*Whatcom County*, Decision 7288-A (PECB, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| WHATCOM COUNTY DEPUTY SHERIFFS' GUILD, | ) | |
| Complainant, | ) | CASE 14475-U-99-3592 |
| vs. | ) | DECISION 7288-A - PECB |
| WHATCOM COUNTY, | ) | DECISION OF COMMISSION |
| Respondent. | ) | |

Cline and Associates, by *James M. Cline*, Attorney at Law, for the union.

Halvorson & Saunders, P.L.L.C., by *Larry Halvorson*, Attorney at Law, for the employer.

This case comes before the Commission on an appeal filed by the Whatcom County Deputy Sheriffs' Guild, seeking to overturn findings of fact, a conclusion of law, and an order of dismissal issued by Examiner Katrina I. Boedecker.[1] The Commission affirms; the complaint is dismissed.

## BACKGROUND

On March 24, 1999, the Whatcom County Deputy Sheriffs' Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Whatcom County (employer) as respondent. The complaint

[1] *Whatcom County*, Decision 7288 (PECB, 2001).

involves bargaining unit employees Kate Lynch and Jim Smith, who applied for an assignment at Paradise Lakes Country Club in 1998 and were given that assignment for 1999. A preliminary ruling was issued under WAC 391-45-110 on May 18, 1999, finding a cause of action to exist on allegations summarized as:

> The employer's failure to maintain the past practice for East County deputies, newly assigned to Paradise, to *call into service* as they were traveling towards the East County area and *being compensated for such travel time*.

(emphasis added).[2]

A hearing was held on September 22 and 23, 1999. The Examiner ruled that the employer did not unilaterally change an established past practice and dismissed the complaint.

The facts are fully detailed in the Examiner's decision and are only addressed here in relevant part.

## POSITIONS OF THE PARTIES

The union asserts that the employer unilaterally changed a mandatory subject of bargaining that involved both hours and wages. Specifically, the union claims that a uniform, established past practice existed before September 1998, under which employees were permitted to travel "on the clock" to patrol zones. The union asserts that a past practice can exist without regard to occasional deviations.

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[2] As used in the preliminary ruling, the term "*into* service" is understood to mean the start of a work shift for which the bargaining unit employee is compensated for travel time from home to their initial start location.

The employer acknowledges that it directed Lynch and Smith to begin and end their shifts at Paradise Lakes when practicable, but contends that was within the confines of a long-established practice whereby deputies are not paid for commuting between their residences and the work locations to which they have been assigned to begin and end their work days. The employer argues that such commuting time is not a mandatory subject of bargaining and does not involve wages or hours. The employer asserts there is no established practice of compensating deputies for travel time between their homes and east county or other special assignments, or between their homes and the station. Except for Finding of Fact 9, as discussed below, the employer asks that the Examiner's findings of fact, conclusions of law, and order dismissing the complaint be affirmed.

## DISCUSSION

The ultimate issue presented by this appeal is whether the employer violated RCW 41.56.140(4) by directing bargaining unit employees assigned to Paradise Valley and/or east county to report to their assigned work area at the *start* of their work shifts. Issues arise in this case as to whether: (1) the assignments sought by and awarded to bargaining unit employees Lynch and Smith were within a class of "special" assignments historically recognized; and (2) whether bargaining unit employees previously working on special assignments have been compensated for their time spent in commuting between their residences and their initial start locations.

The Examiner answered the first of those questions in the affirmative, and we affirm. As to the second of those questions, the union failed to sustain its burden of proof that there was a past

practice of compensating employees assigned to Paradise Valley and/or east county for their commuting time, and thus failed to meet its burden of proof that there was a duty to bargain or refusal to bargain resulting in an unfair labor practice.

## Standards of Law

We agree with the Examiner's statement of the law, and therefore restate the law only briefly here.

The Duty to Bargain -
Under RCW 41.56.030(4), a public employer has a duty to bargain, "personnel matters, including wages, hours and working conditions." RCW 41.56.140(4) makes it an unfair labor practice for a public employer to refuse to engage in collective bargaining (under certain circumstances). As the complaining party in this case, the union has the burden to prove any alleged unfair labor practice. WAC 391-45-270(a).

A "mandatory subject of bargaining" is a matter on which RCW 41.56.030(4) obligates an employer and the exclusive bargaining representative of its employees to bargain in good faith. *Federal Way School District*, Decision 232-A (EDUC, 1977), *aff'd*, WPERR CD-57 (King County Superior Court, 1978). The determination as to when a duty to bargain exists is a question of law and fact for the Commission to decide. WAC 391-45-550. However, it is well-settled that both "wages" and the "hours" for which an employee is to be paid are mandatory subjects of bargaining.

Unilateral Changes -
A party to a collective bargaining relationship commits an unfair labor practice under RCW 41.56.140(4) if it imposes a new term or condition of employment, or meaningfully changes existing wages,

hours or working conditions of bargaining unit employees, without having first exhausted any bargaining obligations it has under Chapter 41.56 RCW. *City of Tacoma*, Decision 4539-A (PECB, 1994); *Kitsap County Fire District 7*, Decision 2872 (PECB, 1988). A complainant alleging a "unilateral change" must establish *both*: (1) the existence of a relevant status quo or past practice; *and* (2) a change of a mandatory subject of bargaining. *Whatcom County*, Decision 7288, *supra* (citations omitted); *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1999).[3]

A "past practice" is a course of dealing acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous." *City of Pasco*, Decision 4197-A (PECB, 1994). However, in order to be an established past practice, the action must be consistent, and all parties must have knowledge of it. *Whatcom County*, Decision 7288, *supra*. Further, to constitute an unfair labor practice, a change in the status quo must be meaningful. *City of Kalama*, Decision 6773-A (PECB, 2000); *Kitsap County Fire District 7, supra*. In this case, the status quo was established from the factual record and documentation presented at the hearing; and the Examiner made findings regarding the status quo in her decision.

## Special Assignment v. Regular Patrol Deputies

For purpose of determining relevant comparisons for the deputies assigned at Paradise Valley and/or east county, it is necessary to

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[3] Unilateral changes regarding matters that are not mandatory subjects of bargaining do not violate the statute. *Spokane County Fire District 9*, Decision 3021 (PECB, 1998).

determine if those employees were on "regular" or "special" assignments during the period relevant to this proceeding.

The union argues that the Examiner erred by considering the practices for certain "special" assignments. It asserts that deputies on patrol assignments have always been permitted to travel to their patrol zones (including the east county zone) on the clock, and that the special assignments cited by the employer and Examiner are relevant only for those special assignments.

The employer argues that there are three "regular" patrol shifts (day, swing, and graveyard), and that Lynch and Smith were not assigned to any of those regular patrols. Rather, it argues that they were on "special" assignments, that the record is replete with evidence showing that numerous deputies on special assignments have begun and ended their shifts for many years at locations other than the station, and that those special assignments included the east county assignments.

We hold that the employees at issue in this proceeding were on special assignment during the relevant time period. Documents presented at the hearing depicted the Paradise Valley and east county patrol assignments as special assignments. Exhibits 24-B, 24-E, 24-F, 24-G, 24-I, 24-L, 24-M, and 24-N. Thus, it was appropriate for the Examiner to compare deputies Lynch and Smith to employees on special assignments cited by the employer. If the union wanted other special assignments considered, it was the union's responsibility to present such evidence.

We also agree with the Examiner that the record does not show that deputies working on special assignments were ever consistently paid for their travel time from their residences to their assigned work

locations. *See* Finding of Fact 6; Amended Finding of Fact 6 below. Even if some employees on special assignments were paid for travel time between the station and their assigned work areas, that practice did not obligate the employer in the situation that was before the Examiner. The relevant inquiry here is whether prior employees on special assignments have been compensated for travel time from their residence to their initial start location. *See* Findings of Fact 7 and 9.

## Challenged Findings, Conclusion, and Order

The union assigned error to Findings of Fact 7, 9, 10, and 13; Conclusion of Law 2; and the order of dismissal. The Commission has reviewed those portions of the Examiner's decision, and affirms the ruling that no unfair labor practice was committed.

Assignments of Error and Verities on Appeal -
Unchallenged findings of fact are treated as verities on appeal. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). A party assigning error has the burden of showing a challenged finding is in error and not supported by substantial evidence; otherwise findings are presumed correct. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990) (citations omitted); *C-TRAN (Amalgamated Transit Union, Local 757), supra.* Thus, a finding will be considered a verity on appeal if an assignment of error is not supported with legal or factual argument. *See C-TRAN (Amalgamated Transit Union, Local 757), supra.*

The union did not assign error to Finding of Fact 6 in its notice of appeal. That finding states as follows:

> Steve Gatterman was assigned as one of the east county patrol deputies in 1995. He would begin his work shifts either from his residence or from the station, and he would end his work shifts at his residence unless he needed to do business at the station. Any travel time between his residence and the station was unpaid, but he was compensated for his travel time between his residence and the patrol zone.

Nevertheless, the union now argues that the Examiner erroneously discounted the testimony of Deputy Steve Gatterman when she wrote that Gatterman declined to state that his supervisor knew of his practice of beginning and ending his east county shift at either the station or his home. Because error was not assigned to this finding on appeal, it stands as a verity.[4]

The union did not argue the error assigned to Finding of Fact 7, where the Examiner wrote:

> In 1996, Scott Huso was assigned as east county patrol deputy. At first, Huso started and ended his work shifts at his residence. Sometime during the year, the employer concluded that some employees working on special assignments were abusing the practice of

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[4] Even if we were to reach the merits of the union's argument, we would agree with the Examiner's analysis. Gatterman did not testify that anybody with authority to act on behalf of the employer knew he was not in the east county area at the start of his shift. Gatterman also testified that Sergeant McFadden informed him of problems with people not working at the start of their shifts, so that a new policy required deputies to be at the assigned work location at the start of their shift. Lieutenant Parks' September 12, 1996, memo stated that generally starting or ending an assignment at one's home was inconsistent with departmental policy. Gatterman's violation of policy did not establish a past practice.

> signing in by radio when leaving their residences, and the employer then directed all patrol personnel, including east county deputies, to start their work shifts at their assigned duty stations, unless directed to a call or other assignment by the sergeant. Thereafter, the east county patrol deputy would come into the station in Bellingham to attend the shift briefing.

The union assigned error to this finding in its notice of appeal, but it did not make any argument or statement in its appeal brief relating to Deputy Huso. Thus, Finding of Fact 7 stands as a verity on appeal.

The union did not argue the error assigned to Finding of Fact 13, where the Examiner wrote:

> In the first half of 1999, the community association at the PLCC development dissolved, and ceased paying the employer for special law enforcement coverage. The sheriff made an entrepreneurial determination that the Paradise Valley area should continue to receive special patrols, because of the positive effect they had. The employer placed responsibility for patrol of the Paradise Valley into its east county zone, and directed that the east county deputies be considered to be in their duty area as soon as they enter the area, i.e., Nugent's Corner East. The deputies were to report to their duty assignment at the start of the shift.

As with Finding of Fact 7, the union did not follow through with argument to support the assignment of error set forth in its notice of appeal. Moreover, the union admits that testimony was given that the contract that had paid for the disputed patrols was cancelled by the Paradise Lakes Country Club development in the spring of 1999, and that the employees were thereafter directed to

travel off-the-clock to start their shifts at Nugent's Corner. Thus, the finding stands as a verity on appeal.

Challenged Finding of Fact Concerning Cliff Langley -
The union argues that the most critical error of the decision is set out in paragraph 9 of the Examiner's findings, where the Examiner wrote:

> Cliff Langley accepted one of the east county patrol assignments for 1997. He was *instructed to start and finish his shift in the Nugent's corner area*, which was 8 to 10 miles from his residence. However, he generally began his work shifts by coming into the station. Although Langley would call in on the radio when he was in the patrol car on his way from his residence to the station, he was not paid for his commute time. Langley would generally return to the station at the end of his shift, but he would sometimes "clear from the field" and end his shift at Nugent's Corner.

(emphasis added).

The union contends that Lieutenant Parks never gave Deputy Langley any such "instruction," and that Langley instead testified that he was told by Parks that he could start his work shifts at *either* Nugent's Corner or the station. The union notes that Parks testified in this proceeding, and that he did not dispute the testimony that he gave Langley the option of starting either at Nugent's Corner or the station. In its appeal brief, the union reasons:

> But this err by finding that an "instruction" had been given becomes the *most fundamental err in the entire decision*. The linchpin of the Examiner's reasoning is that no past practice was created largely because of this supposed instruction to Langley. All the

> other *prior* East County deputies had been permitted to commute directly from their home and it is uncontroverted, even by the Examiner or the County, that the other deputies were always paid for their commute time. It is the supposed variability in the working condition presented by the Langley situation which leads the Examiner to conclude that the past practice was so uneven that it did not amount to even being a past practice.

(emphasis added).

The employer admits Parks told Langley he could start and end his east county shifts at either Nugent's Corner or the station, but it describes the union's arguments regarding this finding as specious. It claims this error is harmless, and that what is material is that Langley traveled from his residence to the station or Nugent's Corner on his own time. We agree with the employer's analysis:

First, Langley testified that Parks instructed him to start his shift in the Nugent's Corner area, that Parks never told him he had to start at Nugent's Corner, and that he understood Parks as saying he had the option of starting at Nugent's Corner. Langley testified that he typically started his shift at the station, and that he was not paid for his travel time from his residence to the station. Whether Langley was also told that he could start his shift at the station does not alter the correctness of the finding. Examiners are not required to recite all of the evidence in findings of fact, but rather are to distill the volume of evidence into the facts required and relevant to support their conclusions. Because we agree with the employer about the importance of the fact that Langley was not paid for his travel time, any error in Finding of Fact 9 did not affect the outcome of the case.

Second, even if "prior" east county deputies may have started their shifts from their residences, this was possibly done without

the employer's knowledge (as described above), against the employer's policy. *See* Findings of Fact 6 and 7. Prior east county deputies had started their shifts from the station, but testimony was given that Gatterman and ultimately Huso were not paid for their travel time between their residences and the station. *See* Findings of Fact 6 and 7.

Thus, there is substantial evidence in the record to support the challenged portions of this finding.

Challenged Finding of Fact Concerning Nick Childers -
The union objects to paragraph 10 of the findings of fact where the Examiner wrote:

> Nick Childers had an east county patrol deputy assignment for a few weeks at the beginning of 1997. At some point in his brief tenure in that assignment, the employer allowed him to *end* his work shifts at his residence.

(emphasis added).

The union argues that the Examiner erred by attempting to characterize Childers' practice as a mere "special accommodation" that was designed to last for only a few weeks, and it contends that both: (a) the record is clear that Parks specifically agreed that Childers could travel on the clock directly to the patrol beat, and (b) that Childers' assignment to that patrol was cut short only because he was reassigned as a detective. Additionally, it argues that although the finding indicates that Childers was allowed to *begin* his shift at his residence "at some point" in his tenure, he followed that practice throughout his brief tenure on the east county assignment.

The employer argues that it is immaterial whether Childers was allowed to *end* his shift at his residence throughout his short tenure in the east county assignment or for only part of his time in that assignment. It contends that the important fact is that Childers *started* his east county shifts at the station and that his travel time from his residence to the station was unpaid. The employer points out that the Examiner astutely recognized that Childers interpreted the employer's permission that he could *end* the shift at his residence as an "accommodation" of a special need, is an acknowledgment that the practice was something different (i.e., that the shift typically *ended* at the assigned work location and the employee traveled home on his own time).

Again, we find multiple grounds to affirm the Examiner's decision on this issue:

First, Childers testified that he was an east county deputy in 1997, and that Parks allowed him to end his work shifts at his home. Thus, we find there is substantial evidence in the record to support the challenged portions of paragraph 10 of the Examiner's findings of fact.

Second, the arguments of both the union and employer go beyond the scope of this finding, which is confined to where Childers' *ended* his work shifts. Thus, we merely point out that Childers testified that he started his shifts at the station, and that he traveled to the station on his own time; and we do not address all of the arguments presented by the parties.

Finally, it is immaterial whether Childers was allowed to end his work shift at his residence for part or all of his assignment. That particular assignment only lasted a few weeks. Examiners need not include every detail in findings of fact so that, even if the arrangement operated for the entire period of his assignment, it is

still true that Childers was allowed to end his assignment at his residence "at some point" in his brief tenure.

Challenged Conclusion of Law 2 -

Paragraph 2 of the Examiner's conclusions of law set forth the ruling that no unfair labor practice was committed, as follows:

> The employer's directive that bargaining unit employees assigned at Paradise Valley and/or as east county patrol deputy after September 24, 1998, report to their assigned work area(s) at the start of their work shifts did not constitute a change from an established past practice, so that no duty to bargain arose under RCW 41.56.030(4), and the employer did not make a unilateral change in violation of RCW 41.56.140(4).

The union argues that the Examiner erred by ruling that no past practice existed. It points out that the employer's chief witness, Parks, admitted that deputies assigned to various patrol beats including the east county area have always traveled to their patrol zones on the clock, and it asserts that employees were even allowed in a number of instances to travel on the clock from their residences to the east county zone and other remote locations. The union adds that on the clock travel to the eastern portion of the county is consistent with department practices that treat the east county as yet another patrol zone.

The employer claims that the evidence shows a long-standing practice of requiring employees on special assignment to report to locations other than the station, without compensation. Thus, it contends that the directives given to Lynch and Smith in connection with their special assignment to Paradise Lakes, and then later to east county, was consistent with this well-established practice and did not constitute a unilateral change of the established status quo.

We find the union's arguments concerning Conclusion of Law 2 to be misplaced:

First, as discussed above, the deputies at issue in this case were on special assignment and not assigned to regular patrol beats. Thus, although some deputies may have been allowed to travel to patrol beats on the clock, Paradise Valley and/or east county deputies were on special assignment and did not travel to patrol beats on the clock.

Second, we agree with the Examiner and employer that employees on special assignments have reported at the start of their shifts to locations other than the station, without compensation for the time they spent traveling from their residences. We insert an additional Finding of Fact, below, to set forth examples established by the evidence.[5]

Furthermore, deputies on special assignment have not been paid for their travel commute time from their residences to the station at the start of their shifts. Findings of Fact 6, 7 and 9.

We thus agree with the Examiner's conclusion that the employer's directive did not constitute a change from an established practice. With the inclusion of the one clarifying finding, as described above, the findings of fact support the Examiner's conclusion that

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[5] Testimony was given that neither Anthony Ferry nor other range officers were compensated for their travel time between their residences and the range facility, and that neither Art Edge nor other drug task force members were compensated for their travel time between their residences and their work locations. When Lynch was assigned to a boat patrol and to Baker Lake, she was at the boat or at the Baker Lake house at the start of her shift, and was not paid for her travel time. When Gatterman was working as a road use investigator, he started his shifts at the specific location where he was to be working that day.

there was no duty to bargain and that the employer did not make an unlawful unilateral change.

Because the complainant in this unilateral change case has not proven that there has been a meaningful change in an established past practice, it is not necessary for the Commission to determine whether the dispute involved an mandatory subject of bargaining.

## Effect of Delay on Deference to Examiner

The union claims that the lapse of time that occurred between the hearing and the issuance of the Examiner's decision produced a number of factual errors involving fundamental issues in this case, and that the delay should eliminate the deference customarily given to examiner decisions. The passage of time does not, by itself, deprive a presiding officer of his or her superior position to weigh the credibility of evidence. *Renton Technical College*, Decision 7441-A (CCOL, 2002); *Brinnon School District*, Decision 7210-A (PECB, 2001). Whenever contradictory evidence is submitted, our examiners are required to weigh that evidence. *Renton, supra; C-TRAN (Amalgamated Transit Union, Local 757), supra; Brinnon School District, supra.* As explained above, and as can be deduced from our holding, we do not agree that the delay in this case actually produced significant factual errors. Therefore, we defer to the factual findings and inferences made by the Examiner in this case, as is our usual practice. *Renton, supra; C-TRAN (Amalgamated Transit Union, Local 757), supra; Brinnon School District, supra.*

## Other Issues Re-Argued on Appeal

Because the union did not establish that the employer committed an unfair labor practice, it is not necessary to address the "other defenses" arguments presented by the union on appeal. Similarly,

because the union did not establish that the employer committed any unfair labor practice, we decline to address the union's claims that the employees involved are entitled to back pay or that the union is thereby entitled to attorney fees under RCW 49.48.030. The remedial authority conferred upon the Commission by RCW 41.56.160 is triggered by the finding of an unfair labor practice violation, and there is no need to address either standard or extraordinary remedies in a case where no violation of the statute is found.[6]

## Conclusion

The Examiner applied the correct legal standards to this case. There is substantial evidence to support the Examiner's challenged findings of fact; and, with the addition of the one clarifying finding of fact, the Examiner's findings of fact support her conclusion of law that the employer did not commit unfair labor practices. Thus, the order of dismissal stands.

NOW, THEREFORE, it is

## ORDERED

1. An additional finding of fact is inserted as Finding of Fact 6 to read as follows:

   6. Deputies on special assignment have reported to locations other than the station without compensation. Neither Anthony Ferry or other range officers were compensated for their travel time between

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[6] Like the Examiner, we decline to address the employer's arguments based on the Fair Labor Standards Act. Any interpretation or application of that statute would be for the appropriate federal agency or for the courts.

their homes and the range facility. Neither Art Edge nor other drug task force members were compensated for their travel time between their residences and their work locations. When Lynch was assigned to boat patrol and Baker Lake, she was at the boat or at the Baker Lake house at the start of her shift and did not get paid for her travel time. When Gatterman was working as a road use investigator he could start his shift at the specific location where he was to be working that day.

2. The remaining findings of fact issued by the Examiner are renumbered accordingly.

3. With the addition of the finding of fact set forth in paragraph 1 of this order, the findings of fact, conclusions of law, and order of dismissal issued in the above-captioned matter by Examiner Boedecker are AFFIRMED and adopted by the Commission.

Issued at Olympia, Washington, on the 14th day of August, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner