. We disagree.

A state statute preempts local legislation where the legislature, either expressly or implicitly, occupies the field, leaving no room for concurrent jurisdiction. *Watson v. City of Seattle*, 189 Wn.2d 149, 171, 401 P.3d 1 (2017). For a statute to expressly

[3] *See* RCW 42.30.140(4)(b).

preempt local legislation, it must include clear preemption language, specifically calling out that intent. *Id.* Teamsters concedes the OPMA does not contain clear preemption language.

In determining whether the OPMA impliedly preempts the field of open meetings, we consider the purposes of the legislative enactment, and the facts and circumstances upon which the enactment was intended to operate. *Lenci v. City of Seattle*, 63 Wn.2d 664, 669-70, 388 P.2d 926 (1964), *abrograted on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). When construing a statute, our fundamental objective is to ascertain and give effect to the legislature's intent. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). The declared intent of the OPMA is to advance government transparency. RCW 42.30.010. We, thus, construe the OPMA liberally to advance this intent. *Columbia Riverkeeper*, 188 Wn.2d at 435.

In *Lenci*, the question was whether the city of Seattle's ordinance that required eight-foot high walls around wrecking yards was preempted by state law that required six-foot high walls around such yards. The court held, "'the fact that a city charter provision or ordinance enlarges upon the provisions of a statute by requiring more than the statute requires, does not create a conflict unless the statute expressly limits the requirements.'"

63 Wn.2d at 671 (quoting *State ex rel. Isham v. City of Spokane*, 2 Wn.2d 392, 398, 98 P.2d 306 (1940)).

Here, the County's ordinance enlarges on the OPMA's requirements for open meetings by creating greater transparency. We decline to construe the OPMA as preempting local ordinances, such as the resolution before us, from providing greater public transparency. Such a construction would frustrate the declared intent of the OPMA.

BOTH PARTIES COMMITTED ULPS

The County's contention

The County contends PERC erred by ordering the parties to bargain over whether collective bargaining should be public or private. The County argues that public collective bargaining is a managerial prerogative and it should not be required to bargain over it.

When examining the question whether an issue is a mandatory subject of bargaining or a managerial prerogative, this court applies a balancing test. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Comm'n*, 113 Wn.2d 197, 203, 778 P.2d 32 (1989). "On one side of the balance is the relationship the subject bears to 'wages, hours and working conditions'. On the other side is the extent to which the

subject lies 'at the core of entrepreneurial control' or is a management prerogative." *Id.* (internal quotation marks omitted) (quoting *Spokane Educ. Ass'n*, 83 Wn.2d at 376). "Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics dominates." *Fire Fighters, Local Union 1052*, 113 Wn.2d at 203.

The County argues that public collective bargaining has no relationship to wages, hours, or working conditions. We agree. The County then argues that the public has a right to know how its tax dollars are spent and cites *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2474, 201 L. Ed. 2d 924 (2018). We certainly agree with this principle and note that the County has the ability to keep the public informed of how its tax dollars are spent.[4] But the public's right to know how its tax dollars are spent is not the test. The test is whether public collective bargaining is "'at the core of entrepreneurial control.'" *Fire Fighters, Local Union 1052*, 113 Wn.2d at 203 (quoting *Spokane Educ. Ass'n*, 83 Wn.2d at 376).

[4] For instance, the County can begin in open session by explaining to the public its current budgetary issues and what topics it anticipates will be discussed during collective bargaining. After each bargaining session, the County can provide the public regular updates of what topics were discussed and the progress of negotiations. Once negotiations have concluded, the County can inform the public how each of the issues was decided and how these issues impact its budget.

We see no evidence of this.

If public bargaining was at the core of entrepreneurial control, the legislature—itself a public entity—would not have exempted collective bargaining from open meetings. Even in the midst of the present dispute, the County requested that some subjects be discussed in private. This shows that public bargaining, without some flexibility to engage in private discussions, would inhibit the free flow of information the County needs to make informed decisions.

Teamster's contention

Teamsters contends the procedure for collective bargaining is the type of a permissive subject where past practice determines who prevails and, because past practice was private collective bargaining, its desired process must prevail. Teamsters wholly relies on a footnote in *Aggregate Industries v. National Labor Relations Board*, 824 F.3d 1095, 1099 n.4 (D.C. Cir. 2016). In the footnote, the court implies there are some permissive subjects that, if one party refuses to bargain, result in maintaining the status quo.

This statement is not supported by any authority and is inconsistent with various authorities brought to our attention. For instance in *Klauder*, the court held that permissive subjects such as interest arbitration "must be a product of renewed mutual

consent" and expire with the parties' collective bargaining agreement. 107 Wn.2d at 344. Because *Klauder* holds that permissive subjects of bargaining expire at the end of an agreement, we decline to follow contrary authority.

PERC correctly concluded both parties committed ULPs

The County has failed to convince us that public collective bargaining is a managerial prerogative. Also, Teamsters does not contend that private collective bargaining is a union prerogative. We, therefore, conclude that the bargaining procedure in dispute here is not a managerial prerogative or a union prerogative. For this reason, neither the County nor Teamsters had authority to impose its preferred procedure on the other.

