STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KALAMA POLICE GUILD,	)	
	)	
Complainant,	)	CASE 13469-U-97-03286
	)	
vs.	)	DECISION 6773-A - PECB
	)	
CITY OF KALAMA,	)	DECISION OF COMMISSION
	)	
Respondent.	)	
	)	
	)	

Cline and Emmal, by Alex Skalbania, Attorney at Law, appeared on behalf of the complainant.

Pond, Roesch, Rahn and Nelson, P.S., by David Nelson, Attorney at Law, appeared on behalf of the respondent.

This case comes before the Commission on an appeal filed by the Kalama Police Guild, seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner Katrina I. Boedecker.[1] We affirm.

BACKGROUND

The facts of this case are fully detailed in the Examiner's decision and are only summarized here.

The City of Kalama (employer) operates a police department. As of December 31, 1996, the Kalama Police Guild (union) was certified by the Commission as the exclusive bargaining representative of

[1] Kalama Police Guild, Decision 6773 (PECB, 1999).

employees of the police department. In City of Kalama, Decision 5778-A (PECB, 1998), Chief of Police Michael Pennington was excluded from the unit because he was found to have sufficient authority over subordinates to create a potential for conflicts of interest.

The employer and union were not able to negotiate an initial collective bargaining agreement. The union expected the employer to maintain the status quo in place prior to January 1, 1997, when Teamsters Local 58 had been the exclusive bargaining representative, and it argued that the past practice of the employer was to offer vacant patrol shifts as overtime to employees on the seniority roster, on a rotating basis when vacancies occurred. The seniority roster is composed solely of bargaining unit members.

This controversy grew out of a directive issued by then-Mayor Glen Munsey in May of 1997. The mayor ordered the chief to work vacant patrol shifts in the capacity of a patrol officer, to reduce overtime pay to bargaining unit members, thereby: (1) meeting budgetary restraints on the department; and (2) providing additional coverage to the city. The union filed this complaint on October 10, 1997.

Examiner Katrina I. Boedecker held a hearing on December 16, 1998.[2] The Examiner issued her Findings of Fact, Conclusions of Law, and Order on July 30, 1999. The Examiner ruled that the union failed

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[2] The Examiner noted that the delay in getting this matter to hearing was due to two separate causes: (1) the parties agreed to delay processing this case until eligibility of the police chief for inclusion in the bargaining unit was determined; and (2) the parties reached a tentative settlement the day of the first scheduled hearing, and the hearing had to be rescheduled after the City Council failed to ratify that settlement.

failed to sustain its burden of proof that the employer unilaterally changed a mandatory subject of bargaining, because the chief of police had always worked some patrol shifts. Thus, the Examiner found that the disputed directive merely affirmed an existing practice, and she dismissed the union's complaint.

On August 19, 1999, the union filed an appeal, bringing the case before the Commission.

POSITIONS OF THE PARTIES

The union contends the employer committed "skimming", which is an unfair labor practice in violation of RCW 41.56.140, by unilaterally changing the status quo in May of 1997. It argues that the chief did not have discretion to cover open shifts himself, and that the past practice was for bargaining unit members to be called to fill shift vacancies created by absences of other bargaining unit members. Noting that the parties had not negotiated an initial collective bargaining agreement, the union contends that overtime work assignments had to conform with the status quo. The union also argues that Finding of Fact 4 is not supported by the evidence, and potentially contradicts the decision issued by Examiner Frederick J. Rosenberry in City of Kalama, Decision 6739 (PECB, 1999). It notes that extensive evidence on that subject was submitted to Examiner Rosenberry by the parties. Claiming that bargaining unit members were deprived of overtime opportunities, and never refused to work, the union seeks a remedial order for the period from May of 1997 through December of 1998.[3]

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[3] The union assigned error to Finding of Fact 4, which was only relevant to the issue of remedies. Because the Commission finds that there was no unfair labor practice committed by the employer, the Commission declines to address this finding.

The employer contends that it did not "skim" any bargaining unit work, because there was no change of the status quo. It contends that Chief Pennington and two prior police chiefs had discretion to cover patrol shifts, and that Pennington had previously worked patrol shifts throughout his tenure, so the mayor merely reaffirmed an existing practice. The employer asserts that the union does not have "clean-hands" to claim any "skimming" violation during December of 1997 and January of 1998, because union members refused to work extra shifts during those months.

DISCUSSION

"Skimming" Bargaining Unit Work

The first issue presented on appeal is whether the employer violated RCW 41.56.140(1) and (4) in May of 1997, when the mayor directed the police chief to cover shift vacancies in the capacity of a patrol officer. The Commission holds that, because the current chief had always worked patrol shifts and because police chiefs had, for many years, discretion to cover open shifts themselves instead of calling out bargaining unit members, the union failed to meet its burden of proof that the employer unilaterally changed a mandatory subject of bargaining. RCW 41.56.140 was not violated.

The Public Employees' Collective Bargaining Act regulates and protects a process of communication. RCW 41.56.030(4) includes:

> "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....

RCW 41.56.140(1) and (4) provide, in relevant part:

> 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.

A subject matter that an employer is obligated to bargain has been termed a "mandatory" subject of bargaining. Federal Way School District, Decision 232-A (EDUC, 1977) affirmed WPERR CD-57 (King County Superior Court, 1978). It is well settled that wages (including overtime compensation) and hours of work (including shift schedules and work opportunities) are all mandatory subjects of bargaining.

"Skimming" bargaining unit work occurs when an employer fails to give notice to or bargain with the union before transferring bargaining unit work historically performed within the bargaining unit to employees outside of the bargaining unit. South Kitsap School District, Decision 472 (PECB, 1978); Spokane County Fire District 9, Decision 3482-A (PECB, 1991).

The union, as the complaining party, has the burden to prove any alleged skimming has taken place. WAC 391-45-270. A complaint alleging a "unilateral change", such as a skimming violation, must establish both: (1) the existence of a relevant status quo; and (2) a change of employee wages, hours, or working conditions.

Municipality of Metropolitan Seattle, Decision 2746-B (PECB, 1989). To constitute an unfair labor practice, a change in the status quo must be meaningful. In Kitsap County Fire District 7, Decision 2872 (PECB, 1988), a restatement of a previously existing policy was not found to be a meaningful change:

> The record does establish that part of the disputed tobacco use resolution was merely a restatement of existing employer policies which prohibited smoking in dormitories and in or on district-owned fire equipment. To that extent, the disputed resolution **does not constitute any change of wages, hours or working conditions** giving rise to an occasion for bargaining, and the union's past waivers of bargaining rights continue to operate here. Therefore, the **employer was under no obligation to bargain those aspects of the tobacco use resolution which, in effect, merely restated the prior policy.**

[Emphasis by **bold** supplied.]

An employer thus only commits an unfair labor practice under RCW 41.56.140(4) if it imposes a new term or condition of employment, or meaningfully changes an existing term or condition of employment without having exhausted its bargaining obligations under Chapter 41.56 RCW. See City of Tacoma, Decision 4539-A (PECB, 1994); Kitsap County Fire District 7, supra. In this case, the status quo was established from the factual record at the hearing.

The Immediate Past Practice -

As to the period immediately prior to the mayor's directive, Chief Pennington testified that he would have called a bargaining unit member to cover a vacant shift on an overtime basis, instead of covering the vacant shift himself. He also testified that he had made a schedule whereby at least one bargaining unit member was

scheduled to be on duty at all hours of every day, except for 4:00 a.m. to 8:00 a.m.

Chief Pennington testified that he was hired as a "working chief". In a letter to the employer's attorney dated June 4, 1997, Pennington stated that he is a patrol officer when he works alone. He testified that, during the entire time he was chief, he approved overtime based upon his discretion as well as what the mayor and budget allowed him to do. During the hearing to determine whether the chief was eligible for inclusion in the bargaining unit, Pennington testified that he spent 90 to 95 percent of his shift on patrol duties, and that over 75 to 80 percent of the time he was by himself covering a shift. City of Kalama, Decision 5778-A, supra. He said that five to seven times a month he was the only officer on duty. He documented his "typical" eight hour shift as containing five hours where he actually patrolled the city. He also testified that he does criminal investigations, walks a beat, does vehicle shuffles, wears a uniform, drives a marked police vehicle, and answers service calls.

The Historical Practice -

Glenn Munsey, who issued the disputed directive while serving as the employer's mayor, testified that Chief Pennington and the two previous chiefs performed patrol duties and worked scheduled patrol shifts. Both parties agreed that Chief Pennington worked as a patrol officer for approximately six months when Sergeant DeMars resigned, until another sergeant was hired.

The Disputed Situation -

Pennington testified that, after the mayor's May 1997 directive, he worked duty shifts that could have been filed by bargaining unit members on an overtime basis. As the Examiner noted, review of the

payroll records for the period since May of 1997 shows that the chief continued to cover a modest number of shifts, which was within the practice in effect prior to and at the time this union was certified as the exclusive bargaining representative. As Examiner Boedecker stated in her decision in this case:

> The guild cannot have it both ways: When it was trying to have him included in the bargaining unit, Pennington had a history of performing bargaining unit work; when it is complaining about employer conduct, Pennington's history of doing bargaining unit work is disregarded. **The change in the thrust of the testimony between the two hearings makes the testimony in the second hearing suspicious.** The evidence this guild submitted in the representation case undermines its argument in this unfair labor practice case.

City of Kalama, Decision 6773, supra [emphasis by **bold** supplied].

Thus, the Examiner concluded that the union had not met its burden of proving that the employer changed the status quo.

There is sufficient evidence in the record to support the Examiner's finding that Chief Pennington was hired as a working officer, had discretion to cover open shifts himself, always covered some patrol shifts, and was sometimes the only officer on duty; and that the two police chiefs prior to 1994 had discretion to cover open shifts themselves. This finding supports the Examiner's conclusion that the union did not meet its burden of proving that the mayor's May 1997 directive was a change in the status quo. Therefore, the Commission affirms the Examiner's ruling that there was no unfair labor practice.

Thus, the Commission affirms this finding.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Katrina I. Boedecker in the above-captioned matter on July 30, 1999, are AFFIRMED.

Issued at Olympia, Washington, on the 4th day of August, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner