STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 77,	)	
Complainant,	)	CASE 15254-U-00-3852
vs.	)	DECISION 7277-B - PECB
LEWIS COUNTY PUBLIC UTILITY DISTRICT,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

Rinehart Robblee & Hannah, by *Ann Senter*, Attorney at Law, for the union.

Hanson Law Offices, by *Craig W. Hanson*, Attorney at Law, for the employer.

On June 16, 2001, International Brotherhood of Electrical Workers, Local 77, (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Lewis County Public Utility District (employer) as respondent. The case was remanded by the Commission for an evidentiary hearing on the merits, following the issuance of a deficiency notice, the filing of an amended complaint, the issuance of an order of dismissal, and the filing of a notice of appeal. The hearing was held on April 16, 2002, before Examiner Walter M. Stuteville. The parties filed post-hearing briefs.

The Examiner rules that the employer unlawfully altered an established past practice following the certification of the union. A remedial order is issued.

BACKGROUND

In March of 1999, the union was certified as exclusive bargaining representative of certain "hydrospecialists" then employed by the employer at its Cowlitz Falls Project.[1] The parties have been negotiating a collective bargaining agreement since the issuance of that certification, but had not reached a settlement by the time of the hearing in this case.[2]

In a letter addressed to the employer under date of January 4, 2000, union business representative Jerry Yerkes asked the employer to implement a three percent pay increase for the hydrospecialist classifications. The union's request was based on the employer's past practice of granting what it termed "a normally scheduled pay raise or other forms of compensation" effective at approximately the first of each year.

The employer responded on January 11, 2000. In his response, Manager David Muller denied the request and stated that no compensation changes would be implemented during bargaining as such changes are "the very subject of negotiations." He further stated that: "It would be entirely inappropriate for the [employer] to grant compensation changes of any kind without agreement of a complete collective bargaining agreement package."

The union made three allegations in its unfair labor practice complaint filed on June 16, 2001: (1) That the employer had made provision in its budget in April of 1999 for a three percent,

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[1] *Lewis County PUD*, Decision 6622-A (PECB, 1999).

[2] During negotiations the parties agreed to change the job titles utilized at the Cowlitz Falls Project from hydrospecialist to hydrocraft worker.

across-the-board, cost-of-living wage increase for all of its employees (including those now represented by the union) that was non-discretionary, automatic, and not based on merit; (2) the wage increase was scheduled to go into effect January 1, 2000; and (3) all employees other than those represented by the union received that wage increase on January 1, 2000.

The Preliminary Ruling and Dismissal

The union's complaint was reviewed for purposes of a preliminary ruling under WAC 391-45-110. In a deficiency notice issued on September 27, 2000, Director of Administration Mark S. Downing cited Commission precedents which appeared to preclude finding that a cause of action existed. In particular, he stated that the wage increase demanded by the union would have constituted a violation of the status quo that an employer is obligated to maintain with regard to employee wages, hours, and working conditions, once a union becomes the exclusive bargaining representative of those employees.

In an amended complaint filed on October 11, 2000, the union alleged that: "Prior to certification [of the union], the [e]mployer had a longstanding practice of granting regular annual wage increases to its employees at Cowlitz Falls Dam. This practice was an established term and condition of employment for the employees." The union also submitted a letter analyzing National Labor Relations Board (NLRB) decisions it cited in support of its position.

An order of dismissal issued on January 31, 2001, placed significance on the allegation that the employer budgeted for the wage increase after (not before) the union was certified, and reasoned

that granting of the wage increase would have violated the employer's obligation to maintain the status quo after certification of the union.

The union appealed the order of dismissal to the Commission. On January 8, 2002, the Commission overturned the dismissal and ordered further proceedings.[3] In its decision, the Commission noted that NLRB precedent must be applied in this case, because the employer is a public utility district subject to RCW 54.04.170 and 54.04.180, as well as to Chapter 41.56 RCW. Although it noted that the NLRB precedents on this subject are not without controversy, it determined that the complaint is arguably sufficient to warrant a full evidentiary hearing.

POSITIONS OF THE PARTIES

The union contends that the Commission should give weight to NLRB precedent when deciding this case, and that NLRB precedents unequivocally hold that an employer commits an unfair labor practice by discontinuing an established practice of regular wage increases without first bargaining with a newly-certified union. Additionally, the union claims that, by focusing on the date of the budgeted wage increase, the order of dismissal ignored the employer's long-established practice regarding regular annual wage increases.

The employer argues that the employer's practice concerning wage increases granted to its unrepresented employees is irregular as to both amounts and basis, and does not establish a past practice or

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[3] *Lewis County Public Utility District*, Decision 7277-A (PECB, 2002).

the "dynamic status quo" referenced in both Commission and NLRB decisions. It asserts that it has used a variable criteria, variable rates, and variable dates when it has increased the wages of its employees in the past, and thus has not established a pattern which it should be obligated to follow once the employees became represented by an exclusive bargaining representative.

DISCUSSION

This proceeding is conducted under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, but is also affected by provisions found within the statute concerning public utility districts:

> RCW 54.04.170 COLLECTIVE BARGAINING AUTHORIZED FOR EMPLOYEES. Employees of public utility districts are hereby authorized and entitled to enter into collective bargaining relations with their employers with all the rights and privileges incident thereto as are accorded to similar employees in private industry.
>
> RCW 54.04.180 COLLECTIVE BARGAINING AUTHORIZED FOR DISTRICTS. Any public utility district may enter into collective bargaining relations with its employees in the same manner that a private employer might do and may agree to be bound by the result of such collective bargaining.

That coordinated interpretation of statutes is dictated by *PUD of Clark County*, Decision 2125 (PECB, 1985); *aff'd*, 110 Wn.2d 114 (1988).

As stated in the Commission's decision remanding this case for further proceedings, the facts of this case are novel to this

agency. Whether the line of NLRB precedent cited by the union constitutes sound labor policy is not a question for the undersigned Examiner to consider or decide. The Commission's holding that it should look to federal labor law when deciding disputes involving public utility districts and their employees is driven by the specific language of RCW 54.04.170 and 54.04.180, and could result in a line of precedent somewhat different from that applied by the Commission and its staff to other types of public employers and public employees.[4]

Commission Precedent

The Commission has consistently held that the wages of bargaining unit employees become a subject for collective bargaining as soon as a union becomes the exclusive bargaining representative of the employees involved. *Centralia School District*, Decision 7423 (PECB, 2001); *City of Moses Lake*, Decision 6328 (PECB, 1998); *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994).

In *Snohomish County Fire District 3*, the Commission held that an employer did not violate its status quo obligation by failing to grant a general cost of living wage increase. Although the employer had given wage increases annually, the Commission did not

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[4] Under *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984), the Commission and the Washington courts have looked to NLRB precedents for guidance in the administration of similar provisions of state law, but Washington law has developed in some areas quite differently from the federal law. For example, given different statutory language, "supervisors" who are excluded from all bargaining rights under the federal law have full bargaining rights under *City of Tacoma*, Decision 95-A (PECB, 1977) and *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977).

find that the employer's general wage increase practices predating recognition of the union were part of the status quo. A "dynamic status quo" operates under Commission precedents, but only where actions are taken to follow through with changes that were set in motion prior to the filing of a representation petition. *King County*, Decision 6063-A (PECB, 1998); *King County*, Decision 5910 (PECB, 1997); *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990). If expected by the employees, changes that are part of a dynamic status quo do not disrupt a bargaining relationship. *King County*, Decision 6063-A, *supra* (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). Thus, where wage increases are previously scheduled, they are part of the dynamic status quo, and it would be unlawful to withhold them just because a representation petition is filed. *King County*, Decision 6063-A, *supra*. In *Snohomish County*, Decision 1868 (PECB, 1984), the employer violated its status quo obligation by failing to grant step increases based on length of service under a wage scale.

Of specific interest in this case, the Commission has distinguished between step increases and cost of living wage increases. *Snohomish County Fire District 3*:

- In awarding step increases, employers typically have no element of discretion concerning increase amounts fixed ahead of time and to be paid when employees attain certain levels of longevity, so that the employees expect those increases. *See also Centralia School District*.

- On the other hand, general wage increases are usually far less concrete, do not follow an established or fixed formula, and allow the employer discretion as to whether to grant an increase at all.

In the case at hand, the Director of Administration categorized the post-certification "cost-of-living" wage increase withheld by the

employer as a general wage increase set in motion after the filing of the representation petition, and his dismissal of the complaint thus appeared to be consistent with Commission precedents.

Public Utility Districts

The decision of the Supreme Court of the State of Washington in *Public Utility District 1 of Clark County* affirmed that the Commission has jurisdiction over labor-management disputes involving public utility districts and their employees. The Court did not upset an earlier state court of appeals ruling which stated that, because public utility district employees have the same collective bargaining rights as do similar employees in private industry, disputes between those parties should be determined by reference to the substantive principles of federal labor law. *Electrical Workers v. PUD*, 40 Wn. App. 61 (1985).

In a followup case, *Public Utility District 1 of Clark County*, Decision 2045-A (PECB, 1989), *aff'd*, Decision 2045-B (PECB, 1989), an Examiner stated that "closer adherence" to NLRB precedent is required in cases falling under RCW 54.04.170 and .180 than the general deference permitted by *Nucleonics*.

Federal Precedent

In the case now before the Examiner, the order of dismissal did not cite nor discuss any NLRB precedent. As directed by the Commission, federal labor law must be considered in this case, because it involves a dispute between a public utility district and its employees.

Both the Commission and the NLRB cite *NLRB v. Katz*, 369 U.S. 736 (1962) for the same general rule: That an employer commits an

unfair labor practice by unilaterally changing the terms and conditions of employment of union-represented employees. In *Katz*, the Supreme Court of the United States held that an employer negotiating with a newly certified bargaining agent was barred from unilaterally granting wage or merit increases unless they are "fixed and automatic" in nature. With the passage of time, the Commission and NLRB now appear to differ as to what constitutes a "fixed and automatic" increase, with the Commission following a narrower interpretation.

Among the federal precedents that support the union's position in this case are:

- In *Burrows Paper Corp.*, 332 NLRB No. 15 (2000), the NLRB ruled that the employer violated the duty to bargain by unilaterally withholding a customary across-the-board pay increase to employees after the union was certified. There was a 25-year established practice of the employer granting at least a three percent raise in or around July of each year. Thus, employees retained an expectancy that they would receive a raise of some amount at about the same time every years.[5]

- In *Kurdziel Iron of Wauseon*, 327 NLRB 44 (1998), the employer had an established practice of granting cost-of-living increases on an annual basis, and had given increases of 3.75 percent and 2.75 percent, respectively, in the preceding two years. The NLRB ruled that the employer committed refusal to bargain and interference violations when it unilaterally changed this practice after the union was

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[5] *Burrows* limited *Rural/Metro Medical Services*, 327 NLRB 49 (1998) (where an employer used a fixed criterion to determine whether an employee receives a raise) to situations in which each employee receives a merit raise based on an individual performance evaluation.

certified as exclusive bargaining representative and during the period when the parties were negotiating their initial collective bargaining agreement.

- In *Lamonts Apparel*, 317 NLRB 286 (1995), the employer had a long-established practice of surveying market data and granting cost adjustment increases annually, if the data supported an increase. Employees who had received a cost adjustment increase for at least the last 13 years were found to have had an expectation that they would continue to do so at least until the parties reached an initial collective bargaining agreement to establish wages. The NLRB found that the employer's past practice was sufficiently well-established to have become a term and condition of employment and that the employer committed refusal to bargain and interference violations when it discontinued this past practice without notice to the union or opportunity to bargain.

- *In Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enf'd*, 73 F.3d 406 (D.C. Cir. 1996), the NLRB ruled that the employer committed refusal to bargain and interference violations by unilaterally withholding annual merit wage increases from employees during negotiations for an initial contract with a newly-certified union. Here, the merit raises were fixed as to timing but discretionary as to amount. The merit review program was an established practice and a term and condition of employment regularly expected by employees. The NLRB wrote that it is the unilateral change in the terms and conditions of employment that results in the finding of a refusal to bargain violation, and not the type of wage increase that is discontinued.

- In *Bryant & Stratton*, 140 F.3d 169 (2nd Cir. 1998), *enf'd*, 321 NLRB 1007 (1996), an employer was found to have committed an

unfair labor practice by its unilateral discontinuing of a practice of providing employees discretionary merit increases on specific schedules, using fixed criteria.

- In *Acme Die Casting v. NLRB*, 309 NLRB 1085 (1992), an employer had granted across-the-board wage increases semi-annually for seven years, with each increase ranging from 15 cents to 30 cents per hour. The NLRB ruled that the employer's failure to give such a wage increase after the union was certified constituted a refusal to bargain violation.

However, recent NLRB precedents in this area have not been free from debate, and thus may still represent an unsettled area of the law. *Acme Die Casting* was remanded to the NLRB by the Court of Appeals for the D.C. Circuit, with instructions to set forth comprehensible rules as to when the frequency and quantity of wage increases constitute a settled practice that the employer must continue. *Acme Die Casting v. NLRB*, 26 F.3d 162 (D.C. Cir. 1994). After the NLRB merely reiterated its earlier conclusion, in *Acme Die Casting*, 317 NLRB 1353 (1995), the D.C. Circuit expressed its exasperation with the NLRB in *Acme Die Casting v. NLRB*, 93 F.3d 854 (1996), and it only enforced findings that had already been affirmed. The court noted that the NLRB's perspective seems to shift from case to case.

Application of Federal Precedent

An important piece of information which was not spelled out in either the union's original complaint or its amended complaint was the regularity of the wage raises received by the hydrospecialists prior to the certification of the union as their exclusive bargaining representative. At the hearing, the union produced an analysis of the wages of one of the employees involved, taken from the employee's pay records, which was admitted as Exhibit 2:

	Date	Event	Rate
	3/7/94	hydrospecialist II-1st step	$16.00
•	*1/1/95*	*3% increase*	*$16.48*
	3/7/95	hydrospecialist II-2nd step	$18.28
	12/2/95	hydrospecialist III-1st step	$19.06
•	*1/1/96*	*3% increase*	*$19.63*
	11/30/96	hydrospecialist III-2nd step	$21.75
•	*12/14/96*	*3% increase*	*$22.40*
•	*12/13/97*	*5% increase*	*$23.52*
•	*12/12/98*	*3% increase*	*$24.22*

(emphasis and bullets added).

The analysis provided by the union comports, within a few cents, with the employer's list of wage rates admitted as Exhibit 12. Thus, the evidence supports a conclusion that this employer has regularly increased the wages of these employees at approximately the same time every year since the creation of these positions.[6]

The practices of this employer may even have been considered binding under the *Rural/Metro Medical Services* test that has been narrowed or abandoned in recent NLRB decisions. The NLRB had set forth three criteria for determining when a wage program was established as a condition of employment, as discussed below.

Number of Years Wage Program has been in Place -
The practice of granting annual pay increase at the first of the year has existed for as long as these positions have existed. While that may not be as long as the practices described in some of the NLRB precedents, a five-year practice cannot be ignored.

Regularity With Which Raises Were Granted -
The wage increases granted by this employer to its employees have been consistent as to both timing and amount. For at least five

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[6] In fact, the only deviation from pattern was in 1997 (for 1998), when the amount granted was five percent instead of the three percent granted in other years.

years prior to the certification of the union, the annual wage increase was granted within approximately two weeks at the end of the year; the amount of the increase has never been less than three percent.

Use of Fixed Criteria for Eligibility and/or Amount -
The employer's manager, David Muller, gave somewhat vague testimony as to the criteria for granting the wage increases. While he made reference to wage comparability, cost of living indexes, Bonneville Power Administration oversight, and the employer's ability to pay, he did not explain how such diverse factors were used or how/why they consistently (with one higher exception) produced three percent wage increases. Despite testimony that the increase was discretionary, there was no evidence presented that such discretion had ever been exercised. Review of the evidence thus supports a conclusion that there was no real governing criteria except the passage of time.[7]

Commission precedents such as *Spokane County*, Decision 2377 (PECB, 1986) enforce a "dynamic status quo" concept similar to the *Rural/Metro* test, as follows:

> If the changes are non-discretionary and merely preserve the "dynamic status quo", i.e., action consistent with past policies and practices, then no violation will be found. Such changes, if expected by the employees, do not disrupt the bargaining relationship or undermine support for the union. *NLRB v. Katz, supra.*

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[7] Whether or not intended as such, the employer seems to have de facto established an increment plan which produced a pay increase every year, without any notable exceptions.

The pattern of wage increases established by a full evidentiary record in this case may well meet the Commission's standard for a binding past practice, and it certainly comes within the recent NLRB precedents. The employer committed an unfair labor practice when it altered that practice without bargaining.

FINDINGS OF FACT

1. Lewis County Public Utility District is a municipal corporation created under Title 54 RCW, and is a public employer within the meaning of Chapter 41.56 RCW. David J. Muller is the manager of the Lewis County Public Utility District.

2. International Brotherhood of Electrical Workers, Local 77, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of hydrospecialists employed by the Lewis County Public Utility District at the Cowlitz Falls hydroelectric plant. Jerry Yerkes is the union business agent assigned to represent the bargaining unit involved in this case.

3. Since the first hiring of hydrospecialists in 1994, the employer granted annual general wage increases. Notwithstanding testimony that those wage increases were discretionary and were based on several external factors, those wage increases were granted consistently to all employees around the first of each year, and were consistently in the amount of three percent, apart from one year when the amount was five percent.

4. The union was certified as exclusive bargaining representative in March of 1999, and the parties began negotiations on an initial collective bargaining agreement.

5. The employer withheld payment of an annual pay increase for the employees involved for the year 2000, without notice to or collective bargaining with the union.

6. In a letter sent to the employer on January 4, 2000, Yerkes requested that a 3% wage increase be implemented for the employees involved, effective January 1, 2000, consistent with what the union viewed as binding past practice.

7. In a letter sent to the union on January 11, 2000, Muller denied the union's request on the basis that the employer would not change any compensation while bargaining was taking place on that very subject.

8. The parties' negotiations continued until approximately February or March of 2001, when they signed their initial collective bargaining agreement.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW, RCW 54.04.170, and RCW 54.04.180, and under Chapter 391-45 WAC.

2. The practice of granting annual wage increases in an amount of at least three percent at or around the start of each year was binding dynamic status quo under RCW 54.04.170 and 54.04.180 by application of National Labor Relations Board precedent.

3. The practice of granting annual wage increases in an amount of at least three percent at or around the start of each year was binding dynamic status quo under Chapter 41.56 RCW and Public Employment Relations Commission precedent.

4. By denying the employees at issue in this proceeding a wage increase for the year 2000 in an amount of at least three percent, without notice to or bargaining with the union certified as their exclusive bargaining representative, the Lewis County Public Utility District committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

ORDER

The Lewis County Public Utility District, its officers and agents shall immediately take the following actions to remedy its unfair labor practices:

A. CEASE AND DESIST from:

1. Unilaterally changing the wages, hours and working conditions of its employees representing the dynamic status quo, without notice to and bargaining with the exclusive bargaining representative of those employees.

2. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 and Chapter 54.04 RCW:

1. Grant all employees in the hydro-specialist bargaining unit a general wage increase of three percent, effective January 1, 2000, and adjust any subsequent pay rates in

conformity with the collective bargaining agreement in effect between the employer and union.

2. Give notice to and, upon request, negotiate in good faith with International Brotherhood of Electrical Workers, Local 77, before implementing any change of the wages, hours or working conditions of employees represented by that union.

3. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

4. Read the notice attached to this order into the record at a regular public meeting of the elected governing body of the Lewis County Public Utility District, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

5. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

6. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been

taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 18th day of September, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL grant all employees in the hydrocraft worker bargaining unit a general wage increase of three percent (3%), effective January 1, 2000, and adjust any subsequent pay rates in conformity with the collective bargaining agreement in effect between the employer and the union.

WE WILL give notice to and, upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, Local 77, before implementing any change of the wages, hours or working conditions of employees represented by that union.

WE WILL read this notice into the record at a regular meeting of the elected governing body of the Lewis County Public Utility District, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

LEWIS COUNTY PUBLIC UTILITY DISTRICT

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.