Neither party may "hold collective bargaining hostage to unilaterally imposed preconditions to bargaining." *UPS Supply Chain Solutions, Inc.*, 366 N.L.R.B. No. 111, slip op. at 2, 2018 WL 3032952. Here, the parties did just that. Each insisted on their own procedure for collective bargaining. This prevented them from bargaining on mandatory subjects. Their insistence caused an impasse over a permissive subject of bargaining, which is a ULP.

Both the County and Teamsters argue the other enacted improper resolutions that prevented a discussion of mandatory subjects. Both argue the other is to blame. We disagree.

Neither party offered to bargain the disputed procedure in good faith. Rather, each insisted that their procedure be used. This insistence held collective bargaining hostage and resulted in an impasse over a permissive subject.

REMEDY

PERC ordered the parties to bargain in good faith to resolve to what extent collective bargaining should be public. If two attempts of good faith bargaining could not resolve the question, PERC would appoint a mediator. If mediation failed, PERC concluded that the parties would return to status quo, which it found was private collective bargaining.

The County contends PERC erred by applying the status quo doctrine to the case. It argues the doctrine does not apply to permissive subjects of bargaining, such as procedures for bargaining, only mandatory subjects. We agree.

This issue has been examined extensively by PERC itself. Before this case, PERC's decisions have consistently concluded that the status quo doctrine was inappropriate when looking at permissive subjects of bargaining. *See Int'l Ass'n of Fire*

Fighters, Local 469 v. City of Yakima, No. 7900-U-89-1699 at 10 (Wash. Pub. Emp't Relations Comm'n Oct. 17, 1991); *Teamsters Local 117 v. Port of Seattle*, No. 24668-U-12-6306 (Wash. Pub. Emp't Relations Comm'n Feb. 10, 2014). As the board described in *City of Yakima*, "In practical application, one of the principal distinctions between 'mandatory' and 'permissive' subjects is that the status quo must be maintained on mandatory subjects after the expiration of a collective bargaining agreement, while obligations concerning a permissive subject expire with the contract in which they were contained." *Fire Fighters, Local 469*, No. 7900-U-89-1699 at 10 (alteration in original).

This is consistent with our own jurisprudence. In *Kitsap County v. Kitsap County Correctional Officers Guild, Inc.*, the court acknowledged that waivers were permissive subjects of bargaining and, because of that, expire with the previous collective bargaining agreement unless mutually agreed on. 179 Wn. App. 987, 996, 320 P.3d 70 (2014).

We conclude status quo is not an appropriate remedy when parties are unable to agree on a permissive subject of bargaining. We remand for PERC to reconsider the appropriate remedy.[5]

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, A.C.J.

Siddoway, J.

[5] The parties have not briefed whether PERC can order binding interest arbitration over a permissive subject, which is neither an employer nor a union prerogative. Even if PERC lacks such authority, the parties might still agree to resolve the dispute by binding interest arbitration in the manner described in RCW 41.56.450.

Korsmo, A.C.J. (concurring) – I have signed the majority opinion, but write separately to address the real problem at issue in this case. The resolution adopted by Lincoln County (County)—and a few other jurisdictions—has to be one of the most cynical political documents drafted in modern times. It takes an *exemption* to the Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, *reverses* it, and then claims to be operating under the principles of the OPMA—and does so in the labor relations arena, a sphere in which the OPMA does not apply. In addition to being irrelevant, the effort to amend the public bargaining statutes by local legislation is preempted by state law.

The OPMA requires that "meetings of the governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting of the governing body of a public agency." RCW 42.30.030. That definition includes several terms of art that are significant to explaining why the OPMA is inapplicable. A "governing body" is one, including the body's committees and commissions, that "conducts hearings, or takes testimony or public comment" for a public agency. RCW 42.30.020(2). A county or other political subdivision of the state is a "public agency." RCW 42.30.020(1)(b). A "meeting" is one at which "action" is taken.

RCW 42.30.020(4). In turn, "action" means "transaction of the official business of a public agency by a governing body," including receipt of public testimony, deliberations, and "final actions." RCW 42.30.020(3). "'Final action' means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body . . . ." *Id.*

These definitions explain why the OPMA is inapplicable to labor negotiations. A meeting between private individuals (the Teamsters Local 690 (Union) and its members) and a governing body simply cannot be a "meeting *of* the governing body." The typical labor negotiation also has nothing to do with taking testimony or public comment for the public agency, meaning that the County's representatives are never acting as a "governing body" during negotiations. Exchanging proposals during bargaining does not constitute a "meeting" because it does not involve "action," even if a County artificially attempts to create a "final action" situation by sending a majority of its commissioners to take part in negotiations.[1] For all of these reasons, and probably a few others, the OPMA simply is not implicated in this case. It is an irrelevancy.[2]

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[1] This is another aspect of the OPMA problem in this context. The County is always free to determine the makeup of its negotiating team and can manipulate its membership to place a matter within or without the OPMA. This fact demonstrates the artificial nature of the "controversy" appellant has raised.

[2] While local agencies can open more of their official business to the public than the OPMA requires, the mere act of government officials talking to private individuals does not make that interaction public business. Thus, I agree that the OPMA does not preempt the Lincoln County resolution.

In essence, this was a local attempt to amend state labor law by requiring that labor negotiations be conducted on the County's terms. The County had no authority to impose any conditions on negotiations. The Public Employees' Collective Bargaining Act (PECBA), chapter 41.56 RCW, was developed "to promote the continued improvement of the relationship between public employers and their employees by providing a *uniform basis*" for organizing and representation. RCW 41.56.010 (emphasis added). It should go without saying that requiring employees in some counties to bargain under local ordinances and others under state law cannot constitute "uniform" bargaining. To that end, we should recognize that the PECBA preempts the field of public bargaining.

The resolution is a local attempt to control the ground rules for negotiation in violation of state labor law. Just as the County could not pass a resolution stating that no represented employee would receive a raise from the County, it cannot condition negotiations on compliance with its chosen bargaining rules. The County's resolution is no more effectual than a resolution requiring bargaining in Times Square at midnight New Year's Eve or in Tahiti the following day.

Neither side gets to determine the ground rules for negotiations. It is considered bad faith and, therefore, an unfair labor practice for parties to bargain to an impasse over a permissive bargaining issue. *Klauder v. San Juan Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342, 728 P.2d 1044 (1986). The Public Employment Relations Commission (PERC)

understandably treats ground rules as matters of permissive bargaining over which it has no authority to compel a resolution in accordance with RCW 41.56.160 (establishing PERC authority to enforce unfair labor practices is limited to practices prohibited by RCW 41.56.140 and RCW 41.56.150).[3] PERC should refine that practice and assume ancillary jurisdiction over "ground rules" disputes that directly relate to mandatory subjects of bargaining.[4] Otherwise, a motivated party can bog down negotiations indefinitely a la the Paris Peace Talks dispute over table configuration in 1968-69. Here, negotiations over mandatory issues have been stalled by the failure to get past the permissive, procedural hurdle thrown up by the County.

Under existing practices, PERC correctly found that both parties committed unfair labor practices by bargaining the topic to an impasse. In my view, however, the only unfair practice occurred when the County insisted on matters being done its own way or not at all. The County was the proponent of the change that led to the impasse and should be the one held responsible. While I appreciate that means the responding party normally would not have any incentive to change its opposition, the responding party already has no obligation to bargain at all over permissive issues. The only obligation

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[3] PERC also leaves the enforcement of contract provisions, including topics of permissive bargaining, to the courts. *E.g.*, *Seattle Cmty. Coll. Fed'n of Teachers v. Cmty. Coll. Dist. 6—Seattle*, No. 16643-U-02-4345 (Wash. Pub. Emp't Relations Comm'n June 12, 2003).

[4] PERC also should decide the scope of this ancillary jurisdiction, including the ability to determine whether a ground rules impasse is actually an effort to avoid

here was to bargain over wages and working conditions, something the Union was prepared to do.

Ultimately, the legislature will need to clarify the ability of public employers or employees to insist on preconditions for bargaining. That body also is free to open negotiations to the public if desired.[5] It also should clarify PERC's authority to resolve ground rules disputes and provide for remedies.

Korsmo, A.C.J.

mandatory bargaining.

[5] In my view, as well as the view of PERC and the National Labor Relations Board, it is bad public policy to invite others to attend negotiations. *E.g.*, *Pullman Police Officers' Guild v. City of Pullman*, No. 16177-U-02-4134 (Wash. Pub. Emp't Relations Comm'n May 30, 2003). However, the legislature is entitled to enact the policies it desires.

DECISIONS

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

Collection: DECISIONS

Date: 08/29/2018

Case Number: 128814-U-17, 128815-U-17, 128818-U-17, 128819-U-17

Decision Maker: Commission

Case Type: Unfair Labor Practice

Appeal Status: ON APPEAL IN COURT

Case History: See Also - Lincoln County, Decision 12648 (PECB, 2017) - 01/10/2017 - Unfair Labor Practice
See Also - Lincoln County (Teamsters Local 690), Decision 12844 (PECB, 2018) - 04/03/2018 - Unfair Labor Practice

Additional Information: Superior Court affirmed. On appeal in Division III.

Statute: PECB - RCW 41.56

Lincoln County (Teamsters Local 690), Decision 12844-A (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-A - PECB CASE 128815-U-17 DECISION 12845-A - PECB DECISION OF COMMISSION
TEAMSTERS LOCAL 690, Complainant, vs. LINCOLN COUNTY,	CASE 128818-U-17 DECISION 12846-A - PECB CASE 128819-U-17 DECISION 12847-A - PECB

Respondent. | DECISION OF COMMISSION

Paul M. Ostroff, Attorney at Law, Lane Powell PC, for Lincoln County.

Jack Holland and *Michael R. McCarthy*, Attorneys at Law, Reid, McCarthy, Ballew & Leahy, L.L.P., for Teamsters Local 690.

Collective bargaining is the mutual obligation of the public employer and exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement on mandatory subjects of bargaining. RCW 41.56.030(4). Inherent in this obligation is the duty for parties to communicate with one another. The bargaining obligation and the duty to communicate require parties to offer their viewpoints and positions, consider the viewpoints and positions of the other party, and find an effective means to negotiate and reach a written agreement on mandatory subjects of bargaining.

In this case, both parties believed they could impose how bargaining would be conducted on the other party. In the end, neither party fulfilled its statutory obligation to bargain in good faith, because both parties conditioned negotiations over mandatory subjects on a permissive subject of bargaining.

