

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE POLICE GUILD,)	
)	CASE 10001-U-92-2285
Complainant,)	
)	
vs.)	DECISION 5054 - PECB
)	
CITY OF SPOKANE,)	
)	
Respondent.)	
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SPOKANE POLICE LIEUTENANTS AND)	CASE 10002-U-92-2286
CAPTAINS ASSOCIATION,)	
)	
Complainant,)	DECISION 5055 - PECB
)	
vs.)	
)	CONSOLIDATED
CITY OF SPOKANE,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
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Christopher Vick and Associates, by Christopher Vick, Attorney at Law, appeared on behalf of the complainants.

James C. Sloane, City Attorney, by Pat Dalton, Assistant City Attorney, appeared on behalf of the respondent.

On September 14, 1992, the Spokane Police Guild and the Spokane Police Lieutenants and Captains Association each filed a complaint with the Public Employment Relations Commission, charging that the City of Spokane had violated RCW 41.56.140(4), by refusing to bargain concerning the creation of a "Citizens Review Panel" with the power to examine and change actions based on police department internal investigations. Examiner Katrina I. Boedecker was designated to process the case under Chapter 391-45 WAC. The parties requested several delays of these proceedings, while they attempted to resolve the matters themselves, but these settlement efforts were ultimately unsuccessful. The parties submitted a stipulated "Statement of Agreed Facts" on August 8, 1994, in lieu

of having an evidentiary hearing. The parties filed their legal arguments by October 3, 1994.

BACKGROUND

The ensuing paragraphs detail the pertinent factual background upon which the parties agree.

The executive power in the city government of the City of Spokane rests in the city manager. The city manager serves at the pleasure of the council which may remove him by a majority vote. He has delegated the disciplinary power concerning uniformed police department employees to the chief.

Prior to the fall of 1992, non-criminal charges made by a citizen against an employee of the Spokane Police Department were processed in the following manner:

- A. First, the complaint was forwarded to the police department's Office of Professional Standards (OPS).¹ If the allegation was defined as "serious" (e.g. excessive force, false arrest), OPS staff investigated. If the allegation was defined as "non-serious" (e.g. demeanor), it was routinely investigated by the shift supervisor.
- B. Next, the investigation was completed pursuant to OPS's procedure. Once all issues had been investigated and evidence gathered, the OPS commander or the shift supervisor submitted the completed file to the Administrative Review Panel (ARP)

¹ OPS was formerly known as Internal Affairs (IA). OPS now includes IA as one of its functions.

which consists of the assistant and deputy police chiefs and the four police captains. The ARP reviewed each case completely and discussed it as a panel. The ARP then made a recommendation to the police chief.

- C. The chief reviewed the complete OPS file and considered the ARP's recommendations. The chief then made one of the following determinations: a) proper conduct; b) improper conduct; c) insufficient evidence; d) policy/training/equipment failure; e) misconduct not based on the original complaint; or f) unfounded complaint (the allegation was demonstrably false). The chief would then impose discipline, if appropriate. The chief's decision could be appealed to the Civil Service Commission or through the parties' grievance procedure. In neither case could the level of discipline imposed by the chief, or his findings be increased to make the officer suffer a less favorable finding than the chief had made.

During the summer of 1992, the city council was considering implementation of a "citizens review" process whereby citizens could appeal the chief's findings of **proper** officer conduct. In response to publicity surrounding the proposal, the complainants' attorney wrote the city attorney June 26, 1992, demanding that the city engage in collective bargaining with regard to any disciplinary procedures which the city intended to change. He requested information as to how the new proposed changes in the public advisory committee process would effect disciplinary procedures and, especially noted that the complainants would be interested in preserving confidential information, such as internal investigation files that did not result in discipline.

On August 12, 1992, the city responded by sending a draft resolution to be presented to the city council to establish the Citizens Review Panel (CRP) and an outline of the CRP process. The resolution defines the responsibilities and functions of the CRP:

1. The Citizens Review Panel shall be composed of eleven (11) citizens of the City of Spokane, appointed by the Mayor and the City Council. The Chief of Police shall recommend the appointment of four (4) of the members of the Citizens Review Panel.

