STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2916, Complainant,	)	CASE 7300-U-88-1506
vs.	)	DECISION 3661-A - PECB
SPOKANE COUNTY FIRE DISTRICT 9, Respondent.	)	DECISION OF COMMISSION

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.

This case comes before the Commission on a timely petition for review filed by Spokane County Fire District 9, seeking to overturn a decision issued by Examiner Walter M. Stuteville.

BACKGROUND

Spokane County Fire District 9 provides fire suppression and emergency medical services in northern Spokane County, Washington. The area served covers approximately 140 square miles and has approximately 35,000 residents. 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. Joe Greene is the deputy chief in charge of training.

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.

In 1987, Chief Anderson concluded that improvements were needed in the department's training program for its fire fighting personnel. Under Anderson's general direction, Deputy Chief Greene began developing a training program geared toward National Fire Protection Association ("NFPA") standards, including audio-visual aids, training manuals, sample tests, and new training records forms. The training materials described certain engine evolutions, and specified time periods for completing each evolution (hereinafter referred to as "performance standards"). In December, 1987, Greene asked the captains to evaluate whether the performance standards were realistic. Thereafter, those performance standards were used when training was conducted with department fire fighters, but there were no sanctions if crews failed to achieve the standards.

In January, 1988, the parties were engaged in negotiations for a collective bargaining agreement to take effect once the parties' existing contract expired on December 31, 1988. At a negotiating session in mid-January, Oliver stated the union's opposition to the development and implementation of performance standards. Anderson understood the union's concern to be that discipline would have to be used to enforce performance standards. Anderson contends he informed Oliver that discipline would eventually be used to enforce performance standards, but not initially, and not until after the union's concerns were addressed.

At a negotiating session on February 4, 1988, the union again expressed concern regarding the employer's perceived unilateral implementation of a new training program. A labor-management meeting was scheduled for February 18, 1988, to specifically discuss that program.

At the February 18, 1988 meeting, Anderson stated that performance standards were still in the process of being developed, that input was being sought as to potential performance standards, that nothing in the existing program was being maintained in any employee's personnel file or used as a basis for discipline or promotion, and that the employer would negotiate the impact of any new standards once they had been decided upon. Oliver questioned the chief concerning quizzes that were being given to the fire fighters, and Anderson explained that Greene had passed along the quizzes as part of the process of developing performance standards.[1] Throughout the meeting, the union maintained its opposition to the performance standards.

After the February 18th meeting, Anderson discussed the union's concerns with Greene, and instructed Greene to stop using paid fire fighters in the development of performance standards. According to Anderson and Greene, the standards have not been utilized since then. The employer did not send the union written notice to this effect, however.

On March 10, 1988, the union filed a complaint with the Public Employment Relations Commission, alleging that the employer had violated RCW 41.56.140(1) and (4), by unilaterally implementing a training program and minimum performance standards for employees in the bargaining unit represented by the union.

In a preliminary ruling made under WAC 391-45-110, the Executive Director concluded that the decision to adopt new training requirements was not a mandatory subject of bargaining. The union's complaint was found to state a cause of action only as to whether the employer had violated an obligation to bargain the

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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.

"effects" that the new training program would have on the bargaining unit. The union did not appeal that preliminary ruling.

On December 28, 1990, Examiner Stuteville ruled that the employer had committed a violation of RCW 41.56.140(4), by failing and refusing to bargain over the effects of the training program and performance standards during their development. The employer has petitioned for review of the Examiner's decision, thus bringing the matter before the full Commission.

POSITIONS OF THE PARTIES

The employer acknowledges that bargaining will be required at some point over the effects of new performance standards. It contends that no duty arose in this case, because new performance standards had not yet been implemented. The employer asserts that a duty to bargain does not arise until the possible effects on bargaining unit members are known. In the employer's view, the Examiner confused "decision" bargaining and "effects" bargaining, and erred in finding that there was a duty to bargain effects of the performance standards when they were still in a developmental stage.

The union did not file an appeal brief, but presumably wishes the Commission to sustain the Examiner's ruling.

DISCUSSION

The Duty to Bargain

A public employer has a duty to bargain, pursuant to RCW 41.56.030-(4), regarding "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. In deciding whether a duty to bargain exists, there are two principal considerations: (1) The extent to which a managerial action impacts upon the wages, hours or working conditions of employees, and (2) the extent to which a managerial action is deemed to be an essential management prerogative. International Association of Fire Fighters Local 1052 v. PERC, 113 Wn.2d 197, 200 (1989)["Fire Fighters"].

Even if an initial decision by management is found not to involve a mandatory subject of bargaining, if that "permissive" decision has a material impact upon the wages, hours, or working conditions of bargaining unit employees, then there is a mandatory duty to bargain those "effects."[2] The case now before the Commission arises from such a permissive decision, i.e., the incorporation of timed performance standards into a fire fighter training program. At issue is the timing of any "effects" bargaining.

Developmental Period Exemption -

The employer contends that bargaining should not be required during the "developmental" stages of a change in working conditions. Its theory is that it was only trying out the performance standards at issue, and had not yet decided whether those standards were the ones it wished to implement. The employer draws an analogy to when an employer considers a change in its medical plan, and solicits information before deciding whether to actually propose a change in the program. Since an employer is not required to bargain over a contemplated medical plan change until it has a specific proposal to make, this employer feels no bargaining was required over the fire fighter performance standards at issue here until it decided just which standards it wished to utilize.

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[2] Seattle School District, Decision 2079-B (PECB, 1984).

The analogy proposed by the employer is not persuasive. In the situation described by the employer, the employees would continue to be covered by the existing medical plan while the employer is gathering information about a contemplated change. There would thus be no interim impact upon the bargaining unit. In the case of the performance standards at issue here, the employer was using the bargaining unit employees to evaluate the reasonableness and effectiveness of those standards. Even though the performance standards were being utilized on a trial basis, there could nevertheless have been interim effects on bargaining unit employees.

The employer has not cited, and we have not found, any legal precedent under the National Labor Relations Act, supporting the idea that an employer should be relieved of its duty to bargain merely because certain unilateral changes in working conditions are claimed to be "developmental" or "experimental". Nor have we found precedent for such a proposition under the collective bargaining acts of other states.[3] We refuse to adopt such a blanket rule, because of the obvious potential for abuse that could result.[4] In the Commission's view, the critical consideration is not whether a unilateral change is labelled "developmental" or "experimental"; the critical consideration is the nature of the impact on the bargaining unit.

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[3] The National Public Employment Reporter (NPER) publishes summaries of decisions from state labor relations boards. While the absence of full-text reporting must be considered in analyzing the precedential value of NPER case summaries, a review of the summaries dating back to 1987 revealed no case in which an employer was relieved of a duty to bargain simply because certain unilateral changes were labelled developmental or temporary.

[4] For example, an employer under pressure to fill a big order might increase production quotas on a "trial basis" long enough to fill the order, thus avoiding bargaining on premium pay to compensate for the increased workload. Other such examples can be readily contemplated.

Impact on the Bargaining Unit -

It must not be assumed that every permissive decision automatically requires "effects" bargaining. The impact on the bargaining unit of a particular managerial action must still be considered on a case-by-case basis. If a change has no material impact on employee wages, hours or working conditions, then there will be no duty to bargain "effects" of the permissive managerial action. See, e.g., Seattle School District, supra; Litton Microwave Cooking Products, 300 NLRB No. 37, 136 LRRM 1163 (1990); Peerless Food Products, 236 NLRB 161 (1978); Rust Craft Broadcasting, 225 NLRB 327 (1976).[5] That is why the Executive Director assigned this case to hearing "on the limited issue of the effect of new 'performance standards' on bargaining unit employees."

The Examiner concluded that "the implementation of new performance standards would clearly have an impact on the working conditions of members of the bargaining unit". While that may be true prospectively, and for the long-term, there was no discussion of the extent of any current impact. We are persuaded by the record that any impact during the trial period was minimal.

The employer already had a training program. Addition of the performance standards changed the contents of that program, but not the wages or hours of represented employees. Working conditions changed in terms of the actual tasks engaged in during times set

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[5] In cases where a unilateral change has only a minimal impact, an employer may still commit an unfair labor practice if the changes are designed by their timing and wording to undermine the union as the bargaining representative. Champion Parts Rebuilders v. NLRB, 717 F.2d 845, 114 LRRM 2674, 2682 n.11 (3d Circuit, 1983), citing Hedstrom Co. v. NLRB, 629 F.2d 305 (3d Circuit, 1980), cert. den. 450 U.S. 996 (1981); and Flambeau Plastics Corp. v. NLRB, 401 F.2d 128 (7th Circuit, 1968), cert. den. 393 U.S. 1019 (1968). No such violation is claimed in the case before us.

aside for training, but every change in a training program does not become bargainable per se.

Chief Anderson and Deputy Chief Greene gave uncontroverted testimony that timed performance standards were utilized in the training program only to evaluate their appropriateness. There were no disciplinary sanctions for failing to complete the various engine evolutions within the specified time. Nothing related to the performance standards was placed in the personnel files of fire fighters, and the performance standards had no impact on the evaluations of the fire fighters. The fact that the bargaining unit's drills now include timed performance standards does not constitute an "effect" that must be bargained; that change is precisely the managerial prerogative that the Executive Director ruled did not require bargaining.

In cases relied upon by the union, there were clear reasons for rejecting employer contentions that the effects of a unilateral change were minimal. In Seattle School District, supra, employees were transferred, classifications of positions were changed, and promotional ladders were altered, all of which must be regarded as material changes over which bargaining was required.[6] In Kal-Equipment Company, 237 NLRB 194 (1978), employees were subject to reprimand for poor performance following a change in production standards. The same was true in Tenneco Chemical, 249 NLRB 1176 (1980), where the employer reserved the discretion to enforce raised production standards by discipline.

In this case, the union was given an opportunity to show some actual effects of the "experimental" changes (e.g., an increased workload, skills or risks warranting a wage premium; the potential for discipline). In comparison to the aforementioned cases, no material effects have been demonstrated.

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[6] Seattle School District, Decision 2079-B at page 16.

Fire Chief Anderson testified that he informed union president Oliver of the limited use of the performance standards during meetings in January and February of 1988. Oliver's recollection differs, and the union emphasizes that it never received such assurances in writing. It would certainly have been preferable if the employer had placed the Chief's assurances in writing, but the union's ongoing nervousness about potential future effects does not warrant a finding that there was any material impact.

Future Bargaining Obligations -
The employer has indicated that, once it decides which performance standards to enforce through discipline or other personnel actions, it will submit those proposed standards to the union for negotiations over their effects. The employer has also indicated that it will not implement any discipline before bargaining that "effect". The chief's testimony suggests that bargaining over material effects of the adoption of performance standards will be conducted in a meaningful manner and at a meaningful time in the future.[7]

The timing of an obligation to bargain the "effects" of a permissive decision will necessarily depend on the facts of a particular case. When the effects are sufficiently foreseeable before implementation of a permissive decision, a bargaining obligation can reasonably be found to arise.[8] In this case, any effects are still too speculative to require bargaining. For now, we agree with the employer that no duty to bargain arose in this case. Accordingly, the decision of the Examiner is reversed.

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[7] In First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the Supreme Court of the United States observed that "effects" bargaining must be conducted in a meaningful manner and at a meaningful time.

[8] This Commission has held that an employer may implement permissive decisions even though bargaining has not been **concluded** on the "effects" of that decision. City of Bellevue, Decision 3343-A (PECB, 1990). This does not mean an employer can refuse to even **commence** "effects" bargaining until after a permissive decision is implemented.

AMENDED FINDINGS OF FACT

1. Spokane County Fire District 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 9. At all times pertinent hereto, Charles (Rick) Oliver was the 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. The performance standards had no material effect on employees' wages, hours, evaluations, promotions or other working conditions.

4. At meetings held in January and/or February of 1988, the employer explained the developmental nature of the program, 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. The employer reserved the right to utilize disciplinary enforcement of performance standards at some unspecified future date, but indicated that it would negotiate with the union over the effects of enforcing performance standards prior to doing so.

AMENDED CONCLUSIONS OF LAW

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

2. In the absence of material effects on the wages, hours or working conditions of bargaining unit employees, the changes implemented by the employer in its training program, as described in paragraph 3 of the foregoing findings of fact, did not give rise to a mandatory duty to bargain collectively under RCW 41.56.030(4).

3. By implementing changes in its training program, as described in paragraph 3 of the foregoing findings of fact, without bargaining the effects of those changes on bargaining unit employees, Spokane County Fire District 9 did not commit an unfair labor practice under RCW 41.56.140(4).

AMENDED ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

Issued at Olympia, Washington, the 8th day of October, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Dustin C. McCreary

DUSTIN C. McCREARY, Commissioner