City of Wenatchee, Decision 6517-A (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| WENATCHEE POLICE GUILD, Complainant, | ) | CASE 13505-U-97-3298 |
| vs. | ) | DECISION 6517-A - PECB |
| CITY OF WENATCHEE, Respondent. | ) | DECISION OF COMMISSION |

Cline & Emmal, by Sydney D. Vinnedge, Attorney at Law, appeared on behalf of the complainant.

Eileen M. Lawrence, Attorney at Law, appeared on behalf of the respondent.

This case comes before the Commission on an appeal by the City of Wenatchee (employer), seeking to overturn the Findings of Fact, Conclusions of Law, and Order of Examiner Pamela G. Bradburn.[1] We affirm the Examiner's decision that the employer committed unfair labor practices by unilaterally changing a light duty policy.

## BACKGROUND

The employer and the Wenatchee Police Guild (union) have had a collective bargaining relationship since at least 1978. The bargaining unit consists of 35 commissioned officers in the employer's police department. Since as early as 1982, the employer has allowed employees in that bargaining unit to perform "light-

[1] City of Wenatchee, Decision 6517 (PECB, 1998).

duty" functions when they have been temporarily disabled and planned to return to their normal duties. The employer's practices in regard to light duty were acknowledged in Article 14.4 of the parties' 1997-1999 collective bargaining agreement. This case involves an alleged unilateral change of the light duty policy.

History of Light Duty Requests -

Approximately 19 employees were allowed to work on *temporary* light duty assignments between 1982 and May of 1997. During that period, the employer denied the requests of two employees for light duty assignments:

- One of those involved a request for *permanent* light duty from an employee who had a back injury. He was placed on light duty until his physician directed that he not return to patrol duties. The employer then denied his request to continue on light duty, because there was not enough work to keep an officer on light duty for an indefinite period of time.

- The other involved a request for an *extended* and *indefinite* period of six months to two years.

Prior to the onset of the present dispute, it was the understanding among employees that light duty would be allowed any time an officer was temporarily disabled, on or off duty, and could not perform patrol duties.

Types of Light Duty Work -

For their light duty assignments, employees have performed tasks such as responding to telephone calls and walk-in contacts, handling complaints, assisting with paperwork and filing in the records department, assisting with dispatch functions (e.g., dispatching officers to calls and using computers to obtain drivers

license and vehicle information), pulling warrants, following up on issues by making telephone calls and gathering information. They also worked with warrant files and arrest packets (e.g., making telephone calls and updating information regarding addresses and telephone numbers), matched photos with warrant information, made photocopies, and provided warrants to officers on patrol. One employee worked on a large backlog of fingerprint cards, filling out the cards and preparing them for submission to state and federal agencies. Officers on light duty have also assisted other officers by taking statements when multiple suspects are arrested, and serving as the officer contact for reports. They have made minor reports, processed and packaged evidence, and took witness statements. The types of work assigned in the past to officers on light duty still exists.

Issues Affecting Employee Leave -

Police officers hired prior to 1977 enjoyed benefits under Law Enforcement Officers' and Fire Fighters' Retirement System Plan I (LEOFF I), which kept employees on full pay during periods of disability. The Law Enforcement Officers' and Fire Fighters' Retirement System Plan II (LEOFF II) adopted by the Legislature in 1977 provided lesser benefits to police officers hired since that time. One way to offset the decrease of benefits available for LEOFF II employees was for unions representing law enforcement officers to bargain for sick leave benefits to bridge a gap between the two retirement systems. Sick leave is accumulated on a monthly basis, and time off on sick leave is deducted from the employee's individual balance. In the early to mid-1990's, the parties to this case agreed to additional sick leave provisions benefitting the employees. Their 1993-94 collective bargaining agreement called for the employer to grant each newly-hired officer 24 days of sick leave upon completion of his or her probationary period;

their 1995-96 contract added a shared-leave program, allowing employees to donate sick leave to employees within the bargaining unit who are not LEOFF I beneficiaries.

Changes Affecting Light Duty Policy -

In recent years, the employer has experienced changes affecting its police department and police patrols, arising from a change in community concerns and budget resources. A population increase has resulted in increased service calls. Because of safety concerns, there has been greater pressure to place more officers on the street. The police department has also been directed to undertake community-oriented policing tasks that require officers to perform patrol duties. Placing a person on light duty creates management problems for the employer:

- Because one less officer is on the street, another officer must be called in on overtime during the frequent occasions when one or more officers is already on leave or at training;[2]

- Light duty situations require the employer to evaluate and act upon the recommendations of the employee's medical provider(s), and to determine which available tasks might be suitable for the employee to perform; and

- The employer now considers commissioned police officers to be too great a resource and too expensive to be used for tasks (such as reviewing warrants, taking telephone calls, and assisting with dispatch functions) normally performed by non-commissioned employees at lower pay rates.

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[2] The employer has established a minimum manning level of three officers on duty.

In February of 1997, Officer Jill Shaw requested light duty for an off-duty injury. She was on light duty from February 20th to March 20th. She assisted with paperwork and dispatching, pulled warrants, and did follow-up checking current information. She performed clerical tasks, took phone calls, and greeted walk-ins. The employer experienced difficulty, however, in giving her a workload that kept her occupied. The employer had concerns because Shaw was seen playing computer games while on light duty. There was discussion about assigning her to the Columbia River Drug Task Force, but it would have been out of the norm for the police department to assign an officer to such a multi-agency task force.

The employer re-evaluated the light duty policy and, by mid-1997, was taking the position that the negotiated sick leave benefits were adequate to address the needs of the officers during recovery periods when they could not perform patrol duties. The employer began to analyze and scrutinize light duty requests more closely.

Light Duty Requests Denied in 1997 and 1998 -
About May or June of 1997, Officer Shaw approached the employer concerning the possibility of going on light duty if she were to become pregnant. The employer informed her that light duty would not be approved for that purpose.

Officer Kim Sherwood has a medical condition which requires her to receive injections into her vocal cords every two to three months. After each such injection, she loses her voice for a week to 10 days. Sherwood requested light duty in December of 1997, and April of 1998, but her requests were denied. She had an injection on July 7, 1998,[3] but did not request light duty because she thought it would be futile in the face of the previous rejections.

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[3] This was eight days before the hearing in this case.

In September of 1997, Officer Guy Miner requested light duty following surgery to correct an off-duty injury. He needed to be medicated and to rest more than a patrol assignment would allow. His request for light duty was denied, and he was off work for the six weeks of his recovery period.

The union filed this complaint charging unfair labor practices on October 30, 1997, alleging the employer unilaterally changed a long-standing past practice of providing light duty assignments when it denied Miner's request for light duty. Examiner Pamela G. Bradburn held a hearing, and issued her Findings of Fact, Conclusions of Law, and Order on December 16, 1998. The Examiner concluded that the employer committed unfair labor practices in violation of RCW 41.56.140(4), by changing the light duty policy without first obtaining the agreement of the union or proceeding through bargaining or interest arbitration. She ordered the employer to rescind the changes made to the light duty policy, give the union advance notice of any proposed changes to the policy, and obtain agreement of the union to any changes to that policy.

The employer appealed the Examiner's decision, and the union filed a cross-appeal seeking an additional make-whole remedy for Officer Sherwood for any leave lost before or after the hearing as a result of the unilateral change, without regard to whether there was an actual request for light duty.

## POSITIONS OF THE PARTIES

The employer argues that the parties' collective bargaining agreement contains an explicit light duty policy, that clear contract terms granted the management authority to grant or deny a

light duty request, and that the management had discretion to determine the need for light duty services, so the subject is not a mandatory subject of bargaining. It claims that light duty assignments were evaluated consistently with contract terms, and that the management rights clause of the parties' contract constitutes a waiver of bargaining over all duty-related assignments. It contends that the case involves a breach of contract, that the Commission does not have jurisdiction over the issue, and that the complaint should be dismissed or deferred to arbitration. In addition, the employer claims the Examiner erred by finding an "interference" violation not alleged by the union.

