STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRKLAND POLICE OFFICERS' GUILD, Complainant,	)	CASE 14677-U-99-3682
vs.	)	DECISION 6949-A - PECB
CITY OF KIRKLAND, Respondent.	)	DECISION OF COMMISSION

Cline & Associates, by James M. Cline, Attorney at Law, appeared on behalf of the complainant.

Wm. R. Evans, Assistant City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on an appeal filed by the Kirkland Police Officers' Guild, seeking to overturn the order of dismissal issued by Executive Director Marvin L. Schurke on January 31, 2000.[1] We affirm.

BACKGROUND

On June 30, 1999, the Kirkland Police Officers' Guild (union) filed a complaint charging unfair labor practices with the Commission, naming the City of Kirkland (employer) as respondent. The union filed this complaint after the employer informed it that resigned employee Bernard Kaopuiki would have to pass a physical fitness

[1] City of Kirkland, Decision 6949 (PECB, 2000).

test, an oral board, a polygraph test, a psychological screening, and a background investigation before he could be re-employed as a detective with the Kirkland Police Department. The union alleged that the employer refused to bargain, in violation of RCW 41.56.140(4), by unilaterally modifying its practices regarding the re-hiring of former employees who sought to return to work in the bargaining unit represented by the union.

The City of Kirkland has a civil service commission, created under Chapter 41.12 RCW, that has adopted rules and regulations applicable to city police officers. Relevant portions of the "leaves and resignations" section of those rules and regulations read as follows:

> Section 4: Resignation. An employee wishing to leave the classified service of the City in good standing shall file a written resignation, stating the effective date and reasons for leaving with the appointing authority at least two weeks prior to leaving. The resignation shall be forwarded to the Commission with a statement by the appointing authority as to the resigned employee's service performance and any pertinent information concerning the cause for resignation. Failure to comply with this rule shall be entered on the service record of the employee and may be cause for denying future employment by the City. The resignation of the employee who fails to give notice shall be reported by the appointing authority immediately.
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> Section 5: Reinstatement. Within one year a resigned employee, with the approval of the appointing authority and with concurrence of the Commission, may be reinstated in the position from which he/she resigned, if vacant, or in a vacant position in the same or comparable class, or with the approval of the Commission, may be placed on the eligibility list for the class to which his/her former position was allocated. No person resigning

> during the probationary period shall be reinstated, but with the approval of the Secretary and Chief Examiner, may be placed on the list from which he was certified and appointed.

Kirkland Civil Service Commission, Rules & Regulations, p. 12.

During relevant times referenced in the complaint, reinstatement rights were covered under the civil service rules, adopted under Chapter 41.12 RCW, not in the collective bargaining agreement negotiated by these parties under Chapter 41.56 RCW.

The process for re-hires is different from that of new hires in that re-hires are not required to take another written examination. The civil service commission maintains a reinstatement register for re-hires that is separate from the register for entry-level candidates. The reinstatement process has not been utilized by police officers, but has been utilized by fire fighters who were reinstated without being examined, tested, or investigated.

In the summer of 1997, Kaopuiki resigned from his position with the police department. In the spring of 1998, Kaopuiki sought reinstatement to his former position. On July 14, 1998, the civil service commission placed Kaopuiki on a reinstatement register. From that time until the spring of 1999, there were no openings in the Kirkland Police Department for which to select Kaopuiki or other candidates. In this spring of 1999, Kaopuiki received a series of notices from the civil service examiner, stating that a physical agility test was going to be conducted and that he could contact the police department regarding the test.

In May 1999, the union met with Police Chief Pleas Green in a labor management meeting. During that meeting, Chief Green told the union that Kaopuiki would have to take physical, oral, and other

tests before he could be reinstated. The union filed this complaint following that meeting.

The complaint was reviewed under WAC 391-45-110, and a deficiency notice was issued on January 4, 2000.[2] An amended complaint was filed on January 14, 2000, and reviewed under WAC 391-45-110. The Executive Director concluded that the complaint, as amended, failed to state a claim for relief through the unfair labor practice proceedings before the Public Employment Relations Commission and dismissed the complaint, finding that resigned employees were outside of the bargaining unit.

On February 22, 2000, the union filed a notice of appeal, bringing this case before the Commission.

POSITION OF THE PARTIES

On appeal, the union does not challenge the Executive Director's ruling that resigned employees are not employees and, thus, not members of the bargaining unit; rather, the union asserts that current employees are "vitally affected" by whether resigned employees must take a test to be re-hired, and therefore, the employer committed an unfair labor practice by requiring tests without bargaining. The union contends the employer is not exempted from bargaining because there was no past practice requiring tests for re-hires. The union asserts that fire fighters subject to the same rules have not had to take additional tests like new hires, but admits such a past practice may not be controlling.

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[2] The rule is set forth here as it existed at the time relevant to this case. It has since been amended.

The employer contends that the union cannot assert rights on behalf of an individual who is not an employee; a bargaining unit does not represent non-employees when they are non-employees; there was no past practice regarding reinstatement and, therefore, cannot be any unilateral change; and the reinstatement process in another bargaining unit cannot create a past practice for this unit.

DISCUSSION

No Duty to Bargain Concerning Non-employees

We agree with the Executive Director that the fundamental flaw with the union's claim is that the union is seeking to assert rights on behalf of an individual who is not an employee within the bargaining unit represented by the union. The duty to bargain imposed by Chapter 41.56 RCW relates to the wages, hours and working conditions **of employees** within the particular bargaining unit represented by an exclusive bargaining representative. RCW 41.56.080.

Both the Commission and the Supreme Court of the United States have limited what it means to be an employee. The Commission did not impose a duty to bargain upon an employer with regard to pre-hire conditions, even when a "circumvention" violation was found involving an agreement negotiated by an employer with a new employee shortly after he started work. City of Pasco, Decision 4197-A (PECB, 1994).[3] The Supreme Court of the United States found that former employees who had retired with no expectation of return were not employees. Allied Chemical & Alkali Workers, Local 1 v.

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[3] While the Commission's decision was challenged in court on "timeliness" principles, that does not affect the point for which it is cited here.

Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). The Supreme Court further stated that it did not have knowledge of the existence of any decision in which an individual who had ceased work without expectation of further employment had been held to be an employee.

In the case now before the Commission, Kaopuiki resigned from his former position with no expectation of return, much like employees who retire. The most that can be argued is that Kaopuiki ultimately had a hope of returning, but that is far different than the expectation those employees on military duty or medical leave hold. Thus, the employer is under no duty to bargain with the union.

Although civil service rules affecting the wages, hours and working conditions of bargaining unit employees are a mandatory subject of collective bargaining, both civil service rules and employer personnel policies generally can affect matters outside of the sphere of mandatory collective bargaining. City of Yakima, Decision 3503-A (PECB, 1990), affirmed 117 Wn.2d 655 (1991).

The "Vitally Affects" Test

The union contends that reinstatement rights vitally affect existing employees. The "vitally affects" test was adopted in Pittsburgh Plate Glass, where the Supreme Court held that when a third-party interest vitally affects the terms and conditions of employment of active employees, then active employees have a right to bargain over this subject. Pittsburgh Plate Glass, supra. As examples of subjects that vitally affect active employees, the Court cited cases where current employees were allowed to bargain over topics that threatened their jobs. That union had argued that active employees knew they would one day retire and, therefore, wanted to look out for the interests of current retirees in hope

that when they were in that situation then-current employees would look out for them. The Court rejected this argument, characterizing the potential benefit active employees gained by bargaining for the interests of current retirees as speculative.[4] The court thus held that what benefits the employer paid retirees did not vitally affect active employees.

In the case at hand, the union advances an argument similar to the argument rejected by the court in Pittsburgh Plate Glass. It argues what happens to resigned employees vitally affects active employees because "it is important for these officers to know that should they seek employment in other departments they could return," under the existing civil service arrangement. Union's appeal brief, p.7. This is similar to the union arguing in Pittsburgh Plate Glass that the rights of retirees vitally affected active employees because one day bargaining unit members would retire. It is speculative at best to argue that when active members of the bargaining unit decide to resign, the remaining unit members would choose to forego some benefit in favor of making sure it was easier for resigned employees to return. Thus, here, active employees are not vitally affected by what happens to resigned employees, and the bargaining unit does not represent resigned employees or their interests.

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[4] In the future, the Court noted that active employees might choose to bargain for better wages and hours, sacrificing benefits for retirees. Thus, allowing active employees to bargain for current retirees in hope of future benefits was at best an "improbable investment," not a subject that vitally affects the interest of active employees.

No Unilateral Change Without Past Practice or Agreement

Even if the Commission were to accept the union's argument concerning the vitally affects test, we would still affirm the dismissal because there was no unilateral change. The union acknowledges in its amended complaint that it "is unaware of any prior reinstatement appointment for a police officer." The union further states in its appeal brief that there is a void in the civil service rules regarding reinstatement. It does not allege that the re-hiring procedure has actually been negotiated by the parties in the past. It is well established that the duty to bargain imposes a duty to give notice and provide opportunity for good faith bargaining prior to implementing any change of past practices concerning the wages, hours or working conditions of bargaining unit employees. RCW 41.56.030(4); Municipality of Metropolitan Seattle, Decision 2746-B (PECB, 1990). We agree with the Executive Director that there can be no unilateral change, as in this case, where there is no past practice or agreement, and thus, there is no refusal to bargain violation.

Despite the lack of past practice amongst its own bargaining unit, the union asserts there was a unilateral change because there was a past practice amongst the fire fighters' union that utilized the same civil service rules. We reject this argument as inconsistent with the plain language of the statute and inconsistent with prior Commission decisions. RCW 41.56.030(4) reads as follows:

> "Collective bargaining" means . . . 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, **which may be peculiar to**

> **an appropriate bargaining unit of such public employer . . . .**

[Emphasis by **bold** supplied.]

The "peculiar" language contained within the definition of collective bargaining has been interpreted as meaning that the collective bargaining process in each appropriate bargaining unit stands alone. City of Pasco v. PERC, Decision 3368-A (PECB, 1990), affirmed 119 Wn.2d 504 (1992). Also, compare City of Wenatchee, Decision 2216 (PECB, 1985), where the dispute concerned promotions to positions within the bargaining unit represented by the union involved, to City of Bellevue, Decision 3156-A (PECB, 1990) where the Commission mentioned, as a routine and foregone conclusion, the previous dismissal of allegations concerning promotions to positions outside of the bargaining unit represented by that union. Therefore, the existence of a past practice for reinstatements of former employees to another bargaining unit without need for further examination, testing, or background checks is not a basis for a claim of past practice or bargaining rights affecting the bargaining unit represented by this union.

Conclusion

We agree with the Executive Director that the amended complaint failed to state a claim upon which relief can be granted. That the union might want to negotiate the reinstatement rights of current bargaining unit members for the future well-being of those current members is a totally different issue than allowing a bargaining unit to represent non-employees and their possible reinstatement rights when they are non-employees. Moreover, because there was no past practice involving police officers or agreement between the parties, there is no unilateral change violation.

NOW, THEREFORE, it is

ORDERED

The Order of Dismissal issued by Marvin L. Schurke in the above-captioned matter on January 31, 2000, is AFFIRMED.

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