City of Kirkland, Decision 8822 (PECB, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRKLAND POLICE OFFICERS GUILD,	)	CASE 17298-U-03-4468
	)	DECISION 8822 - PECB
Complainant,	)	
	)	CASE 17320-U-03-4472
vs.	)	DECISION 8823 - PECB
	)	
CITY OF KIRKLAND,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

Cline & Associates, by *George Merker*, Attorney at Law, for the guild.

William R. Evans, Assistant City Attorney, for the employer.

On March 10, 2003, the Kirkland Police Officers Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Kirkland (employer) committed unfair labor practices in violation of RCW 41.56.140. A preliminary ruling issued on December 19, 2003, under WAC 391-45-110, found a cause of action to exist on allegations summarized as:

> Employer interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4), by its unilateral change in employee co-pays for health insurance benefits, without providing an opportunity for bargaining.

Examiner Claire Collins held a hearing on July 14, 2004. The parties submitted post-hearing briefs on September 17, 2004. On the basis of the evidence presented at the hearing, the case is dismissed.

BACKGROUND

The employer contracts with the Association of Washington Cities (AWC) for healthcare insurance benefits for it's represented and non-represented employees. The union represents two bargaining units with collective bargaining agreements, the commissioned law enforcement officers and non-commissioned law enforcement support staff. Both collective bargaining agreements contain an article addressing medical insurance benefits.

AWC e-mailed an estimate of benefit changes and premium increases to the employer on August 23, 2002. The employer received notification from AWC in mid-September regarding the final rates and benefit changes that it would implement on January 1, 2003.

The employer sent a letter dated October 14, 2002, addressed to the guild president, Kevin Murphy, with copies sent to members of the negotiation team. The letter included a proposal regarding a cost of living adjustment (COLA) reduction[1] and a list of facts that included the AWC-initiated change to prescription co-pays.

In the letter the employer requested "that the proposals and facts be submitted to Commissioned Police and Support Staff for consideration of modification of the present agreements." The letter included a request for a response from the two collective bargaining units before November 1, 2002, so the results could be shared with the city council at budget meetings scheduled for November 6, 2002.

Though the guild made no objection to the deadline it did not respond by November 1, 2002. The employer's representative,

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[1] The requested reduction in the COLA required a modification to the current collective bargaining agreement. It would have reduced the previously negotiated COLA for 2003.

Motiryo Keambiroiro, attempted several times to contact Murphy but was unsuccessful. Don Carroll, current guild president, then guild treasurer, suggested that Keambiroiro attend a bargaining unit meeting and present the information included in the letter to the membership, which she did on December 4, 2002. Carroll, in a phone call to Keambiroiro, responded that a vote taken regarding the COLA reduction had failed, but voiced no opposition to the facts listed which included the AWC change to the prescription co-pays.

The union's attorney, James Cline, faxed a letter to Keambiroiro on the afternoon of December 30, 2002, notifying the employer that the guild did not consent to the changes to the health insurance benefits and the changes would need to be negotiated and "Therefore, those obligations continue to belong to the City. . . ." Keambiroiro replied in a letter dated December 31, 2002, that the employer did not seek to change its obligations under the bargaining agreements for either the police or support groups but AWC made the changes to the plans and the guild had not requested negotiation with regard to the medical plan changes, so the changes would apply to both the city and the guild.

On January 1, 2003, the AWC implemented the changes to the prescription co-pays.

DISCUSSION

Allegation of Employer Interference with Employee Rights

The union's brief alleges that "the city interfered with employee rights in violation of RCW 41.56.140(1) by unilaterally changing employee co-pays for health insurance benefits." Based on testimony at the hearing, the employer notified the union by a letter dated October 14, 2002, and requested a response by November 1, 2002. The union did not respond to the requested deadline

stated in the letter, nor did it express any objection to the letter or the deadline. The employer made a presentation to the union membership on December 4, 2002, to explain the issues and answer any questions that the union members may have had.

It is clear that implementation took place only after the union, with reasonable time to review and request bargaining on the impending issue of the co-pay, failed to provide a timely response prior to the implementation date. The evidence of this case does not support an interference charge.

Failure to Bargain - *Fait Accompli* - Waiver by Inaction

The duty to bargain includes a duty to give notice and provide an opportunity for bargaining prior to implementing changes concerning a mandatory subject of bargaining. *City of Anacortes,* Decision 6863-B (PECB, 2001). The employer gave notice in it's October 4, 2002, letter and made several attempts to prompt the union to provide a response. The employer's notice obligation was met at that time -- it was the union's obligation to request bargaining in a timely manner.

The employer asserts a waiver by inaction defense while the union claims a *fait accompli.* In *Lake Washington Technical College,* Decision 4721-A (PECB, 1995), the Commission states:

> A union which desires to influence the employer's decision must make a timely request for bargaining. The Commission does not find waivers by inaction lightly, but a "waiver by inaction" defense asserted by an employer will likely be sustained if the union fails to request bargaining, or fails to make timely proposals for the employer to consider.

Notice is the key to distinguishing between *fait accompli* and waiver by inaction situations. As noted by the Commission in *Clover Park School District,* Decision 3266 (PECB, 1989):

> A key ingredient in finding a waiver by inaction is . . . a finding that the employer gave adequate notice to the union. Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. If the employer's action has already occurred when the union is given notice, the notice would not be considered timely and the union will be excused from the need to demand bargaining on a *fait accompli*.

A *fait accompli* occurs where the change is announced at the same time as the notice. The change was made by AWC, not the city. The change was scheduled to take place on January 1, 2003. Ample time existed for the union to request to bargain the impact of the change, so *fait accompli* is not appropriate in this case.

A specific and timely request for bargaining will generally support a finding that there has been no waiver by inaction, while union silence will generally support finding a waiver by inaction. *Seattle School District,* Decision 5755-A (PECB, 1998).

The employer notified the union of the changes to the prescription co-pays in it's October 14, 2002, letter. This notification was sufficient to meet the standard of notification required for a duty to bargain. It was then up to the union to request bargaining over the impact of the change.

There was significant testimony given regarding the interpretation of the employer's letter. Motiryo Keambiroiro, former director of administrative services for the employer, stated that the letter was sent to the union president and to the individual members of the negotiating team. The employer requested a response by November 1, 2002. Keambiroiro testified that she made several attempts to contact the union president with no response. Carroll requested that Keambiroiro address the membership to explain the letter. That presentation was made on December 4, 2002, after which Carroll responded that the union would not accept the

reduction in the COLA that was requested. However, the union remained silent on the prescription co-pay issue until December 30, 2002, when Cline faxed a letter to the employer requesting to bargain the effects of the change which was to be implemented on January 1, 2003.

The Examiner finds that the employer met it's bargaining obligation by providing timely notice and, in addition, the employer made numerous attempts to contact union officials to get a response to the notice, while the union remained silent on the topic of prescription co-pay changes. The union has thus committed a waiver by inaction.

The Material Effect/De Minimis Defense

The employer asserts a defense that the change to the prescription co-pay is de minimis and therefore no duty to bargain the change existed. In past Commission decisions it has been clearly held that any change that affects even a few employees defeats the de minimis defense. In *Kennewick School District*, Decision 6427-A (PECB, 1998) the Commission states:

> No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours, or working conditions. In order for there to be a unilateral change giving rise to a duty to bargain, there must have been some material change from the status quo.

Material effect is discussed in *Richland School District*, Decision 6269 (PECB, 1998), where it states: "even if these hours reductions were not a major issue for the employer as a whole, a loss of vacation or health benefits could be very substantial from the perspective of an individual bargaining unit employee." The increase to prescription co-pays will have an effect on employees and their dependents and therefore this is not an appropriate defense.

FINDING OF FACT

1. The City of Kirkland is a public employer within the meaning of RCW 41.56.030(1). Among other services, the employer maintains a police department.

2. The Kirkland Police Guild, a bargaining representative within the meaning of RCW 41.56.030(3), represents two bargaining units, the police officers and the police support group.

3. The employer and guild were parties to two collective bargaining agreements both of which were effective January 1, 2001, to December 31, 2003. Both agreements contain articles addressing medical benefits.

4. AWC made prescription co-pay changes to the plans that they offer to participants effective January 1, 2003.

5. The employer sent a letter to the union dated October 14, 2002, which informed the union of the changes to the prescription co-pays for Regence Blue Shield.

6. At the union's suggestion, on December 4, 2002, the employer made a presentation to the union membership explaining the proposed concessions and facts provided in the October 14 letter.

7. The union responded to the request regarding the COLA reduction but did not comment on the prescription co-pay change.

8. The union's attorney, sent a letter dated December 30, 2002, stating "these changes will need to be negotiated before they may be implemented."

CONCLUSIONS OF LAW

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

2. Changes to health care benefits are mandatory subjects of collective bargaining under RCW 41.56.030(4).

3. By not responding to the employer's timely notice of pending prescription co-pay changes, the union waived it's collective bargaining rights by inaction.

ORDER

The complaint in this matter is DISMISSED on its merits.

Issued at Olympia Washington, on the 7th day of January, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Claire Collins

CLAIRE COLLINS, 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.