The union argues that the parties' collective bargaining agreement does not protect or prohibit the conduct in question. It claims that the employer had a practice in place for more than 15 years, by which management representatives repeatedly approved employee requests for temporary light duty assignments. It claims that light duty work was available, but that the employer made a unilateral change of policy by denying the requests of Miner and Sherwood without notice and bargaining. The union argues that light duty is a mandatory subject of bargaining, and that it did not waive its right to bargain over that subject. The union contends that deferral is inappropriate, would not yield a result of interest to the Commission to resolve the unfair labor practice, and would merely delay the ultimate decision. The union asks the Commission to uphold the Examiner's decision.

In its cross-appeal, the union urges the Commission to make Sherwood whole for all sick leave used as a result of the unilateral change, including two times when she did not make futile requests after the change of the light duty policy. The union claims that, but for the unilateral change, Sherwood would have

made additional requests and would have received light duty assignments, and that she had to use additional sick leave and vacation leave to cover the time off.

In response to the union's cross-appeal, the employer asserts it should not be held responsible for Sherwood's failure to request light duty. The employer suggests that it can only grant light duty when it is requested, and it urges the Commission to deny the union's requested additional remedy.

## DISCUSSION

### The Commission's Jurisdiction

The Commission has jurisdiction in this case to rule on the union's allegation that the employer has violated Chapter 41.56 RCW. RCW 41.56.140 through .160 establish this Commission as the forum for implementing a legislative policy of peaceful labor-management relations in public employment. City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991). RCW 41.56.140 enumerates unfair labor practices by a public employer:

> It shall be an unfair labor practice for a public employer:
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> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights** guaranteed by this chapter;
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> (2) To control, dominate or interfere with a bargaining representative;
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> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
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> (4) **To refuse to engage in collective bargaining.**

[Emphasis by **bold** supplied.]

Under RCW 41.56.160, aggrieved parties may bring complaints to the Commission if they believe their rights have been violated. Public Employment Relations Commission v. City of Kennewick, 99 Wn.2d 832 (1983). Because Chapter 41.56 RCW is remedial in nature, its provisions are to be liberally construed to effect its purpose. Public Utility District 1 of Clark County v. Public Employment Relations Commission, 110 Wn.2d 114 (1988). Additionally, the courts of this state give great deference to Commission decisions, and to the Commission's interpretation of the collective bargaining statutes. Kennewick, supra.

## The Duty to Bargain

RCW 41.56.030(4) defines the collective bargaining obligation between public employers and the exclusive bargaining representatives chosen by their employees, as follows:

> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement **with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer,** except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ...
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> [Emphasis by **bold** supplied.]

That definition is patterned after the definition found in the National Labor Relations Act (NLRA). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA

are persuasive in interpreting state labor acts which are similar to the NLRA. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

The potential subjects for bargaining are commonly divided into categories of "mandatory", "permissive" and "illegal". Matters affecting the wages, hours, and working conditions of bargaining unit employees are mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or which are regarded as prerogatives of employers or unions have been categorized as "nonmandatory" or "permissive". See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, Federal Way Education Association v. Public Employment Relations Commission, WPERR CD-57 (King County Superior Court, 1978). In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which it affects personnel matters. Where a subject relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. International Association of Fire Fighters, Local 1051 v. Public Employment Relations Commission (City of Richland), 113 Wn.2d 197 (1989). The critical consideration in determining whether an employer has a duty to bargain is the nature of the impact on the bargaining unit. Spokane County Fire District 9, Decision 3661-A (PECB, 1991).

We have no difficulty in finding that the light duty policy at issue in this case is a mandatory subject of bargaining. The Commission is mindful of the court's admonition in Richland, supra, that resolving scope-of-bargaining questions is a task which requires particularity and sensitivity to the diverse interests of the public, the employer, the employees, and the union. In Washington Public Power Supply System, Decision 6058-A (PECB,

1998), we held that the employer had a duty to bargain a change of tobacco policy, because the matter was of direct concern to employees, and the employer's general concerns about maintaining a professional image did not outweigh the union's specific right to bargain the working conditions of the employees. In City of Brier, Decision 5089-A (PECB, 1995), the Commission's application of the balancing test resulted in a conclusion that cost considerations put forth by the employer as its only reasons for its claim of a business need to discontinue a past practice were outweighed by employee interests in the economic value of using patrol vehicles for commuting, where the costs had existed all along.[4] In the case now before us, the employer has not advanced argument in its brief about application of the balancing test.

Testimony provided by employer representatives indicates several reasons why the employer was taking a new approach in regard to allowing light duty. We infer that the population increases were gradual, and that any safety concerns, budget constraints, impositions on management, and higher cost for law enforcement officers to perform work usually done by lower-paid employees have existed all along. The employer certainly has not provided us with any evidence or argument that the problems it faced in 1997 warranted a unilateral change without fulfilling its bargaining obligations under Chapter 41.56 RCW.

Just as the issues of patrol vehicle usage in City of Brier, and tobacco usage in Washington Public Power Supply System, were of direct concern to employees, the light duty policy is of direct concern to the employees in this case. Light duty provides an

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[4] The practice had been in existence for a sufficient period to conclude that they were not a compelling business need which would justify a change of practice without bargaining.

alternative to taking sick leave (which is itself a mandatory subject of bargaining affecting both wages and hours), and allows employees to keep sick leave accumulation for other purposes including payout (which, although somewhat more remote or conditional, still has a potential impact as an alternative form of "wages"). For employees who are unable to perform the full duties normally required of them, the alternatives to working on light duty could be to go on leave without pay, to resign, or to be laid off (all of which clearly affect "wages", and tenure of employment which is clearly a "working condition"). The availability of light duty is thus found to be an economic benefit, and a working condition, of strong interest to those employees who ever have occasion to request light duty assignments. The employer's general reasons (as gleaned from the testimony) are outweighed by the union's specific right to bargain the wages and working conditions of the employees it represents.

The duty to bargain precludes unilateral changes. A party to a bargaining relationship violates RCW 41.56.140(4), if it fails to give notice of a change affecting a mandatory subject of bargaining prior to its implementation (i.e., presents the other party with a fait accompli), or fails to bargain in good faith in response to a timely request for bargaining. Federal Way School District, supra; Green River Community College, Decision 4008-A (CCOL, 1993); City of Brier, Decision 5089-A (PECB, 1995).[5]

## Past Practice and Unilateral Change

We have no difficulty in finding that a change was implemented here. While no duty to bargain arises from a reiteration of established policy, or from changes having no material effect on

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[5] See, also, NLRB v. Katz, 369 U.S. 736 (1962).

employee wages, hours or working conditions, as in Clark County Fire District 6, Decision 3428 (PECB, 1990); City of Yakima, Decision 3564-A (PECB, 1991); Evergreen School District, Decision 3954 (PECB, 1991); and Green River Community College, supra,[6] it is clear that the light duty policy was changed in this case.

The employer disputes the existence of a past practice, but the record shows that the requests of a great majority, if not all, employees who requested light duty for short-term needs were granted over a period of at least 14 to 15 years, and those employees were allowed to preserve their wages or sick leave balances while performing light duty tasks.

The record also shows that the employer was in the process of rethinking its light duty policy at the time this dispute arose. Employer representatives testified that recent changes affected the approach the employer was taking to light duty requests. Those changes included:

- Population increases;
- Safety concerns;
- Pressure to place more officers on patrol;
- Increased realization of the imposition which light duty imposes on management;
- Problems associated with unfamiliarity of officers (who are accustomed to patrol duties) with performing office work;

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[6] The decisions in Kitsap County Fire District 7, Decision 2872-A (PECB, 1988) and Pierce County Fire District 3, Decision 4146 (PECB, 1992) distinguish between restatements of old policies and new policies.

- Troubles with assuring minimum manning levels on patrol when an officer leaves for light duty;
- Problems with training officers who go on light duty to perform the tasks, and to use new technology;
- Budget constraints;
- Greater cognizance of the cost of commissioned officers performing functions normally done by lower paid employees; and
- Collective bargaining agreement provisions that attempted to bridge the gap between LEOFF II and LEOFF I.

Captain Murray testified, "Ten years ago we would probably be more apt to grant the light-duty position than in today's situations". [Tr. p. 128] Chief Badgley testified that he has recently become more concerned about light duty requests in general, and the sick leave bank changed the employer's attitude toward light duty "considerably". [Tr. p. 159] The testimony of the employer's representatives show clearly that they were thinking a ***change of practice*** was needed with regard to routinely allowing light duty.

We are not persuaded by the employer's argument that a past practice cannot be based on the practices or beliefs of non-management employees, and that one sergeant (Sergeant Britt) liberally granted light duty requests without management approval. Anyone who granted the light duty requests which form the background to this case acted within their apparent scope of authority. Even if higher management was unaware of a sergeant's "liberal" practice of allowing light duty assignments, unfair labor practices committed by a superior serving in an official capacity are considered to be the responsibility of the public employer as an entity. See, Mansfield School District, Decision 5238-A (PECB,

1996); and City of Brier, Decision 5089-A (PECB, 1995), and cases cited therein.

The employer argues that the union must establish that the change affects a significant number of union members, but that argument has no merit. As described above, the testimony of the employer representatives provides a basis for a strong inference that the denials of light duty requests in 1997 were not isolated incidents. The employer was clearly taking a closer look at all light duty requests, and examining its general policy affecting all bargaining unit members. The change of practice would also affect all bargaining unit employees in the future.

## Deferral to Arbitration

We are not persuaded by the employer's argument that this case should have been deferred to arbitration. RCW 41.56.160 vests the Commission with considerable discretion in the processing of unfair labor practice cases. Pierce County, Decision 1671-A (PECB, 1984). Early in its history, the Commission ruled that deferral to arbitration is a matter of policy, rather than a matter of law, and that agreements between parties cannot restrict the jurisdiction of the Commission. City of Seattle, Decision 809-A (PECB, 1980). The Commission reviewed and restated its policies on deferral to arbitration in City of Yakima, Decision 3564-A (PECB, 1991), where the type of case appropriate for deferral was narrowly defined:

> This Commission has taken a conservative approach, limiting "deferral" to situations where an employer's conduct at issue in a "unilateral change" case is arguably protected or prohibited by an existing collective bargaining agreement. ... **The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to**

> **assist this Commission in evaluating a "waiver by contract" defense** which has been or may be asserted in the unfair labor practice case.

[Emphasis by **bold** supplied.]

The Commission further outlined the following preconditions to "deferral": (1) The existence of a contract; (2) an agreement to accept an arbitration award as "final and binding"; and (3) no dispute between the parties concerning arbitrability. Thus, deferral to arbitration is only appropriate in "unilateral change" unfair labor practice cases, where disputed employer conduct is arguably protected or prohibited by an existing collective bargaining agreement, and the legislative policy favoring grievance arbitration can be implemented by leaving the interpretation of the contract to an arbitrator. In addition, the Commission has the authority to refuse to defer to arbitration any unfair labor practice case, and may interpret any collective bargaining agreement to the extent necessary to decide a pending unfair labor practice case.

The employer urges us to read City of Yakima as requiring deferral in this case, but the Commission stated there that deferral is not a method by which respondents can avoid determinations as to whether they committed an unfair labor practice. As a discretionary (rather than mandatory) policy, deferral is ordered only where it can be anticipated that the delay in processing of an unfair labor practice case will yield an answer to the question that is of interest to the Commission in resolving the unfair labor practice case. In this case:

- The union clearly alleged a unilateral change in its complaint, by referring to a longstanding past practice. Where allegations clearly concern a change of practice, the Commis-

sion has jurisdiction under the unfair labor practice provisions of the statute. The duty we enforce (i.e., the duty to notify the union of any proposed changes in practices and provide the union an opportunity to bargain), arises out of the statutory duty to bargain under RCW 41.56.030, and is separate and apart from obligations enforced by arbitrators. See, City of Bellevue, Decision 3085-A (PECB, 1989), affirmed, 119 Wn.2d 373 (1992), and City of Bremerton, Decision 6006-A (PECB, 1998). As noted by the Supreme Court in Bellevue, arbitrators have no particular expertise in the interpretation or administration of the statute.

- The preliminary ruling issued in November of 1997 called for the employer to file its answer to the complaint, and specifically called for the employer to assert any affirmative defenses.

- The employer's answer, filed on December 24, 1997, did not assert any affirmative defenses, and did not even mention the parties' collective bargaining agreement, let alone any "waiver by contract" defense.

- The Examiner issued a notice on January 5, 1998, setting a hearing on the case for February 23 and 24, 1998.

- The Examiner issued amended notices of hearing on February 23rd, April 14th, and May 4th, the last of which set hearing dates of July 15 and 16, 1998.

- It was not until June 4, 1998, that the employer first requested deferral to arbitration.

While we would be critical of an Examiner's rejection of a ***timely*** request for deferral to arbitration in a case such as this, where the conditions for deferral to arbitration under Yakima otherwise appear to be met, we find no fault with the Examiner's rejection of the deferral request under the circumstances of this case. Having provided no clue in its answer as to the potential propriety of deferral, and having then waited more than five additional months without requesting deferral, the employer is not in a position to complain. Granting the motion for deferral would have significantly delayed the resolution of this controversy. This case fits within the Commission's precedents for processing as an unfair labor practice case.

## Waiver by Contract

Contract Law in Washington State -

The principal outcome of the collective bargaining process under Chapter 41.56 RCW is for an employer and the exclusive bargaining representative of its employees to sign a written collective bargaining agreement controlling wages, hours and working conditions of bargaining unit employees for a period of up to three years. RCW 41.56.030(4); 41.56.070. Such contracts are enforceable according to their terms, including by means of arbitration. RCW 41.56.122(2); 41.58.020(4). Thus, there is no duty to bargain for the life of the contract on the matters set forth in a collective bargaining agreement. If a union waives its bargaining rights by contract language, an employer action in conformity with that contract will not be an unlawful unilateral change. City of Yakima, supra. Waiver by contract is an affirmative defense, and the employer has the burden of proof. Lakewood School District, Decision 755-A (PECB, 1980).

The Supreme Court of the State of Washington has long adhered to an "objective manifestation" theory of contracts, and imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts. Plumbing Shop, Inc. v. Pitts, 67 Wn.2d 514 (1965).[7] In Lynott v. National Union Fire Insurance Company, 123 Wn.2d 678, 684 (1994), the Supreme Court wrote, "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions". Washington courts may examine the subsequent conduct of contracting parties in discerning their contractual intent, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract. See, Berg v. Hudesman, 115 Wn.2d 657 (1990), cited in Lynott.[8] The subjective intention of the parties is irrelevant under Washington law and Commission precedent. Additionally, the Supreme Court has required that agreements reached in collective bargaining be put in writing to be enforceable.[9]

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[7] Our Supreme Court quoted from Judge Learned Hand in Everett v. Estate of Sumstad, 95 Wn.2d 853 (1981):

> **A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.** A contract is an obligation attached by the mere force of law to certain acts of the parties, usually **words**, which ordinarily accompany and **represent a known intent.** If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held ... Everett v. Estate of Sumstad, supra.

[Emphasis by **bold** supplied]..

[8] See, also, Hall v. Custom Craft Fixtures, Inc., 87 Wn.App. 1 (1997).

[9] State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970).

Contractual Provisions in This Case -

The employer claims that the following contract provisions govern the dispute in this case:

> Article 4.1 Any and all rights concerned with the management and operation of the City are exclusively that of the City unless otherwise provided by the terms of this Agreement. The City has the authority to adopt rules for the operation of the City and conduct of its officers, provided such rules are not in conflict with the provisions of this Agreement or with applicable law. The city has the right to (among other actions) temporarily lay off officers; discipline or discharge officers for just cause; to **assign work and determine duties of officers;** to schedule hours of work, consistent with this agreement and collective bargaining obligations; to determine the number of personnel to be assigned duty at any time; and to perform all other functions not otherwise expressly limited by this Agreement.
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> ***
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> Article 14.4 Officers on disability who are (1) released by their physician to perform light-duty assignments and (2) able to perform a needed light-duty function in the Police Department, are encouraged to do so.

[Emphasis by **bold** supplied.]

In addition, the employer also cites as pertinent: (1) Article 5.1(b), which allows alternative work schedules; (2) Article 7, which provides enhanced sick leave benefits available to LEOFF II officers who successfully complete probation; (3) Section 7.3(c), which states in part, "Sick leave may be extended by the appointing power after all accumulated sick leave is liquidated when an officer is injured in the line of duty ..."; (4) Section 7.4(g), which allows an officer to use annual leave as sick leave, but not sick leave as annual leave; (5) Section 7.6, which provides for a

shared leave program; and (6) Article 14.1.3, which deals with industrial accidents or occupational diseases affecting LEOFF II officers. None of the contractual provisions cited by the employer or found in the parties' contract specifically requires the employer to provide an employee light duty assignments.

The employer argues that the management rights clause constitutes a waiver of bargaining over all duty-related assignments, because of the specific reference to the assignment of duties. While giving the employer the right "to assign work and determine duties of officers", Article 4.1 of the contract was presumably negotiated and/or renewed in the context of the long-standing past practice of granting requests for temporary light duty assignments. Article 14.4 inherently acknowledges the existence of the light duty practice, by encouraging employees to go on light duty if the function is needed. Article 4.1 does not state specifically that the employer has a right to change the light duty practice, or to deny all future requests for light duty.[10]

Likewise, the phrase "to determine the number of personnel to be assigned to duty at any time" does not specifically reveal any intention of the parties that the employer may deny all requests

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[10] See, City of Kelso, Decision 2633-A (PECB, 1988), where a management rights clause giving the employer the exclusive right to manage the fire department and stating "all powers, authorities, functions and rights not specifically and expressly restricted by this Agreement are subject to exclusive management control," was too general to constitute a waiver of bargaining rights on a decision to lay off employees. Likewise, in Washington Public Power Supply System, supra, a management rights clause retaining for the employer "the exclusive right to manage and operate its business," and stating "All management functions, rights and responsibilities ... not modified or restricted by this Agreement are retained ..." was not a waiver by contract as to tobacco use.

for light duty. To give it that interpretation would nullify the language of Article 14.4.

The employer argues that Section 5.1(b) prevents the union from asserting a past practice, because of the language "alternative work schedules agreed to between officers and the city shall not create a binding past practice between the parties." However, Article 5.1 (b) does not specifically address whether the employer would be required to place employees on light duty.

While other cited contract provisions shed some light on the whole scheme of use of sick leave by bargaining unit members as agreed to by the parties, those provisions do not specifically address the issues in this case. The employer put on no evidence, such as discussions during collective bargaining negotiations or written correspondence between the parties, to show that the union knowingly waived its rights to bargain changes in the light duty practice and policy, and that the parties' intention at the time of the contract was that the employer would maintain that right.[11]

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[11] The employer takes issue with numerous findings of the Examiner and misinterprets the Examiner's wording. For instance, the employer suggests that the Examiner found that the collective bargaining agreement contains the light duty policy. The Examiner, however, only acknowledged that the collective bargaining agreement contained a clause concerning light duty, but not that the agreement contained ***the*** light duty policy or a policy that covered the issues in this case. She found a policy on light duty was established both by the contract and the employer's actions. The employer's claim that the Examiner found the collective bargaining agreement protected or prohibited the employer's action also misinterprets the Examiner's words. We do not address each and every argument here, but state only that the employer's arguments misinterpreting the Examiner's wording indicate a lack of a fundamental basis for its defense.

A reasonable interpretation of the collective bargaining agreement is that it does not evidence an intent of the parties that the complete termination of the light duty practice would be the prerogative of management. The contract terms relied upon by the employer here are too general to give rise to a specific waiver of the union's right to negotiate. The unilateral change made by the employer in this case violated RCW 41.56.140(4).

