STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CLARK COUNTY CUSTODY OFFICERS GUILD, Complainant, vs. CLARK COUNTY, Respondent.	CASE 11440-U-94-2684 DECISION 5373 - PECB ORDER OF DISMISSAL

Hoag, Garrettson, Goldberg & Fenrich, by Taylor L. Jacobson and Jaime B. Goldberg, appeared on behalf of the union.

Michael R. Snyder, appeared on behalf of the employer.

On November 18, 1994, Clark County Custody Officers Guild filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The complaint alleged Clark

County had interfered with employee rights by negotiating changed work shifts with Office and Professional Employees International Union, Local 11, after the guild had filed a petition to replace Local 11.[1] Pamela G. Bradburn was designated as Examiner to conduct further proceedings pursuant to Chapter 391-45 WAC.

Processing of the guild's complaint was delayed by its motion to intervene in two complaints charging unfair labor practices filed by Local 11 against the employer.[2] Then, when Local 11 withdrew its two complaints, the guild asked that its own complaint be held in abeyance pending the election in its representation case.[3] The guild was certified as exclusive bargaining representative of the custody officers' bargaining unit on May 31, 1995. Clark County, Decision 5133 (PECB, 1995). A hearing was held June 13, 1995, in Vancouver, Washington, on the guild's complaint. The Examiner received both parties' briefs August 15, 1995.

BACKGROUND

Parties

During the relevant period, Chief Jail Deputy Joe Dunegan held the top administrative position at the jail. Human Resource Representative Dana Bennett provided labor relations assistance and advice to the Sheriff's Office from July 1992 to the present.[4]

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1 The guild's petition for investigation of a question concerning representation, seeking to replace Local 11 as bargaining representative of a unit of custody officers in the Clark County jail, was filed October 3, 1994 (Case 11345-E-94-1866).

2 The Examiner granted the guild's motion to intervene.

3 Without such a request, the representation petition could not have been processed until the guild's unfair labor practice charge had been resolved. WAC 391-25-370.

4 Bennett had not participated in negotiating the collective bargaining agreement between Local 11 and the employer covering the period from July 22, 1992 through December 31, 1994.

Custody Officer Tod Peterson has worked for the employer in that position since late 1989, and was the guild president during the relevant period.

Labor Relations Specialist Dave Winders was the Local 11 representative responsible for the custody officers' bargaining unit during the relevant period.

History Regarding Work Shifts

The employer's collective bargaining agreement with Local 11 for the period from July 22, 1992 through December 31, 1994, provides:

> 11.1 The operations of the Department shall be carried out through a combination of one or more of the shifts listed below. The County agrees that prior to implementing an alternative work schedule from those listed below, the affected employees shall be given not less than forty-eight (48) hours advance notice, excluding overtime and call back work. Work schedules established by this agreement include :
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> > A. A repeating cycle of five (5) consecutive days of work, eight (8) hours of work per day, forty (4 0) hours of work per week, followed by two (2) days of rest.
> >
> > B.A two (2) week repeating cycle of five (5) consecutive days followed by two
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> > (2) days of rest followed by five (5) days of work followed by three (3) days of rest. A work day will be eight and three-quarters (8 3/4) hours including a fifteen (15) minute daily briefing period. Prior to implementing any change or
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> > [sic.] shift the Union will be consulted regarding the change.
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> > C.A three (3) work week repeating cycle of five (5) consecutive days of work followed by three (3) days of rest followed by five (5) consecutive days of work followed by two (2) days of rest. A work day for such employees shall be nine (9) hours, including the fifteen (15) minute daily briefing

> period. Prior to implementing any change of shift the Union shall be consulted regarding the change.
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> D.Four (4) days of work, ten (10) hours of work per day, forty (40) hours of work per week, followed by three (3) days of rest. Prior to implementing any change of shift the Union shall be consulted regarding the change.
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> E. Four (4) days per week, twelve (12) hours per day (including the fifteen [15] minute daily briefing), followed by four (4) days of rest. Prior to implementing any change of shift the Union shall be consulted regarding the change.
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> 11.3...
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> It is acknowledged by the Union that the County retains the right to assign employees to eight (8) hour, ten (10) hour, or twelve (12) hour shifts.
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> 11.4 It is understood that actual work schedules may have to be modified to comply with the Fair Labor Standards Act. Modifications to existing deployment schedules[5] shall be negotiated and arrived at in the same fashion as if it were part of this Agreement. Prior to any deployment plan changes, the Employees and the Union agree to consult and discuss the proposed changes. ...

