STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE MANAGEMENT ASSOCIATION,	)	CASE NO. 4040-U-82-631
Complainant,	)	DECISION NO. 1667-A - PECB
vs.	)	
CITY OF SEATTLE,	)	DECISION OF COMMISSION
Respondent.	)	

William M. Taylor, Attorney at Law, appeared on behalf of the complainant at hearing: Durning, Webster & Lonnquist, by James H. Webster, Attorney at Law, filed the brief in opposition to the petition for review.

Douglas N. Jewett, City Attorney, by Debra K. Hankins, Assistant City Attorney, appeared on behalf of the complainant at hearing; Gordon J. Campbell, Assistant City Attorney, filed the petition for review and supporting brief.

Examiner Kenneth J. Latsch issued his findings of fact, conclusions of law and order in the above-entitled matter on July 29, 1983, holding that the City of Seattle had committed unfair labor practices within the meaning of RCW 41.56.140(4). The remedial order issued by the examiner required the city to bargain collectively with the Seattle Police Management Association regarding certain modifications of standby procedures and, if necessary, to submit any unresolved dispute for mediation and interest arbitration as provided in RCW 41.56.440, et seq. On August 22, 1983, the city timely filed a petition for review. Both parties filed briefs for consideration by the Commission.

The employer first contends that the management rights and complete agreement clauses contained in the collective bargaining agreement between the parties constituted a waiver of bargaining rights by the association, and permitted the employer to make changes in its standby procedures without fulfilling the customary statutory obligations of giving notice to the exclusive bargaining representative and an opportunity for collective bargaining. Next, the employer contends that the union's inaction on a previous occasion when standby procedures were altered, and its failure to secure contract language on the subject after raising the issue at the

bargaining table during negotiations for the collective bargaining agreement, evidence a waiver by the union of its right to bargain over the issue. Next, the city urges that the modifications which it made were consistent with past practice. Finally, based on the premise that the dispute resolution procedures contained in RCW 41.56.440 et seq. are available only for disputes concerning the negotiation of an entire collective bargaining agreement, the city contends that the Examiner exceeded his authority by extending his bargaining order to include submission of any unresolved issues for determination through the statutory interest arbitration procedure.

The association's argument starts from the premise that the city has not disputed that standby duty is a mandatory subject of collective bargaining, and that the city has not disputed its failure to negotiate with the association prior to implementing changes of the standby duty schedule. Pointing to the fact that "standby" is not specifically mentioned in the management rights clause of the collective bargaining agreement, the association contends that the contract does not contain an express and unmistakeable waiver of bargaining rights on the part of the association. The association acknowledges that the subject of standby was discussed during the 1980-81 contract negotiations, but differs from the city on the effect of those negotiations. In the association's view, the absence of agreement on its proposal to implement a pay premium for standby duty merely constituted acknowledgment of the standby arrangements then in effect, and did not constitute a waiver of bargaining rights as to future changes of the standby procedure, or particularly as to the expansion of the standby procedure to affect significantly more members of the bargaining unit than had ever before been affected. The association contends that the change of standby policy constituted a significant change in conditions of employment for members of its bargaining unit. Pointing to the legislative policy on which the statutory interest arbitration procedure is based, and to the absence of definitive language limiting interest arbitration to situations in which a complete collective bargaining agreement is in question, and to federal and state precedents which make no distinction between mid-term or whole-contract bargaining obligations, the association supports the examiner's remedial order as a logical and necessary outgrowth of the bargaining obligation.

The Commission finds no waiver by contract. When the management rights and complete agreement clauses were negotiated, the standby schedule involved only four precinct captains, a major and an assistant chief. The history of negotiations and the contractual provisions relied upon by the employer could properly be relied upon to support preservation of the status quo at the time of the agreement. We will leave unanswered the question of whether the history of bargaining and the contract provisions protected the city's implementation of relatively minor changes in the standby schedule that

became effective in May, 1981. The changes of the standby duty system implemented in February, 1982 were developed long after the negotiations relied upon by the city were concluded. They were markedly different from anything in existence or discussed during negotiations which took place a year before the details were announced by the city. We find the city's reliance on Jacobs Manufacturing Co., 94 NLRB 1214, 1221 (1951) to be misplaced. Jacobs holds that agreement on a management rights clause does not relieve the employer of the duty to bargain subjects which were neither discussed nor embodied in the contract. The city maintains that the topic of standby was discussed in negotiations, thereby meeting the Jacobs waiver test. The Commission looks beyond the name assigned to the topic and disagrees. The discussion during the negotiations centered on compensation for employees working on the then-current standby duty schedule. Expansion of the standby schedule to include all captains is a separate matter that was neither discussed nor embodied in any of the proposals made in negotiations.

The same reasoning applicable to the waiver by contract argument also defeats the city's contention that, because the association did not ask to bargain each time the city implemented a change of the standby duty schedule, it waived its bargaining rights. The changes made prior to February, 1982, affected only a small portion of the bargaining unit represented by the association. The February, 1982 changes were substantially different from prior standby schedules in regards to who was impacted. We find City of Yakima, Decision 1124-A (PECB, 1981), which is relied upon by the city, to be inapposite. The union in Yakima did not make a timely request for bargaining on an issue, and thereby waived its bargaining rights by inaction. In the case at hand, the examiner found no violation with respect to changes made prior to February, 1982, and there has been no petition for review from the association. There, the similarity ends. The association made a timely request for bargaining in response to the December, 1981 announcement of a significant expansion of the standby duty procedure, and it continued to press its claim of a right to negotiate after being rebuffed by the city. The union's inaction in response to the earlier minor changes of standby arrangements cannot be taken to be a waiver for all time of bargaining rights on the subject, and particularly cannot be taken to be a waiver of bargaining rights as to a significantly different system than that which was involved in any previous waiver by inaction.

We concur with the examiner's remedial order which, in addition to the customary "bargaining order" issued in connection with a violation of RCW 41.56.140(4), compels the city to bring any bargaining dispute to a conclusion under the procedures specified in RCW 41.56.440, et seq. Over the last 25 years, the collective bargaining process has been imported into

the public sector from the private sector, with much private sector law and practice following. One of relatively few significant differences between public sector and private sector bargaining environments is the absence in the public sector (at least in the State of Washington) of a statutorily protected right of public employees to strike or of public employers to lock out their employees in connection with a labor dispute. Nevertheless, strikes and lockouts have occurred from time to time in the public sector in the state. In 1973, the legislature, expressing concern (now codified in RCW 41.56.430) that uninterrupted and dedicated service of certain types of public employees is vital to the welfare and safety of the public, imposed for those types of public employees impasse procedures which end in interest arbitration and prescribed penalties for strikes. The employees involved in the case at hand are "uniformed personnel", the mid-management corps of the police department in the state's largest city, and are covered by the interest arbitration provisions of the statute. There was and is no collective bargaining agreement (or waiver of bargaining rights) between the association and the city on the subject of standby duty procedures, because of the city's unlawful refusal to bargain on that subject in 1982.

The timetable for negotiations, mediation and interest arbitration which is found in RCW 41.56.440 and RCW 41.56.450 is clearly more attuned to bargaining of an entire collective bargaining agreement than to mid-term negotiations on individual issues, but we are unable to conclude from the context of that timetable in the statute that the legislature intended to preclude interest arbitration of individual issues in appropriate circumstances. First, the timetable set forth in the statute establishes deadlines, but does not preclude an earlier start than that specified. Second, these parties have, in fact, already adapted the statutory timetable to their own local practice. The timetable set forth in the statute is in keeping with the practices of most employers of and organizations representing uniformed personnel, who schedule their collective bargaining agreements to run with the January 1/December 31 fiscal years of local government employers. The parties to this case signed a contract expiring on August 31st. The docket records of the Commission indicate that the City of Seattle and unions representing its employees generally, deviate from the norm, such that contract expiration is set for August 31st rather than December 31st. Third, in view of the public policy stated by the legislature, it would be illogical and inconsistent with the stated legislative purposes to preclude application of RCW 41.56.430, et seq. absent clear direction in the statute to do so. We thus interpret the statute as directory for the normal situation rather than as exclusionary of other situations.

We find additional support for this interpretation in RCW 41.56.490 and RCW 41.56.480. We understand the message to be that the legislature does not

want strikes by uniformed personnel. The prohibition and fines made applicable to "uniformed personnel" strikes in RCW 41.56.490 are without distinction as to "contract renewal", "mid-term negotiations" or "first contract" situations. Similarly, the right of either party or of the Commission on its own motion to seek a court order compelling interest arbitration (RCW 41.56.480) is without distinction as to the nature of the underlying negotiations.

When taken together, the duty to bargain imposed on both union and management by RCW 41.56.030(4) and the provisions of RCW 41.56.470 also dictate the conclusion that interest arbitration is applicable in the event of any impasse in negotiations. The duty to bargain normally requires that an employer bargain to agreement or to impasse prior to implementing changes of mandatory subjects of collective bargaining. In the absence of interest arbitration, private sector law and practice recognize the right (and exercise) of employees to strike in response to a unilaterally implemented change. If the interest arbitration procedures were to be made unavailable based on a restrictive reading of the time lines set forth in the statute, an employer would be in a position to thwart the collective bargaining process as to statutorily required mid-term negotiations on matters not covered by a collective bargaining agreement, as to negotiations of an initial collective bargaining agreement for any union certified during the last half of any calendar year, or as to negotiations conducted pursuant to a remedial order in an unfair labor practice case. The balance of power would be tipped in favor of the employer by the provisions of RCW 41.56.490, which clearly preclude the alternative of economic action which would be available to private sector employees.

Finally, the arguments advanced by the city logically lead to a situation which would be more burdensome on employers than submission of unresolved negotiating issues to mediation and, if an impasse is reached, to interest arbitration. If the timetable set forth in the statute is to be taken as exclusionary, it would have to be applied both ways. But many mid-term bargaining situations arise because an employer finds it necessary or desirable to make changes on mandatory subjects of bargaining not covered in either the negotiations for or terms of an existing collective bargaining agreement. If an employer has the right to raise such matters and have them negotiated, is it logical or reasonable to altogether preclude the possibility that the parties may in good faith arrive at an impasse? An employer with a pressing need to make a mid-term change should not be held off until the next budget cycle. Rather, the procedures of negotiations, mediation and, if necessary, interest arbitration must be made available in the event of an impasse in good faith negotiations on a mid-term bargaining dispute so that (if the interest arbitration panel concurs with the employer's position) it can be freed of the "maintain status quo" obligations imposed by RCW 41.56.030(4) in the same manner that an employer seeking

changes during negotiations for a contract renewal can (if the interest arbitration panel concurs with the employer's position) be freed of onerous provisions of the previous contract.

ORDER

1. The examiner's findings of fact are affirmed and adopted as the findings of fact of the Commission.

2. The examiner's conclusions of law are amended to read as follows:

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

   B. The management rights clause and complete agreement clause contained in the collective bargaining agreement in effect between the parties on February 22, 1982 did not constitute a waiver of bargaining rights conferred by RCW 41.56.030(4) as to the subject of standby duty as modified by the City of Seattle effective February 22, 1982, so that the City of Seattle was under a continuing duty to bargain as to such changes.

   C. The conduct of the Seattle Police Management Association during negotiations in 1980 and on previous occasions when minor adjustments of standby duty practices were implemented by the City of Seattle did not constitute a waiver by the association of the bargaining rights conferred on it by RCW 41.56.030(4) as to the subject of standby duty as modified by the City of Seattle effective February 22, 1982, so that the City of Seattle was under a continuing duty to bargain as to such changes.

   D. The past practices of the Seattle Police Department do not include standby duty schedules of the nature implemented by the City of Seattle on February 22, 1982, so that the City of Seattle was under a continuing duty to bargain as to such changes.

   E. By failing to give notice to and an opportunity to bargain with Seattle Police Management Association regarding the changes of standby duty procedures announced on December 31, 1981, and by implementing changes of standby duty procedures without having bargained and submitted an unresolved dispute for interest arbitration as provided in RCW 41.56.440, et seq. and WAC 391-55-200, et seq., the City of Seattle has refused to bargain and has violated RCW 41.56.140(4) and (1).

3. The examiner's order is affirmed and adopted as the order of the Commission.

4. The City of Seattle shall notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time shall provide the Executive Director with a signed copy of the notice required by the examiner's order.

ISSUED at Olympia, Washington, this 28th day of February, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Mary Ellen Krug

MARY ELLEN KRUG, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make unilateral modifications of wages, hours or conditions of employment of supervisory law enforcement personnel without first giving notice to and bargaining collectively with Seattle Police Management Association.

WE WILL negotiate in good faith with Seattle Police Management Association concerning the effects of a modification in standby duty schedules.

DATED:_____

CITY OF SEATTLE

BY:_____
AUTHORIZED REPRESENTATIVE

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

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.