## Employer Interference

The employer argues that the Examiner erred by making a conclusion of law that the employer committed an "interference" violation under RCW 41.56.140(1). That section of the statute was not cited by the union in its complaint.

Like the practice of the National Labor Relations Board in its administration of the similar provisions of the NLRA, the Commission routinely finds a "derivative" interference violation under RCW 41.56.140(1) whenever a domination, discrimination or refusal to bargain violation is found under RCW 41.56.140(2), (3) or (4). Any of the latter violations inherently interferes with the rights of bargaining unit employees. See, Battle Ground School District, Decision 2449-A (PECB, 1986), and City of Seattle, Decision 4851-A (PECB, 1995). Thus, the Examiner's citation of RCW 41.56.140(1) in this case was correct.

## Remedy

The union argues that Kim Sherwood should be made whole for all lost sick leave incurred because of the unilateral change in policy. It acknowledges that Sherwood twice refrained from requesting light duty, but argues that was because she thought it would be futile to do so and that, but for the unilateral change,

Sherwood would have made additional requests and would have received light duty assignments. Essentially, the union seeks a remedy making Sherwood whole for any leave lost before and after the hearing as a result of the unilateral change, without regard to whether there was an actual request for light duty.

We are denying the union's request for this additional remedy, because a remedy for an unfair labor practice cannot be based on hypothetical arguments. Because the employer did not have the opportunity to act on requests by Sherwood, we cannot presume that the employer would have denied them.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact, Conclusions of Law, and Order issued in the above-captioned matter on December 16, 1998, by Examiner Pamela G. Bradburn, are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission, except as follows:

2. Paragraph 2 of the Conclusions of Law is AMENDED to read as follows:

   2. The City of Wenatchee has committed unfair labor practices within the meaning of RCW 41.56.140(4) and (1), by changing the traditional light duty policy without giving notice to the Wenatchee Police Guild and fulfilling its collective bargaining obligations under Chapter 41.56 RCW.

3. THE CITY OF WENATCHEE, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

a. CEASE AND DESIST from:

(1) Changing the light duty policy historically applied to members of the bargaining unit represented by the Wenatchee Police Guild, without first giving notice to that organization and fulfilling its collective bargaining obligations under Chapter 41.56 RCW.

(2) In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

(1) Restore the light duty policy which was in effect prior to the unilateral change.

(2) Give notice to the Wenatchee Police Guild of any changes to the light duty policy proposed for implementation in the future; upon request, bargain in good faith with that organization; and, if no agreement is reached, submit the matter to interest arbitration under RCW 41.56.430, et seq.

(3) Make Officer Guy Miner whole for any sick leave used as a result of the denial of his request for

light duty made in September of 1997; and make Officer Kim Sherwood whole for any sick leave used as a result of the denial of her requests for light duty made in December of 1997 and April of 1998.

(4) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

(5) Read the notice attached hereto and marked "Appendix" aloud at the next public meeting of the City Council of the City of Wenatchee and append a copy thereof to the official minutes of said meeting.

(6) Notify Wenatchee Police Guild, in writing, within 30 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 Wenatchee Police Guild with a signed copy of the notice required by the preceding paragraph.

(7) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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 Executive Director

with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 22nd day of April, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

**THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:**

WE WILL restore the status quo ante by reinstating the light duty policy historically applied to employees in the bargaining unit represented by Wenatchee Police Guild.

WE WILL give notice to the Wenatchee Police Guild of any changes of the light duty policy proposed for implementation in the future; we will bargain, upon request, concerning any such proposal; and will implement only such changes as are agreed upon in collective bargaining or awarded through interest arbitration.

WE WILL restore sick leave used by Officer Guy Miner when his request for light duty was denied in September of 1997.

WE WILL restore sick leave used by Officer Kim Sherwood when her requests for light duty were denied in December of 1997 and April of 1998.

WE WILL read this notice into the record of the next public meeting of the City Council, and append a copy thereof to the official minutes of such meeting.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

CITY OF WENATCHEE

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.