2. The official functions of the Citizens Review Panel are:

- a) to serve as a forum for citizens to bring their concerns about the police department's response to complaints investigated by Internal Affairs;
- b) to review the results of investigations by Internal Affairs of complaints brought by citizens concerning the actions or omissions of officers and employees of the Spokane Police Department, while acting within the scope of their authority;
- c) to monitor complaint trends to identify possible problem areas of police department activities in dealing with citizens.

...
5. If eight (8) members of the Citizens Review Panel vote to refer the matter to the Public Safety Committee for further review, the complaint is automatically transferred to the Chairman of the Public Safety Committee.

Neither party considered the complainants to have acquiesced to the city council's plan to create a CRP.

The city manager believed that the city charter gave him the authority needed to oversee the chief's disciplinary actions. On August 24, 1992, the city council enacted resolution 92-67 creating the CRP without bargaining.

The complainants objected to the council's action and filed these unfair labor practices complaints.

The CRP has been meeting regularly since its inception. It has developed a pamphlet describing its functions:

The Citizens Review Panel was formed to:

- * **Serve as an independent forum** for citizens to voice their concerns about the Spokane Police Department's response to complaints about performance and conduct;
- * **Review the results** of the Spokane Police Department's internal investigations of complaints brought by citizens concerning the actions or omissions of officers and employees of the Spokane Police Department;
- * **Monitor complaint trends** to identify possible areas of concern regarding the Spokane Police Department performance or conduct in dealing with citizens.

[Emphasis by **bold** in original.]

Among the information in a "questions and answers" section of the pamphlet, stated:

What does the Citizens Review Panel do with my Complaint?

1. They gather all the available information from the Spokane Police Department.
2. They schedule a time when you can meet with the Panel and talk about the complaint issue. Members may have questions for you.
3. The Citizens Review Panel will decide to either (1) affirm the Spokane Police Department's findings or (2) refer your complaint to the Public Safety Committee for further action and/or investigation.

[Emphasis by **bold** in original.]

Even with the establishment of the CRP, a citizen still must first file a complaint with the police department, which processes it as described above. If the chief finds misconduct, the CRP has no jurisdiction to hear the citizen's complaint. If the chief resolves the complaint "not in favor of the citizen" (*i.e.*, proper conduct, insufficient evidence, unfounded, etc.), the citizen may forward the complaint to the CRP.

The CRP holds public hearings on all complaints brought before it. It may investigate. The CRP can recommend to the city council -- through the Public Safety Committee -- that discipline be imposed.

Prior to the creation of the CRP, the police department's OPS file was not disclosed outside the department except as required by law. Generally, this meant that findings that did not conclude that the officer was culpable, would not be released. Since its inception, the members of the CRP have been provided a copy of the complete investigative file. While the CRP has no policy on disclosure of the investigative file, when sought by members of the public or the press, the CRP has released the investigative file.

POSITIONS OF THE PARTIES

The unions argue that when the city unilaterally created the CRP, it unilaterally changed its disciplinary procedures by subjecting officers to a new level of disciplinary review after they have already been cleared of wrongdoing. Additionally, the complainants contend that the city has unilaterally changed its past practice of considering internal investigation files, regarding unsustained charges as confidential. It contends the public disclosure of such information is not at the core of the city's entrepreneurial control but is rather substantially invasive of the employee's privacy rights and inherently constitutes a working condition.

Finally, the unions assert that the city unilaterally changed its disciplinary procedures by subjecting officers to public hearings concerning unsubstantiated citizen complaints.

The city argues that the formation of the CRP is not a mandatory subject of bargaining, because the CRP does not have the authority to impact the disciplinary process. It contends that the city charter vests the city manager with the exclusive authority to discipline and he has designated the police chief to discipline police officers. The city argues that the CRP cannot actually affect the disciplinary process; rather, it merely provides for an "organized group" to be the focus for complaints. Finally, the city asserts that the release of the files is not a change in working conditions and not a mandatory subject of bargaining, since the CRP receives only information that is generally available to the public.

