STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFF'S GUILD,	)	
Complainant,	)	CASE 17596-U-03-4550
vs.	)	DECISION 8893-A - PECB
KITSAP COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

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

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

This case comes before the Commission on a timely appeal filed by Kitsap County (employer) seeking to overturn the Findings of Facts, Conclusions of Law, and Order issued by Examiner J. Martin Smith.[1] The Kitsap County Deputy Sheriff's Guild supports the Examiner's decision.

ISSUES PRESENTED

The only issue presented by this appeal is whether the employer unilaterally changed its scheduling practices regarding approval of employee annual leave.

[1] *Kitsap County*, Decision 8893 (PECB, 2005).

For the reasons set forth below, we reverse the Examiner's findings and conclusions that the employer unilaterally changed its approval process for employee annual leave. The union failed to establish that the employer changed any practice or procedure with respect to employee leave, and also failed to establish that a past practice existed regarding approval or denial of employee annual leave for training purposes. We therefore dismiss the union's complaint.

ANALYSIS

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" and "permissive":

- 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).

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 reasonably be 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).

Unilateral Change

Where a unilateral change is alleged, the complainant must prove that the dispute involves a mandatory subject of bargaining and

that the employer made a decision giving rise to the duty to bargain. *Municipality of Metropolitan Seattle (METRO)*, Decision 2746-B. No violation exists where there is no change to an established past practice. *King County*, Decision 4893-A (PECB, 1995); *City of Pasco*, Decision 4197-A (PECB, 1994). In order for a unilateral change to be unlawful, that change must have a "material and substantial" impact on the terms and conditions of employment. *King County*, Decision 4893-A (PECB, 1995).

Application of Standard

Here, the Examiner found that the employer unilaterally changed employee leave when it issued a memorandum instructing employees to restrict their use of annual leave during a block of time set aside for training purposes. The Examiner characterized this change to the terms and conditions of employment as being more than *de minimus* and in conflict with the parties' past practices of restricting the use of annual leave only in case of an emergency. We disagree with both of these conclusions.

This record demonstrates the following contractual provisions or policies in place that could affect use of employee annual leave:

- Article I, Section I of the parties' collective bargaining agreement sets forth the management rights clause, and provides in part:

> All management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of frequency or infrequency of their exercise, shall remain vested exclusively in Employer. It is expressly recognized that such rights, powers, authority and function include, but are by no means whatsoever limited to, the full and exclusive control, management and operation of its business and affairs; the determination of the scope of activities . . . the right to establish or

> change shifts, schedules of work and standards of performance. . . .

- Article II, Section J of the parties' collective bargaining agreement provides that "[e]mployees . . . shall work shifts as they may be assigned from time to time by the Sheriff or his designee and shall be subject to call in any emergency while off duty."

- Sheriff's Office Rules and Regulations Policy 1.05.14 covers requests for use of employee annual leave, and provides in part:

> Application for annual leave shall be . . . submitted to the shift/unit supervisor who may approve or disapprove the request.
> . . .
> D) Annual leave is to be taken at the convenience of the department.

The provisions of the collective bargaining agreement were in effect for the period covering 2000-2002, and Policy 1.05.14 has been in effect since at least May 1990.

The Alleged Unilateral Change

Although the union filed its complaint regarding alleged denial of annual leave in February/March of 2003, the issue of annual leave use actually began in mid-2002, when the employer announced the use of employee leave would be limited during a five-week period covering February/March 2003 for employee service training. Following the employer's announcement, the union notified the employer that it would file an unfair labor practice complaint regarding the employer's alleged unilateral action. Although the employer had initially denied annual leave requests to several employees for the period at issue, it subsequently asked them to

resubmit their requests and granted them. The union did not file an unfair labor practice complaint at that time.[2]

In January 2003, Patrol Chief Gary Simpson distributed a memorandum to bargaining unit employees notifying them that, starting in February, service training would commence for all deputies and supervisors.[3] In this memo, Simpson asked for cooperation to help make the training a success, including a request that all employees make an effort to attend the training, and informed employees that he did not wish to alter the training schedule.

With respect to the denial of leave, although Simpson informed employees that he believed that the employer had the right to "modify the guidelines for approving leave requested, he also explicitly informed employees that if they "feel they need to have a specific day off during the training program, ask." Simpson also noted in his memo that while any employee who misses part of the training will have to make those dates up at a later time, "annual leave requests will be considered on a case-by-case basis."

On April 29, 2003, union President Michael Rodrigue sent a letter informing the employer that prohibiting leave for reasons other than an emergency was a "violation of the contract," and asked for clarification regarding the employer's intent. Lieutenant Ned Newlin responded to Rodrigue's letter on May 8, 2003, informing him that no special direction had been given to sergeants regarding annual leave, but that the parties' collective bargaining agreement as well as Policy 1.05.14 permitted the employer to approve annual

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[2] While the employer's actions in mid-2002 provide background, they are beyond the six-month statute of limitations.

[3] Exhibit 3.

leave at the convenience of the employer. The union filed its complaint on June 13, 2003, alleging the employer unilaterally changed its practice regarding the approval of annual leave.

Application of Standard

The Examiner found that the employer unilaterally changed a past practice regarding the use of annual leave without first bargaining to impasse. We disagree. Neither this record nor the collective bargaining agreement and employer policies support a finding that the employer's past practice regarding annual leave was altered.

First, the employer's January 2003 memorandum did not change the status quo, it merely restated a policy that had been in place for a considerable length of time. The management rights provision and Policy 1.05.14, when read together, provide the employer with a considerable amount of latitude when granting or denying a request for employee leave. The employer's memorandum merely informed employees that their cooperation in attending the planned training was necessary to prevent staffing problems as well as the scheduling of make-up training for those employees who missed the first session.

Second, we find that the Examiner erred in concluding that the parties' established past practice was to deny leave only in instances of an emergency. Article II, Section J of the parties' collective bargaining agreement generally discusses the use of leave in emergency situations, but none of those provisions directly state that leave will *only* be denied in the event of an emergency. For example, leave was denied when employees who volunteered to work with the Special Weapons and Tactics (SWAT) team were in training, albeit on a more limited basis. The fact that previous instances exist where the employer withheld leave

directly undermines President Rodrigue's testimony that he believed that leave could only be denied in the event of an emergency.[4]

Furthermore, the employer's January 2003 memorandum specifically informs employees that if they feel that they need a day off during the training block, to ask, and the employer would look at leave requests on a case-by-case basis. The Examiner placed some emphasis on the fact that the burden was on employees to show that the leave was necessary, but in light of Policy 1.05.14, we find that this was a permissible restriction. Finally, this record demonstrates that no employees were actually denied leave during the training block.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

1. Kitsap County is a municipal corporation and public employer within the meaning of RCW 41.56.030(1).

2. Kitsap County Deputy Sheriff's Guild is the exclusive bargaining representative, within the definition of RCW 41.56.030(3), for field and commissioned deputy sheriff officers in Kitsap County.

3. Kitsap County provides a police and law enforcement operation through its Sheriff's Department, employing about 95 officers for patrol and related duties.

4. Sheriff's Office Rules and Regulations Policy 1.05.14 has been in effect since at least May of 1990. That policy states that

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[4] Transcript, page 95, line 17 through page 96, line 4.

annual leave is to be taken at the convenience of the Sheriff's Department.

5. In January 2003, the Sheriff's Department issued a memorandum to bargaining unit employees notifying them that service training courses would be taking place during a five-week period in February and March 2003. The memorandum asked employees to postpone all leave requests until after the training period. The memorandum also informed bargaining unit employees that annual leave requests would be decided on a case-by-case basis.

6. No bargaining unit employees were denied the use of annual leave as a result of the January 2003 memorandum.

7. Prior to the January 2003 memorandum, no established past practice existed limiting denial of annual leave to emergency situations.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. With regard to the employer's practices regarding the approval or denial of employee annual leave, as described in Findings of Fact 4 through 7, Kitsap County did not violate RCW 41.56.140(4) or (1).

AMENDED ORDER

The complaint charging unfair labor practices filed in case 17596-U-03-4550 against Kitsap County is DISMISSED on the merits.

Issued at Olympia, Washington, the 15th day of June, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER:	17596-U-03-04550	FILED:	06/13/2003	FILED BY:	PARTY 2
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BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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