STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARYSVILLE POLICE OFFICER'S ASSOCIATION,	)	
Complainant,	)	CASE 11643-U-95-2738
vs.	)	DECISION 5306 - PECB
CITY OF MARYSVILLE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Cline and Emmal, by Stephen Garvey, Attorney at Law, joined by Patrick Emmal, Attorney at Law, on the brief, appeared on behalf of the complainant.

Robert R. Braun, Jr., Employee Relations Service Inc., appeared on behalf of the employer.

On March 9, 1995, the Marysville Police Officer's Association (MPOA) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Marysville (employer) had committed unfair labor practices under RCW 41.56.140(4), by unilaterally eliminating part-time job share arrangements and by changing hours of work without bargaining. On March 30, 1995, the Executive Director issued a preliminary ruling under WAC 391-45-110, finding a cause of action to exist. The employer filed an answer on April 18, 1995. A hearing was held in Kirkland, Washington, on July 26, 1995, before Examiner William A. Lang. The parties filed post-hearing briefs on September 8, 1995.

BACKGROUND

Marysville is a suburban community with a population of approximately 11,000, situated on the Interstate 5 corridor a few miles

north of Everett, Washington. The employer operated a police and fire 911 dispatch center which provided emergency dispatch services 24 hours each day, 7 days each week. Twelve communication officers were employed in that center.

Prior to this controversy, the employees in the 911 dispatch center were represented for the purposes of collective bargaining by Teamsters Union, Local 763. Under a collective bargaining agreement between the employer and Local 763, the established work schedule for the dispatch center was five eight-hour shifts for a 40 hour week.

Prior to this controversy, two communication officers, Shannon Millar and Janice Swobody, shared a full-time dispatch position under a job share arrangement with the employer. The record shows that Millar initiated a job share request to the employer's civil service commission on November 6, 1989. That was done via the chain of command, which included Millar's immediate supervisor, Debra Irvin,[1] the dispatch center supervisor, Sergeant Dennis L. Peterson,[2] Police Chief Robert L. Dyer, and City Administrator John Garner. Millar informed the employer officials that there was another dispatcher who was interested in a part-time arrangement. and stated that she found working full-time a strain on her family situation with three young children still at home. On February 14, 1990, Chief Dyer informed Mayor Rita Matheny that the city council had approved Millar's request for job share, and asked the mayor to approve Millar's change to a part-time status on March 1, 1990.

On March 7, 1990 Personnel Technician Charlene Byde advised Police Officer Jarl Gunderson, who was a shop steward for Local 763, that

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[1] Irvin was also a member of the bargaining unit represented by Teamsters Local 763.

[2] The record shows that Peterson was later promoted to lieutenant, and that he was appointed as supervisor of the dispatch center on two different occasions.

the employer wanted a statement that the union had no objections to the change of Millar's schedule to part-time status. Byde stated that Millar's benefits would change.[3] Although Local 763 Business Agent John Komar testified in this proceeding that Byde had erroneously interpreted the provisions of the collective bargaining agreement then in effect, the job-sharing did go into effect.

The record shows that the two job-sharing communication officers worked full-time schedules on occasion, at the convenience of the employer.[4] Both Millar and Swobody testified that they felt "badgered" by supervisors to work full-time.

On December 7, 1994, the Marysville Police Officer's Association (MPOA) was certified as exclusive bargaining representative of the dispatch center employees, displacing Teamsters Local 763.[5] The employer and the MPOA began to negotiate a collective bargaining agreement shortly thereafter. As of the date of the hearing in this controversy, the parties had not arrived at an agreement.

On January 19, 1995, Police Chief Dyer sent similarly-worded letters to Millar and Swobody, as follows:

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[3] Byde determined that Millar would only receive medical benefits for herself, that she would earn no retirement credit, and that her union dues would be reduced to one-half.

[4] On June 17, 1992, Sergeant Peterson informed City Administrator Garner that Millar and Swobody had reluctantly agreed to work full-time during the summer months of July and August to cover vacations and training of new hires. Peterson recommended that they receive full benefits for the two months. On July 17, 1992, Garner approved the request and asked Millar and Swobody to contact Byde to discuss her benefits. Garner apologized for the inconvenience to them and their families.

[5] City of Marysville, Decision 4854-A, 4855-A and 4856-A (PECB, 1994).

> It was with a great deal of thought that the decision was made to dissolve the Jobshare position which you now hold with Janis, enabling you both to work part time. This was not an easy decision but I feel that it will be in the best interest of the department to eliminate the Jobshare position and open up two full time positions. The two full time positions belong to you and Janis if you so choose.
>
> I know this won't be an easy decision for you and your family to make but please let me know your intentions by January 31, 1995. The two full time positions will go in effect March 01, 1995. ...

In a January 26, 1995 letter to Chief Dyer, MPOA Attorney Garvey asserted that the proposed change in practice with respect to the elimination of the job share arrangement was an unfair labor practice. Garvey informed Dyer that Millar and Swobody were under no obligation to accept full-time employment until such time as the change had been negotiated. Garvey noted that the employer and the MPOA were in negotiations on a collective bargaining agreement, and that the union would be willing to discuss the change at the negotiation sessions. The MPOA asked the chief to maintain the status quo until the matter could be bargained.

On February 10, 1995, the employer's labor relations consultant, Robert R. Braun, responded on behalf of the employer. Braun took the position that:

> Your letter of January 26, 1995 is incorrect in many respects. The current terms and conditions of employment permit the Police Chief to determine, among other things, his need for staffing. The determination as to the number of part time employees necessary for the efficient operation of the Department, [sic] rests in the hands of the Police Chief.
>
> In order to clarify the memorandums dated January 19, 1995 from the Chief be advised that **the terminology used therein is one of**

> **convenience not what was referenced in the agreed upon terms and conditions of employment.** The affected employees are each part time employees. **There is no such thing as a "job share" position**, technically speaking, within City employment. The term "Job Share" is only a phrase of common usage for two consecutive part time positions scheduled together. **Two part time employees were appropriately scheduled so that the City could avoid the employment of a full time person.** The original request was made by a Dispatcher. Staffing conditions beyond the control of the Chief have now changed necessitating the reconfiguration of part time and full time positions within the dispatch center. The Chief has exercised his prerogative and determined that in order to meet the staffing needs of the department it will be necessary to have two full time positions added to the current full time complement and no part time positions within the dispatching operations.
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> **As a matter of courtesy to the Guild**, the city is prepared to discuss with you the matters about which you may have concerns, however, **such discussions should not be considered to be collective bargaining as the City does not consider any obligation to exist regarding its decision** to increase its complement of full time positions. ...
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> [Emphasis by **bold** supplied.]

On February 23, 1995, Dyer informed Millar and Swobody that the job share positions would be eliminated March 1, 1995. On February 25, 1995, Irvin informed all dispatchers that the shift schedules for dispatchers would need to be rebid, because of Millar and Swobody taking full-time positions. The rebid process caused a delay in the elimination of the job share positions to April 1, 1995.

POSITIONS OF THE PARTIES

The union argues that work hours are a mandatory subject of bargaining, that the job share arrangement was a past practice, and

that the employer was not entitled to unilaterally change that practice. The union contends that the offer of "courtesy" discussions, and a brief discussion with the employer's representative after a formal collective bargaining session, do not constitute "bargaining". It notes that discussion did not deal with the decision to end the job share arrangement, but only with the shift bidding effects of the decision. The union contends the decision to end the job share arrangement was presented to it by the employer as a fait accompli.

The employer argues that there is no part-time "job share" classification or past practice, because the arrangement was made as a result of personal requests and accommodation rather than through negotiations with the Teamsters Union. The employer maintains that the terms and conditions of work under the expired agreement with the former union reflect the status quo while the first contract is being negotiated with the successor union. The employer claims that the status quo consists of a work schedule of 40 hours in five days, so that the police chief did not change the status quo when he ended the job share arrangement and scheduled the two communication officers full-time.

DISCUSSION

Past Practice

The 911 Dispatch Center was generally staffed by communication officers who worked eight-hour shifts, five days per week. That was the work schedule set forth in the collective bargaining agreement between the employer and the previous exclusive bargaining representative of these employees.

The employer's argument that the job share arrangement involving Millar and Swobody was a temporary trial arrangement not provided

for in the collective bargaining agreement is not supported by the evidence. In fact, the evidence indicates that the job share arrangement was neither temporary nor informal.

The two communication officers approached their supervisors with a written request to share a full-time position, with one communication officer working two shifts and the other employee working the remaining three shifts each work week. The request was processed through the chain of command, and was approved by the city council, the mayor and civil service commission to be effective on March 1, 1990. In direct contradiction of the employer's present claim that the job sharing was outside of the collective bargaining process, it is documented that the employer asked Local 763 for assurances that it had no objections to the change to a part-time status.

The employer's formal actions approving the change from full-time status to part-time status were never characterized as "temporary", or as being on a "trial basis". Moreover, the two dispatchers had shared the full-time position for five years when they were informed that the employer required them to work full-time. These actions clearly support a conclusion that the job share arrangement had the status of a past practice.

Duty to Bargain

The duty to bargain defined in RCW 41.56.030(4) and enforced in RCW 41.56.140(4) obligates an employer to maintain the status quo on all wages, hours and working conditions of its union-represented employees, unless notice has been given the exclusive bargaining representative and an opportunity has been provided for bargaining prior to any change, and bargaining is conducted in good faith. South Kitsap School District, Decision 472 (PECB, 1978).

In this case, the employer interprets the status quo as being reflected in its expired collective bargaining agreement with the

previous exclusive bargaining representative. According to the employer, that contract provided for a full-time schedule and thus permitted the employer to require Swobody and Millar to work full-time. The employer seems to interpret the "five-day-40 hour-work week" provision of the expired Teamster contract as a waiver, but that ignores both the expiration of that contract and the change of bargaining representatives.

To the extent the employer suggests that the expired contract provided any authority for the police chief to change the part-time positions to full-time positions, Commission precedent clearly holds that waivers of statutory bargaining rights expire with the certification of a new exclusive bargaining representative. See: City of Bremerton, Decision 2733 (PECB, 1987), where a police chief relied, in similar circumstances, on a waiver contained in an expired collective bargaining agreement between the employer and a former exclusive bargaining representative as a basis for changing a fixed shift schedule into a rotating shift schedule. In this controversy, as in City of Bremerton, the unilateral change was exacerbated by the fact that the employer was bargaining a first agreement with the newly-certified organization at the time.

The employer's claim that it did, in fact, bargain this issue when the parties had a discussion on job sharing after a negotiating session is also unsupported by the record. It is clear from the employer's February 10, 1995 letter that a discussion of the change in the part-time work schedule was being tolerated only as a "courtesy", and not as negotiations on the decision to end the job-sharing arrangement. It is also clear, from the terms of that letter, that the union was presented with a fait accompli. Moreover, the record also shows that the employer's actual purpose in the discussion held after a bargaining session was to discuss the dislocation and ripple effect that the rebidding of shifts would cause, rather than the decision to change the past practice on shift arrangements for Millar and Swobody.

The "Staffing" Decision

There was evidence presented at the hearing in this matter that implied the employer had a business reason to end the job share arrangement. Although the employer did not pursue this as a defense to the unilateral change, the Examiner feels compelled to comment that what occurred here did not rise to the level of a "staffing" decision of the type involved in City of Centralia, Decision 5282 (PECB, September 29, 1995).

Dispatch center head Peterson testified that the job share arrangement was not working out, because the part-time communication officers felt left out of information that was passed from shift to shift. There is also mention of complaints by the part-time officers about the lack of benefits, and a lack of overtime opportunities, but it is clear that those were not brought to the employer in bargaining by either Local 763 or the MPOA.

The record indicates that the employer effectively increased its workforce by one full-time position. That change of staffing level is not at issue in this case. What is at issue is that the employer's decision to terminate the job share arrangement forced the part-time employees to choose between full-time work or loss of their jobs. The record also shows that the employer was constantly attempting to cover absences of other officers by urging Millar and Swobody to work additional hours. It is clear that the job share arrangement could have continued while the employer achieved its staffing increase by hiring one more full-time employee. If there was a lack of communication between shifts and the need to cover absences was, indeed, the energy behind the employer's desire to end the job share arrangement, those matters would seem to be amenable to solving by negotiation. A negotiated settlement could even have accommodated the employees' desire for increased benefits, if paired with the employer's desire for coverage. Thus, the employer's interest in "staffing" in this case does not

predominate over the interests of its employees in their wages, hours and working conditions.

Conclusions

The job share arrangement was a past practice recognized by the employer and both unions. The arrangement was part of the status quo, so that the employer was obligated to bargain a change of the hours. The employer made and implemented its decision without notice to the union or bargaining, and so committed an unfair labor practice in violation of RCW 41.56.140(4).

Remedy

The union argues that the communication officers have suffered great inconvenience and hardship from the change in schedule which caused family dislocation and child care expense. The union asks that the award include overtime payment for the extra hours that they were forced to work.

The payment of overtime for hours worked beyond an employee's normal schedule is considered a penalty, in order to discourage employers from encroaching on employees' personal lives. While the union's rationale has some logic, and the personal and family difficulties forced by the change of schedule are apparent, it would be not be appropriate to assess overtime penalty here. The remedy for an unfair labor violation is a return to the status quo. Since the affected communication officers were paid for full-time work, it would be appropriate to return the two communication officers to their previous part-time schedule with the condition that the job share arrangement continue for at least as long as they were forced on the full-time schedule. This time lapse would give the parties a cooling off period and sufficient time to negotiate in good faith on a mutually acceptable change from the status quo.

The union has also asked for the award of attorney fees because of the well settled nature of this case. The Commission has ordered losing unfair labor practice respondents to pay the attorney fees of successful complainants, but only in extraordinary circumstances. The Examiner does not believe the facts of this controversy warrant an award of attorney fees. Because the employer thought it was maintaining the status quo, its error in refusing to bargain cannot be characterized as an aggravated violation warranting the award of attorney fees. See: Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), and City of Mercer Island, Decision 1026-B (PECB, 1982).

FINDINGS OF FACT

1. The City of Marysville is a public employer within the meaning of RCW 41.56.030(1).

2. Marysville Police Officer's Association, a bargaining representative within the meaning of RCW 41.56.030(5), was certified on December 7, 1994, as exclusive bargaining representative of non-supervisory communication officers employed by the City of Marysville.

3. Prior to December 7, 1994, non-supervisory communication officers employed by the City of Marysville were represented for the purposes of collective bargaining by Teamsters Union, Local 763.

4. In 1989, the City of Marysville, with the knowledge and consent of Teamsters Local 763, authorized employees Janis Swobody and Shannon Millar to share a full-time position under a job share arrangement, by which each officer worked part-time. That arrangement excepted the participating employees from the normal full-time schedule of five shifts of eight hours each per week. The job share arrangement continued for

five years, and remained in effect as a past practice when the Marysville Police Officer's Association was certified as exclusive bargaining representative of the employees involved.

5. On March 1, 1995, the City of Marysville unilaterally canceled the job share arrangement for employees represented by the Marysville Police Officer's Association, and forced Swobody and Millar to choose between accepting full-time employment or suffering termination of their employment.

6. The City of Marysville refused to bargain the cancellation of the job share arrangement, in response to a timely demand for bargaining made by the exclusive bargaining representative.

CONCLUSIONS OF LAW

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

2. Hours of work and the job share arrangement are mandatory subjects of bargaining under RCW 41.56.030(4), and there was no operative waiver by the Marysville Police Officer's Association of its bargaining rights under that statute.

3. By unilaterally implementing a change involving a mandatory subject of collective bargaining and by failing and refusing to bargain in response to the demand for bargaining made by the Marysville Police Officer's Association, the City of Marysville has committed and is committing unfair labor practices within the meaning of RCW 41.56.140(4) and (1).

ORDER

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

1. CEASE AND DESIST from:

   a. Failing and refusing to bargain in good faith with the Marysville Police Officer's Association as the exclusive bargaining representative of its communication officer employees, with respect to all wages, hours and working conditions and specifically with respect to hours of work and job share arrangements;

   b. 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.

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

   a. Reinstate the hours of work and job share arrangement system in effect among its communication officers prior to April 1, 1995, especially as it relates to Janis Swobody and Shannon Millar, by which each officer worked part-time. Said job share arrangements shall remain in effect for not less than the period of time measured from April 1, 1995 to the date respondent complies with this order.

   b. Give notice to and, upon request, bargain collectively in good faith with the Marysville Police Officer's Association prior to implementing any change of wages, hours or working conditions of employees in the certified bargaining unit.

   c. 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.

d. Notify the above-named complainant, 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 complainant with a signed copy of the notice required by the preceding paragraph.

e. 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.

Dated at Olympia, Washington, on the 13th day of October, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM A. LANG, Examiner

This order will be the final order of the agency unless 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, reinstate the hours of work and job share arrangement system in effect among its communication officers prior to April 1, 1995, especially as it relates to Janis Swobody and Shannon Millar, by which each officer worked part-time. Said job share arrangements shall remain in effect for not less than the period of time measured from April 1, 1995 to the date respondent complies with this order.

WE WILL, give notice to and, upon request, bargain collectively in good faith with the Marysville Police Officer's Association prior to implementing any change of wages, hours or working conditions of employees in the certified bargaining unit.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

CITY OF MARYSVILLE

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.