Kitsap County, Decision 8292-B (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFF'S GUILD,	
Complainant,	CASE 17190-U-03-4448
vs.	DECISION 8292-B - PECB
KITSAP COUNTY,	
Respondent.	DECISION OF COMMISSION

Cline and Associates, by *George E. Merker*, Attorney at Law, for the union.

Russell D. Hauge, Prosecuting Attorney, by *John S. Dolese*, Senior Deputy Prosecuting Attorney, for the employer.

Schroeter Goldmark Bender, by *Martin Garfinkel*, for the International Federation of Professional and Technical Engineers, Local 17, amicus curie.

Emmal Skalbania Vinnedge, by *Alex Skalbania*, for the Washington State Lodge of the Fraternal Order of Police, amicus curie.

This case comes before the Commission on a timely appeal filed by the Kitsap County Deputy Sheriff's Guild (union) seeking to overturn certain Findings of Fact, Conclusions of Law, and Order

issued by Examiner Katrina I. Boedecker.[1] Kitsap County (employer) supports the Examiner's decision. The Washington State Lodge of the Fraternal Order of Police and the International Federation of Professional and Technical Engineers, Local 17 (collectively "amicus") were granted leave to file amicus curie briefs urging the Commission to reverse certain portions of the Examiner's decision.

ISSUES

1. Did the Examiner commit reversible error when she concluded that the union failed to sustain its burden of proof demonstrating that the employer unilaterally changed a past practice regarding union release time and overtime for guild activities?

2. Did the Examiner commit reversible error when she concluded that the union failed to meet its burden of proof that comments made by the employer interfered with employee protected rights?

We affirm the Examiner's order dismissing the union's complaint regarding the employer's unilateral change to employee release time for union activities and the payment of employee overtime for union activities. This record supports the Examiner's findings and conclusions that the union failed to establish that the parties had a past practice regarding union release time. Additionally, we find that the Examiner's comments regarding the permissible and impermissible uses of release time for union activities were unnecessary in light of the fact that no unilateral change violation occurred, and were also beyond the scope of the complaint. We vacate the unnecessary portions of the Examiner's decision that comment on the permissible uses of union release time. Finally, we affirm the Examiner's findings and conclusions that the comments made by the employer to bargaining unit employees did not interfere with employee rights.

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1 Kitsap County, Decision 8292-A (PECB, 2005).

ISSUE 1 - UNILATERAL CHANGE TO RELEASE TIME

The Public Employees' Collective Bargaining Act (PECB or Chapter 41.56 RCW) imposes a duty to bargain on mandatory subjects of bargaining. RCW 41.56.030(4). The duty to bargain is enforced through RCW 41.56.140(4), and unfair labor practices are processed under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270.

The potential subjects for bargaining between an employer and union are commonly divided into "mandatory," "permissive," and "illegal" categories:

- Matters affecting employee "wages, hours, and working conditions" mentioned in RCW 41.56.030(4) are the mandatory subjects of bargaining. *See NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958), *cited in Federal Way School District*, Decision 232-A (EDUC, 1977).

- Permissive subjects are matters considered to be remote from employee wages, hours and working conditions, including matters which are regarded as prerogatives of employers or of unions. *See Federal Way School District*, Decision 232-A; *Renton School District*, Decision 706 (EDUC, 1979).

- Illegal subjects are matters where an agreement between a union and employer would contravene other statutes or court decisions. *See King County Fire District 11*, Decision 4538-A (PECB, 1994); *City of Richland*, Decision 2486-A (PECB, 1986).

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). However, the determination as to whether a duty to bargain exists is a question of law and fact for the Commission to decide. WAC 391-45-550.

Past Practices

Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may be rationally considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002) *citing City of Pasco*, Decision 4197-A (PECB, 1994).

For a "past practice" to exist, two basic elements are required: (1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *See, generally*, *Whatcom County*, Decision 7288-A (no unilateral change violation found where employer lacked knowledge of past practice). It must also be shown that the conduct was known and mutually accepted by the parties. To constitute an unfair labor practice, a change in the status quo must be meaningful. *City of Kalama*, Decision 6773-A (PECB, 2000).

Where a unilateral change is alleged, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Municipality of Metropolitan Seattle (METRO),* Decision 2746-B. The Commission does not assert jurisdiction to remedy alleged violations of past practices where there is, in fact, no change of practice. *King County*, Decision 4893-A (PECB, 1995); *City of Pasco*, Decision 4197-A (PECB, 1994). No duty to bargain arises from a reiteration of established policy. *Clark County Fire District 6*, Decision 3428 (PECB, 1990); *City of Yakima*, Decision 3564-A (PECB, 1991).

Application of Standards

The Examiner found that no established part practice existed regarding union release time, and dismissed the union's complaint. The union argues that the Examiner ignored evidence demonstrating the established past practice regarding both the granting of union release time and

overtime to employees for activities necessary for the administration of the parties collective bargaining agreement. We disagree.

The union introduced evidence and testimony at hearing in an attempt to document what it considered the accepted practice of employee release time for union activities, including attendance at union called meetings, disciplinary investigations and hearings involving bargaining unit employees, at collective bargaining negotiation sessions, at interest arbitration hearings, and to attend union related conferences.

Prior to 2000, the parties' collective bargaining agreement contained the following language with respect to the use of union release time:

> The employer shall allow reasonable time off with pay for Guild members conducting business vital to the Guild; provided such time off be taken at the consent of the Sheriff or his designee or by the authority of the Board of County Commissioners.

However, substantial changes were made to this language for the 2000-2002 Collective Bargaining Agreement which was the agreement in effect at the time of the complaint. It now states:

> The employer shall allow reasonable time off with pay for Guild members conducting official business; provided such time off be taken at the consent of the Sheriff or his designee or by the authority of the Board of County Commissioners and provided further that such consent shall not be unreasonably withheld.

The record demonstrates that the employer was concerned about use of release time under the 1997-1999 contract language, and successfully bargained a change. The alteration of the pertinent contractual language represents a significant change in policy, and any "past practice" that may have been established to interpret the 1997-1999 language was not applicable as a means to interpret the

2000-2002 contact. Simply put, the mutually accepted change in language represents a mutually accepted change in practice.

Much of that testimony centered around instances of release time under the old contractual language, and did not relate to instances of release time under the current contractual language. With respect to the examples of union release time provided by the union under the current contract, we agree with the Examiner that the instances were too sporadic in their frequency and failed to demonstrate that the union and employer had established a consistent interpretation of the language that both parties could rely upon. Those instances of release time under the existing contract only related to attendance at disciplinary investigations, and did not provide evidence of a consistent and established practice under the existing contract. Having found no unilateral change to a mandatory subject of bargaining, the Examiner properly dismissed the union's complaint.

Permissible Uses of Release Time

The Examiner devotes a considerable portion of her decision to announcing the permissible and impermissible uses of release time for union activities. The union and amicus urge reversal of the Examiner's standard. The employer supports the announced standard as a correct interpretation of Commission precedent.

We do not address the Examiner's announced standard regarding the permissible and impermissible uses of union release time, and accordingly we also decline to adopt the Examiner's standard as that of the Commission. Having found that no "past practice" existed, the Examiner found that no unilateral change occurred. Having found no unilateral change, the Examiner should have simply dismissed the complaint because she no longer had a case or controversy before her. Commission precedents consistently hold that we will not rule upon the parties' hypothetical scenarios.[2] *See, e.g.,*

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2 The one exception to this rule is the declaratory ruling process under the Administrative Procedure Act, Chapter 34.05 RCW.

City of Seattle, Decision 3872-B (PECB, 1993). Unless an actual case or controversy regarding union release time is before this Commission, we decline to comment on the permissible uses of union release time.

ISSUE 2 - EMPLOYER INTERFERENCE

It is well settled that RCW 41.56.040 provides that no public employer shall interfere with, restrain, coerce, or discriminate against public employees in the free exercise of their collective bargaining rights. The enforcement clause for this right is in RCW 41.56.140(1) which provides that an employer who interferes with the collective bargaining right of its employees is guilty of an unfair labor practice. *King County*, Decision 8630-A (PECB, 2005).

The test for interference is whether a typical employee could, in the same circumstances, reasonably perceive the employer's action as discouraging with his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant is not required to show intent or motive for interference that the employee involved was actually coerced, or that the respondent had a union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights.

Application of Standard

Here, the union asserts that the Examiner erred in concluding that the employer's comments to the union president did not rise to the level of interference. We have reviewed the record and find that substantial evidence supports the Examiner's findings and conclusions as to this issue.

The key fact to both our conclusions as well as the Examiner's is the fact that the employer's statements were made to the union president. The standard announced in *City of Renton*, Decision 7476-A (PECB, 2002) regarding employer statements to union officers continues to apply to uniformly to all individuals subject to this Commission's jurisdiction, and we decline to carve out a special rule for uniformed personnel.

NOW, THEREFORE, it is

ORDERED

1 The Finding of Fact issued by Examiner Katrina I. Boedecker are AFFIRMED and ADOPTED as the Findings of Fact of the Commission except paragraph 5, which is stricken from the record.

2 The Conclusion of Law and Order are AFFIRMED and ADOPTED and the Conclusions of Law and Order of the Commission.

Issued at Olympia, Washington, the 31st day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

[SIGNED]

MARILYN GLENN SAYAN, Chairperson

[SIGNED]

PAMELA G. BRADBURN, Commissioner

[SIGNED]

DOUGLAS G. MOONEY, Commissioner