Firehouse Lawyer

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Three PERC Cases of Significance

At the joint labor-management conference sponsored by the Washington State Association of Fire Chiefs and the International Association of Fire Fighters, on October 16, the Firehouse Lawyer, Joseph F. Quinn, will be one of a panel of five attorneys speaking on a variety of labor issues. One of my two topics, on which I have been asked to take the lead, is discussion of recent unfair labor cases decided by the Public Employment Relations Commission. The following are my comments, to be delivered or summarized in one portion of the conference.

THREE ULP CASES OF INTEREST

I. Snohomish County, Decision 8733-C (PECB, 2006).

In June 2006, the PERC decided this interesting ULP case. The question presented by this case is whether a union committed an unfair labor practice by insisting upon bargaining regarding its proposal that an employer make matching contributions to an employee deferred compensation plan. The employer filed the ULP complaint, alleging that the proposed deferred comp plan was a form of supplemental pension.

As we all know from the Court of Appeals' 1998 decision in International Association of Fire Fighters, Local 27 v. City of Seattle, 93 Wn. App. 235 (Div. I, 1998) review denied, 137 Wn. 2d 1035 (1999), the attempt to bargain for supplemental pensions, or a pension system different than provided by the LEOFF statute (RCW 41.26) would be a ULP, as the court held that is an illegal subject. While the parties in this case stipulated that RCW 41.26.040 (1) as interpreted in the above case precludes supplementing the pension through collective bargaining, and while they also agreed that LEOFF does not prohibit employees from contributing to a deferred comp plan (as allowed by several IRS laws to be done without including the money in current income earned) the employer said the LEOFF statute as interpreted by the court in IAFF v. Seattle means that the employer cannot pay matching amounts and therefore it did not have to bargain about that, as it would be an illegal subject.

By way of background, there are three types of bargaining subjects: mandatory, permissive and illegal. Typical mandatory subjects about which employers *must* bargain include wages, hours and working conditions. Permissive subjects, about which employers and unions *may* bargain (but which neither party can push to impasse) include such matters as ground rules for bargaining, management and union prerogatives, and the like. Illegal subjects include items on which there are mandatory federal or state statutes. In one case, PERC noted that by federal statute the Coast Guard had exclusive authority over staffing of vessels, so it would not allow bargaining on that subject, which would be illegal. The IAFF v. Seattle case is another good example.

PERC's analysis, like that of the Hearing Examiner below, was that the deferred comp plan was quite different than the LEOFF pension system. Unlike the pension, the deferred comp plan was voluntary for the employee. The pension obligation is contractual and if the employee is eligible the employer must pay it. Upon becoming eligible, the employee obtains a vested right to the pension and the employer cannot alter it to the employee's detriment without a corresponding benefit. This is well settled law. Unlike the pension plan, the deferred comp plan could be altered through collective bargaining, without any corresponding benefit to employees who suffer. Also, when an employee leaves employment, they can take their deferred comp regardless of whether they are eligible yet to take their pension. In essence, the deferred comp just allows the employees to set aside some pre-tax wages to be collected at a later time. The plan may or may not have an employer match. If it does have a match, this must be set up so that it does not count as "wages" or that would conflict with LEOFF.

Various WAC regulations set forth what is counted toward "wages" for purposes of LEOFF, but nothing in those regulations suggests that such matching contributions by employers create a problem.

This case does seem to clarify the relationship of deferred compensation plans to the pension system and the bargaining process required under state public bargaining laws.

II. IAFF Local 2829 v. City of Redmond, Decision 8863 (PECB 2005).

Local 2829 represents all fire fighters working at the city of Redmond's fire department. The parties commenced bargaining for a new contract in November 2001. Before the last contract expired at the end of 2001,

the parties met in labor-management meetings (not bargaining) to discuss promotions policy, testing dates, examinations, a fire inspector position, "newly promoted" employees, audiology exams, the "rule of three" and related topics.

It is also important to recognize that Redmond has a civil service system for such fire fighters pursuant to RCW 41.08. Many of the civil service rules and statutes may be applicable to such topics as promotions and testing.

Near the end of 2001, bargaining ensued for a new contract, and two issues came to the fore in bargaining: (1) the promotional process and (2) funding of health insurance premiums. Next, at a May 2002 meeting of the Redmond Civil Service Commission (RCSC) the RCSC decided to re-constitute a non-bargaining unit position in the fire department. They approved an eligibility list for a position, called "fire administrative assistant". The union protested RCSC actions, including the vote itself (apparently conducted in two executive sessions) and the passing of a note from the Chief Examiner to a Commissioner. At a June meeting of the RCSC, employer negotiator Doug Albright made a presentation to the RCSC about the relationship between the RCSC work and the duty to bargain. The union contended that meeting circumvented the employer's obligation to offer proposals in bargaining.

The first issue related to promotions language. As is typical, promotions and testing are civil service issues. The union asked for information to assist it in the bargaining process, particularly wanting to know what happened at the May meeting and wanting to know the content of the note that was passed. During bargaining in July, the union continually expressed concern about independence of the chief examiner and proposed to alter the civil service promotions system. Some proposals related to procedures for placement on promotional lists within the bargaining unit. While the employer offered to negotiate concerning specific terms relating to civil service promotion rules, it generally advocated to maintain the statutory civil service system, and collective bargaining agreement language embracing that system. By July 24 bargaining, the union was proposing to replace the civil service "rule of three" with a "rule of one" (in other words, the top ranked candidate gets the promotion).

The second major issue related to the insurance controversy. In particular, the issue related to how much the employer would pay monthly for dependent premiums. In the 1999-2001 agreement the employer paid 100% of those costs. In May of 2002, the employer proposed that employees pay 10% of those premiums in 2003 and 20% in 2004. In the alternative, for 2004 the employer proposed a "study-group" option, under which for that year rates would await a study of insurance costs in the area. The union was "confused" by this proposal, so the employer made a new proposal in September. Now, based on actuarial estimates, the employer proposed a fixed dollar amount for each employee, for their dependents' coverage. The employer used six comparable jurisdictions in the Puget Sound area for that proposal. By the time the parties got to interest arbitration, the employer had switched back to its "10/20" proposal.

The union contended that the employer had committed a ULP by insisting to impasse on this permissive subject—in this case the insurance proposal which would increase costs to employees in an indeterminate amount over the life of the contract, allegedly without an opportunity to bargain.

By June 2003, 12 issues were certified for interest arbitration. However, the union filed a ULP and therefore PERC's Executive Director suspended the promotions language issue and the insurance issue from interest arbitration due to the ULP charge and the procedure under WAC 391-55-265 (1) (b).

The first issue addressed by PERC Examiner J. Martin Smith was whether the Employer violated RCW 41.56 by refusing to provide the union with relevant information for the bargaining process with respect to actions during two meetings of the RCSC. It is well settled that information sought to assist in bargaining must be relevant to a proposal or a grievance. In his letter of May 29, 2002, union attorney James Webster sought "complete information" on what transpired in the two executive sessions of the RCSC, and the "content" of the note that was passed. Examiner Smith found "no clear link" between a "random note" passed to a commissioner from the chief examiner and the union's bargaining proposals. He noted that the Open Public Meetings Act (sic) has a bar against disclosure of "qualifications" for applicants for public employment (an apparent reference to the statute that makes applications for public employment exempt from public disclosure). See now RCW 42.56.250 (2), which is actually part of the Open Public Records Act. He found there was no action taken at the RCSC meetings that impacted the unit and therefore the employer did not commit a ULP.

The second issue was whether the employer committed a ULP by refusing to bargain in good faith or interfering with employee's rights in its bargaining conduct with respect to the "promotion proposals". PERC has previously held that, if civil service rules impact working conditions, discipline, or promotions within the bargaining unit there is a duty to bargain. When the union submitted its July proposal, the employer responded in an August letter, essentially proposing to continue the current contract language. As the parties approached interest arbitration, in December of 2003, the union made a more specific proposal. The employer viewed those proposals as removing the promotional process from civil service.

The Examiner noted that prior to the first proposal in July of 2002, there were numerous discussions at the bargaining table on this subject, and stated that "discussions count as bargaining, even without proposals." Based on the evidence, the Examiner found that the employer did not commit a ULP and that the parties negotiated in good faith on the promotions issue. He said that the interest arbitrator, Alan Krebs, left the promotions article in the collective bargaining agreement, adding a "written-explanation provision" when a higher-scoring candidate was passed over for promotion under the rule of three.

The Examiner also found that the employer did not violate the statute by failing to make counter-proposals. He said that there is no specific procedure for bargaining; once presented, counter-proposals must be dealt with. The employer was open to discussing union proposals and responding thereto.

He also found no ULP for refusing to give reasons for the employer stance on promotional standards. A negotiating party may maintain its firm position on a particular issue throughout bargaining, if that position is genuinely and sincerely held. It is the totality of the

employer's conduct that will be measured, the Examiner said.

The union also contended that the employer insisted that the parties use labor-management meetings, rather than collective bargaining, to address the promotional issues. In fact, many of the promotion-related issues had been discussed in labor-management meetings prior to the commencement of formal negotiations in late 2001. The union did maintain a dialogue with the human resources department, as suggested by management. The union did make all of its proposals through the bargaining process, and while the employer suggested other alternatives to bargaining, the union was found to be wrong in alleging the employer insisted upon a non-bargaining solution.

Finally, the union alleged that the employer engaged in "regressive bargaining" with respect to its insurance proposals. Regressive bargaining is a term used to describe a party's conduct when it makes a proposal that either asks for more than its previous proposal or retreats to a position offering less than its previous proposals, which would be obviously unacceptable to the other party. The union did not convince the Examiner that the fixed dollar cost proposal was less generous than the employer's previous proposal to require payments of a percentage. At one point, the Examiner addressed what he called "the union's curious contention" that the employer's insurance proposals were somehow permissive topics. He found the employer's proposals to be "straightforward" and "written in familiar language" commonly seen at the bargaining table. He said actually the union proposal was more "variable and illusory".

This decision teaches us several valuable lessons. First, both labor and management are well advised to learn and know the difference between labor-management committee meetings (which are not bargaining) and the collective bargaining process. Second, the interplay between the civil service rules and procedures and the collective bargaining agreement must be understood by those in departments having civil service, such as city fire departments. By his ruling, the Examiner made it clear that a party does not have to make specific proposals or counter-proposals to be found to be acting in good faith. It is not per se a ULP to insist on the current contract language; PERC looks at the totality of the circumstances, so if there is give and take generally in the bargaining process, a firm "no change" stance on one issue (such as the role of the civil service rules, or insisting on maintaining the "rule of three") does not per se mean a ULP has been committed.

Also, the decision reiterates some definitions, such as permissive subjects and regressive bargaining, so that is a good refresher.

III. City of Issaquah, Decision 9255 (PECB, 2006).

The third ULP case is a bit different, as it involves a ULP charge against a union, instead of an employer. Teamsters Local 763 represented a bargaining unit of civilian employees in the Issaquah Police Department, consisting of approximately 25 employees, such as communications, corrections, and records personnel. The Issaquah Police Services Association filed a change of representative petition with PERC in November 2004, seeking to replace the Teamsters as the exclusive bargaining representative of this unit. In March of 2005, the Teamsters filed this ULP, which "blocked" processing of the representation case.

The Teamsters alleged "interference" with employees' rights, in violation of RCW 41.56.150 (1) and inducing the employer to commit a ULP in violation of RCW 41.56.150 (2). So what did the Association do? In March of 2005, the Association asked the employer to discontinue recognition of the Teamsters and cease payroll deductions for union dues! The Examiner found violations and also said the employer would have committed a ULP had it acquiesced in these requests, which it did not.

Because the Teamsters local questioned the appropriateness of the corrections officers being in the same bargaining unit as the other employees, in

the representation process, the Association claimed that was a "disavowal" of those employees and justified the withdrawal of recognition. The Examiner disagreed. In the course of her decision, the Examiner pointed out that the union may be guilty of an inducement ULP even if the employer has the "good sense to refuse the request". Thus, even trying to get the employer to commit an unlawful act can be an inducement violation.

The Examiner also did a good job explaining the exact status of the recognized "exclusive bargaining representative". RCW 41.56 does afford a privileged status to this representative, in that the duty to bargain exists only between the employer and that representative for that particular bargaining unit of employees. The filing of a petition to change bargaining representative (or a "decert" petition) does not change that status. See Renton School District, Decision 1501-A (PECB, 1982). The employer is not required to recognize the petitioning union for any purpose. See Community College District 13, Decision 8117-B (PSRA, 2005). The petitioner does not acquire any bargaining rights. See Clark County, Decision 5373-A (PECB, 1996) and Emergency Dispatch Center, Decision 3255-B.

It is true that parties involved in representation cases may have some rights to make claims about that process, such as the violation of the "laboratory conditions" concept. See Clark County, supra.

While an exclusive bargaining representative loses its status upon the success of a "change of representative" petition, it does not do so simply because the current contract expires. Spokane County, Decision 2377 (PECB, 1986). The Examiner also made note of RCW 41.56.123 (1), which provides for a one year carryover for all terms and conditions in an expiring contract, which remains in effect until a successor agreement is signed or one year, whichever is less. After that time, an employer may unilaterally implement its proposals.

The Examiner ruled that the Association committed ULPs in this case, because dues checkoff must be maintained in the absence of a decertification ruling. Trying to induce the employer to cease deductions was a ULP, even though unsuccessful.

On the interference charge, the Examiner noted that the test is whether a typical employee in similar circumstances reasonably could perceive the conduct as a threat of reprisal or force or promise of benefit related to the pursuit of rights protected by the chapter. Intent or motivation is not a factor in the claim or defense. Nor is it necessary to show the employees were actually interfered with, so it is the mere *attempt to interfere* that creates the violation.

Because the Association's e-mail communication was coercive or threatening in tone (it alleged that continuing the deductions would subject the employer to a ULP) the Examiner found that the union had committed an interference ULP. The Examiner, however, did not award attorney's fees to the prevailing party, because the Association's position was not found to be frivolous or part of a repetitive pattern.

This case teaches us that unions, as well as employers, must be careful during the process of representation changes, or any kind of representation case. When a union engages in a "raid" upon a

bargaining unit already represented by another union, they should be careful not to be so aggressive that they interfere with employee rights protected by statute.

SPEAKING OF PERC…

What agency of State government has the longest-serving executive director in history? Actually, it is the Public Employment Relations Commission, where Marvin Schurke has ably served the State, both labor and management, and the citizens of the State of Washington since 1976! Yes, that is thirty years in the same job. Congratulations and a happy retirement to Marv, as he has certainly earned it. I had the honor and privilege of working with Mr. Schurke for more than four years as one of the three commissioners of PERC, so I know all too well what a quality public servant he has been all these years. The staff and the whole State will miss him.

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