STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 763, Complainant,	)	CASE 17883-U-03-4616
vs.	)	DECISION 9180 - PECB
SNOHOMISH COUNTY, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Steven J. Bladek, Deputy Prosecuting Attorney, for the employer.

Reid, Pedersen, McCarthy & Ballew, by *Thomas A. Leahy*, Attorney at Law, for the union.

On October 1, 2003, Teamsters Local 763 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission, against Snohomish County (employer). The union is the exclusive bargaining representative for a unit of support services personnel employed in the Snohomish County Sheriff's Department. The bargaining unit includes four Judicial Service Officers (JSOs), whose positions are central to this case.

After initial review of the union's complaint, agency staff issued a deficiency notice on February 11, 2004. The union filed an amended complaint to correct deficiencies on February 20, 2004. The agency issued a preliminary ruling on February 25, 2004, finding that a cause of action existed for allegations of skimming of bargaining unit work without providing an opportunity to bargain, in violation of 41.56.140(4) [and its derivative "interference" allegation in violation of 41.56.140(1)]. Examiner Lisa

A. Hartrich conducted a hearing on February 3 and 4, 2005, and April 12 and 13, 2005.[1] The last date of hearing, April 14, 2005, was conducted by telephone conference. The parties submitted post-hearing briefs.[2]

ISSUES PRESENTED

Issue 1: Did the county have a duty to bargain over the decision to transfer work performed by Judicial Service Officers (JSOs) to another bargaining unit?

Issue 2: If a duty to bargain existed, did the employer violate RCW 41.56.140(4) and (1) by failing to bargain to impasse over the decision to transfer the JSO work to another unit?

Issue 3: Does the employer have a valid affirmative defense of waiver by inaction?

Based on the record as a whole, the examiner finds that the employer did have a duty to bargain with the union over the decision to transfer work from the support services unit to the

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[1] The examiner originally scheduled the hearing for July 15 and July 16, 2004. However, the hearing was postponed indefinitely upon the joint request of the parties. The parties did not request new dates until November 2004.

[2] On April 1, 2005, just prior to the second set of hearing dates, the union filed a second amended complaint, along with a "Motion for Reconsideration of Hearing Examiner's Decision not to Rule on Union's Change of Scope Arguments and to Amend Pleadings to Conform to Evidence." The examiner denied the motion. However, the union's second amended complaint was advanced as a new complaint, and has since been assigned to another examiner in case 19393-U-05-4924.

deputy sheriffs bargaining unit. However, the employer did not commit an unfair labor practice because it provided adequate notice to the union before it transferred the work, provided an opportunity to bargain, and bargained to impasse. In addition, there cannot be an unfair labor practice violation because the union waived its right to bargain by its own inaction.

ANALYSIS

Issue 1: Did the county have a duty to bargain over the decision to transfer work performed by the JSOs to another bargaining unit?

This case centers around four Judicial Service Officers (JSOs) whose positions were eliminated by the employer in January 2005. The JSOs have been members of the Teamsters Local 763 bargaining unit since the positions were created by the employer in 1989. JSO duties include serving protection orders, eviction orders, weapons surrender orders, criminal warrants, and civil contempt bench warrants. Prior to 1989, these duties were performed by the deputy sheriffs. The deputy sheriffs belong to a separate bargaining unit, represented by the Snohomish County Deputy Sheriff's Association.

In preparation for constructing the 2004 budget, the employer discussed eliminating the JSO positions from the support services unit and transferring the work back to the deputy sheriffs. When the union became aware that these positions were likely to be eliminated on January 1, 2004, the union filed this unfair labor practice complaint.

The JSO layoffs did not occur in January 2004 as expected because the employer approved funding for the positions in its 2004 budget.

However, the positions were only partially funded through June 30, 2004. Just prior to the scheduled layoffs in June, the employer provided emergency funding for the JSO positions through December 31, 2004. Ultimately, the work was transferred from the support services unit to the deputy sheriffs in January 2005, and the four JSOs were laid off.

The duty to bargain

Under Chapter 41.56 RCW, a public employer has a duty to bargain collectively with the exclusive bargaining representative of its employees. RCW 41.56.140 states:

> It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> . . . .
>
> (4) To refuse to engage in collective bargaining.

An employer's unilateral change in a term or condition of employment, without fulfilling its bargaining obligation, normally constitutes a "refusal to bargain" unfair labor practice.

Mandatory and permissive subjects

RCW 41.56.030(4) requires an employer and exclusive bargaining representative to bargain in good faith on personnel matters, including wages, hours and working conditions. These matters are known as mandatory subjects of bargaining, meaning that an employer must bargain over changes to such conditions upon request of the other party. If an employer unilaterally implements a change in a mandatory subject without bargaining to impasse or agreement, the employer may have committed an unfair labor practice. *City of Pasco*, 119 Wn.2d 504 (1992).

On the other hand, an employer does not have an obligation to bargain over permissive subjects of bargaining. Permissive subjects are matters of management prerogative that do not affect employee wages or hours, or are considered remote from terms and conditions of employment. *City of Seattle*, Decision 8313-A (PECB, 2003). Neither party may insist on bargaining to impasse over a change in a permissive subject.

"Skimming" is a mandatory subject

"Skimming" occurs when an employer transfers work previously performed by its employees in one bargaining unit to employees outside of that bargaining unit, without providing an opportunity to bargain with the union. *South Kitsap School District*, Decision 472 (PECB, 1978); *Spokane County Fire District 9*, Decision 3482-A (PECB, 1991); *City of Seattle*, Decision 8313-A (PECB, 2003). Skimming usually refers to work internally transferred, while "contracting out" usually applies to work transferred to employees of another employer.

The courts determined long ago that skimming is a mandatory subject of bargaining. In *Fibreboard Paper Products v. NLRB*, 379 US 203 (1964), the employer replaced existing maintenance employees with those of an independent contractor. In that decision, the Supreme Court of the United States held that the transfer of work from one bargaining unit to employees outside the unit, and the resulting terminations, were "terms and conditions of employment," and therefore, mandatory subjects of bargaining. The Court acknowledged that the bargaining process may not always result in a workable solution, but it was still important to encourage collective bargaining for the purpose of promoting labor harmony.

Commission decisions have followed suit, beginning with *South Kitsap School District*, Decision 472. In *South Kitsap*, the

employer decided to terminate its teacher aide program and replace it with a new "certificated instructional support team," without bargaining with the union. The decision resulted in layoffs of teacher aides. The examiner held that the decision to terminate the aides and transfer their work to other employees was a mandatory subject of bargaining, and ordered the employer to reinstate the discharged aides to their former positions.

Skimming is a mandatory subject of bargaining because it clearly impacts the wages, hours and working conditions of employees. As explained in *City of Tacoma*, Decision 6601 (PECB, 1999), a bargaining obligation exists when work is removed from a bargaining unit because, at a minimum, "the loss of work opportunities affects the work hours of bargaining unit employees. Changes in employee work hours give rise to a bargaining obligation."

In past decisions, the Commission has employed a multi-factor analysis to determine whether an employer has a duty to bargain over the transfer of bargaining unit work.[3] *Clover Park School District*, Decision 2560-B (PECB, 1988); *Spokane Fire District 9*, Decision 3482-A (PECB, 1991). This analysis may prove useful when there is some question regarding the employer's motivation for transferring the work, for example, if it claims it is "no longer in the business." However, the facts here describe a classic skimming case that does not require a belabored analysis. It is a plain and simple transfer of work from one unit to another, and there is no doubt the employer is still "in the business" of

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[3] For example: Is the work at issue bargaining unit work? Was the work historically performed by bargaining unit employees? Will the transfer have a harmful effect on bargaining unit employees? Was the employer's motivation purely economic?

serving warrants and protection orders.[4] The decision to make such a change is undoubtedly a mandatory subject of bargaining, and therefore both parties have a duty to bargain in good faith to agreement or impasse.

The parties do not take issue with the assertion that "skimming" is a mandatory subject of bargaining. However, the union insists that the transfer of work to the deputy sheriffs is really a "change in scope of the bargaining unit" (or unit clarification) issue, not a skimming issue. If that were true, the union contends "change in scope" would be considered a permissive subject, and therefore, the employer would be acting illegally by pushing the parties to impasse. However, unit clarification is not a subject for bargaining in the conventional mandatory/permissive/illegal sense. Rather, the Commission has the sole responsibility to determine appropriate bargaining units. While parties may agree on units, such agreements do not indicate that the unit is or will continue to be appropriate. RCW 41.56.060; *City of Richland,* Decision 279-A (PECB, 1978).

Commission examiners are confined to processing causes of action found in the preliminary ruling (in this case, "skimming," not "change of scope"). Therefore, the examiner will not address the union's scope arguments in this decision. *See King County,* Decision 6994-B (PECB, 2002).

Issue 2: Did the employer violate RCW 41.56.140(4) and (1) by failing to bargain to impasse over the decision to transfer the JSO work to another unit?

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[4] In this case, not only was the JSO work transferred to the deputy sheriffs, but the JSOs trained the deputies who would be taking their assignments.

An employer commits an unfair labor practice if it makes changes to a mandatory subject of bargaining without first (1) giving notice to the union; (2) providing an opportunity to bargain before making a decision on the proposed change; and (3) upon timely request, bargaining in good faith to agreement or impasse. *City of Kennewick,* Decision 482-B (PECB, 1978); *City of Anacortes*, Decision 6863-A (PECB, 2000); *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

Notice

An employer must give adequate notice to the affected party in advance of making a change in a mandatory subject. Once an employer provides sufficient notice, the union must show it made a timely request to bargain. *Clover Park Technical College*, Decision 8534-A.

If the union has adequate prior knowledge of the change, yet fails to request bargaining, it waives its right to bargain. *City of Yakima*, Decision 1124-A (PECB, 1981). However, when a change is presented by an employer as a fait accompli so that bargaining is futile, a union's failure to request bargaining cannot be deemed a waiver. *City of Tukwila*, Decision 2434-A (PECB, 1987).

The union argues it did not have proper notice of the JSO layoffs, and that the decision was presented as a fait accompli. The union insists that the employer made the decision to transfer the JSO work when it "finalized" its budget in November 2003, and that it did not ever intend to bargain with the union over the decision. However, the record shows that the union was well aware the positions were in jeopardy prior to the budget approval. In fact, the union filed the original unfair labor practice complaint in October 2003, prior to the budget vote.

There can be no fait accompli where there is reasonable notice of a change prior to implementation. In this case, the union had ample notice of the contemplated change, the most obvious example being that the employer did not implement until over one year after the budget ordinance was "finalized." During much of that time, the parties were meeting to negotiate their collective bargaining agreement, and had regular interactions. The employer advanced several proposals beginning nine months before implementation which were flatly rejected by the union. The union did not give the process a chance to operate, thereby putting the employer in the futile position of attempting to collectively bargain by itself.

Opportunity to bargain

The employer must provide the union with an opportunity to bargain a proposed change in wages, hours and working conditions. The reason for requiring notice is to allow a meaningful opportunity for the union to offer suggestions and alternatives and to allow the employer a chance to consider the proposals in good faith. *Pierce County*, Decision 1845 (PECB, 1984).

Evidence presented at the hearing demonstrated that the employer provided the union with several opportunities to bargain over the transfer of work. The employer attempted to discuss the issue during regular collective bargaining sessions, and sent several proposals across the table. For example, the employer offered to place the JSOs on a list for potential vacancies in another department.

The union repeatedly dismissed the employer's invitations to bargain the JSO issue throughout the spring and summer of 2004, on the grounds that it believed the work transfer was a permissive subject of bargaining. The record shows this happened on more than

one occasion, including April 14, 2004, May 3, 2004, and May 13, 2004. For example, in the union's counterproposal during contract negotiations on May 13, 2004, the union made its position quite clear:

> The Union has stated to the County bargaining team on at least the previous two bargaining sessions that removing the JSO positions and/or work from the bargaining unit and giving it to the Guild is a permissive subject of bargaining, and that the Union was not interested in bargaining it.

By the end of June 2004 the parties had not come to any resolution. Since the employer had only budgeted the JSO positions until June 30, Cabot Dow, the employer's lead negotiator, made an emergency request for funding. The funding was approved through the end of 2004. This bought more time for both parties to negotiate a solution to the problem, and indicates that the employer intended to provide a reasonable opportunity to bargain.

Bargaining to impasse

An employer can lawfully implement a unilateral change to a mandatory subject after the parties have bargained in good faith to impasse. *Spokane County*, Decision 2167-A (PECB, 1985). Impasse exists "where there are irreconcilable differences in the positions of the parties after good faith negotiations." *Mason County*, Decision 3706-A (PECB, 1991).

While the bargaining process should be given every opportunity to succeed, neither party is entitled to reduce collective bargaining to an exercise in futility. *City of Snohomish*, Decision 1661-A (PECB, 1984); *Grant County Public Hospital District 1*, Decision 8460 (PECB, 2004). In *Port of Seattle*, 124 Wn.App. 1008 (2004) the Washington Court of Appeals upheld a Commission decision which

provided some guidance to the process. The court held that while there is a duty to bargain, there is no duty to agree.

> [T]he purpose of bargaining is to protect the communication process between labor and management; it does not mandate specific results. There is no duty to agree, but the desired communications cannot result in an agreement unless the process is given a chance to operate.

A critical question in the impasse analysis is whether a party had reasonable cause to believe, and did believe, that impasse had been reached, or that further negotiations would not be fruitful. *Cheney Lumber Co. v. NLRB*, 319 F.2d 375 (1963); *Pierce County*, Decision 1710 (PECB, 1983); *Grant County Public Hospital District 1*, Decision 8460.

In the present case, the union maintains that the parties were not at impasse, and contends that the employer did not notify the union they were at impasse until after the employer had already implemented the layoffs in January 2005. The union claims the employer bargained in bad faith, and simply "went through the motions" so it could declare impasse and implement.

Contrary to the union's claim, the examiner finds the employer did not bargain in bad faith. Rather, it was the bad faith conduct of the union that gave the employer the reasonable belief impasse had occurred.

Bad faith bargaining

In order to determine whether a party bargained in bad faith, the totality of conduct is examined. If the conduct reflects a rejection of the principle of collective bargaining, the party will be considered to have acted in bad faith. *City of Snohomish*, Decision 1661-A; *Pierce County*, Decision 1710.

A party cannot ignore its responsibility to bargain over subjects of concern and then later accuse the other party of failing to bargain. *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1037 (1996). In this case, the totality of the union's conduct shows a consistent unwillingness to participate in the bargaining process with regard to the JSO issue.

Throughout the spring and summer of 2004, the union frustrated the bargaining process by consistently taking the position that the JSO work transfer was a permissive subject of bargaining. Yet, paradoxically, it conveniently maintained that it still wanted to bargain. For example, a June 22, 2004, letter written by Timothy Sullivan, administrative assistant for the union, to Cabot Dow, states:

> I look forward to hearing from you so we can continue negotiations regarding the JSOs. I would like to set up dates to negotiate the JSO issue (subject, of course, to the above caveat that Teamsters Local 763 believes this to be a permissive subject of bargaining).

At other times, the union flatly refused to bargain (as described earlier). It also resisted the employer's requests to mediate in September and October of 2004.

On December 21, 2004, when the parties finally did meet with a mediator, the union advanced just one proposal after an all-day session - for a payout of $725,000. After receiving that proposal, Dow believed the parties were at impasse. He stated, "[M]y testimony is that no further meetings would produce anything because I hadn't seen anything from the union that would show any interest in settlement for nine months."

Later, the union again attempted to show it was still willing to engage in negotiations. Just prior to, and just after the first

set of hearing dates in this case, the union sent letters to Mr. Dow, on January 21, 2005, March 22, 2005, and April 11, 2005. These letters requested dates for bargaining over the JSO issue, but again, "without waiving our position that removing the JSO duties and/or positions from the Teamsters Local 763 bargaining unit . . . is a permissive - not a mandatory - subject of bargaining." At the hearing, the union used these letters to try to establish that the parties were not at impasse. However, the examiner finds these letters to be disingenuous. The union's fundamental position still had not changed.

In finding that the parties bargained to impasse, the examiner concludes that the employer did meet its duty to bargain in good faith over the JSO work transfer issue, and therefore did not commit an unfair labor practice.

Issue 3: Does the employer have a valid affirmative defense of waiver by inaction?

Assuming *arguendo* that the parties were not at impasse in December 2004 the employer would still be relieved of its duty to bargain based on a "waiver by inaction" defense. A waiver by inaction exists when an employer proposes a change in a mandatory subject of bargaining and provides an opportunity to bargain, yet the union does not request to bargain, or fails to advance meaningful proposals in a timely manner. *Whatcom County*, Decision 7643 (PECB, 2002); *Port of Moses Lake*, Decision 7238 (PECB, 2000).

The union's request must signify a genuine desire to bargain. The filing of an unfair labor practice complaint does not constitute a valid bargaining request. *Clover Park Technical College*, Decision 8534-A.

Here, the union did not advance any meaningful proposals, and did not demonstrate a genuine desire to bargain on behalf of the JSOs. Therefore, the employer has a valid affirmative defense of waiver by inaction.

CONCLUSION

The employer is relieved of its duty to bargain with the union over the decision to transfer the JSO work to the deputy sheriffs. Even though the union, at times, stated it was interested in bargaining, it did nothing to advance that interest. Instead, the union hammered away at a losing theory when it could have been bargaining on behalf of its members facing job losses. The union failed to put forth good faith efforts or proposals to attempt to resolve the issue, thereby constituting a waiver by inaction.

FINDINGS OF FACT

1. Snohomish County is a public employer within the meaning of RCW 41.56.030(1).

2. Teamsters Local 763 is the legal bargaining representative, within the meaning of RCW 41.56.030(3), of an appropriate bargaining unit of law enforcement support service employees of the Snohomish County Sheriff's Department. This unit includes four Judicial Service Officers (JSOs).

3. The employer and union are parties to a collective bargaining agreement, which at time of filing of this complaint was effective through December 31, 2003.

4. Prior to 1989, JSO duties were performed by the sheriff deputies, represented by the Snohomish County Deputy Sheriff's Association.

5. In 1989, some duties previously assigned to the sheriff deputies were assigned to the newly-created JSO classification. The JSOs continued to do this work until January 2005.

6. In July 2003, the union became aware that the JSO positions were listed in the employer's 2004 budget reduction package for possible elimination.

7. In the employer's 2004 budget ordinance, which was approved on November 19, 2003, the employer appropriated funds for four JSO positions up until June 30, 2004.

8. In April 2004, the employer made a proposal to the union to eliminate the JSO positions and remove all JSO work from the Teamsters bargaining unit as of June 30, 2004. The employer proposed to put the JSOs on a re-employment list for potential vacancies in another department.

9. The union maintained that removing the JSO work and transferring it to another unit was a permissive subject of bargaining.

10. In late June 2004, the employer passed an emergency ordinance to continue funding for the JSO positions through the remainder of 2004.

11. The JSO positions were eliminated as of December 31, 2004, and the work was transferred to the deputy sheriffs.

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 decision to transfer JSO bargaining unit work to the deputy sheriffs is a mandatory subject of bargaining.

3. The employer provided ample notice and opportunity to bargain over the JSO work transfer, and reasonably believed it was at impasse. Therefore, the employer did not commit an unfair labor practice.

4. By inadequately responding to the employer's attempts to bargain both the decision and the effects of the work transfer, the union waived its collective bargaining rights by inaction.

ORDER

The complaint charging unfair labor practices filed in Case 17883-U-03-4616 is dismissed.

Issued at Olympia, Washington, on the 2nd day of December, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

LISA A. HARTRICH, 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.