The facts of this case are not disputed. On September 6, 2016, Lincoln County (employer) enacted Resolution 16-22, which resolved to "conduct all collective bargaining contract negotiations in a manner that is open to the public."[1]

The employer and Teamsters Local 690 (union) were parties to two collective bargaining agreements, one covering commissioned officers and one covering non-commissioned employees of the sheriff's office. Both agreements were effective from January 1, 2014, through December 31, 2016.

On January 17, 2017, the employer and union met and negotiated during the public session of a Lincoln County Commission meeting. Unable to reach an agreement on the terms of a successor collective bargaining agreement, the employer and union required additional negotiations. The parties scheduled a second meeting for February 27, 2017. The events of this meeting are what gave rise to the unfair labor practice complaints.

The February 27, 2017, bargaining session took place during the public session of a Lincoln County Commission meeting. Chairman Rob Coffman called the meeting to order. Union business representative Joe Kuhn stated that the union was ready and willing to bargain. Kuhn then introduced the union's attorney Jack Holland, who said the union was willing to bargain but would do so in accordance with the parties' prior practice of bargaining in private. Holland asked that anyone not directly involved in the negotiations leave the room.

Coffman responded that the employer was ready to bargain and would do so in accordance with the employer's resolution. Holland and Coffman repeated their positions several times. The union team left the room.

Coffman kept the meeting open until the union team left the building. Then, he adjourned the meeting.

The employer filed two unfair labor practice complaints alleging that the union had refused to meet with the employer. The union filed two unfair labor practice complaints alleging that the employer had refused to bargain unless the union agreed to bargain in a public meeting. Examiner Jamie L. Siegel held a hearing and concluded that both the union and the employer had refused to bargain by conditioning their willingness to bargain on a permissive subject of bargaining. Both parties appealed.

The issues before the Commission are whether the union refused to bargain when it left the February 27, 2017, meeting and would not agree to bargain publicly; whether the employer refused to bargain on February 27, 2017, when it would not agree to bargain privately; and what the appropriate remedy is when two parties condition their bargaining on a permissive subject of bargaining.

We affirm the Examiner. Both parties conditioned their willingness to negotiate on the other party agreeing to bargain in a unilaterally predetermined manner. In most unfair labor practice cases, an order requiring the parties to negotiate is an appropriate remedial order. Under the circumstances presented here, we find it necessary to craft a remedial order that will effectuate the purposes of Chapter 41.56 RCW, the Public Employees' Collective Bargaining Act.

ANALYSIS

Parties' Preliminary Arguments

The employer argued that the Unfair Labor Practice Manager's decision in *Lincoln County*, Decision 12648 (PECB, 2017), found that the employer did not commit an unfair labor practice when it adopted Resolution 16-22. We disagree. The Unfair Labor Practice Manager did not rule on the merits of the union's complaint. Rather, she dismissed the complaint at the preliminary ruling stage for failure to state a cause of action.

When a party files an unfair labor practice complaint with the agency, an unfair labor practice administrator reviews the complaint to determine whether the facts alleged state a cause of action. WAC 391-45-110. The agency's unfair labor practice administrators act as gatekeepers to ensure complainants allege sufficient facts to proceed to hearing.

If the unfair labor practice administrator concludes that a complaint does not allege sufficient facts to proceed to hearing, he or she issues a deficiency notice. WAC 391-45-110(1). The complainant then has 21 days to file an amended complaint. *Id.* If the amended complaint alleges sufficient facts to proceed to hearing, the unfair labor practice administrator issues a preliminary ruling. WAC 391-45-110(2). The preliminary ruling

establishes the time frame in which a respondent must file an answer. *Id.* The case is then assigned to an examiner, who will conduct a hearing on the merits and issue a decision. However, if the amended complaint does not state a cause of action, the unfair labor practice administrator dismisses the complaint. WAC 391-45-110(1). Complaints alleging insufficient facts are dismissed without a hearing on the merits.

In *Lincoln County*, Decision 12648, the Unfair Labor Practice Manager concluded that the facts the union alleged were insufficient to state a cause of action for a unilateral change to a mandatory subject of bargaining. The Unfair Labor Practice Manager did not rule on whether the employer had committed an unfair labor practice. The agency did not hold a hearing on the merits, so *Lincoln County*, Decision 12648, was not a ruling on the merits of the union's complaint in that case.

The union asked the Commission to find that Chapter 42.30 RCW, the Open Public Meetings Act (OPMA), preempted Resolution 16-22, and, thus, the employer acted improperly. The union is correct that the Commission has ruled on preemption in the past. *See City of Seattle*, Decision 4687-B (PECB, 1997). In this case, however, it is not necessary for us to reach that issue. We have decided this case based upon Chapter 41.56 RCW.

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

The Commission reviews factual findings for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

Duty to Bargain

Chapter 41.56 RCW "'regulates the subjective conduct and motivations of the parties in a collective bargaining situation, but expressly refrains from mandating any result or procedure for achieving final resolution of an intractable bargaining dispute.'" *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997), *citing Unilateral Employer Action Under Public Sector Binding Interest Arbitration*, 6 J.L. & Com. 107, 113–14 (1986). This agency or the courts intervene "only when the conduct of a party

indicates a refusal to bargain in good faith," which is defined as "'an absence of a sincere desire to reach agreement.'" *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d at 460.

A public employer and a union representing public employees have a duty to bargain over mandatory subjects of bargaining. RCW 41.56.030(4). As an element of good faith, a party is required to make proposals on mandatory subjects of bargaining. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d at 460, *citing Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341 (1986). "[N]either party shall be compelled to agree to a proposal or be required to make a concession . . . ." RCW 41.56.030(4). Thus, a balance must be struck to reflect the natural tension between the parties' obligations to bargain in good faith and the statutory admonition that parties are not required to make concessions or reach agreements. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017); *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Snohomish*, Decision 1661-A (PECB, 1984).

If a subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not to bargain and to agree or not agree. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d at 460; *Whatcom County*, Decision 7244-B (PECB, 2004). Agreements on permissive subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 344. A party commits an unfair labor practice when it bargains to impasse over a permissive subject of bargaining. *Id.* at 342.

Whether a particular subject of bargaining is mandatory is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 203 (1989).

Permissive subjects fall into different categories. Some permissive subjects, such as an employer's authority to determine its budget, are managerial prerogatives. *Spokane Education Association v. Barnes*, 83 Wn.2d 366, 376 (1974). When a permissive subject of bargaining is a managerial prerogative, the employer is free to make a change before bargaining the effects of its decision. *Port of Seattle*, Decision 11763-A (PORT, 2014); *Central Washington University*, Decision 10413-A (PSRA, 2011). Similarly, if the permissive subject is a union prerogative, the union would be free to make a change before bargaining.

Remedy

The Legislature created the Commission to provide uniform and impartial adjustment and settlement of disputes arising from employer-employee relations. The Legislature further intended the Commission to provide efficient and expert administration of public labor relations. RCW 41.58.005. To fulfill the Commission's mission to adjust disputes, the Legislature granted the Commission the power to remedy unfair labor practices. RCW 41.56.160(1); *City of Vancouver v. Public Employment Relations Commission*,

180 Wn. App. 333, 347 (2014). Chapter 41.56 RCW is remedial in nature, and its "provisions should be liberally construed to effect its purpose." *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101, 109 (1978).

"Agencies enjoy substantial freedom in developing remedies." *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621, 634 (1992). The Commission has authority to issue appropriate orders that, in its expertise, the Commission "believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful." *Id.* at 634–35. *See also Snohomish County*, Decision 9834-B (PECB, 2008).

The standard remedy for an unfair labor practice violation orders the offending party to cease and desist and, if necessary, to restore the status quo; make employees whole; post notice of the violation; and publicly read the notice and orders the parties to bargain from the status quo. *City of Anacortes*, Decision 6863-B (PECB, 2001). Requiring the employer to read a copy of the notice at a meeting of its governing body has become part of the standard remedy for an employer who is found to have committed an unfair labor practice violation. *Seattle School District*, Decision 5542-C (PECB, 1997); *University of Washington*, Decision 11414 (PSRA, 2012), *aff'd*, Decision 11414-A (PSRA, 2013); *City of Yakima*, Decision 10270-A (PECB, 2011).

Application of Standards

Procedures for bargaining are permissive subjects of bargaining.

"[P]arties need not bargain on other matters which are referred to as permissive or nonmandatory issues including those that deal with the procedures by which wages, hours and the other terms and conditions of employment are established." *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 341–42. While parties are not required to bargain over permissive subjects of bargaining, bargaining procedures do not belong exclusively to either the employer or the union. This is because neither party can "hold collective bargaining hostage to unilaterally imposed preconditions on negotiations." *UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111, 2018 NLRB Lexis 216, 10 (2018); *Mason County*, Decision 3116-A (PECB, 1989) (holding that a party may not insist on the withdrawal of litigation as a condition of bargaining); *City of Yakima*, Decision 1130 (PECB, 1981).

How negotiations are conducted relates neither to the employees' interest in wages, hours, and working conditions nor to the employer's entrepreneurial control. How negotiations are conducted is a matter of the relationship between the employer and the union. The "how" is the framework for discussing wages, hours, and working conditions and is a permissive subject of bargaining

Both parties asked the Commission to find their proposed method of collective bargaining preferable. While we rely on Washington State labor law to reach our decision in this case, we note that collective bargaining has historically taken place in private meetings. We further note that the National Labor Relations Board and federal courts have opined that collective bargaining occurs best when it is conducted off the record, in the sense that the sessions are not transcribed or recorded. *See NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 656

(1981), *citing Bartlett-Collins Co.*, 237 NLRB 770 (1978) (stating the presence of a court reporter "has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining" and that parties may talk for the record rather than progress toward agreement); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171 (1980).[2]

The question of whether the OPMA applied to public-sector collective bargaining came before the Commission in *Mason County*, Decision 2307-A (PECB, 1986). Following a court of appeals decision finding that collective bargaining was subject to the OPMA in *Mason County v. Public Employment Relations Commission*, 54 Wn. App. 36 (1989), the Legislature created an exception allowing collective bargaining negotiations to take place outside of open public meetings. RCW 42.30.140(4). Once the parties reach an agreement, the employer is then required to ratify the agreement in an open public meeting. RCW 42.30.060; *State ex rel. Bain v. Clallam County Board of County Commissioners*, 77 Wn.2d 542, 547–49 (1970); *Mason County*, Decision 10798-A (PECB, 2011); *see Chimacum School District*, Decision 12623-A (PECB, 2017). This affords the parties the opportunity to negotiate in a private setting while satisfying the employer's obligation to take final action on any agreements in an open meeting.

While collective bargaining has historically taken place in private meetings, the employer provided statutes from 10 other states that provide for varying degrees of open collective bargaining in the public sector.[3] However, some of those states do not have the same collective bargaining mechanism as Washington. Idaho, for example, has neither a collective bargaining law similar to Washington's laws nor an agency similar to the Public Employment Relations Commission. Under Oregon's public meetings law, negotiations are open unless both parties "request that negotiations be conducted in executive session." Oregon Revised Statutes 192.660(3). Each state has devised its own scheme for collective bargaining and public meetings.

We are aware that open negotiations are becoming more common. A quick internet search reveals that open bargaining appeals to some unions and employers.[4] In the Royal City School District, for example, the employer and union are currently negotiating in open meetings.[5] The employer has posted notice of negotiations and proposals on its website.[6]

Other than requiring parties to negotiate in good faith, Chapter 41.56 RCW does not prescribe how parties will bargain. The parties must discuss and agree on how to conduct their negotiations. An issue as significant as how a collective bargaining agreement will be negotiated requires more communication than the parties saying they are available and ready to bargain but only in the way they want.

Through discussion and negotiations, parties can come to agreement on procedures for bargaining. Some parties use an interest-based model, while others choose a more traditional approach. Some parties find ground rules useful, while others do not. Some parties agree not to discuss their negotiations in the media. Some parties, especially those we have observed in strike situations, post their formal proposals on their websites immediately after a negotiation session has ended. Parties are only limited by their lack of

resourcefulness when creating a bargaining procedure.

In any event, both the employer and union must agree on the process. To reach agreement, they must talk to each other and make proposals about how to conduct negotiations.

We see no reason to treat the question of whether negotiations should be held in open public meetings differently than other procedures for how bargaining will be conducted.

A party commits an unfair labor practice when it conditions negotiations over mandatory subjects of bargaining on a permissive subject of bargaining.

"The fact that an issue is a non-mandatory subject of bargaining does not of itself require that one substantive result be favored over another. It implies only that the parties may not preclude other negotiations on the basis of that issue." *Latrobe Steel Co. v. NLRB*, 630 F.2d at 178, *citing NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Mason County*, Decision 3116-A; *Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989); *Whatcom County*, Decision 7244-B (holding that an employer may make proposals on waivers of bargaining rights but may not take a waiver, which is a permissive subject of bargaining, to impasse); *Success Village Apartments, Inc.*, 347 NLRB 1065 (2006) (finding an employer committed an unfair labor practice when it refused to meet in face-to-face negotiations with the union). Neither party can insist on how to conduct negotiations—either in private or in an open meeting—as a precondition to negotiating mandatory subjects of bargaining.

Here, the employer determined that to pass a tax increase, its interests would be best served by negotiating collective bargaining agreements in public. The employer passed Resolution 16-22, establishing a policy to negotiate in open meetings. The employer did not propose to the union that the parties conduct collective bargaining in public. Rather, through its correspondence and conduct, the employer imposed negotiations in open public meetings on the union.

The union could have proposed to the employer a plan for how to conduct negotiations privately or how to conduct negotiations regarding sensitive employee issues. Instead, at the February 27, 2017, meeting, the union said it was ready to bargain but would do so only in private, and the employer said it was ready to bargain but would do so only under its resolution in an open public meeting.

Negotiations over how to achieve transparency in collective bargaining could have allowed the parties to agree on a process that would have met both the employer's interest in transparency and the union's interest in privacy. The employer could have communicated with the union about its interest in opening the process and sought agreement from the union on how to move forward.

By engaging in back and forth discussion about their interests and goals, the parties may have found some middle ground that would have met both of their needs. The parties could have discussed providing public notice of their negotiation sessions, posting proposals on the employer's website, or providing bargaining

updates, among other things. However, neither party proposed to the other a method for negotiations. The parties never discussed the issue.

So, it is no surprise that the parties reached a stalemate. Neither party would discuss mandatory subjects of bargaining unless and until the other party capitulated. Both sides conditioned negotiations over mandatory subjects of bargaining on a permissive subject of bargaining. In doing so, the union and the employer refused to bargain mandatory subjects.

The collective bargaining obligation is not onerous. RCW 41.56.030(4) requires the parties to meet at reasonable times and negotiate in good faith over mandatory subjects of bargaining. Neither the union nor the employer did this. To avoid finding itself in violation of the collective bargaining laws, an employer or a union must raise the issue of how to conduct negotiations with the other side. Otherwise, the parties should continue to negotiate as they have previously negotiated. In this case, neither the employer nor the union raised the issue of how to conduct negotiations with the other party but instead drew lines in the sand and refused to fulfill their statutory obligations unless and until the other party capitulated.

The Legislature granted public employees the right to negotiate mandatory subjects of bargaining with their employer through their chosen representative. By conditioning bargaining on agreement on ground rules, the employer and union have prevented the employees from exercising their statutory rights.

The parties erred by refusing to negotiate mandatory subjects of bargaining by insisting that the other party capitulate to their demands on a permissive subject of bargaining.

An appropriate remedial order requires the parties to negotiate in good faith from the status quo.
In collective bargaining, good-faith negotiations never take place "from scratch." Rather, they take place from the status quo. *Shelton School District*, Decision 579-B (EDUC, 1984). "In practical application, one of the principal distinctions between 'mandatory' and 'permissive' subjects is that the *status quo* must be maintained on mandatory subjects after the expiration of a collective bargaining agreement, while obligations concerning a permissive subject expire with the contract in which they were contained." *City of Yakima*, Decision 3564-A (PECB, 1991). Agreements on permissive subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 344; *Cowlitz County*, Decision 12483-A (PECB, 2016).

Procedures for conducting collective bargaining are permissive subjects of bargaining. Unlike budgetary matters, which are the employer's prerogative, and internal union affairs, which are the union's prerogative, bargaining procedures belong solely to neither party but to both parties simultaneously. Thus, it would be in error to allow one party to impose its will on the other.

On appeal, the union contends that the Examiner's remedial order "begs the question, 'What do we do now?'" What the parties do now is what the parties have been refusing to do since February 27, 2017. The

parties must fulfill their statutory obligation. The parties must bargain.

The Examiner entered an appropriate remedial order consistent with agency practice. An order requiring parties to bargain recognizes that the parties have the most information about their situation and are in the best position to make a decision. A bargaining order affords the parties the creativity and space to generate solutions that work for them. A bargaining order recognizes that there will be some give and take. When reaching an agreement on how to conduct their bargaining, the parties can compromise on other issues as well, provided neither party insists on how bargaining should be conducted as a condition of negotiating mandatory subjects.

We are aware that the parties hold strong beliefs that could quickly lead to a stalemate that may impede the parties from carrying out their statutory duty to meet and negotiate over mandatory subjects, including wages, hours, and working conditions. It is our duty as the Commission to fashion remedies that will effectuate the applicable statute. To provide a uniform and impartial system to resolve labor relations disputes, we must at times fashion remedies that impart consistency and direction to the parties. When parties become entrenched in their positions and lose sight of their statutory obligation, they need help to move forward to resolution. Therefore, we find it appropriate to provide a framework for the parties to negotiate.

To best effectuate the purposes of Chapter 41.56 RCW, we order the employer and the union to cease and desist from insisting as a condition of bargaining that the other party agree to bargain in private or in public. If either party continues to insist on how to conduct negotiations as a condition for negotiating mandatory subjects of bargaining, that party will expose itself to further violations of the act.

We order the parties to negotiate in good faith over the method by which the parties will conduct their negotiations. The policy of Washington State is to allow employees to negotiate with their employer through a representative of their own choosing. RCW 41.56.010. Public employers and the unions selected by the employees must negotiate in good faith. RCW 41.56.030(4). In this case, the parties have not discussed or made proposals about how they will conduct their negotiations.

If after two good-faith negotiation sessions the parties are unable to reach an agreement on how to conduct their negotiations, the Commission will appoint a mediator to assist the parties. If after engaging in good-faith negotiations and mediation the parties cannot reach agreement, to best effectuate the purposes of Chapter 41.56 RCW, we find it would be in the parties' best interest to remove the barrier that prevents them from carrying out their statutory duty. The historic practice of collective bargaining in Washington generally and the practice of this employer and union specifically has been through private negotiations.[7] Thus, if the parties are unable to come to a resolution through good-faith negotiations and mediation, the parties will negotiate from the status quo—that is, in private meetings.

Our remedial authority is broad and permits us to order negotiations consistent with the parties' past practice of negotiating in private. The goal of this remedial order is to ensure that the parties ultimately fulfill their

statutory obligation to negotiate in good faith over mandatory subjects of bargaining.

As noted, neither party will satisfy its obligation to negotiate in good faith or comply with this order if it responds to the other party's proposals on how to conduct the negotiations by simply saying "no" and waiting out the compliance process. If a party does not fully embrace its statutory obligation to negotiate in good faith, then it risks further violations of the act.[8] We are optimistic that the parties will be able to reach an agreement on how to conduct their negotiations.

CONCLUSION

Both the union and the employer refused to negotiate mandatory subjects of bargaining when they preconditioned negotiations on a permissive subject of bargaining. Thus, both the employer and the union refused to bargain in violation of the statute. We affirm the Examiner.

Regarding our remedy, Washington State policy favors collective bargaining negotiations. In this case, the parties ignored their statutory obligation to bargain in good faith over mandatory subjects of bargaining by conditioning negotiations on how bargaining was to take place. They did not bargain about how they would bargain. The parties are in the best position to decide how to negotiate. The remedy simply requires the parties to do what they have refused to do: bargain.

ORDER

The findings of fact and conclusions of law issued by Examiner Jamie L. Siegel are AFFIRMED and adopted as the findings of fact and conclusions of law of the Commission. The Examiner's order is VACATED and the following order is substituted:

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. insisting as a condition of bargaining with Lincoln County that negotiations take place in private meetings.

   b. refusing to bargain by failing to meet and discuss mandatory subjects of bargaining.

   c. in any other manner interfering with, restraining, or coercing 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 permissive subjects of bargaining.

b. If after two good-faith negotiation sessions the parties do not have agreement on how to conduct negotiations, submit a request for mediation to the Commission.

c. If the parties are unable to reach agreement on how to conduct negotiations after good-faith bargaining and mediation, conduct collective bargaining sessions in private meetings.

d. Contact a 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.

e. 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.

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, 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 compliance officer with a signed copy of the notice provided by the compliance officer.

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. insisting as a condition of bargaining with Teamsters Local 690 that negotiations take place in public meetings.

b. refusing to bargain by failing to meet and discuss mandatory subjects of bargaining.

c. 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 permissive subjects of bargaining.

b. If after two good-faith negotiation sessions the parties do not have agreement on how to conduct negotiations, submit a request for mediation to the Commission.

c. If the parties are unable to reach agreement on how to conduct negotiations after good-faith bargaining and mediation, conduct collective bargaining sessions in private meetings.

d. Contact a 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.

e. 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.

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, 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 compliance officer with a signed copy of the notice provided by the compliance officer.

ISSUED at Olympia, Washington, this 29th day of August, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

MARK BUSTO, Commissioner

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[1] Employer Ex. 3.

[2] In *City of Pullman*, Decision 8086 (PECB, 2003), *aff'd*, Decision 8086-A (PECB, 2003), the issue before the examiner was whether recording an investigatory interview was a mandatory subject of bargaining. In reaching her decision, the examiner distinguished recording during negotiations and recording during an investigatory interview.

[3] Alaska, Florida, Idaho, Iowa, Kansas, Minnesota, Montana, Oregon, Tennessee, and Texas. Employer's Post-Hearing Brief, Appendix B.

[4] Merrie Najimy, *Seven Steps to Opening Up Bargaining*, LABOR NOTES (February 1, 2016), http://www.labornotes.org/2016/02/seven-steps-opening-bargaining.

[5] *Teachers Union Collective Bargaining Session Open to the Public in Royal City*, SUN TRIBUNE (June 26, 2018, 11:10 a.m.), http://www.suntribunenews.com/local_news/20180626/teachers_union_collective_bargaining_session_open_to_the_public_in_royal_city.

[6] *Collective Bargaining Negotiations Notice*, ROYAL SCHOOL DISTRICT, https://www.royal.wednet.edu/rsd/en/505-collective-bargaining-negotiations-notice-2 (last visited August 16, 2018).

[7] Tr. 241:4–17.

[8] The Commission historically has not taken repeat offenses lightly and considers continued illegal behavior when fashioning remedies. *See Lewis County*, Decision 644 (PECB, 1979).

DECISIONS

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

Collection: DECISIONS
Date: 04/03/2018
Case Number: 128814-U-17, 128815-U-17, 128818-U-17, 128819-U-17
Decision Maker: Examiner
Case Type: Unfair Labor Practice
Appeal Status: ON APPEAL IN COURT
Case History: See Also – Lincoln County (Teamsters Local 690), Decision 12844-A (PECB, 2018) – 08/29/2018 – Unfair Labor Practice
Additional Information: Commission affirmed
Statute: PECB – RCW 41.56

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,	CASE 128818-U-17 DECISION 12846 - PECB CASE 128819-U-17

DECISION 12847 - PECB

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

David Dewhirst, Litigation Counsel, Freedom Foundation, and *Paul Ostroff*, Attorney at Law, Lane Powell PC, for Lincoln County.

Jack Holland and *Michael McCarthy*, Attorneys at Law, Reid, McCarthy, Ballew & Leahy, L.L.P., for the Teamsters Local 690.

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.

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.

Bargaining

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.

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 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]

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 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 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]

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.

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[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.

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

[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).

[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?!"

[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.

[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.

[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.

SUPREME COURT OF THE STATE OF WASHINGTON

LINCOLN COUNTY, Appellant/Cross-Respondent, v. PUBLIC EMPLOYMENT RELATIONS COMMISSION of the State of Washington; OFFICE OF THE ATTORNEY GENERAL, Respondents, and TEAMSTERS LOCAL 690, Respondent/Cross-Appellant.	CASE No. COA No. 37054-2-III DECLARATION OF FILING AND SERVICE FOR TEAMSTERS LOCAL 690's PETITION FOR REVIEW

DECLARATION OF FILING AND SERVICE

The undersigned hereby certifies that on the 2nd day of December, 2020, she caused the foregoing **Teamsters Local 690's Petition for Review of Decision Terminating Review of Administrative Decision** to be filed electronically via the Washington State Appellate Courts' Portal and a true and

correct copy to be served via electronic mail (pursuant to the parties' agreement for service by electronic mail) to:

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Laura K. Reese, Paralegal	Laura.Reese@atg.wa.gov
Charlotte Armstrong, Legal Assistant	Charlotte.Armstrong@atg.wa.gov
TPC EF Mailbox	tpcef@atg.wa.gov
Jeffrey S. Barkdull, Attorney	jbarkdull@co.lincoln.wa.us
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Docketing	docketing-PDX@lanepowell.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jenny Haverkamp

Jenny Haverkamp, Legal Assistant

REID MCCARTHY BALLEW LEAHY LLP

December 02, 2020 - 4:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
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Superior Court Case Number:	18-2-00081-6

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