City of Moses Lake, Decision 6328 (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 760, Complainant,	)	CASE 13086-U-97-3164
vs.	)	DECISION 6328 - PECB
CITY OF MOSES LAKE, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Joseph K. Gavinski, City Manager, appeared for the employer.

Davies, Roberts & Reid, by Kenneth J. Pedersen, Attorney at Law, appeared for the union.

On April 11, 1997, Teamsters Union, Local 760, filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the City of Moses Lake had violated RCW 41.56.140(4). Specifically, the union alleges that the employer unilaterally changed the shift schedules of union-represented employees by changing from a "bidding system" to a "rotating system", without bargaining the issue with the exclusive bargaining representative. A hearing was held at Moses Lake, Washington, on October 21, 1997, before Examiner Rex L. Lacy. The parties filed briefs.

BACKGROUND

The City of Moses Lake (employer) is located in central Washington State. The employer's day-to-day operations are under the

direction of City Manager Joseph Gavinski. Among other services, the employer maintains and operates a Police Department under the supervision of Chief of Police Fred Haynes.

Teamsters Union, Local 760 (union), is the exclusive bargaining representative of a bargaining unit of law enforcement personnel up to and including the rank of sergeant. The bargaining unit is defined in Article 3, Section 3.01(D) of the parties' collective bargaining agreement, as follows:

> Bargaining unit as used herein shall include all full time paid employees of the Police Department, excluding the Police Chief, Asst. Police Chief, and secretary.

The bargaining relationship has existed for a substantial period, and these parties have negotiated several contracts. Their latest contract was effective from January 1, 1995 through December 31, 1996.

The parties did not successfully conclude negotiations for a successor agreement. Mediation was requested and provided under RCW 41.56.440, and that controversy has been referred to interest arbitration under RCW 41.56.450 et seq.

The issue at hand involves the employer's decision to change from a seniority-driven "bidding" system for shift scheduling to a "rotating" system, without notice to or bargaining with the union. The police officers in this bargaining unit had worked on a rotating shift schedule until 1989, when the employer agreed to try a bid system on an experimental basis. Later, the experiment was codified and placed in the Moses Lake Police Department Manual, as follows:

> 4.1.1 PATROL SHIFTS
> Patrol shifts consists of a Sergeant, an [sic] Corporal, and at least two police officers. Patrol Officers, Corporals, and Sergeants will bid for shifts each January, with seniority and time in grade being given preference.

The shift bidding system then remained in effect until October of 1996.

On or about September 5, 1996, Assistant Chief of Police Dean Mitchell informed members of the bargaining unit that the employer would be implementing a rotating shift system, effective October 15, 1996. The employer did not inform the union of the change, and there was no bargaining on either the decision or its effects. This complaint followed, on April 11, 1997.

POSITIONS OF THE PARTIES

The union contends that the complaint was timely filed under the statute as to the implementation of the change, that shift scheduling is a mandatory subject of bargaining under several Commission precedents, that the union was not required to request bargaining on a shift scheduling practice that it was not seeking to change, and that the employer committed an unfair labor practice by its unilateral change. The union points out that it did, in fact, ask the employer to rescind the notification of the shift scheduling change and to negotiate the change, but that the employer refused to do so.

The employer contends that this unfair labor practice complaint was not filed in a timely manner. It also contends that shift scheduling is not a mandatory subject of collective bargaining, and

that the union waived its right to pursue an unfair labor practice complaint, because it failed to raise the shift scheduling issue in the parties' negotiations for a successor contract.

DISCUSSION

The Duty to Bargain

The duty to bargain under the Public Employees' Collective Bargaining Act is set forth in RCW 41.56.030(4), as follows:

> RCW 41.45.030 Definitions.
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> ...
>
> (4) "Collective bargaining" means the performance of the mutual obligation 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 grievance procedure and collective negotiations on personnel matters, including **wages, hours and working conditions** which may be peculiar to an appropriate bargaining unit of such public employees, 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. ...

After an exclusive bargaining representative is voluntarily recognized or certified by the Commission for an appropriate bargaining unit, the status quo must be maintained as to bargainable matters, unless the duty to bargain is satisfied. See, Federal Way School District, Decision 232-A (PECB, 1977), citing NLRB v. Katz, 369 U.S. 736 (1962). An employer and union generally negotiate a collective bargaining agreement which regulates most aspects of their relationship for the duration of that contract,

but collective bargaining and the resulting contracts can never anticipate and deal with all potential subjects of bargaining. Thus, the duty to bargain continues in effect between the parties during the term of a contract, as to matters which are mandatory subjects of bargaining that are not covered by the specific terms and conditions set forth in their collective bargaining agreement. City of Seattle, Decision 1667-A (PECB, 1984). See, also, Litton Financial Printing v NLRB, 949 F.2d 249 (8th Cir. 1991), cert. den 503 U.S. 985 (1992). If mandatory subjects of bargaining have not been raised by either party during bargaining, or if such issues are entirely new, they may not be changed unilaterally by either party.

The Commission administers the duty to bargain through the "refusal to bargain" unfair labor practices delineated in RCW 41.56.140(4) and RCW 41.56.150(4), to protect the collective bargaining process under which unions and employers negotiate. The Commission does not, however, assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

Situations sometimes arise where one of the parties to a collective bargaining relationship considers it necessary, desirable, or convenient to make changes during the term of a collective bargaining agreement. When the contemplated changes affect the wages, hours, or working conditions of bargaining unit employees, the party desiring the change must give notice of the contemplated change to the opposite party. That notice must be given sufficiently in advance of making a decision on the change,[1] to allow

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[1] If the change is presented as a fait accompli, bargaining would be prejudiced or a nullity. The opposite party is then relieved of having to request bargaining. Clover Park School District, Decision 839 (PECB, 1980).

time for bargaining prior to making a decision to change the existing practice. If the party receiving notice of an opportunity for collective bargaining makes a timely request for bargaining on the change decision,[2] the moving party must bargain in good faith concerning the proposed change. City of Pasco, Decisions 4197 and 4198 (PECB, 1992).[3]

The Timeliness Issue

RCW 41.56.160 both authorizes and limits the Commission's processing of unfair labor practice complaints, providing:

> RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS AND CEASE AND DESIST ORDERS. (1) The Commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That **a complaint shall not be processed for any**

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[2] A party which fails to request bargaining when presented with an opportunity to do so may be found to have waived its bargaining rights by inaction. City of Yakima, Decision 1124-A (PECB, 1981).

[3] Outside of the arena of "uniformed personnel" (as defined in RCW 41.56.030(7) and interest arbitration under RCW 41.56.430 et seq., it is possible for the moving party to lawfully implement its proposal without the consent of the opposite party, if the parties reach an impasse in collective bargaining. Pierce County, Decision 1710 (PECB, 1983). See, also, RCW 41.56.123. Such considerations do not apply in this case, however, because the bargaining unit consists of "uniformed personnel". See, City of Seattle, Decision 1667-A, supra; RCW 41.56.470. Upon an impasse in bargaining for a unit of "uniformed personnel", the party proposing a change must pursue its arguments through mediation and interest arbitration, and will only be permitted to implement its proposal if it is blessed by an interest arbitration award.

> **unfair labor practice occurring more than six months before the filing of the complaint with the commission. ...**

[Emphasis by **bold** supplied.]

The complaint charging unfair labor practices filed in this matter on April 11, 1997 was timely, on its face, only as to employer actions on and after October 11, 1996.

The employer first notified the employees of the change of the shift scheduling system in September of 1996, but it did not make the change effective at that time. Moreover, since the change was announced directly to bargaining unit employees, it must be inferred that the union only had actual notice of the change some time thereafter.

The employer announced that the change was to be made effective on October 15, 1996, and there is no evidence that it was actually implemented any earlier than that date. Simple arithmetic shows that the unfair labor practice complaint filed in this matter on April 11, 1997 was within the six month statute of limitations period after the change was actually implemented. See, Washington Public Power Supply System, Decision 6058-A (PECB, 1998).

Waiver

Among the most defenses most commonly asserted by employers in response to a "unilateral change" complaint are waiver by contract and waiver by inaction. Such is the case in this matter. In affirming a ruling by the National Labor Relations Board, a court stated:

> [A]ny waiver of the statutory right to bargain over a mandatory subject must be clear and unmistakable. ... Waiver of the right cannot be assumed.

Metromedia, Inc. v NLRB, 232 NLRB 486 (1977), enforced 586 F.2d 1182 (8th Cir. (1978).

Numerous precedents indicate that the same high standard is applied by the Commission in evaluating "waiver" defenses.

The waiver by contract defense advanced by the employer here stems from the employer rights clause of the parties' collective bargaining agreement. Whenever a management's rights clause is the source of an asserted waiver of bargaining rights, it is scrutinized to ascertain whether it affords specific protection for the challenged action. A catch-all phrase such as the "Company retains the responsibility and authority of managing the Company's business" is not enough. See, e.g., Leeds & Northrup v NLRB, 391 F.2d 874 (3rd Cir. 1969). Similarly, a clause stating "all management rights not given up in the contract are expressly reserved to" the employer falls short of a "clear and unmistakable" waiver. See, e.g., Proctor Mfg. Company, 131 NLRB 1166 (1961). In this case, the employer rights clause of these parties collective bargaining agreement states:

> ARTICLE 8 - EMPLOYER RIGHTS
>
> 8.01 Except as expressly limited by a specific provision of this agreement or law, the employer hereby reserves and retains the exclusive rights to take any action it deems appropriate for the efficient management of its' facilities or operations and the direction of its work force.
>
> 8.02 The employer by not exercising any right hereby reserved to it, or the exercise of any such right or function in a particular way,

> shall not be deemed a waiver of the right to exercise such prerogatives or right in the same or some other way not in conflict with the terms of this agreement

The Examiner finds that the contract contains only general or catch-all language, and is not specific enough to constitute a waiver by the union of its bargaining rights.

The waiver by inaction defense asserted by the employer here is based on the fact that the union did not request to bargain the shift scheduling issue after the employer unilaterally implemented the change from a bid system to a rotating system on October 15, 1996. It points out that the parties were still in negotiations for a new agreement at that time, and suggests that the union could have raised the issue during those negotiations.[4] The union was not the moving party concerning changing the shift scheduling system, however. If the change of shift scheduling was a mandatory subject of collective bargaining, it was the employer that had a duty to give notice to the union and provide an opportunity for bargaining before the decision was made. The employer did not give notice to the union, and instead announced the unilateral change directly to the employees. When later requested to rescind the change, the employer refused to do so. Numerous Commission precedents establish and reiterate the principle that, where a decision to change the status quo has been made and implemented by an employer without giving the union sufficient time to engage in meaningful negotiations, the union has little recourse but to file and process unfair labor practice charges. In addressing the inadequate time to bargain a change, the NLRB has stated:

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[4] The employer did not ask the union to bargain concerning shift schedules.

> [N]o genuine bargaining ... can be conducted where the decision has already been made and implemented. Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.
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> International Ladies' Garment Workers Union v NLRB, 463 F.2d 907 (D.C. Cir. 1982).

Thus, notice is not considered timely where the employer presents a fait accompli. City of Bellevue, Decision 839 (PECB, 1980). In this case, it is clear that the employer presented the change of shift scheduling as a fait accompli. The decision to change the system, and even the effective date of the change, had already been determined when the employees were notified of the change. The Examiner thus concludes that the union had no obligation to make a proposal with regard to shift scheduling, and therefore, did not waive its bargaining rights by inaction.

Mandatory Subject of Bargaining -

The employer asserts that shift scheduling is not a mandatory subject of bargaining under the three-way categorization of issues used by both the Commission and the NLRB:

> The potential subjects for bargaining between an employer and union are commonly divided into categories of "mandatory", "permissive" and "illegal". Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or which are regarded as a prerogative of employers or of 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, 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 the issue effects 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 a matter is the nature of the impact on the bargaining unit. Spokane County Fire District 9, Decision 3661-A (PECB, 1991), and therefore, it was not necessary to negotiate with the union concerning the change implemented by the employer.

The topic of shift scheduling clearly affects the days and hours when employees will work, and thus falls under the "hours" aspect of the definition of collective bargaining set forth in RCW 41.56.030(4). The Commission has previously ruled that shift scheduling is a mandatory subject of bargaining. City of Yakima, Decision 767-A (PECB, 1980); City of Auburn, Decision 901 (PECB, 1980); City of Fircrest, Decisions 5669, 5905, and 5906 (PECB, 1997).

Conclusions -

The employer failed to give the required notice to the union, failed to provide an opportunity for bargaining prior to making its decision to change the shift scheduling system, and refused to restore the status quo when asked to do so by the union. In that light, the Commission has stated:

> [N]otice is key. We do not require a union to make a gesture which in all likelihood would be ineffective after a change has been announced as a fait accompli. Nor is a union

> required to take action which would be premature.

City of Bremerton, Decision 2733-A (PECB, 1987).

Since the shift schedule was (and is) a mandatory subject of bargaining, the employer committed a "refusal to bargain" violation under RCW 41.56.140(4). Since this is a unit of "uniformed personnel", for which all unilateral changes are prohibited by RCW 41.56.470 and City of Seattle, Decision 1667-A (PECB, 1984), the employer should have known that any unilateral change was unlawful.

FINDINGS OF FACT

1. The City of Moses Lake, Washington, is a municipal corporation of the state of Washington and is a "public employer within the meaning of RCW 41.56.030(1). The employer maintains and operates a Police Department under the direction of Chief of Police Fred Haynes.

2. Teamsters Union, Local 760, is the exclusive bargaining representative of a bargaining unit of law enforcement personnel employed by the City of Moses Lake, up to and including the rank of sergeant. Excluded from that bargaining unit are the chief of police, assistant chief of police, and a secretary.

3. The employer and union have been parties to a series of collective bargaining agreements, the latest of which was effective from January 1, 1995 to December 31, 1996. That contract did not expressly reserve to the employer a right to change shift schedules. At the time of the hearing, the

parties had not negotiated a successor contract, and had been certified to interest arbitration pursuant to RCW 41.56.450.

4. Prior to the events giving rise to this controversy, Article 4, Section 4.1.1 (D) of the City of Moses Lake Police Department Manual contained a provision establishing a "bid" system for shift scheduling. The bid system gave preference in the assignment of employees to work shifts, based on the employee's length of service.

5. Without prior notice to Teamsters Local 760, and acting at the direction of the chief of police, the assistant chief of police directly notified bargaining unit employees that the bid system for shift scheduling was to be replaced by a rotating shift system.

6. On October 15, 1996, the employer unilaterally implemented a "rotating" shift system affecting the working hours and daily work schedules of employees in the bargaining unit represented by Teamsters Local 760.

7. On March 17, 1997, Teamsters Local 760 requested, in writing, that the employer return to the bid shift system.

8. On March 25, 1997, the employer refused, in writing, to return to the bid system of shift scheduling. The employer therein indicated it considered work schedules to be a management prerogative.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The shift scheduling procedure at issue in this case directly affected the hours of work of bargaining unit employees, and was a mandatory subject of bargaining under RCW 41.56.030(4).

3. The parties' collective bargaining agreement did not contain or constitute a waiver of the union's right to bargain changes of shift scheduling procedures, so that the employer had a duty to bargain such matters under RCW 41.56.030(4).

4. The employer's announcement of the change of shift scheduling practices directly to employees as a fait accompli relieved the union of any obligation to request bargaining, so that there was no waiver by inaction of the union's bargaining rights under RCW 41.56.030(4).

5. By failing and refusing to bargain a mandatory subject of bargaining, and by unilaterally implementing changes in a mandatory subject of collective bargaining, the City of Moses Lake, has committed unfair labor practices within the meaning of RCW 41.56.140(4) and (1).

ORDER

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that City of Moses Lake, Washington, its officers and agents, shall immediately:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with Teamsters Union, Local 760, by developing and implementing changes of the wages, hours or working conditions of employees in the bargaining unit represented by that organization, and specifically including changes in the shift scheduling system used to assign law enforcement personnel.

   b. In any other manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed in Chapter 41.56.RCW.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS to remedy its unfair labor practices and to effectuate the policies of the Act:

   a. Rescind the rotating shift scheduling system that was implemented on or after October 15, 1996.

   b. Restore, effective with the first shift change following the date of this order, the shift bidding system which was in effect prior to October 15, 1996.

   c. Give notice to and, upon request, bargain with Teamsters Union, Local 760, prior to implementing any changes of the wages, hours or working conditions of employees in the bargaining unit represented by that organization, except insofar as such changes are authorized by the parties' collective bargaining agreement.

   d. 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, after being duly signed by an authorized representative of the City of Moses Lake, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Moses Lake to ensure that said notices are not removed, altered, defaced or covered by other material.

e. Read the notice required by the preceding paragraph aloud at the next public meeting of the employer's city council, and append a copy thereof to the official minutes of said meeting.

f. Notify Teamsters Union, Local 760, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide that organization with a signed copy of the notice required by the preceding paragraph.

g. Notify the Executive Director of the Commission, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

Dated at Olympia, Washington, this 9th day of June, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

APPENDIX

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

WE WILL give notice to Teamsters Union, Local 760, of any proposed changes of employee wages, hours or working conditions, including changes of shift scheduling systems, sufficiently in advance of any desired implementation date, in order to afford the union time to request to bargain the proposed change.

WE WILL, upon request, bargain with Teamsters Union, Local 760, concerning mandatory subjects of bargaining.

WE WILL read this notice aloud at the next public meeting of the employer's city council, and append a copy thereof to the official minutes of said meeting.

DATED: _____

CITY OF MOSES LAKE, WASHINGTON

BY: _____
Authorized Representative

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

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