Port of Moses Lake, Decision 7238 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 769, Complainant,	)	CASE 14731-U-99-3700
vs.	)	DECISION 7238 - PECB
PORT OF MOSES LAKE, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Davies, Roberts & Reid, by Carlton W. M. Seu, Attorney at Law, and Kenneth Pederson, Attorney at Law, represented the union.

Menke Jackson Beyer & Elofson, by Anthony F. Menke, Attorney at Law, and Harold J. Moberg, Attorney at Law, represented the employer.

On August 5, 1999, Teamsters Union, Local 760 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Port of Moses Lake (employer) had violated RCW 41.56.140(4). A preliminary ruling was issued on September 22, 1999, finding a cause of action to exist as follows:

> Employer refusal to bargain in good faith, by:
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> 1. Failure or refusal to supply, upon request of the union, any existing job descriptions for certain employees in the bargaining unit represented by the union; and/or
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> 2. Failure or refusal to meet at reasonable times and bargain with the union in good faith, in the absence of existing job

descriptions, regarding the job descriptions of the same employees.

A hearing was conducted by Examiner J. Martin Smith on January 11, 2000, and March 28, 2000. The parties filed post-hearing briefs to complete the record in this case.

Based on the evidence received at the hearing and the arguments of the parties, the Examiner rules that the employer has not committed an unfair labor practice.

BACKGROUND

The employer is a municipal corporation organized under the laws of the State of Washington.[1] It operates the Grant County International Airport and a surrounding industrial park facility located near Moses Lake, Washington. David Bailey is the manager of the employer's operations.

One commercial air carrier, Horizon Airlines, services Moses Lake with three flights per day. Japan Airlines (JAL) uses the airport to train its air crews throughout the week.[2] The Federal Aviation Administration (FAA) has certified the airport under Part 139 of the Federal Aviation Rules, and requires the employer to provide a minimum level of crash-fire-rescue capability. In the past 11 years there have been approximately 10 fires at the facility.

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[1] *See* Title 53 RCW. This case is processed under Chapter 41.56 RCW per RCW 53.18.015, in the absence of unfair labor practice provisions in Chapter 53.18 RCW.

[2] The airport was developed in the early 1950's as Larson Air Force Base, a United States Air Force facility. It features a runway which is three miles long.

The Public Safety Officers

Prior to 1978, the employer had separate security and firefighting workforces. The fire fighters were members of Law Enforcement Officers and Fire Fighters Retirement System established under state law at Chapter 41.26 RCW (LEOFF). The three employees then working in security operations were commissioned as law enforcement officers by the Grant County Sheriff's Department.

In 1978, the employer abolished the commissioned security positions, changed the job title of the fire fighters to "public safety officer", and added patrol and maintenance of the airport to their duties. The employees on the payroll at that time remained in the LEOFF retirement system, but all public safety officers hired since 1978 have been enrolled in the Public Employees Retirement System established under state law at Chapter 41.40 RCW (PERS). Among the current public safety officers, only one (Charlie Alaniz) predates the consolidation and is covered under LEOFF. The others are covered under PERS.

Currently, eight public safety officers and their chief are full time employees who each work three 24-hours shifts per week. They respond to fire alarms, security alarms, and other emergencies at the airport. In medical emergency situations, they are required to summon outside paramedic personnel on a "mutual aid" basis. The public safety officers patrol the airport at night for trespassers, and provide limited security for Horizon Airlines during embarkation and debarkation of passengers, but they do not have law enforcement authority. They must summon the Grant County Sheriff's Department if their requests are met with resistence. They also perform routine maintenance consisting of removal of foreign

objects from the runway, minor maintenance of the fire trucks and other airport vehicles, and maintenance of the station itself.

On a monthly basis, the public safety officers receive specialized and FAA-required training on aircraft rescue and firefighting. They also receive training on structure fires, emergency medical responses, and hazardous materials responses. They are required to have first responder certification, the lowest level of medical emergency training, but are not required to have "EMT" or "IV Tech" certification. They are not required to pass the State of Washington Fire Academy or the physical skills and fitness tests required for employment as fire fighters.

The Bargaining Relationship

Since at least July of 1988, the public safety officers have been represented by the union in a bargaining unit which also includes the employer's maintenance and office-clerical personnel. The duties of the public safety officers have not changed during the span of that bargaining relationship.

The employer and union have been parties to at least five successive collective bargaining agreements. The contract language concerning retirement has remained unchanged throughout that period, stating:

> Article 20 - Retirement Program
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> Permanent Employees shall participate in the State of Washington Public Employee or Law Enforcement and Firefighters [sic] Retirement System. Contributions to the system shall be prescribed by RCW 41.40 and RCW 41.26.080.

When the complaint was filed to initiate this proceeding in August of 1999, the parties had a collective bargaining agreement in effect for the period from July 1, 1997, through June 30, 2000.

Well before the start of negotiations for the parties' 1997-2000 contract, retirement benefits had been a repeated subject of discussion between one of the bargaining unit members, Jack Zeilenga, and the union's shop steward, Ron Jenson. Zeilenga contended that he should have been placed in the LEOFF system when he was hired in May of 1996, not the PERS system. Jenson and Zeilenga also discussed the lack of any job description for the public safety officers.

Jenson brought Zeilenga's concerns to the attention of the union's business agent, Larry Nickell. According to Nickell's testimony, he had previously believed or understood that all of the public safety officers were covered by LEOFF, by operation of the retirement clause of the parties' collective bargaining agreement. When Jenson approached Nickell with Zeilenga's concerns, Nickell responded that determination of the proper retirement system was up to the state Department of Retirement Systems (DRS), and recommended that Jenson contact DRS.[3]

Jenson contacted DRS in January of 1997, and supplied that agency with an unofficial job description for the public safety officer positions. Jenson did not receive an immediate response from DRS.

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[3] Conforming to Nickell's view of the situation, the Examiner notes that Zeilenga's entitlement to LEOFF coverage is not before the Commission in this case. Even if Zeilenga previously accumulated service credit under LEOFF, issues concerning any cashouts and forfeitures of such credits would have to be decided by DRS under statutes and regulations administered by that agency.

Negotiations for the parties' 1997-2000 contract started in April of 1997. David Bailey represented the employer. Nickell and Jenson represented the union. The union did not make any proposal concerning the job description for the public safety officers, and did not raise any issue concerning their retirement benefits. According to Zeilenga's testimony, neither subject was introduced at the bargaining table because the union did not want to "cloud the negotiations" with issues that were ***"not bargainable"***.

Jenson wrote another letter to DRS in September of 1997, requesting a response to the inquiry submitted in January of 1997. There was no response from DRS before the parties signed their 1997-2000 collective bargaining agreement in January of 1998.

Jenson wrote another letter to DRS in March of 1998, but did not receive a direct response from that agency. In April of 1998, Jenson was copied with a letter from DRS to the employer, requesting that the employer either confirm Jenson's job description or provide its own version.[4] The employer did not respond to the request made by DRS.

In a letter dated December 4, 1998, Nickell asked Bailey to respond to a request made by DRS in its letter of April 1998. Bailey replied to Nickell, by letter dated January 29, 1999. After stating that the employer was "in the process" of contracting with a human resources consultant to complete a job description for the public safety officers and other employees, he stated:

> Upon completion of this job description, we believe it would be to our mutual best inter-

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[4] Nothing in the record explains why DRS took 15 months to respond to Jenson, other than that they were "backed up."

> est to submit the job description to [DRS] for their evaluation and recommendation.

According to Bailey, the consultant did not provide the employer with a draft version of a job description until some time in January or February of 2000. A copy was provided to the employer's general counsel, but neither DRS nor the union was supplied with the draft job description.

In the absence of a response from the employer or its consultant, Nickell sent a letter to the employer on May 4, 1999, making a written demand for bargaining on a job description. In doing so, however, he specifically couched his request in terms of "in order to achieve a determination from the State." After receiving no response to that demand, the union filed the instant complaint on August 4, 1999.

POSITIONS OF THE PARTIES

The union argues that the employer committed an unfair labor practice when it: (1) refused to respond to the DRS request for validation of the union's version of a job description or its own job description, so that DRS could determine the proper retirement system for the public safety officers; or, in the alternative, (2) refused to bargain with the union over the terms of the job description.

The employer argues that no job description existed for the public safety officer positions when DRS requested a job description, and that it did not commit an unfair labor practice when it failed to respond to a request for a document that did not exist. The employer further contends that there was no obligation to negotiate

with the union on a job description for the public safety officer positions. Finally, the employer defends on the basis that the union waived its right to bargain on the job description when it failed to bring the issue up during the most recent round of contract negotiations.

DISCUSSION

The Duty to Bargain

These parties bargain collectively under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Their duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means ... 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, ...

Employers and unions generally negotiate collective bargaining agreements regulating most aspects of their relationship (and waive the duty to bargain) for the duration of the contract. However, where a collective bargaining agreement is silent, or where the parties expressly provide for a contract re-opener, the duty to bargain mandatory subjects is fully applicable. Adams County, Decision 6907 (PECB, 1999).[5]

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[5] *See also* City of Fircrest, Decision 5669-A (PECB, 1997), citing City of Seattle, Decision 1667-A (1984).

The duty to bargain is enforced through RCW 41.56.140(4) and unfair labor practice proceedings under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270. In order to meet its burden of proof in this case, the union must demonstrate that it: (1) demanded to bargain; (2) that the duty to bargain existed on the requested subject at the time of the demand; and (3) that the employer refused to bargain that subject at that time.

The Demand to Bargain -

Before an employer can refuse to bargain, it must first receive a demand for bargaining. In this case, the evidence is clear that the union did not make a timely request for bargaining on the job description for the public safety officers.

As far back as 1996, Jenson, the union's shop steward, knew that his co-worker, Zeilenga, disagreed with being placed in PERS rather than in LEOFF. However, Jenson neither encouraged Zeilenga to file a grievance nor put the subject on the bargaining table during the contract negotiations in 1997. In fact, Zeilenga testified that the issue was intentionally left off the bargaining table, because the union did not believe it was bargainable and that raising the issue would "cloud the negotiations." The evidence also establishes that Nickell, the union's business representative, knew about the issue before or during the contract negotiations in 1997.

When presented with notice of an opportunity for bargaining, a party must make a timely request if it desires to assert its rights under the statute.[6] If a union fails to advance proposals in a

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[6] *See* King County, Decision 4893-A (PECB, 1995).

timely manner,[7] or is silent on an issue,[8] a "waiver by inaction" defense asserted by the employer will likely be sustained.[9] Whatever the particular facts, the burden of proof is with the party claiming waiver. In this case, the employer, successfully meeting this burden, shifts it back to the union.

The union defends its failure to raise the job description as a subject for bargaining during the parties' last round of negotiations, by claiming it did not realize there was going to be an unresolved problem until the employer failed to respond to the DRS request. Notwithstanding its business agent and shop steward having knowledge of the retirement issue, and the lack of a response from DRS during the parties' contract negotiations, the union would thus focus on the request DRS sent to the employer several months after the contract was signed.

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[7] City of Yakima, Decision 3564-A (PECB, 1991).

[8] In City of Burlington, Decision 5841-A (PECB, 1997), the Commission noted that a union may have waived its right to bargain the maintaining of a past practice allowing an employee to commute in a patrol vehicle, because of inaction at the time of an original individual agreement. That record provided a basis to infer that the union knew or should have known of an agreement made in circumvention of the exclusive bargaining representative.

[9] For example, in Newport School District, Decision 2153 (PECB, 1985), the union objected to the employer's contemplated contracting out of school bus operations but did not make any bargaining proposals until after the employer had accepted a bid for the services. The Examiner concluded that the union had waived its right to bargain. *See also* Adams County, *supra;* Mukilteo School District, Decision 3795-A (PECB, 1992); North Franklin School District, Decision 3980-A (PECB, 1993); and Lake Washington Technical College, Decision 4721-A (PECB, 1995).

The union also argues that, even if it had known of the employer's disregard of the DRS request *prior* to the signing of the contract, it still may not have raised the issue at the bargaining table. This is because the union, outside of bargaining, had requested the employer's help in working on the issue with DRS. The employer had appeared to agree, responding that:

> Upon completion of this job description [by the outside consultant], we believe it would be to our mutual best interest to submit the job description to the Washington State Department of Retirement Systems for their evaluation and recommendation.

Thus, the union contends it was under the impression that the employer was cooperating with DRS, and it had no reason to believe that the issue needed to be raised until well into the current contract.

These union arguments are not convincing. The union had any number of valid reasons (and ample opportunity) to raise an issue during bargaining. Instead, it elected to demand bargaining on the job description 11 months after the current contract had been signed. The employer correctly argues that this constitutes a waiver by inaction on behalf of the union.

Job Description as a Mandatory Subject -

Even if the union were to survive the waiver argument, it still faced an issue as to whether the employer was required to bargain under the circumstances present in this case. The issue at the center of this controversy is the employer's failure to respond to DRS request for either validation of the union's version of the job description or its own version of a job description. The purpose

of that inquiry was, however, outside of the collective bargaining relationship between these parties.

DRS sought a job description in order to determine the most appropriate retirement plan for the public safety employees. The union's attempt to compel the creation and production of an employer-approved job description thus had nothing to do with the negotiation of wages, hours or working conditions of the employees, or of administering the parties' current collective bargaining agreement.

Although the employer did not respond to the DRS request or the union's request for bargaining, and the union filed the complaint to initiate this proceeding, it is undisputed that the employer did not propose or in fact change the job duties of the public safety employees during either the negotiations for the parties' current contract or the term of the current contract. Nor did the employer seek to change Article XX, the Retirement System clause, which appears to allow LEOFF and PERS participation as equal alternatives. These facts do not establish the existence of an opportunity for collective bargaining.

The union argues that, even in the absence of a unilateral change, it had a right to demand bargaining because the public safety officers' job description was not previously negotiated. It thus asserts that the employer committed an unfair labor practice when it failed to respond to the demand. Because job descriptions are not specifically covered in the parties' contract, the question that must be answered in order to resolve this argument is whether job descriptions are mandatory subjects of bargaining.

The employer argues that it was not required to respond to the union's demand for bargaining, because job descriptions are non-mandatory subjects of bargaining. That position is supported by a long line of decisions where the Commission has held that (because job descriptions differ in scope and authority from pay grades or other distinctions stated in collective bargaining agreements), neither drafting them nor wrangling over their precise language is required by the collective bargaining statutes. *See* Port of Bellingham, Decision 6017 (PECB, 1997), where no unfair labor practice was found when the employer submitted a pre-existing job description that the union had never seen, as one of several evidentiary items at a hearing before DRS.[10]

The Employer's "Retirement Not Mandatory" Defense -

The employer attempts to turn the tables on the union, by claiming that "the real reason the union demanded to bargain about a job description was to attempt to change the public safety officers' retirement coverage from PERS to LEOFF." Though this is true on its face, the employer incorrectly implies that the union is attempting to achieve the change in retirement systems at the bargaining table. In fact, the union concedes in its brief that coverage by the LEOFF system and supplements to the LEOFF system are not mandatory subjects of bargaining. City of Seattle, Decision 4687-B (PECB, 1997). The union also stipulates that it

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[10] *See also* Seattle School District, Decision 2079 (PECB, 1984)(the rewriting of the job description for the assistant custodian position was within the district's management rights. The Examiner held that the union's right to bargain was limited to the wage rate assigned to the newly created job); Lakewood School District, Decision 755 (PECB, 1979), Central Cartage, Inc., 236 NLRB 163 (1978); Morton General Hospital, Decision 3521 (PECB, 1990); City of DuPont, Decision 4959-B (PECB, 1995).

will accept both the job description provided by the employer and the retirement decision made by DRS. Thus, the employer's defense based on Seattle has no effect in this case.

The Employer's "Doesn't Exist" Defense -

The employer defends on the basis that no job description existed when the union made its request. The union creatively attempts to distinguish the case at hand from the precedents concerning the duty to bargain job descriptions, by arguing that it is the mere *existence* of the job description (rather than the act of its drafting or particular contents), that will have a direct effect on the employees' wages, hours and working conditions. Unlike the cases that have come before, the union argues that *any* job description submitted to DRS will provide the sole basis on which a determination as to the correct retirement system will be made. Thus, the union contends that, at least in this case, the job description, when created, will certainly be more than "merely a guide to recruiters and interviewers",[11] and therefore must be a mandatory subject of bargaining.[12] The union argues that ordering the employer to bargain the existence of this particular job description would not be the same as the union trying to bargain over a supplemental retirement system, as in Fire Fighters v. City of Seattle, 93 Wn. App. 235 (1998). It also argues that this case is distinguishable because it's DRS, *and not the job description*, that is the final arbiter of the employee's retirement system. Thus, the union valiantly tries to give wings to the theory that

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[11] Port of Bellingham, *supra*.

[12] The evidence also indicates that the employer, in addition to refusing to bargain with the union, has yet to produce the job description to DRS as promised. The employer's explanation is that the job descriptions, in the creation pipeline for over a year, were being "reviewed" by counsel.

the DRS request for a job description changed the issue into a mandatory subject of bargaining.

Unfortunately for the union, a request from DRS to the employer to provide the job description neither magically transforms the issue into a mandatory subject of bargaining nor creates a means for the Examiner to compel the employer to take action. Therefore, because the employer had no duty to bargain in this case it has not committed an unfair labor practice.

Conclusion

The complainant has the burden of proof in an unfair labor practice case. City of Kalama, Decision 6739 (PECB, 1999). In this case, the burden was on the union to set forth facts sufficient to support its allegation that the employer refused to bargain concerning a mandatory subject of bargaining. Auburn School District, Decision 3406 (PECB, 1990); City of Seattle, Decision 3199-B (1991). The union has failed to carry its burden of proof on this issue, and the unfair labor practice charge must be dismissed.

FINDINGS OF FACT

1. The Port of Moses Lake, a municipal corporation under the meaning of RCW 41.56.030, operates the Grant County International Airport and also manages and maintains a surrounding industrial park facility. David Bailey is overall manager of the Port of Moses Lake and its airport facility.

2. Teamsters Union, Local 760, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the Port of Moses Lake who work at the municipal airport.

3. The employer and union are parties to a collective bargaining agreement effective from July 1, 1997, to June 30, 2000.

4. The Federal Aviation Administration has certified the airport under Part 139 of the Federal Aviation Rules requiring the port to provide a minimum level of crash fire rescue capability. To satisfy those requirements, the employer maintains a workforce of eight employees in a "public safety officer" classification. They receive specialized training on a monthly basis in FAA-required aircraft rescue and fire fighting training, as well as additional training in structural fires, emergency medical response, and hazardous materials.

5. The current public safety officers and their chief are full time employees who each work three 24-hours shifts per week. In general, they respond to fire and security alarms and other related emergencies. When not engaged in training or duties related to their role as rescue and fire fighting personnel, these employees perform watchman and/or maintenance duties on the airport premises.

6. During or about 1997, the union initiated a request to the state Department of Retirement Systems, in an attempt to obtain coverage for the public safety officers under the Law Enforcement Officers and Fire Fighters Retirement System created by Chapter 41.26 RCW.

7. During bargaining for the parties' current collective bargaining agreement in 1997, the union neither requested a copy of the employer's job description for the public safety officers for purposes of negotiating their wages, hours and working conditions, nor requested bargaining on the existence or terms of such a job description.

8. In April of 1998, after the parties had signed their current collective bargaining agreement, the Department of Retirement Systems requested that the employer either verify the union-submitted job description for the public safety officers or supply one of its own. The employer did not respond to that request.

9. In December of 1998, the union demanded bargaining on the job description for the public safety officers. The employer did not respond to that request. This unfair labor practice proceeding was initiated by a complaint charging unfair labor practices filed by the union on August 5, 1999.

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. Teamsters Union, Local 760 has failed to sustain its burden of proof that a duty to bargain existed during the term of the parties' collective bargaining under RCW 41.56.030(4) as to the job description for the public safety officer classification.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed on its merits.

DATED at Olympia, Washington, this 13th day of December, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.