STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

YAKIMA POLICE PATROLMEN'S ASSOCIATION,	)	
Complainant,	)	CASE 19206-U-05-4882
vs.	)	DECISION 9062-B - PECB
CITY OF YAKIMA,	)	
Respondent.	)	DECISION OF COMMISSION

Cline and Associates, by *James M. Cline*, Attorney at Law, for the union.

Summit Law Group, PLLC, by *Bruce Schroeder*, Attorney at Law, and *Kristin D. Anger*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Yakima (employer) and a timely cross-appeal filed by the Yakima Police Patrolmen's Association (union), each seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Christy L. Yoshitomi.[1]

ISSUES PRESENTED

1. Did the employer circumvent the exclusive bargaining representative in violation of RCW 41.56.140(1) through its communications with Officer Brian Dahl regarding his return to work agreement?

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[1] *City of Yakima*, Decision 9062-A (PECB, 2006).

2. Did the employer refuse to bargain with the exclusive bargaining representative in violation of RCW 41.56.140(1) by failing to bargain the provisions of Dahl's return to work order?

3. Did the employer refuse to bargain a drug testing procedure for all bargaining unit employees in violation of RCW 41.56.140(1)?

For the reasons set forth below, we affirm the Examiner's decision that the employer did not circumvent the union when it discussed the terms of the return to work order directly with Dahl and did not refuse to bargain the terms of Dahl's return to work order. This record supports the Examiner's findings and conclusions that the employer's discussions regarding the return to work order with Dahl occurred while the union was present. Additionally this record also supports the Examiner's findings and conclusions that the union was afforded the opportunity to negotiate with the employer regarding the return to work order. Finally, we affirm the Examiner's findings and conclusions that the employer refused to bargain a random drug testing procedure. When the employer expressed its desire for a random drug testing program that covered all bargaining unit employees and the union presented the employer with its proposal, the employer was obligated to engage in bargaining with the union.

FACTUAL SITUATION

A brief summation of the facts is prudent here to place the issues in their proper context. On March 31, 2004, Officer Brian Dahl, a patrol officer and bargaining unit member, approached Lieutenant Steve Finch, a member of management, to disclose an addiction to prescription medications. Finch immediately contacted Chief Sam

Granato and the two discussed the matter with Dahl. Granato placed Dahl on administrative leave and required Dahl to visit a psychologist, Dr. L Paul Schneider, for an evaluation. Schneider examined Dahl and reported to the employer that Dahl could return to work, but also stated that any return to work should be subject to numerous conditions, including the avoidance of all narcotics and random urinalysis.

Following receipt of Schneider's report, the employer and union met to discuss the possibility of Dahl returning to work. Dahl testified that he said he could comply with Schneider's terms, but the union argued Schneider was not qualified to make the fitness-for-duty recommendation. The employer and union then agreed to have a psychiatrist, Dr. Kathleen Decker, evaluate Dahl.

Decker examined Dahl and returned a report that was significantly less favorable to Dahl. Specifically, Decker expressed reservation regarding Dahl's long-term prognosis for recovery, and also thought Dahl was at high risk for relapse. Like Schneider, Decker also recommended that Dahl's return to work be subject to random urinalysis.

Before consulting with the employer over Decker's recommendation, Boyle and Walls urged Dahl to sign the return to work order to avoid the possibility of termination.

Return to Work Agreement

The parties subsequently met on August 18, 2004, to discuss Dahl's return to work. Attendees at this meeting included Granato, Finch, Dahl, Captain Greg Copeland, Officer Eric Walls, who was the current president of the union, and Officer Shawn Boyle. Boyle, who served as the secretary of the union's executive board, had

been representing Dahl during the investigation. During this meeting, the employer presented Dahl with a return to work agreement that included random urinalysis. Granato explained that if Dahl could follow the terms of the agreement, there should not be any problems. Dahl stated that he could follow the terms of the agreement.

At this point in the discussions, Walls raised several questions about the return to work agreement, including asking questions about which controlled substances Dahl would be tested for, whether the employer would continue to pay for Dahl's psychiatric treatment, and the manner and location of the testing.[2]

Following an explanation from the employer on how the return to work order would be implemented, Dahl signed the agreement. Boyle also signed the agreement as a witness. However, Walls declined to sign the agreement as the union representative, asserting that he did not want to set any precedent regarding a random drug testing program. Although Walls did not sign the agreement, he recognized the uniqueness of Dahl's situation, and he also noted that a random drug testing policy for all bargaining unit employees could be negotiated in the future.

Shortly after the meetings with Officer Dahl, the union presented the employer with a comprehensive drug testing policy. At the subsequent labor management meetings, the union continued to bring up the issue of random drug testing. The parties did not have meaningful discussions regarding a comprehensive drug testing

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[2] The union did not want Dahl to be tested in a police uniform, and also wanted to secure the use of an employer-owned vehicle for Dahl to travel to the testing location.

policy until the parties commenced negotiations for the next collective bargaining agreement.

The union filed this complaint alleging the employer circumvented the exclusive bargaining representative by directly dealing with Dahl, that the employer refused to bargain with the union regarding Dahl's return to work agreement, and refused to bargain a random drug testing program for all bargaining unit employees.

ISSUE 1 - CIRCUMVENTION OF THE EXCLUSIVE BARGAINING REPRESENTATIVE

Changes to the Status Quo - Applicable Legal Standard

All three issues in this case concern the parties' obligation to bargain collectively under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means . . . to meet at reasonable times, 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 . . . .

That duty is enforced on employers through RCW 41.56.140(4) and unfair labor practice proceedings 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(1)(a). The burden to establish affirmative defenses lies with the party asserting the defenses. WAC 391-45-270(1)(b).

The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with

the statutory collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 8*, Decision 3661-A (PECB, 1991).

The duty to bargain requires a party proposing a change to a mandatory subject of bargaining in an interest arbitration eligible unit: (1) give notice to the other party; and (2) provide opportunity to request bargaining on the subject; and (3) bargain in good faith, if requested, and reach an agreement or if no agreement is reached, take the dispute or issue to an interest arbitrator. RCW 41.56.430 through 41.56.490; *See also, e.g., City of Seattle*, Decision 1667-A (PECB, 1984).

We begin by noting that under long-standing Commission precedent, employee discipline is a mandatory subject of bargaining. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991). Neither party disagrees with this conclusion.

Where public employees exercise their rights under Chapter 41.56 RCW to organize and select a labor organization as their exclusive bargaining representative, the public employer's obligation is to bargain with that organization to the exclusion of all others and also to the exclusion of direct dealings with employees on matters that are mandatory subjects of collective bargaining. *City of Wenatchee*, Decision 2216 (PECB, 1985). An employer who circumvents that obligation commits a violation of RCW 41.56.140(4) by refusing to bargain with the exclusive bargaining representative and derivatively interfering with employees' rights in violation of RCW 41.56.140(1).

Application of Standards

This record supports the Examiner's findings and conclusions that the union was involved in Dahl's return to work order to such an extent that the employer did not commit a circumvention violation. Not only was the union present during the conversations with Dahl regarding his return to work agreement, the union's questions about Schneider's qualification led the employer to have Dahl evaluated by Decker.

The union relies upon *State - Patrol*, Decision 4757-A (PECB, 1995). In *State - Patrol*, this Commission affirmed an examiner's finding that an employer committed a circumvention violation when a supervisor directed an employee to sign a last chance agreement. The legal standard announced in *State - Patrol* is sound, but the facts of that case are substantially different from this one. Specifically, in *State - Patrol*, the employer completely bypassed the union in its discussions with the employee, whereas here the union was consulted and its input affected the decision making process.

ISSUE 2 - REFUSAL TO BARGAIN RETURN TO WORK AGREEMENT

As previously noted, employee discipline is a mandatory subject of bargaining. We must now examine whether the Examiner properly concluded that the union waived its right to bargain the terms of Dahl's return to work agreement.

Waiver by Inaction and *Fait Accompli*

The "waiver by inaction" defense is apt where appropriate notice of a proposed change has been given, and the party receiving notice does not request bargaining in a timely manner. *City of Edmonds*, Decision 8798-A (PECB, 2005); *see also City of Yakima*, Decision

1124-A (PECB, 1981) (union responded to notice of a bargaining opportunity with a public information campaign, but never requested bargaining); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995) (union filed a grievance under a collective bargaining agreement, but never requested bargaining). The key ingredient in finding a waiver by inaction by a union 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.

Washington Public Power Supply System, Decision 6058-A (PECB, 1998) (footnotes omitted).

Application of Standard

The Examiner found that the union waived its right to bargain the terms of Dahl's return to work order by inaction. Specifically, the Examiner determined that during all of the discussions regarding Dahl's return to work order, the union failed to demand bargaining over the terms of the return to work order. We agree.

This record supports the Examiner's findings and conclusions that the union was provided ample opportunity to weigh in on the matter, but that the union failed to demand bargaining over the order. Nor do we find that the employer presented the return to work order as a *fait accompli*. This record supports a finding that the union was fully aware that Dahl's return to duty was going to be predicated on the medical evaluations. The union's insistence that a second evaluation be undertaken supports the conclusion that the union was involved with Dahl's reinstatement process. Finally, when the time came for Dahl to sign his return to work order, the union's chief

concern was whether the employer was going to use Dahl's return to work order as a springboard for a drug testing program covering all bargaining unit employees.

Because we find that substantial evidence supports the Examiner's findings and conclusions that the union waived its right to bargain Dahl's return to work order, we need not address the union's or employer's other arguments on appeal.

ISSUE 3 - FAILURE TO BARGAIN UNIT WIDE DRUG TESTING PROGRAM

The final question presented by this appeal is whether the employer was obligated to bargain immediately, on the union's request, a random drug testing policy for all bargaining unit employees. The Examiner found that the union desired to negotiate the policy because the parties' collective bargaining agreement was silent on the issue, and that the employer failed to respond to the union's request for bargaining.

Duty to Bargain

During the term of a collective bargaining agreement, the duty to bargain continues to exist between the employer and union as to matters which are mandatory subjects of bargaining but are not mentioned in the specific terms and conditions of the collective bargaining agreement. *City of Seattle*, Decision 1667-A. If mandatory subjects of bargaining have not been raised by either party during bargaining, or if such issues are entirely new, they may not be acted upon unilaterally by either party without first satisfying its statutory bargaining obligation.

Situations frequently arise where one of the parties to a collective bargaining relationship finds it necessary, desirable or convenient to make changes during the term of a collective

bargaining agreement. If those changes affect terms or conditions of employment of represented employees, the moving party will need to give notice of the contemplated changes to the other party sufficiently in advance of making the decision to allow time for bargaining prior to making a decision on the change of practice. If the other party makes a timely request for bargaining, the moving party must bargain in good faith concerning the proposed change. *City of Pasco*, Decision 4197 (PECB, 1992). Parties can negotiate to an impasse in situations involving bargaining units not eligible for interest arbitration. If parties dealing with interest arbitration eligible employees reach a lawful impasse, then the interest arbitration procedures under Chapter 41.56 RCW and Chapter 391-55 WAC apply.[3] Where one party does not believe that the other party has fulfilled its statutory obligation, it may file unfair labor practice charges.

Application of Standard

Here, we find that substantial evidence supports the Examiner's findings and conclusions that the employer failed to bargain with the union regarding a comprehensive drug testing policy. The Examiner found that when the union presented a sample drug testing policy in August 2004, it conveyed its desire to bargain a policy. Following this request, which was repeated at the subsequent labor management meeting in January 2005, the employer failed to respond. The employer's witness testified that although he expressed a desire for a comprehensive random drug testing policy to the union, he thought that bargaining would be more appropriate when the

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[3] When the parties reach a lawful impasse in negotiations, the employer may be entitled to implement its proposed change(s) without the consent or agreement of the union for bargaining units that are not eligible for interest arbitration. *Pierce County*, Decision 1710 (PECB, 1983).

entire collective bargaining was open for negotiations. However, once the union stated its intention and presented its proposal to the employer, the employer should have responded to the union's request.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Christy L. Yoshitomi are AFFIRMED and ADOPTED as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 25th day of April, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner