STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6, Complainant, vs. KING COUNTY, Respondent.	CASE NO. 4576-U-83-750 DECISION NO. 1957 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Terry Costello, Research Analyst, appeared on behalf of the complainant.

J. Wes Moore, Administrative Assistant, Labor/Employee Relations, appeared on behalf of the respondent.

On April 6, 1983, Service Employees International Union, Local 6, (SEIU or complainant) filed a complaint of unfair labor practices with the Public Employment Relations Commission, alleging that King County (respondent) had violated RCW 41.56.140(4) by unilaterally revoking commissions held by parks personnel while the issue of those commissions was a subject in negotiations. Complainant also alleged that respondent had violated the statute by unilaterally changing disciplinary policy. Hearing was held in the matter on December 21, 1983, before Martha M. Nicoloff, Examiner. At the opening of the hearing, complainant withdrew the portion of its complaint dealing with the discipline policy, and proceeded with the issue involving commissions. The parties submitted post-hearing briefs.

FACTS

Service Employees International Union, Local 6, represents various classifications of employees of the parks, facilities management, and solid waste divisions of King County. The precise date upon which SEIU became the exclusive bargaining agent for the parks employees is not a part of this record; however, it apparently represented those employees at least as early as 1978. The county and the union have been parties to a series of collective bargaining agreements, including one for calendar years 1981 and 1982, and the latest for a term from January 1, 1983 through December 31, 1985.

Several classifications of parks managers are included in the bargaining unit. Among their other duties, park managers have been required to enforce Chapter 7.12, Ordinance 1924 of the King County Code, which establishes rules and regulations governing the use of King County Parks, and prescribes criminal penalties for violations of the ordinance. In 1978, park managers attended a 40-hour training program conducted by "officers of the King County Police" which, among other things, included in its subject matter the coverage of Ordinance 1924, crowd control, discussion of deviant behavior, constitutional rights of the accused, Miranda warnings, and arrest procedures. Park managers who successfully completed the training were issued a certificate from the King County Department of Public Safety, certifying that the holder had satisfactorily completed park manager training and was entitled to "such professional standing as a law enforcement officer as may properly be accorded by reason of such course of instruction". Employees who successfully completed the prescribed training course for park managers also received a commission.[1/] Employees receiving a commission signed a document, witnessed by the chief of security and safety of the King County Parks Division, which noted:

> Having successfully completed the prescribed training course for Park Manager, I hereby accept my Special Commission as a Park Manager for King County Division of Parks.
>
> In accepting this document and badge, I, the undersigned, agree to act in the best interest of the King County Division of Parks at all times and to recognize the following items as a matter of policy:
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> 1. Special Commissions for the King County Division of Parks are a courtesy extended by the Director of the Division of Parks to assist Park Managers in the performance of their duties.
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> 2. Special Commissions are revocable at any time by the Director of the King County Division of Parks.
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> 3. Special Commissions for the King County Division of Parks lend enforcement powers as they pertain to the King County Ordinance 1924 alone. They apply to no other laws unless specified in writing by the Director of the King County Division of Parks.
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> 4. No employee of the King County Division of Parks shall be allowed to carry any type of firearm in the performance of his or her duties. To do so will result in disciplinary action.

There is no evidence that the union was involved in or notified of any of the matters referred to in that document.

1/ There is reference in the record to some training being conducted prior to 1978; however, issuing commissions subsequent to training first became a practice in 1978.

Those managers who completed the training were issued badges, to be displayed or carried upon their person, and were empowered to issue warnings and citations to violators of Ordinance 1924. Copies of any citation issued by a park manager were forwarded to the appropriate district court. Violators were subject to a fine or imprisonment, as well as immediate ejection from the park. Park manager Dennis Reed estimated that, as a commissioned manager, he had issued approximately three citations annually in the park in which he worked, and spent perhaps five percent of his time in enforcement of Ordinance 1924.

In August, 1979, the county revoked the commission of one of its park managers who had been issued a commission through the procedures outlined above. The union filed a grievance on the employee's behalf, claiming a violation of the collective bargaining agreement and a change in the employee's working conditions effected unilaterally by management. In October, 1979, a grievance committee composed of two King County representatives and two representatives from the union issued recommendations which apparently resolved that grievance. The memorandum revoking the grievant's commission was supplanted by one which continued the revocation, but outlined the process by which the grievant might have her commission restored. In the course of that grievance process, the union became aware of the four-point document signed by those employees who had completed park manager training.

In October, 1982, the union presented the county with proposals for a collective bargaining agreement to replace the 1981-1982 contract. In that document, at Article XI, Section 19, the union proposed:

> Parks Division employees shall be given the opportunity to volunteer for training to meet the requirements for becoming commissioned. Qualification for and acceptance of a commission shall not be a requirement for employment in any classification currently within the bargaining unit.
>
> Parks Division employees shall also be given the opportunity to volunteer for training in conflict resolution, said training to enable them to deal effectively with conflict situations that may arise in the course of their employment.
>
> The training opportunities above shall be offered prior to April 1, 1983. Employees attending training sessions will be released from work with pay.

Christine Spieth, SEIU business representative for this unit, initially testified that the entirety of Section 19 dealt with commissions, but amended her testimony to relate only paragraphs one and three to the commission issue.

The parties met in negotiations on several occasions, commencing in November, 1982. The union's proposal concerning commissions and training (Section 19) was discussed at the opening bargaining session. Further discussion was delayed for various reasons until February 17, 1983, when the union raised the issue and was informed that "there was a memo going out to the parks people regarding proper enforcement of (Ordinance) 1924." On March 7, 1983, the union again raised the Section 19 issue and was informed that it was unacceptable to the county as written.

On March 15, 1983, Joe Nagel, manager of the divison of parks and recreation, issued a memorandum to all park operation and recreation employees, in which a meeting was called for March 24, 1983, to discuss division policies and procedures for implementing Ordinance 1924. The apparent purpose of the meeting was to establish priorities for enforcing the ordinance and identify special problem areas. In the memorandum, Nagel noted that he was officially revoking all commissions (with the exception of that of the security chief) in advance of the scheduled meeting, and requiring all employees to hand in badges and commission cards on the date of the meeting. He stated:

> If we decide as a result of the meeting that we need commissioned personnel, we will establish some firm criteria to decide how many are needed and where, criteria for selection including psychological screening, criteria for ongoing training. In addition, we will review the proper classification for commissioned personnel, other duties, appropriate pay grades, etc.

On March 21, 1983, the union made a package proposal in negotiations in which it dropped its proposal on Section 19. The package was not accepted by the county, and the Section 19 proposal remained on the bargaining table. Sometime on March 21, the union became aware of the existence of the March 15 memorandum.[2/] On April 6, 1983, the union filed the instant unfair labor practice charge.

POSITIONS OF THE PARTIES

Complainant contends that respondent had an obligation to bargain over commissions in light of the proposal involving their continuance which was on the bargaining table. It claims that the revocation of commissions constitutes a mandatory subject of bargaining, and that respondent is barred from taking unilateral action regarding a mandatory bargaining subject. It claims respondent was obligated at the least to give notice of its intention

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2/ The record is unclear whether the union learned of the existence of that memorandum at the bargaining table. Also unclear is whether the union proposal was made prior or subsequent to that knowledge.

to revoke the commissions and to bargain over the impact of the revocation on bargaining unit employees. It argues that there is no waiver by the union of its bargaining rights, either by the individual documents signed by employees acknowledging the employer's power to revoke commissions, or by the fact that commissions had never been addressed in prior collective bargaining. It requests immediate restoration of commissions, and an order directing the county to refrain from taking any unilateral action regarding commissions and to bargain with the union on that issue.

Respondent argues that the union has waived any right to bargain on the issue of revocation of commissions, in that such issue has never been a part of the parties' collective bargaining agreements. It bases a further waiver argument on the fact that the union never protested the documents signed by individual employees, in spite of having knowledge of those documents since at least 1979. It argues that the union's proposal on the bargaining table at the time commissions were revoked did not even remotely address the issue of revocation of commissions, but rather dealt with training programs. It argues that commissions are not a requirement for employment, and claims that complainant presented no evidence that employees have been unable to perform the responsibilities of their positions without commissions, or that the lack of commissions has adversely affected employees' wages or working conditions.

DISCUSSION

The employer bases a major portion of its defense in this matter on its waiver arguments. Those arguments are without merit. Where information regarding a subject is conveyed to employees completely outside of the normal channels of collective bargaining, a union cannot be found to have waived its bargaining rights on the subject. Royal School District, Decision No. 1419-A (PECB, 1982). An employer's waiver arguments were held to be without merit when it unilaterally terminated its contributions to a retirement income plan which had been unilaterally adopted five years previously, even though that plan contained a specific provision giving the employer the right to amend or terminate the plan at any time. T.T.P. Corporation, 190 NLRB 48 (1971). In that matter, the Board found that the most that could be assumed from the union's failure to protest the unilateral adoption was that it was satisfied with the terms of the plan. Further, the Board rejected the employer's arguments that the union had waived its rights on the subject by its failure to discuss it in bargaining for several subsequent contracts, holding that waivers must be clearly and unmistakably made. See also: Lakewood School District, Decision No. 755-A (PECB, 1980). The fact that union representatives allowed a revocation to stand in a grievance concerning one bargaining unit member also cannot be said to constitute a clear and unmistakable waiver by the union as to its rights concerning the entire unit.

Numerous decisions of the courts, the National Labor Relations Board, and this Commission have established the standard that an employer commits an unfair labor practice violation when it refuses to bargain over a subject which the applicable statute defines as a mandatory subject of collective bargaining. Conversely, an employer commits no violation if it refuses to bargain or makes a unilateral change regarding a permissive bargaining subject. In the instant matter, the question of whether the employer committed a violation when it unilaterally revoked the commissions of its park managers must go to the question of whether the decision to revoke commissions is a mandatory bargaining subject.

RCW 41.56.030(4) provides:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative 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, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. (Emphasis supplied)

The determination of the service, product or program an employer will provide is generally recognized by various labor boards and the courts to be a prerogative of management and thus a nonmandatory subject of bargaining. See: Discussion of "curriculum" in Federal Way School District, Decision 232 (EDUC, 1977).

Where an employer does not change its product or service, but changes its operation in manufacturing that product or delivering that service, the change in operation may constitute a mandatory subject of bargaining. The National Labor Relations Board has found such to be so only if the change has a significant impact upon unit employees' job interests. See: Westinghouse Electric Corp., 150 NLRB 136 (1965); and Coca Cola Bottling Works, 186 NLRB 142 (1970), wherein the Board affirmed a trial examiner's findings that the employer's unilateral elimination of its bottle inspection machines did not constitute a violation, since the changes did not have a "demonstrably adverse" effect on the job of any worker. The same standard resulted in a finding of a violation in Charmer Industries, 250 NLRB 31 (1980), in which the employer's unilateral promulgation of new collection procedures violated the Act, because the change resulted in substantial additional duties and had substantial impact on working conditions.

In this case, the service being provided by the county is a system of parks operated under rules designed to keep the peace for the benefit of all park users. The conferring of commissions upon certain park managers was one way in which the county had chosen to fulfill its obligations under the ordinance, or, in other words, one way in which it had chosen to deliver or operate its service. In choosing to revoke commissions, the county was not choosing to change its service. The memorandum which revoked commissions clearly indicated that the county and its parks personnel had an obligation under Ordinance 1924[3/] and would continue to carry out that obligation.

The method by which the county delivered that service did change. However, there is no indication in the record that revocation of commissions involved a change in compensation or hours of employment for unit employees. No park manager lost employment, and it does not appear from the record that the way in which park managers performed their duties changed significantly as a result of the revocation of commissions. Indeed, at the time the proposal was made in negotiations, apparently not all park managers held commissions. Those who did not impliedly were not at all affected by the revocation. Reed, the only park manager who testified in this proceeding, perceived that the commissions and the housing of employees in the parks substantially decreased the problem of violation of the ordinance. He testified that it was more difficult, absent the citation powers granted by his commission, to remove a violator of the ordinance from his park, and that by the time the sheriff could get to a rural park such as his (sometimes hours after a call), the situation in the park could be difficult for even the sheriff to control. That testimony and portions of the union's Section 19 bargaining proposal could imply some safety concerns connected marginally with revocation of commissions. However, Reed attributed the decrease in problems both to housing in the parks and the holding of commissions, and Spieth, under cross-examination, agreed that the request for training in conflict resolution in the bargaining proposal did not go to the issue of commissions.

Complainant has the burden of proof here. The examiner is unable to support a finding of adverse effect on the safety of unit employees based upon the minimal record made. It does not appear from this record that the revocation of commissions had the required "demonstrably adverse" effect upon unit employees to make that revocation mandatorily bargainable.

3/ That ordinance provides, at section 7.12.620, "...The King County director of public safety and division of parks employees are authorized and directed to enforce the provisions of this chapter..."

However, the memorandum revoking commissions, authored by an agent of the county, directly addresses the issue of a wage differential for commissioned employees and other potential changes in the working conditions of both commissioned and non-commissioned parks managers. Clearly, such a wage change would fall within the mandatory subject arena, as would any substantial change in working conditions of unit employees.

FINDINGS OF FACT

1. King County is a county of the State of Washington and is a public employer within the meaning of RCW 41.56.030(1).

2. Service Employees International Union, Local 6, a bargaining representative within the meaning of RCW 41.56.030(3), has been the exclusive bargaining agent for certain employees of the parks, facilities management, and solid waste divisions of King County since at least 1978. Several classifications of parks managers are included in the bargaining unit.

3. Among their duties, parks managers have been required to enforce King County Ordinance 1924, which prescribes rules and regulations for use of the King County parks. In 1978, park managers then employed with the county underwent training in the coverage and enforcement of that ordinance, and received limited law enforcement commissions empowering them to enforce that ordinance by issuing of warnings and citation notices. In accepting those commissions, park managers signed a document which provided that the commissions were revocable by the county at any time. There is no evidence the union was a party to that document in 1978, but the union became aware of the commissions and the terms of their issuance as the result of a grievance which arose in 1979. No wage differential attached to holding a commission, and the hours of those employees who held commissions did not change as a result. Approximately five percent of park managers' time was utilized in enforcement of the ordinance as a commissioned employee.

4. The county and the union have been parties to a series of collective bargaining agreements covering the bargaining unit referenced in Finding of Fact 2, the latest for a term of January 1, 1983 through December 31, 1985. None of the contracts spoke to the holding or revocation of commissions by parks managers.

5. In October, 1982, the union submitted proposals to the county for a new collective bargaining agreement. Among those proposals was one which provided that employees could volunteer for training to meet the

requirements for becoming commissioned, although holding a commission would not be a condition of employment. The proposal also stipulated dates by which such training would be completed. The training proposal was discussed at several bargaining sessions.

6. On March 7, 1983, the union was informed that a memorandum would be issued to parks employees regarding enforcement of Ordinance 1924. On March 15, 1983, that memorandum was issued to parks managers, revoking their commissions and detailing plans to determine department priorities for enforcement. The wages and hours of parks managers did not change as a result of that revocation. There is no evidence that working conditions of those employees changed substantially as a result of revocation.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By the actions described in Finding of Fact Nos. 3, 4, and 5, the union did not waive its right to bargain the revocation of commissions.

3. The revocation of commissions was not a mandatory subject of collective bargaining under the provisions of RCW 41.56.030(4).

4. In unilaterally revoking the commissions of certain parks managers, the employer did not violate RCW 41.56.140(4).

ORDER

Upon the basis of the above Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, the complaint is hereby dismissed.

DATED at Olympia, Washington this 10th day of July, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Martha M Nicoloff

MARTHA M. NICOLOFF, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.