Just before this controversy arose, the approximately 90 custody officers in the bargaining unit worked three differing shift arrangements: officers in booking and control worked four 12-hour shifts a week; officers working with the inmate population in the jail, handling transportation of prisoners, and in the work release program worked five eight-hour shifts with the same two days off each week, and officers on graveyard worked four 10-hour shifts per week. This set of slots and shifts had been posted for bidding by seniority each autumn, with employees' actual slot and shift changes implemented in a staggered manner during December and January. Although an

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5 No one defined the term "deployment". The Examiner concludes it refers to the full complement of slots (individual positions) and shifts (number of hours worked per day and number of days worked per week) in the jail.

individual employee could be displaced from his or her prior year's slot by a more senior employee during this annual bid, the only change to the deployment in the past five years was a switch of the graveyard shift in July 1992 from a work week of five eight-hour days to a work week of four 10-hour days.

Employer's Efforts to Change Deployment

The jail administration decided in summer 1994 it would be better to change the deployment of employees from the variety of shifts described above to a uniform shift throughout the jail of five eight-hour days followed by two days off. Chief Jail Deputy Joe Dunegan announced in an August 31, 19 94 memo that the change would be effective in January 1995.

When Dunegan learned that management had not met with Local 11 until August 30, and that the meeting had been informational rather than consultative, he discussed the situation with Human Resources Representative Dana Bennett. Dunegan and Bennett agreed it would be wise to delay the change while meeting with Local 11.

Dunegan and the jail lieutenants met with Local 11 Labor Relations Specialist Dave Winders and two shop stewards on September 21, 1994.[6] Dunegan had heard by that date about an interest among custody officers in leaving Local 11. The guild's representation petition was filed before the second meeting occurred on October 18, 1994. Dunegan informed Winders on October 20, 1994, that management had modified the new deployment so 20 positions would continue working four 12-hour days as defined in section ll.l.D of the collective bargaining agreement, while all remaining positions would work the five on-two off/five on-three off repeating cycle described in section ll.l.B. The same notice was given to all bargaining unit members on October 24, 1994, and the new deployment was fully implemented by January 1995.

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6 The same procedure was used before the 1992 change to the graveyard shift, except that Winders was Local ll's only representative in 1992.

Local 11 grieved what it felt was the employer's failure to negotiate the proposed change in deployment. Dunegan denied the grievance on November 29, 1994. By not advancing the grievance to the next step, Local 11 permitted the grievance to be settled on the basis of Dunegan's response.

The new deployment sharply reduced the number of slots working the shift of four 12-hour days. Guild President Tod Peterson and other employees who had previously worked that shift lost it because they lacked the relative seniority to keep the slots.

POSITIONS OF THE PARTIES

The guild contends the employer was obligated to maintain the deployment that existed when the representation petition was filed during the whole time the question concerning representation was pending, in order to avoid any implication that the employer favored one of the competing unions. Anticipating the employer would claim it was merely complying with its collective bargaining agreement, the guild argues the present situation does not fall within the narrow exclusion from this rule which recognizes a dynamic status quo. In support of this contention, the guild notes the deployment change was discretionary rather than automatic, and the employer acted in concert with one of the contesting unions in making the change. Finally, the guild urges the Commission to decide the filing of a representation petition should halt bargaining over a single mandatory subject, just as it prohibits further negotiations on a successor collective bargaining agreement .

The employer interprets its collective bargaining agreement with Local 11 to grant it the authority, after consultation and discussion with Local 11, to make these changes to its deployment. The employer distinguishes application of an existing collective bargaining agreement from the prohibited negotiation of a new collective bargaining agreement. The employer denies its deployment change was related in any manner to the question concerning representation, and argues the bargaining unit members are bound by the resolution of Local 11's grievance in the employer's favor. Finally, the employer contends the deployment change was

part of the dynamic status quo it was obligated to maintain while the representation petition was decided.

DISCUSSION

Applicable Public Policies

This case presents the Commission with a question it has not previously decided: whether bargaining unit members' rights to a representation election under laboratory conditions are violated when an employer deals with the incumbent union to change work schedules from one alternative listed in the current collective bargaining agreement to another, while the question concerning representation is pending.

Although neither precedent nor public policies directly answer a case of first impression, the policies inherent in the legislation an agency enforces may point the way to the appropriate resolution of the issue. The first public policy that should be considered is the requirement that an employer maintain the status quo for employees within a proposed bargaining unit. The Commission has explained the purpose of this policy as follows:

> Changes by an employer of employee wages, hours and working conditions during the pendency of a question concerning representation improperly affect the laboratory conditions necessary to the free exercise by employees of their right to vote.

Mason County, Decision 1699 (PECB, 1983).

New work rules and a change of payday are examples of unilateral modifications to working conditions found to be unlawful because they were made while representation petitions were pending. Town of Granite Falls, Decision 2692 (PECB, 1987); Lewis County, Decision 2957

(PECB, 1988). This public policy derives from RCW 41.56.040 and applies equally to newly organized and to previously represented employees.[7]

The second public policy is an exception to the status quo rule which recognizes occasional circumstances when the status quo may not be static. Where an employer's salary schedule includes step increases for which employees qualify by length of service, a refusal to grant those step increases during bargaining was unlawful because payment of earned step increases was the status quo. Snohomish County, Decision 1868 (PECB, 1984).[8]

The third applicable public policy is the requirement that an employer cease negotiations for a new collective bargaining agreement with the incumbent union for those employees affected by a representation petition. The employer thereby avoids interfering with employee rights by assisting one of the competing unions, which would violate RCW 41.56.140(1) and (2). Yelm School District, Decision 704-A (PECB, 1980). The Commission has retained this absolute rule despite the National Labor Relations Board's deviation from its parallel rule. RCA del Caribe, Inc., 262 NLRB 963 (1982). See reasoning in Pierce County, Decision 1588 (PECB, 1983) .

The final public policy to be considered is that labor organizations derive their authority as exclusive bargaining representatives upon certification, and lose that authority when they are decertified or replaced by another union as certified exclusive bargaining representative. The Commission has held:

> Thus, we conclude that the loss of status as exclusive bargaining representative precludes the assertion of all collective bargaining rights,

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7 For represented employees, a unilateral change also violates RCW 41.56.140(1) and (4).

8 The holding applies to all employees. The Commission has noted it was the employer's bargaining obligation that dictated the result, not just the pendency of interest arbitration. Snohomish County Fire Protection District ~I Decision 4336-A (PECB, 1994).

> as well as standing to enforce rights which existed prior to the loss of status as exclusive bargaining representative.

Vancouver School District, Decision 2575-A (PECB, 1987), p. 6.

See, also, Peninsula College, Decision 5017 (CCOL, 1995) (union's complaint alleging refusal to bargain dismissed because union replaced by another before hearing), and Renton School District, Decision 1694 (PECB, 1983) (complaint alleging unlawful refusal to arbitrate grievance dismissed for failure to state cause of action because union had been replaced as certified exclusive bargaining representative).

Incumbent's Interim Representational Rights

The Commission does not require unions, employees, and employers to cease all labor relations activity pending resolution of a question concerning representation. That would be an unrealistic rule, given the lengthy delays that may occur.[9] The exception for maintenance of the dynamic status quo, described above, attempts to insure that questions concerning representation do not block the occurrence of routine, non-discretionary changes to employees' working conditions. For example, the exception would clearly have permitted this employer to post an unchanged deployment for annual bidding after the guild filed its representation petition.

The Examiner is persuaded the Commission does not intend its status quo policy to penalize employees and paralyze an incumbent exclusive bargaining representative simply because another labor organization has filed a representation petition. Such an extension of the status quo policy would upset, rather than maintain, the careful balance of power pending an election that is often referred to as laboratory conditions; by substituting an earlier hiatus, it would also conflict

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9 For example, elections may be blocked until unfair labor practice charges are decided. WAC 391-25-370.

with the policy that a union loses it representational authority upon decertification or replacement as exclusive bargaining representative.

The Examiner concludes that the Commission's policies regarding the creation, exercise, and extinction of representational rights require recognition that an incumbent union possesses the authority to continue representing bargaining unit members in some matters while a question concerning representation is pending. An incumbent in these circumstances may not negotiate a new collective bargaining agreement for those bargaining unit members affected by the representation petition, but is the only entity with the right and authority to enforce its existing collective bargaining agreement until the question concerning representation is settled. To conclude to the contrary is to deny bargaining unit members any representation while a question concerning representation is pending, a result that would add an unanticipated and substantial burden to the free choice of bargaining representatives Chapter 41.56 RCW gives public employees.

This recognition of an incumbent union's interim representational rights is consistent with NLRB decisions. Midwest Piping- & Supply Co. , 63 NLRB 1060 (1945),[10] notes that:

> Nothing herein, however, shall be construed as requiring the respondent to vary any wage, hour, seniority, or other substantive features of its relations with the employees themselves, which the respondent has established in the performance of this contract,or to prejudice the assertion by the employees of any rights they may have under such agreement.

Midwest Piping & Supply Co., supra, at 1075 (emphasis added).

The NLRB has clarified the incumbent union's continuing rights as follows:

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10 This NLRB decision was the source of Yelm School District, supra.

> This is not to say that the employer [by ceasing negotiations after a representation petition is filed] must give an undue advantage to the rival union by refusing to permit the incumbent union to continue administering its contract or processing grievances through its stewards.

Shea Chemical Corp., 121 NLRB 1027, 1029 (1958).

The Ninth Circuit Court of Appeals has affirmed the NLRB's concept that an incumbent union retains representational rights until the date of decertification. Sheet Metal Workers, Local 162 v. Jason Manufacturing, 900 F.2d 1392 (1990).

Conclusion

Local 11 retained the right to represent the custody officers' bargaining unit, with respect to those wages, hours, and working conditions outlined in its collective bargaining agreement with the employer, until the guild was certified as exclusive bargaining representative on May 31, 1995. Because this collective bargaining agreement defined both a mechanism for changing the employer's deployment (prior consultation with Local 11), and the shifts among which the employer could choose, the employer committed no violation of RCW 41.56.040 or 41.56.140 by deciding to vary the deployment before the guild filed its representation petition, or thereafter by consulting with Local 11 about the deployment change and changing the deployment.

FINDINGS OF FACT

1. Clark County is a public employer within the meaning of RCW 41.56.030(1) .

2. Office and Professional Employees International Union, Local 11, is a bargaining representative within the meaning of RCW 41.56.030(3), and was until May 31, 1995, the exclusive bargaining representative of an appropriate bargaining unit of employees working in the employer's jail.

3. Clark County Custody Officers Guild is a bargaining representative within the meaning of RCW 41.56.030(3) which became on May 31, 1995, the exclusive bargaining representative of the appropriate bargaining unit of employees described in paragraph 2 above.

4. The collective bargaining agreement between the employer and Local 11 for the period between July 22, 1992 through December 31, 1994, covering the bargaining unit described in paragraph 2 above, listed five different shifts to which the employer could assign employees and permitted the employer to change employees' shifts after consultation with Local 11.

5. The employer and Local 11 had consulted during July 1992, before the employer changed the graveyard shift from five eight-hour days to four 10-hour days.

6. The employer announced on August 31, 1994, it would implement a new set of shifts for employees in the bargaining unit described in paragraph 2 above.

7. The employer approached Local 11 on September 21, 1994, to discuss the shift change. The employer knew by that date thatsome bargaining unit employees were discussing a change of representative.

8. The guild filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission on October 3, 1994.

9. After the employer held a second meeting with Local 11 on October 18, 1994, it announced on October 24, 1995, that shifts of most bargaining unit members would be changed. The changes were implemented during December of 1994 and January of 1995.

CONCLUSIONS OF LAW

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

2. The record fails to establish that Clark County interfered with employee rights guaranteed in Chapter 41.56 RCW by consulting with incumbent union Office and Professional Employees International Union, Local 11, about changing employees' work shifts from one model permitted in the current collective bargaining agreement to another during the pendency of a question concerning representation.

3. The record fails to establish that Clark County interfered with employee rights guaranteed in Chapter 41.56 RCW by changing the employees' work shifts in a manner consistent with the current collective bargaining agreement during the pendency of a question concerning representation.

ORDER

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

Entered at Olympia, Washington, on the 30th day of November, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

[SIGNED]

PAMELA G. BRADBURN, 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.