

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KALAMA POLICE GUILD,	)	
	)	
Complainant,	)	CASE 13878-U-98-3409
	)	
vs.	)	DECISION 6853-A - PECB
	)	
CITY OF KALAMA,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	
	)	

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Emmal, Skalbania & Vinnedge, by Alex J. Skalbania, Attorney at Law, appeared on behalf of the complainant.

David A. 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 a modification of the remedial order issued by Examiner Rex L. Lacy.<sup>1</sup> We modify the Examiner's decision to include a financial make-whole remedy.

BACKGROUND

The facts are fully described in the Examiner's decision, and are only summarized here in relevant part.

The City of Kalama (employer) operates a police department under the day-to-day supervision of a police chief. The mayor has overall supervision of the employer's employees.

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<sup>1</sup> City of Kalama, Decision 6853 (PECB, 1999).

The Kalama Police Guild (union) became the exclusive bargaining representative of Kalama Police Department employees on December 13, 1996. City of Kalama, Decision 5778 (PECB, 1996). The bargaining unit includes all commissioned police officers, excluding the chief.

A policy of allowing police officers to take an employer-owned vehicle home at the conclusion of their work shifts pre-dated Michael Pennington becoming police chief in March 1994. Although employer officials outside of the police department were aware of the policy, they did not make any overt attempt to end that policy prior to March of 1998.

In a memo dated March 30, 1998, Mayor Bud Gish notified Chief Pennington of his decision to end the take-home car practice. That memo read as follows:

In an effort to reduce expenses and wear and tear, city vehicles will no longer be used for transportation to and from personal residence except where an employee is on call and expected to respond directly from personal residence. City vehicles and equipment shall remain at city departments and not be used for other than city use.

Gish testified that the decision to eliminate the take-home car program was made solely by himself, and that he did not request that the union bargain the issue.

#### PROCEDURAL HISTORY

The union filed an unfair labor practice complainant on April 27, 1998. A hearing was held on October 29, 1998, by Examiner Rex L.

Lacy. The Examiner found that: (1) the use of police vehicles for commuting to and from their residences constituted a financial benefit to employees in the bargaining unit represented by the union, and was a mandatory subject of collective bargaining under RCW 41.56.030(4); (2) the employer unilaterally changed a working condition; and (3) by refusing to bargain in good faith with the exclusive bargaining representative of its police department employees concerning a mandatory subject of collective bargaining, the employer committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

The Examiner's decision was issued on October 21, 1999. On November 3, 1999, the union filed a Motion to Modify the Examiner's decision, requesting a financial make-whole remedy for bargaining unit members who were negatively impacted by the unavailability of police vehicles for commuting between work and home. On November 4, 1999, the Executive Director denied the union's motion as untimely, because the motion was not filed within the ten-day period allowed for requesting modifications of decisions. WAC 391-45-330.<sup>2</sup>

On November 9, 1999, the union filed a notice of appeal, bringing this case before the Commission. The employer tendered compliance with the Examiner's order, including reinstating the take-home-car policy and posting/reading of notices, and that tender of compliance was reported to the Commission on December 14, 1999.

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<sup>2</sup> The rule is set forth here as it existed at the time relevant to this case. It has since been amended.

POSITIONS OF THE PARTIES

The union's brief to the Examiner requested a financial make-whole remedy, such as reimbursement for additional mileage which bargaining unit members put on their personal vehicles during the period when they were not allowed to commute in the police vehicles. The union submits that such a remedy is both appropriate and necessary, in order to fulfill the Commission's statutory authority to remedy violations of Chapter 41.56 RCW.

The employer notes that the union's notice of appeal was not supported by a brief citing any authority for modification of the Examiner's order, and argues that no authority exists to modify the decision. The employer acknowledges that the fashioning of remedies is a discretionary action of the Commission, but it contends that the remedy ordered by the Examiner was within his sound discretion, and should not be disturbed.

DISCUSSION

The only issue on appeal is whether the Commission should award a financial make-whole remedy to the bargaining unit members affected by the unilateral change found unlawful in this case. The employer has not challenged the Examiner's conclusion that it committed an unfair labor practice when the mayor ended the take-home-car policy on March 31, 1998. The period involved continued from that date through the time when the take-home car policy was reinstated in compliance with the Examiner's order. The Commission finds that the make-whole remedy for mileage reimbursement should be awarded to affected bargaining unit members for the period involved.

Standards to be Applied

Commission's Authority -

The authority of this Commission to prevent and remedy unfair labor practices is set forth in RCW 41.56.160 as follows:

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 . . . .

(2) If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice and, to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages . . . .

Thus, RCW 41.56.160 establishes that the fashioning of remedies is a discretionary action of the Commission. When interpreting the Public Employees' Collective Bargaining Act, the Supreme Court of the State of Washington has approved a liberal construction of the statute to accomplish its purpose. METRO v. PERC, 118 Wn.2d 621 (1992). With that purpose in mind, the Court has interpreted the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute to make the Commission's lawful orders effective. METRO 118 Wn.2d at 633.<sup>3</sup> The Commission's expertise in resolving labor-

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<sup>3</sup> Similarly, in State ex rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60, 68-69 (1980), the Supreme Court stated that the determinations of the former Higher Education Personnel Board as to remedies under the Public Employees' Collective Bargaining Act should be accorded considerable judicial defer-

management disputes also has been judicially recognized and accorded deference. METRO, 118 Wn.2d at 634 (citing Public Employment Relations Commission v. City of Kennewick, 99 Wn.2d 832 (1983)).

WAC 391-45-410 states that if an unfair labor practice is found to have been committed, the Commission or its Examiner shall issue a remedial order.<sup>4</sup> The purpose is to put the affected employees back in the same position they would have enjoyed if no unfair labor practice had been committed. Skagit County, Decision 6348 (PECB, 1998). Thus, in implementing its remedial authority where unfair labor practice violations are found, the Commission exercises a considerable amount of discretion in determining what is "appropriate" for the particular situation. King County, Decision 3178-A (PECB, 1989); City of Pasco, Decision 4197-B (PECB, 1998).

#### Application of Standards

##### The Conventional Remedy -

The conventional remedy for a unilateral change violation is to order the restoration of the status quo ante, together with back pay to make the affected employees whole for losses they suffered as a result of the unlawful action. Spokane County, Decision 5698 (PECB, 1996). Inasmuch as the Examiner found that the take-home-car policy was a financial benefit to the employees, a financial make-whole remedy would have been appropriate. The Examiner did not explain why he omitted such an order in this case.

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ence, and noted that the "relations of remedy to policy is particularly a matter of administrative competence."

<sup>4</sup> The rule is set forth here as it existed at the time relevant to this case. It has since been amended.

City of Brier Is Distinguishable -

The case at hand is distinguishable from a prior Commission decision involving unilateral elimination of a take-home-car policy. On close examination, we find that the issue of a financial make-whole remedy was not placed before the Commission in that case. Such an issue is before us here, and we must consider the union's remedy request.

In City of Brier, Decision 5089 (PECB, 1995), another Examiner ruled that the use of police vehicles for commuting constituted a financial benefit to employees, ordered the employer to reinstate a take-home-car policy, and ordered the employer to cease and desist from refusing to bargain with the union. That union's complaint had sought reinstatement of the status quo which existed prior to the change of policy, an order requiring that employer to negotiate modification of the vehicle policy with the union, and recovery of all losses suffered as a result of the unilateral change. In its brief to the Examiner, that union reiterated its request for an order requiring the employer to cease and desist from refusing to bargain and requiring the employer to compensate all employees who had suffered financial losses as a result of the disputed change. While the union's brief in that case discussed the cost of fuel, oil, maintenance, general wear and tear, and insurance related to commuting to and from work,<sup>5</sup> the Examiner in that case did not award a financial make-whole remedy, and the union did not appeal the Examiner's decision to the Commission. The employer appealed, and the union's brief to the Commission merely asked that the employer's appeal be denied, without any mention of a financial make-whole remedy. The Commission affirmed the Examiner's decision in that case without addressing the appropriate remedy for employees who suffered loss of a significant

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<sup>5</sup> City of Brier, union's brief at page 8.

benefit derived from being allowed to commute in police vehicles. City of Brier, Decision 5089-A (PECB, 1995).

Remedy -

We find that a financial make-whole remedy is necessary in the instant case, to effectuate the purposes of the Public Employees' Collective Bargaining Act. The duty to bargain under that statute obligated the employer to give notice to the union and to bargain in good faith, prior to altering a take-home-car policy which constituted a financial benefit to bargaining unit members and was a mandatory subject of bargaining. Simply putting the take-home-car policy back in place after a gap of about 19 months fails to restore the employees for the financial benefit they lost.

The federal Internal Revenue Service monitors, and from time to time adjusts, a "standard" allowance for business use of personal vehicles.<sup>6</sup> Although there may have been variances among the situations of individual employees, we deem the federal standard to be appropriate for application to all affected employees in this case.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law issued in the above-captioned matter by Examiner Rex L. Lacy on October 21, 1999, are AFFIRMED as the Findings of Fact and Conclusions of Law of the Commission.

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<sup>6</sup> The rate allowed in the relevant period is understood to have been \$0.31 per mile. IRS Revenue Procedure 98-63.

2. The Order issued in the above-captioned matter by Examiner Rex L. Lacy on October 21, 1999, is AMENDED to include a paragraph 2(g), to read:

Make whole all bargaining unit members for their expenses for commuting between work and home during the period from the effective date of termination of the take-home-car policy on or about March 31, 1998, until the effective date of the reinstatement of the take-home-car policy pursuant to the Examiner's order, by payment to them at the business milage rate(s) in effect at that time under regulations of the federal Internal Revenue Service multiplied by their round-trip mileage.

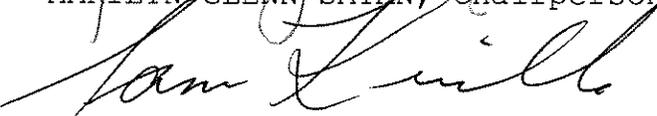
3. Notify the complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order.
4. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order.

Issued at Olympia, Washington, on the 10th day of October, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner