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BARGAINING AND THE OPEN PUBLIC MEETINGS ACT

The Washington State Public Employment Relations Commission (PERC) found in August 2018 that (1) an Employer commits an unfair labor practice by refusing to bargain a mandatory subject of bargaining unless the Union consents to hold such bargaining in an open public meeting; and (2) a Union commits an unfair labor practice by refusing to bargain a mandatory subject of bargaining unless the Employer consents to hold such bargaining in closed session. *Lincoln County (Teamsters Local 690)*, Decision 12844 (PECB 2018).

The PERC found both parties conditioned their willingness to bargain mandatory subjects (wages, hours and working conditions outweighing management's scope of "entrepeneurial control")[1] on a non-mandatory (permissive) subject of bargaining, in this case being the "ground rules" for bargaining. Importantly, "ground rules" focus

[1] *See* the attached *Firehouse Lawyer* articles on mandatory v. permissive subjects:

https://www.firehouselawyer.com/Newsletters/November2017FINAL.pdf

https://www.firehouselawyer.com/Newsletters/April2016FINAL.pdf (Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate)

on the "procedures and protocols for bargaining," PERC noted. PERC also found that a past practice of bargaining in private meetings does not impact whether the bargaining may occur in public, because this case involved a "ground rule" which is permissive.

As a factual backdrop leading up to this dispute: (1) On September 6, 2016, the Employer county passed a resolution stating that all collective bargaining sessions would be held in an open public meeting, after receiving information from the Freedom Foundation,[2] and did so without consulting with the Union because "[T]his is well within our wheelhouse, to pass resolutions on how we conduct all of our policies in the county"; (2) on September 26, 2016, the Union appeared at a county commission meeting and asked that the commission rescind the resolution, which the commission did not do; (3) on September 29, 2016, the Union filed an unfair labor practices complaint alleging that the Employer, by unilaterally passing the resolution that bargaining only occur in an open meeting, refused to bargain; (4) as the complaint was being processed, the parties conducted a bargaining session in January 2017 in an open meeting, where the Union stated that it was not backing down from its position that the resolution represented a refusal to bargain; and (5) the parties met in a public meeting again in February 2017, where the Union's attorney stated that the parties should continue the long-standing practice of bargaining in private, and the Employer stated that it was willing to bargain if this occurred in public; the Union left the meeting and the parties did not bargain at all.

Under the Open Public Meetings Act (OPMA), "[C]ollective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement" are not subject to the requirements of the OPMA. RCW 42.40.140 (4)(a). In other words, when a quorum of a governing body is involved in collective bargaining sessions, such sessions are not *required* to be in a closed or open session. That is why PERC found that both the Employer and Union committed unfair labor practices, because neither could *insist* on bargaining in the open or in private.

What PERC did *not* do in *Teamster 690* is make a ruling on whether such bargaining *must* occur in open or in private. Instead, PERC reminded us that "[C]hapter 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)." (emphasis added). PERC found that "[I]n 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."

[2] As noted by PERC, 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/.

In other words, PERC felt that although the parties didn't need to bargain on this question (public v. private bargaining) because such "ground rules" constitute a permissive subject, the parties still needed to get through the bargaining process somehow: "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." This does not provide very much guidance on the ultimate question (bargaining in private or in public), but *Teamsters 690* illuminates the issues and is helpful in clarifying this issue.

What is the takeaway from this case? *Teamsters 690* does not fully resolve this issue: whether collecting bargaining sessions must occur in public or in private. However, *Teamsters 690* provides fodder for the Employer and Union to have a discussion, in an open meeting, over both parties' interests in having such bargaining sessions in public or in private (if this is even an issue at your agency). Of course, we at the *Firehouse Lawyer* believe that the full and frank discussion between the Employer and Union of issues affecting wages, hours and working conditions is far more likely to occur productively in closed session. But that is up to your agency.

If this question is even an issue at your agency (bargaining in public or private), perhaps the best resolution would be for both parties to agree[3] to hold bargaining sessions in a private session pursuant to RCW 42.30.140 (4)(a) and then produce a "white paper," which would be a public record that briefly summarizes, without extensive detail, what was discussed or proposed in the private session. That way, neither party would have "refused to bargain" because the parties would have met and conferred in good faith, then shared a cursory outline of what was discussed during this good-faith meeting. Again, if this is not an issue at your agency, then consider this with a grain of salt.

The proposed resolution above (private meeting and subsequent white paper) would comport with the OPMA and may satisfy open-government advocates such as the Freedom Foundation[4] and rightfully involved citizens. Again, that is up to your agency and we do not make policy prescriptions. Ultimately, as was found in *Teamsters 690*, "[T]he 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

[3] Just because PERC finds "ground rules" to be a permissive subject that does not require bargaining does not mean that the issue should not be discussed.

[4] Take note that the Employer-county in *Teamsters 690* was represented by an attorney employed by the Freedom Foundation; we anticipate that the Freedom Foundation will become much more involved in labor-management issues, in light of the *Janus* decision: https://www.firehouselawyer.com/Newsletters/June2018Janus.pdf

does not absolve it of its good faith bargaining obligations."

Changing Offices

Joseph Quinn, and Quinn and Quinn, P.S., have been resident-attorneys at the headquarters of Gig Harbor Fire and Medic One, here in Pierce County, for approximately 11 years. But the time has come for the firm to change offices due to the growth of both Gig Harbor Fire and the firm. Two attorneys can't fit into one office. We would like to take this opportunity to thank Fire Chief John Burgess and the administration of Gig Harbor Fire for hosting us all these years (of course, we paid a reasonable rent for the privilege!).

We want our readers to know that our new office will be located in Lakewood, WA at the beginning of 2019, and it will be the first time in 22 years that the Firehouse Lawyers will not be providing our legal services in an actual firehouse!

For the **SAFETY BILL** this month, we remind our readers to have a safe and Happy Halloween.