DISCUSSION

Washington law is well settled that changes in disciplinary procedures constitute mandatory subjects of bargaining. City of Yakima, Decision 3503-A and 3504-A (PECB, 1990), affirmed, 117 Wn.2d 655 (1991). City of Pasco, Decision 4197-A and 4198-A (PECB, 1994). In the City of Pasco case, the employer had a procedure in which police-related traffic accidents and discharges of firearms were submitted to a "board of review", and a system of point values was used to classify police vehicle accidents and recommend disciplinary outcomes. The police chief instituted new "management review" procedure to deal with the same subject matters and the union sought to bargain over the board of review during the negotiations on a successor agreement, but the employer refused to bargain on those issues. The Commission noted that:

"Discipline can affect tenure of employment, which is the ultimate 'working condition' within the traditional scope of 'wages, hours and working condition.' RCW 41.56-.030(4)."

It thus found the City of Pasco guilty of having committed unfair labor practices by unilaterally implementing changes in its disciplinary procedures.

In the case at hand, the City of Spokane has similarly effected changes in disciplinary procedures. Prior to the unilateral imposition of the CRP, an officer would not face discipline if the chief concluded that the officer's conduct was justified, or that there was insufficient evidence of misconduct, or if the charges were false. The CRP that was unilaterally imposed on these two bargaining units was specifically created to review officer conduct only if the chief failed to find misconduct. The CRP can recommend an increase in discipline from what the chief had decided. The recommendation of any discipline at all by the CRP is a greater sanction than a finding of no sustainable misconduct. Such procedures subject the bargaining unit members to institutionalized double jeopardy. A change of working conditions that should have been bargained prior to its implementation.

The Examiner is not persuaded by the employer's argument that since the CRP can only recommend discipline its acts do not constitute a working condition. The record shows that the CRP can now publicly disclose information regarding unsustained allegations about bargaining unit members which had previously been considered confidential internal investigation material. In 1993, the Supreme Court of the State of Washington ruled that disclosure of a performance evaluation of a public employee would be "highly offensive to a reasonable person" and "not of legitimate concern to the public" unless there were specific acts of misconduct found in the evaluation. Dawson v. Daly, 120 WN.2d 782, (1993). If all

evaluations were open to scrutiny by "co-workers, neighbors, the press, or anyone else who made a request", the high court concluded that "employee morale would be seriously undermined, likely resulting in reduced job performance."² The internal investigation files which the CRP can now make public may have a specific finding that there has been no misconduct. The instant decision is not a ruling on the requirements of the Public Records Act, but there is a parallel between performance evaluations where no misconduct is recorded and internal investigation files where no misconduct is recorded. The Supreme Court's analysis that the public disclosure of a performance evaluation of a public employee would be "highly offensive to a reasonable person" holds for the public disclosure of an internal investigation file of a uniformed officer as well. Disclosure of internal investigation files where no misconduct has been found is invasive of an employee's privacy rights and inherently constitutes a working condition. At the same time, public access to unproven charges substantially does not lie at the core of entrepreneurial control. The change at issue here thus constituted a mandatory subject of bargaining. See: IAFF, Local 1052 v. Public Employment Relations Commission, 113 Wn.2d 197 (1989).

Finally, when the CRP holds a public hearing wherein a citizen complainant airs previously unsubstantiated allegations against an officer, such a hearing affects employee working conditions and it is a mandatory subject of bargaining.

² In Dawson, the Court was examining the public disclosure requirements of RCW 42.17.251. The Court's interpretation of the requirements of the Public Records Act (RCW 42.17-.250 - .348) seems to be broadening in Progressive Animal Welfare Society (PAWS) v. University of Washington, 125 Wn.2d 243 (1994). However, the Court did not mention performance evaluations in the PAWS decision, while it specifically found "nothing resembling protected 'personal information'" in the PAWS' request, it ruled that the disclosure of employees' social security numbers, residential addresses, or telephone numbers would be invasive.

When the City of Spokane failed to bargain over the creation and function of the CRP and unilaterally established an institutionalized double jeopardy scheme, it committed an unfair labor practice.

REMEDY

The standard remedy in a "unilateral change" unfair labor practice case is to restore the parties to the status quo ante as it existed before the illegal unilateral change. There appears to be no reason to deviate from that approach in this case. The Spokane City Council will be ordered to give no further effect to its resolution 92-67 which created the CRP without bargaining. The city will be ordered to purge all of the CRP's findings. If the city is still interested in pursuing the proposal of the creation of a CRP, it must first discharge its duty to bargain with the complainants.

FINDINGS OF FACT

1. The City of Spokane is a public employer within the meaning of RCW 41.56.030(1).
2. The Spokane Police Guild is a bargaining representative within the meaning of RCW 41.56.030(3) and is the exclusive bargaining representative of an appropriate bargaining unit of uniformed personnel employed by the City of Spokane.
3. The Spokane Police Lieutenants and Captains Association is a bargaining representative within the meaning of RCW 41.56.030(3) and is the exclusive bargaining representative of an appropriate bargaining unit of uniformed personnel employed by the City of Spokane.

4. Formerly, if the Police Department's internal investigation concluded that an officer was not culpable, the department's investigative file was not subject to release to the public.
5. On August 24, 1992, the Spokane City Council enacted a resolution creating a Citizens Review Panel which would serve as a forum for citizens to bring concerns about the police departments response to complaints investigated by the department's internal affairs section. Specifically, a citizen could appeal a finding by the chief of police that an officer was not subject to discipline for misconduct.
6. The Citizens Review Panel receives a copy of the complete investigative file. When sought by members of the public or the press, the Citizens Review Panel releases the file.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters pursuant to Chapters 41.56 RCW and 391-45 WAC.
2. Disciplinary procedures are a mandatory subject of collective bargaining under RCW 41.56.030(4). By its unilateral creation of a Citizens Review Panel, which has authority to, and actually does, release to the public information regarding disciplinary investigations which had previously been confidential in the Police Department, the employer has committed an unfair labor practice in violation of RCW 41.56.140(1) and (4).

ORDER

The City of Spokane, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

A. CEASE AND DESIST from:

- (1) Unilaterally making changes in disciplinary procedures.
- (2) In any other manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

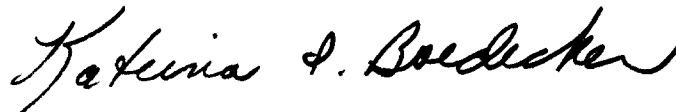
- (1) Give no further effect to its resolution 92-67 which created the Citizens Review Panel.
- (2) Purge all findings of the Citizens Review Panel issued up to date including the date of the employer's compliance with this order.
- (3) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

- (4) Notify the above-named complainants, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainants with a signed copy of the notice required by the preceding paragraph.

- (5) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

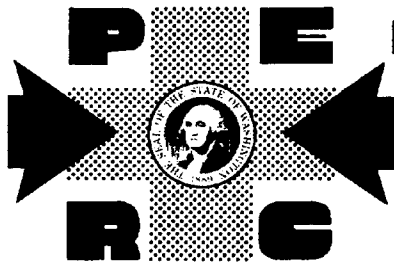
ISSUED at Olympia, Washington, this 24th day of April, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KATRINA I. BOEDECKER, Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT make changes in the disciplinary procedures of the Police Department without first giving notice to the employee bargaining representative's of Police Departments employees and bargaining, upon request.

WE WILL NOT give any further effect to our resolution 92-67 which created the Citizen Review Panel.

WE WILL purge all findings of the Citizen Review Panel.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW.

DATED: _____

CITY OF SPOKANE

BY: _____
 AUTHORIZED REPRESENTATIVE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.