STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BREMERTON PATROLMAN'S ASSOCIATION, Complainant,	)	CASE NO. 6568-U-86-1301
vs.	)	DECISION 2733-A - PECB
CITY OF BREMERTON, Respondent.	)	DECISION OF COMMISSION

Aitchison & Moore, Labor Consultants, by Peter A. Ravella, appeared on behalf of the complainant.

Ian R. Sievers, City Attorney, appeared on behalf of the respondent.

Examiner William A. Lang issued his findings of fact, conclusions of law and order in the above-entitled matter on July 20, 1987. The Examiner ruled that the City of Bremerton committed an unfair labor practice, in violation of RCW 41.56.140(4), by unilaterally changing the shift rotation system for police officers. The Examiner issued a remedial order, and also awarded attorneys fees against the city. The city has petitioned for review by the Commission.

The material facts are essentially undisputed, and are set out in detail in the Examiner's decision. The Commission has selected certain key facts to be reiterated here:

The City of Bremerton and General Teamsters Local 589 were parties to a collective bargaining agreement covering Bremerton's police officers. It expired on December 31, 1985.

The Bremerton Patrolman's Association succeeded Teamsters Local 589 as exclusive bargaining representative of Bremerton's police officers, as of January 10, 1986.[1] The city and the association commenced bargaining in March of 1986 for a new collective bargaining agreement.

In late May, 1986, while there was no collective bargaining agreement in effect, the city announced, without prior negotiation, that a new "rotating" shift schedule would replace the "fixed" shift schedule which had been in existence for the previous 18 months. The city also announced that the hours of each shift would change. As a result of employee protest, the city rescinded the announced change on May 22, 1986. On June 17, 1986, the city changed its position again and, still without negotiations, announced that a rotating shift schedule would be in place on July 21, 1986.

On June 20, 1986, the union demanded bargaining in a letter to the city, and requested that the employer not implement the change. The employer did not respond to the union's request for bargaining, and it implemented the rotating shift schedule on July 21, 1986.

The union again requested negotiations on August 22, 1986. Six days later, the city replied to the union stating that management had the right to unilaterally change shift hours and schedules.

The parties were able to negotiate a new contract on September 3, 1987 with effective dates of "January 1, 1986" (sic) to June 30, 1987. These unfair labor practice proceedings were initiated by the union on September 22, 1986.

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[1] City of Bremerton, Decision 2371 (PECB, 1986).

The city attempted to rely on past (pre-1986) waivers of bargaining rights in its argument before the Examiner.[2] As a historical matter, hours and shift rotations have occurred every year or two since 1964, apparently without negotiations. In February, 1985, the city experimented with a fixed shift schedule, which was to be evaluated after one year. The affected employees were notified at the time the fixed shift experiment began, that a reassessment would take place.

The city's brief in support of its petition for review presents two separate lines of argument. They are:

1. The implementation of the rotating shift schedule was not a unilateral change in terms and conditions of employment, for the reason that the fixed shift schedule was experimental and temporary, with a pre-announced plan for reassessment. Thus, the city asserts that the return to the rotating shift schedule was simply the re-establishment of what had been the status quo ante.

2. The association did not make a timely demand for negotiation. Since the demand was made after the change was implemented, the city contends that it was too late. The city additionally argues that the association waived its rights by not raising the shift change issue at the negotiating table, despite opportunity to do so during four months of negotiations.

The city also challenges the imposition of attorneys' fees.

The city's arguments are not only without merit, but are raised for the first time in the proceedings on the petition for

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2 The employer's arguments were received orally at the hearing; it did not submit a brief.

review. We have previously held that we will not consider issues raised for the first time on review. City of Dayton, Decision 1990-A (PECB, 1984). Because this case involves the imposition of an extraordinary remedy, and because the employer does not fully appreciate its basic bargaining obligations, we nevertheless choose to comment briefly on the issues raised.

The city's theory that the status quo is a rotating shift, (because the fixed shift was temporary and experimental), does not reflect the facts. The fixed schedule began long before the contract between the city and the prior exclusive bargaining representative expired, and had continued for some 18 months. Commission precedent does not support application of the statute of limitations or "waiver" principles to the announcement of a change many months before its implementation. City of Dayton, supra.

Regardless of its earlier intentions, once a representation petition was in fact filed, the city had a duty under the law to maintain the wages, hours and working conditions which existed at that time.

Further, the city's theory ignores the fundamental premise that, regardless of what is or is not the "status quo," shift scheduling is a mandatory subject of collective bargaining. City of Yakima, Decision 767, 767-A (PECB, 1980); City of Auburn, Decision 901 (PECB, 1980). When there is no contract in effect, this means that the employer must give notice of any proposed change and, at the union's request, must bargain the matter. This is true even if scheduling rights were specifically ceded to the employer in the last expired contract, or even in the past twenty contracts. The city failed to give the required notice and refused to negotiate this mandatory subject of bargaining when asked, and so committed a "refusal to

bargain" violation under RCW 41.56.140(4) apart from the unilateral change which it implemented. Since this is a bargaining unit of "uniformed personnel" for which all unilateral changes are prohibited by RCW 41.56.470 and City of Seattle, Decision 1667-A (PECB, 1984), the unilateral change actually implemented by the city only compounded its violation of its obligations under the law.

The city's arguments based on "timeliness of the request" and "waiver" are also without merit. As we have previously held, a waiver of statutorily conferred bargaining rights will not be easily inferred, and must be proven by clear and convincing evidence. Royal School District, Decision 1419-A (PECB, 1982). The common thread among our decisions on union waivers by "inaction" is that the union must not "sit on its rights" when an opportunity for bargaining arises. It must avail itself of reasonable opportunities to notify management that it disagrees with a change proposed by management and desires to bargain about the matter. Again, notice is key. We do not require a union to make gestures which, in all likelihood would be ineffective after a change has been announced as a fait accompli. Nor is a union required to take action which would be premature.

At the time the city put the "fixed" shift schedule into effect (February, 1985), the city may have done nothing with which the previous union found a need to disagree. Both sides of that bargaining relationship were evidently happy to try out the fixed shift schedule. Both sides may even have agreed to the city making a later reassessment of the shift schedule (which it has a right to do anyway). The newly certified exclusive bargaining representative was aggrieved only when the city's reassessment was translated into action, i.e., a decision made to implement a "rotating" shift schedule. Within a matter of

days, the city rescinded its decision, making it unnecessary for the new union to pursue the matter. A month later, the city changed its course again, announcing, as an accomplished fact, that the rotating shift schedule would be implemented on a fixed date. On that occasion, the union responded within three days with a demand for bargaining. Under these circumstances, we can scarcely conceive of how the union's request could have been more timely. After receiving no response from the city, the union reiterated its demand for bargaining. This time, the city replied, stating that it would not negotiate the subject because it believed it to be a matter of management prerogative. In the face of such a response, the union could reasonably conclude that further attempts to negotiate would be futile. Thus, we find no facts in evidence to support a conclusion that the union's bargaining requests were untimely or an inference that its bargaining rights were waived.

We turn now to the award of attorneys' fees. An award of attorneys' fees is an extraordinary remedy which is appropriate where necessary to effectuate the order of the Commission, or where defenses are frivolous and without merit. Lewis County v. PERC, 31 Wn.App 853 (Division II, 1982). The standard is not "persistent and inherently illegal activity" as the city maintains. We agree with the Examiner that the Lewis County criteria are met in this case, and we uphold his award of attorneys' fees to the union. The extraordinary remedy also extends to this decision on review, in which the defenses raised by the city were possibly even more frivolous than those raised before the Examiner.

ORDER

1. The findings of fact and conclusions of law issued in the above-entitled matter by Examiner William A. Lang are affirmed and adopted as the findings of fact and con-

clusions of law of the Public Employment Relations Commission.

2. The City of Bremerton, its officers and agents, shall immediately:

A. Cease and desist from failing and refusing to bargain in good faith with Bremerton Patrolman's Association as the exclusive bargaining representative of its employees in the certified bargaining unit, with respect to all wages, hours and working conditions and specifically with respect to hours of work and shift scheduling procedures.

B. Take the following action to remedy the unfair labor practices and effectuate the policies of the Public Employees Collective Bargaining Act:

1) Reinstate the hours of work and fixed shift schedule system in effect prior to July 20, 1986.

2) Give notice to and, upon request, bargain collectively in good faith with the Bremerton Patrolman's Association prior to implementing any change of wages, hours or working conditions of employees in the certified bargaining unit; and, in the event that resolution of any matter is not achieved through negotiations, submit the dispute for mediation and, if necessary, for interest arbitration for determination as required by RCW 41.56.430, et seq.

3) Reimburse the Bremerton Patrolman's Association for its costs and reasonable attorneys' fees incurred in the prosecution of this case before

the Examiner and in the response to the petition for review, upon presentation of a sworn and itemized statement thereof.

4) Notify all employees by posting, in conspicuous places on the employer's premises where notices to bargaining unit 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 City of Bremerton and shall be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Bremerton to insure that said notices are not removed, altered, defaced or covered by other material.

5) 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 provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 20th day of November, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner