STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2916, Complainant, vs. SPOKANE COUNTY FIRE PROTECTION DISTRICT NO. 9, Respondent.	)	CASE 7300-U-88-1506 DECISION 3661 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Barry E. Ryan, Attorney at Law, appeared on behalf of complainant.

Heller, Ehrman, White & McAuliffe, by Otto G. Klein III, Attorney at Law, appeared on behalf of the employer.

On March 10, 1988, the International Association of Fire Fighters, Local 2916, filed a complaint charging unfair labor practices with the Public Employment Relations Commission. It alleged that Spokane County Fire Protection District No. 9 violated RCW 41.56-.140(1) and (4), by unilaterally implementing a training program and minimum performance standards for employees in a bargaining unit represented by the union. A hearing was held on October 18, 1989, before Examiner Walter M. Stuteville. The parties filed post-hearing briefs.

BACKGROUND

Spokane County Fire Protection District No. 9 covers an area of approximately 140 square miles and has a population of about 35,000. Seven fire stations located throughout the service area are operated by 12 paid fire fighters, 4 dispatchers and about 100

volunteer fire fighters. Robert Anderson has been chief of the fire district since 1987.

International Association of Fire Fighters, Local 2916, is the exclusive bargaining representative of the employer's paid fire fighters up to and including the rank of "captain". At all times pertinent to this case, Rick Oliver was president of the local union and Mike VanHeel was its vice-president. Both were members of the union's negotiating team.

Among the specific responsibilities given to Anderson upon his being hired by the district's elected commissioners was to upgrade and improve the training program for all of the employer's fire fighting personnel. Anderson had identified several problems in the training programs then in existence, including: Deficiencies in training record-keeping; different programs for the paid fire fighters and the volunteers; and lack of direction and professionalism in the training program. Soon after he was appointed, Anderson appointed a long-time employee of the fire district, Joe Greene, as deputy chief in charge of training. Greene was made directly responsible for improving the training program.

Under Anderson's general direction, Greene began implementing a training program geared toward National Fire Protection Association standards. That program included audio-visual aids, training manuals, performance standards and training-records materials obtained from the National Fire Academy. Anderson testified that the performance standards were just in a "developmental" stage that he saw as taking at least two years. According to both Anderson and Greene, the record-keeping, training materials and performance standards were in a "trial" period, and disciplinary enforcement would need to be added at some time in the future. They further asserted that no discipline related to training or performance standards had been imposed on any fire fighter employed by District 9 since implementation of the training program in December, 1987.

The collective bargaining agreement between the parties expired December 31, 1988. The parties began negotiations concerning a successor agreement prior to that date. The overall training program and the specific issue of performance standards were discussed by the parties in the context of those negotiations.

The first discussion of the performance standards appears to have occurred during a negotiation session early in 1988, with Oliver, VanHeel and Chief Anderson all involved. Anderson's uncontradicted testimony was that during the meeting Oliver stated the union's opposition to the development and implementation of performance standards. Further, Anderson understood that the union's concern was the discipline that it believed would have to be used to enforce performance standards.

A second discussion on the subject occurred during a negotiations session held on February 4, 1988. At that time, Oliver listed specific concerns that the union had with the proposed performance standards, and with the written and demonstrative tests which were to be coupled with such standards.

The parties held a labor-management meeting on February 18, 1988, according to a provision of their collective bargaining agreement. During that meeting, the employer addressed Oliver's concerns regarding the training program. Anderson reiterated that no performance standards had been adopted, that the employer was soliciting the paid and volunteer fire fighters to assist in the development of standards, and that nothing in the existing program was being maintained in any employee's personnel file or used as a basis for discipline or promotion. Oliver questioned the chief concerning quizzes that were being given to the fire fighters,[1] and

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[1] These were sample tests Greene had obtained from the National Fire Academy. He had asked captains to try them out with their crews, to learn whether tests more specifically suited to the employer's operation were needed.

Anderson explained that Greene had passed along the quizzes as part of the process of developing performance standards. Throughout the meeting the union maintained its opposition to the performance standards.

The complaint filed in the instant case on March 10, 1988 alleged that the employer had unilaterally implemented a new training program, with various effects on employees. The case was held in abeyance for a time at the request of the parties.[2] An amended complaint was filed in October of 1988. The Executive Director's preliminary ruling under WAC 391-45-110 framed the cause of action in terms limited to the "effects", with reference to discipline or other employer action based on the performance standards. The union did not petition for review of that preliminary ruling, or seek expansion of the scope of the proceedings beyond that indicated by the Executive Director.

Prior to the hearing, the employer filed a motion for summary judgment, which was denied by the Examiner.[3]

POSITIONS OF THE PARTIES

The union argues that the employer has implemented a new training program with minimum performance standards, written tests which are to follow training sessions, and cumulative written and practical tests which are to be administered every six months. The tests are alleged to include practices never before used in this bargaining

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[2] Mediation was provided by the Commission in Case 8012-M-89-3143, filed on June 8, 1989 and closed May 1, 1990.

[3] The Examiner again held this case in abeyance after the receipt of the parties' briefs, because a case on point was pending on review before the Commission. Processing of this case was resumed after the Commission issued its decision in Wenatchee School District, Decision 3240-A (PERC, 1990).

unit, such as specific time limits for certain tasks to be performed by bargaining unit members. The union asserts that the entire program gives rise to a mandatory duty to bargain, and that the employer has committed an unfair labor practice by failing to provide the union an opportunity to negotiate the implementation of the new training program. The union claims the employer failed to respond to its inquiries concerning an enforcement procedure for the performance standards included in the training program.

The employer contends that it has not violated its bargaining obligation, because its training program has not yet permanently established performance standards and contains no disciplinary enforcement. It also asserts that, if a duty to bargain exists with respect to the training program, the union has waived its right to bargain performance standards through explicit language in the parties' collective bargaining agreement giving the employer broad authority to unilaterally implement rules and regulations related to the conduct of employees. Finally, the employer requests that the Examiner award attorney's fees to the employer, based upon frivolous arguments and the union's lack of a bona fide belief in the correctness of its charges.

DISCUSSION

The Duty To Bargain

The "scope" of collective bargaining under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is defined by RCW 41.56.030(4) as:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith ... with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions ...

The determination as to when a duty to bargain exists is a question of law and fact for the Commission to decide:

> WAC 391-45-550 COLLECTIVE BARGAINING--POLICY. It is the policy of the commission to promote bilateral collective bargaining negotiations between employers and the exclusive representatives of their employees. Such parties are encouraged to engage in free and open exchange of proposals and positions on all matters coming into the dispute between them. The commission deems the determination as to whether a particular subject is mandatory or nonmandatory to be a question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction. ...

In deciding whether a duty to bargain exists, the Commission initially decides whether the subject directly impacts bargaining unit employees' wages, hours or working conditions. See, Kitsap County Fire District 7, Decision 2872, 2872-A (PECB, 1988) and Lower Snoqualmie Valley School District, Decision 1602 (PECB, 1983). If the subject does not directly involve wages or hours, then the Commission uses a "balance" test which compares the employees' interest in the terms and conditions of their employment against the employer's need to make business judgments. Edmonds School District, Decision 207 (EDUC, 1977).[4]

In City of Richland, Decision 2448-B (PECB, 1989), the Commission stated:

> The delineation between mandatory and permissive subjects has been established to allow represented workers an opportunity to help

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[4] In implementing this balance test, the Examiner in Seattle School District, Decision 2079 (1984), used a "demonstrably adverse affect" standard, thereby giving weight to an employee concern that the impact of a change in working conditions should outweigh the management's need for flexibility.

> determine their compensation, hours and working conditions and to allow management flexibility in directing the operation. ... The Commission continues to hold that employers must offer the opportunity to bargain over the effects of changes. During this bargaining, the union has the opportunity to identify areas that are affected by any change and bargain over the effects in each area.

On appeal of that case, the Supreme Court described the Commission's task in a different manner:

> The Public Employment Relations Commission must balance the extent to which the subject is a personnel matter, such as wages, hours, and working conditions (which are subject to mandatory bargaining under the statute), against the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative.

City of Richland, sub nom. IAFF, Local 1052 v. PERC, 113 Wn.2d 197, 200 (1989).[5]

The "new training program", "performance standards" and "potential for discipline" issues in the instant case are not directly related to "wages" or "hours". As potential "working conditions", they must be evaluated by balancing the employer's needs and the employees' interests.

In Seattle School District, supra, the Examiner dealt with the question of whether time allocation standards were a mandatory subject of bargaining. The Examiner stated in that case:

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[5] The Supreme Court remanded the Richland case to the Commission, for a determination as to whether "minimum manning" was a mandatory subject of bargaining. The Commission, in turn, remanded the case to the Examiner. Prior to any further action on the remand, the case was withdrawn by the complainant.

> The duty to bargain in this area must be balanced against allowing management a sufficient degree of flexibility that it may fashion innovations promoting a more efficient operation. While at the same time considering where an employer does not change its service but changes its operations in delivering the service, the change would constitute a mandatory subject of bargaining if it had a "demonstrably adverse effect" on the job of any worker. Coca Cola Bottling Works, 186 NLRB 142 (1970), Westinghouse Electric Corp., 150 NLRB 136 (1965) and King County, Decision 1957 (PECB, 1984). In Kal-Equip Co., 237 NLRB 194 (1978) the National Labor Relations Board found that the employer had violated the Labor Management Relations Act (LMRA) when it unilaterally changed its production standards. The Board found that, since employees could be reprimanded for poor performance, the changes had more than a minimal impact on the terms and conditions of employment.

Employees were evaluated on how well they conformed to the time allocation standards, and the Examiner found that "poor evaluations could negatively affect an employee's consideration for more promotions or even result in discipline". The time allocation standards were thus found to be a mandatory subject of bargaining.

In Wenatchee School District, supra, the Commission analyzed an employer's decision to convert its kindergarten program from a half-day format to a full-day format. The Commission concluded that the kindergarten program change was not a mandatory subject of bargaining, because the decision concerned curriculum and basic educational policy. But, citing Federal Way School District, Decision 232-A (EDUC, 1977), affirmed WPERR CD-57 (King County Superior Court, 1978), the Commission noted that an employer may have a duty to bargain the effects of a management decision that was not in itself a mandatory subject of bargaining. The Commission held in Wenatchee that the employer had a duty to bargain the effects that the kindergarten program change had on employees' condition of work. City of Richland, supra.

In the instant case, the employer asserts, in essence, that the request for bargaining is premature. It argues that the entire program is developmental and subject to change, and that disciplinary enforcement of the performance standards will not be a part of the program or used until it is in final form. The employer points to the lack of any disciplinary action having been taken or threatened, and its repeated assurances to the union concerning the issue of disciplinary enforcement.

The union asserts that performance standards, per se, should give rise to a duty to bargain, i.e., that performance standards, by their very nature, are a change in working conditions and therefore are a mandatory subject of bargaining. Citing Electri-Flex Co., 238 NLRB 713 (1978), the union argues that the "very prospect of discipline, demotion, or failing to be promoted" should be the standard applied here in judging whether the performance standards being developed are mandatory subjects of bargaining.

The arguments of both parties miss the target. If followed to its logical conclusions, the employer's contention that bargaining should not be required during the "developmental" stages of a change in working conditions would negate the collective bargaining process. What would be left to negotiate if the program has been fully developed and tested -- at least to the employer's satisfaction? What, exactly, would the union bring to the bargaining table except, perhaps, a general rejection of the entire program. The problem with such an approach is obvious, and it falls far short of the obligation to negotiate changes in working conditions that is imposed by Chapter 41.56 RCW. The union is entitled to notice and an opportunity for bargaining prior to the decision being made. It is entitled to influence decisions affecting its members, not merely to react to decisions made by the employer.

But the union's argument also fails. The union cites Tenneco Chemical, 249 NLRB 1176 (1980), and Kal-Equipment Company, 237 NLRB

1234 (1978), for the proposition that the imposition of performance standards as "a departure from past practice" gives rise to a duty to bargain. The facts in the instant case do not fit the cited National Labor Relations Board cases, however. In both of the cited cases, the new work rules were, in fact, being actively enforced by the employer. In Kal-Equipment Company, there was a pattern of warnings and reprimands that linked production standards and employee performance. No such pattern is found in the instant case. Here, the union has continued to fight the establishment, indeed the existence, of any performance standards long after that target had been declared off-limits by the Executive Director's preliminary ruling.[6] Thus, we are limited here to an analysis of whether the employer failed to negotiate the effects of proposed performance standards.[7]

As a rule, any change in working conditions, particularly if it has a continuing effect on organized employees and is not somehow required by "business necessity", must be negotiated. The implementation of new performance standards would clearly have an impact on the working conditions of members of the bargaining unit. The specific intent of such standards is to change or regulate or standardize the way the rank-and-file employee conducts the

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[6] In his preliminary ruling in this case under WAC 391-45-110, the Executive Director did not find a cause of action with respect to a union allegation that the employer had "unilaterally implemented an entirely new training program ...". A cause of action was found to exist only: "To the limited extent that the complaint addresses the effects of the new standards on bargaining effects of the unit employees, a cause of action appears to be present." The preliminary ruling was not appealed by the union.

[7] Even in the absence of the Executive Director's preliminary ruling limiting the issues in this case, the complainant would face a substantial burden. The ability to propose and refine employment standards is an inherent function of management, and the decision to develop employment standards, including performance criteria, is not a mandatory subject of bargaining.

business of a fire department. The effects of the proposed standards on the existing working conditions must be negotiated.

Along with decisions about what service is to be provided (i.e., the "curriculum" in Federal Way or the "program" in Wenatchee), the decision of what level of performance to attain is not, itself, a mandatory subject of collective bargaining. Such a decision is well in line with common business decisions that any prudent employer might make. The effects that the employer's performance standards have on the employees' conditions of work are, however, mandatory subjects of bargaining.

Contract Waiver

The employer defended that, even if the effects of the performance standards must be bargained, the union had contractually waived its statutory bargaining rights to demand such bargaining. In particular, the employer cites Article 5, Section 2 of the parties' collective bargaining agreement:

> The District shall have the right to make such reasonable rules and regulations respecting the conduct of employees not in conflict with this agreement as it may from time to time deem best for the purpose of maintaining order, safety and/or efficient operations.
>
> Any complaint relative to the reasonableness of such rules established after the date hereof or any complaint relative to the discriminatory application thereof may be considered a grievance and subject to the grievance procedure contained in this agreement while in force.

The Examiner observes that the contract language cited by the employer in this case is very general. It reserves for the employer the right to create rules and regulations limited only by

the ambiguous term: "... (for) the purpose of establishing order, safety and/or efficient operations."

The obligation to bargain collectively may be waived by the terms of a collective bargaining agreement, but the Commission has validated contractual waiver arguments only where the contract language is explicit and unambiguous. Kitsap County Fire District No. 7, supra. General "rules and regulations" language such as the parties here negotiated, or "entire agreement" language, or the even more popular "management rights" clause, will not suffice as a waiver of the statutory right to demand bargaining on a specific mandatory subject of bargaining. A waiver of a mandatory subject of bargaining must be made knowingly. City of Pasco, Decision 2603 (PECB, 1987) and City of Kennewick, Decision 482-B (PECB, 1980).

Because of its lack of specificity, the language relied upon by the employer in this case fails as a clear and unmistakable waiver of statutory bargaining rights on a subject that did not exist at the time the contract was signed.

Conclusion

The employer has violated RCW 41.56.140(4), by failing to bargain the effects of its comprehensive training program and performance standards on the employees represented by the union. Contrary to the union's view, however, the Commission's Wenatchee decision makes it clear that the employer was not obligated to bargain to agreement or impasse on the "effects" prior to implementing its training program.

FINDINGS OF FACT

1. Spokane County Fire Protection District No. 9 is a "public employer" within the meaning of RCW 41.56.030(1). At all

times pertinent hereto, Robert Anderson was fire chief and Joe Greene was the deputy fire chief in charge of training.

2. International Association of Fire Fighters, Local 2916, a "bargaining representative" within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of non-supervisory fire fighters employed by Spokane County Fire Protection District No. 9. At all times pertinent hereto, Charles (Rick) Oliver was the president and Mike VanHeel was the vice-president of the local union.

3. In 1988, Deputy Chief Greene began the development of a comprehensive training program which included written and practical tests and performance standards. Disciplinary enforcement of the standards was neither proposed nor implemented.

4. At a contract negotiating meeting held in January of 1988, the union objected to information passed on to bargaining unit employees holding the rank of captain relating to performance standards. The employer explained the developmental nature of the program and that disciplinary enforcement was not a yet a part of the program. The employer did reserve the right to utilize disciplinary enforcement of performance standards at some unspecified future date.

CONCLUSIONS OF LAW

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

2. The decision by the employer to design and field test a comprehensive training program which includes performance

standards is not a mandatory subject of bargaining within the meaning of RCW 41.56.030(4).

3. The effects upon bargaining unit employees of the performance standards described in paragraph 2 of these conclusions of law do impact the working conditions of bargaining unit employees, and are mandatory subjects of collective bargaining within the definition of RCW 41.56.030(4).

4. By failing and refusing to bargain collectively with International Association of Fire Fighters, Local 2916, concerning the effects of the training program and performance standards during their development, Spokane County Fire Protection District No. 9 has refused to bargain with the exclusive bargaining representative of its employees, and so has committed an unfair labor practice under RCW 41.56.140(4).

ORDER

Spokane County Fire Protection District No. 9, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices and effectuate the purposes and policies of Chapter 41.56 RCW:

1. CEASE AND DESIST from:

   a. Refusing to engage in collective bargaining with the exclusive bargaining representative of its employees concerning the effects of changed performance standards on the employees represented by the union.

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their rights

under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

a. Notify the exclusive bargaining representative of its employees that it is prepared to negotiate, at a time and place acceptable to both parties, concerning the effects that the establishment of new performance standards will have on the working conditions of the members of the bargaining unit, and, upon request, bargain collectively in good faith with the exclusive bargaining representative on such matters.

b. Post, in conspicuous places on the employer's premises where notices to its bargaining unit members are customarily posted, copies of the notice attached hereto and marked "Appendix". Such notice shall, after being duly signed by an authorized representative of Spokane County Fire Protection District No. 9, be and remain posted for sixty (60) days. Reasonable steps shall be taken by Spokane County Fire Protection District No. 9, to ensure that said notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainant, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by this Order.

d. 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 herewith, and that the same time provide

the Executive Director with a signed copy of the notice required by this Order.

DATED at Olympia, Washington, this 28th day of December, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

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

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION HAS HELD A HEARING AT WHICH IT WAS DETERMINED THAT WE, THE EMPLOYER, VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND WE HAVE BEEN ORDERED TO POST THIS NOTICE.

WE WILL NOT refuse to bargain collectively with International Association of Fire Fighters, Local 2916, regarding the effects of the establishment of a training program which includes performance standards.

WE WILL NOT interfere with, restrain or coerce our employees in any manner in the free exercise of their rights guaranteed them by the Public Employees' Collective Bargaining Act.

WE WILL, upon request, bargain collectively with International Association of Fire Fighters, Local 2916, regarding the effects of the establishment of a training program which includes performance standards.

SPOKANE FIRE PROTECTION DISTRICT NO. 9

By:_____
Authorized Representative

Dated _____

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) 754-3444.