STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHELAN COUNTY DEPUTY SHERIFF'S ASSOCIATION,	)	
	)	CASE 11787-U-95-2772
Complainant,	)	
	)	
vs.	)	DECISION 5559 - PECB
	)	
CHELAN COUNTY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

Cline & Emmal, by James M. Cline, appeared on behalf of the union.

Jeffers, Danielson, Sonn & Aylward, by Stanley A. Bastian, appeared on behalf of the employer.

On May 18, 1995, Chelan County Deputy Sheriff's Association filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union alleged Chelan County had refused to bargain by unilaterally changing employee Terry Parker's work hours. After soliciting the parties' comments on its appropriateness, the Executive Director deferred the matter to arbitration on August 17, 1995. The union promptly filed a grievance. When the employer denied it as untimely, the union moved for reconsideration and the Executive Director revoked the deferral on October 26, 1995.[1]

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[1] The Commission does not assert jurisdiction to remedy contract violations. City of Walla Walla, Decision 104 (PECB, 1976). The deferral policy seeks to coordinate the parties' agreement to arbitrate contract interpretation disputes with the Commission's responsibility to prevent unfair labor practices. If an employer refuses to arbitrate on procedural grounds, deferral is revoked and the Commission interprets the contract as required to decide whether an unfair labor practice was committed. City of Yakima, Decision 3564-A (PECB, 1991).

Pamela G. Bradburn was designated as Examiner to conduct further proceedings pursuant to Chapter 391-45 WAC. A hearing was held in Wenatchee, Washington, on January 17, 1996.[2] The record closed when both parties filed briefs by March 27, 1996. For reasons explained below, the complaint is dismissed.

FACTUAL BACKGROUND

Chelan County is a municipal corporation exercising powers granted by Title 36 RCW. At all relevant periods, Dan Breda was the sheriff. Dick Winn was the chief of corrections under Breda, while Gale Wick was Winn's administrative sergeant.

Chelan County Deputy Sheriff's Association has represented a bargaining unit of employees in the Sheriff's Department's field and corrections sections. When the complaint was filed, that unit included field deputies, detectives, dispatchers, corrections deputies, and records personnel.[3] Terry Parker has worked as a corrections deputy during the relevant period.

Creation of Courtroom Security Assignment

Jail personnel are classified and paid as corrections deputies regardless of their actual duty assignments. The employer created a courtroom security duty assignment during spring, 1991. Winn

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[2] The parties delayed scheduling the hearing while they considered coordinating this case with another involving the same parties and similar issues. Since the hearing in this case, the complaint in Case 11597-U-95-2719 has been dismissed. Chelan County, Decision 5469 (PECB, 1996). The decision has been appealed to the Commission.

[3] The unit became eligible for interest arbitration on July 1, 1995. Unit clarification proceedings in Case 12135-C-95-755 will divide the unit according to eligibility for interest arbitration. Thurston County, Decision 4848-A (PECB, 1995).

discussed the new position with Parker before he accepted the assignment. Parker's duties were to discourage security problems by his uniformed presence in the employer's courtrooms and to respond when security problems occurred in the courts. Winn and Parker agreed he would work a 40 hour week, generally from 9:00 am to 5:00 pm, Mondays through Fridays, though each day's actual work hours would match the hours courts were in session. If Parker knew in advance a court session would require him to work before 9:00 am or after 5:00 pm, he was to arrive late or depart early on other days that week to avoid overtime.[4] But if a court session began early or ran late without prior notice, Parker was to receive overtime pay or compensatory time.

Parker's Adjustments to His Work Hours

Some time after completing his first year in the assignment, Parker began turning in an overtime request each time a court session ran late or began early, rather than adjusting his work hours to avoid overtime. He gave the requests to the day's duty sergeant and they were always granted.

Parker also decided during the winter of 1992-1993 to change his work hours so that he would be working from 8:30 am to 4:30 pm, rather than from 9:00 am to 5:00 pm. He explained courts were rarely in session after 4:00 pm, and he felt other corrections deputies resented his having nothing to do between 4:00 and 5:00 pm. Parker neither discussed this in advance with Winn or Wick, nor informed them after the fact; he felt his changed hours were obvious because he saw Wick at 8:30 am nearly every morning. The posted jail work schedule continued to show Parker's work hours as 9:00 am to 5:00 pm.

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[4] The parties' contract provides that overtime is computed on a weekly, rather than a daily, basis.

Parker's Continued Work in the Jail

Winn told Parker when the job was created he could do what he wished during the courts' noon break, suggesting Parker go to lunch with court employees. Like all other corrections deputies, Parker was considered on duty his entire shift so his meal break was paid time. Parker continued joining other corrections deputies for lunch at the jail after he accepted the courtroom security assignment.

During an extended period of high jail workload in 1991 and 1992, the employer directed Parker to work in the jail during his lunch break. He filled in where needed after he had finished eating: he answered phones in the booking area, worked in the control room, or gave medications to inmates. For approximately six months of this high workload period, Parker spent little or no time in court but worked virtually full time in the jail.

After Parker returned to his court security duties but before July of 1993, Winn told Parker to stop taking his lunch break at the jail--to go to the store, do shopping, anything but spend that time in the jail. Winn took this step because Parker's gregarious nature interfered with other employees' work. There is no evidence that Parker's pay was affected by this freedom during his lunch break. In fact, Wick stated Parker would have received his regular pay even if court were to close early for a week.

February 3, 1995 Conversation

Winn learned in early February 1995 that Parker had already left for the day when a courtroom security problem occurred between 4:30 and 5:00 pm: a corrections deputy had to be dispatched from the jail to handle the difficulty. Winn asked Wick to remind Parker the assignment was intended to meet the courts' needs, and that he should stay until 5:00 pm each day. Wick and Parker met on

February 3, 1995. Their recollections of their conversation differ.

Wick remembered telling Parker his personal 8:30 am to 4:30 pm schedule was not good and he was to be present while courts were in session. Wick reminded Parker that court sessions normally began at 9:00 am, he should break for lunch when the courts did but not spend the period at the jail, and he should stay if court continued until 6:00 pm.

Parker understood his schedule was being changed, that he was to work from 9:00 am to 6:00 pm, and that he could eat lunch in the jail but was to take an hour off and spend it away from the jail so he would not be on call.

Both agreed Parker asked whether he would be working nine hour days, and Wick answered there would not be nine hours of work if Parker took a one hour break while the courts recessed.

Wick realized at some date not identified in the record that Parker had interpreted the conversation to require him to work 45 hours a week for 40 hours pay. Wick testified he did not intend to require Parker to take an unpaid lunch.

Parker's Request for Reassignment

Parker was not happy with what he believed to be a changed schedule but told Wick he would try it. Over the weekend, Parker decided he preferred returning to the jail where corrections deputies then worked four ten-hour days per week. The next Monday, Parker gave Wick a memo requesting reassignment to the jail. Winn first testified he learned from the reassignment request that Parker believed he was being asked to work nine hour days, then while still testifying on the same subject, said that he could not recall the reassignment request's exact terms and thought he probably

learned of this concern some time later from Wick or someone else.[5] Winn had no intention to require Parker to work longer hours than other corrections deputies. Winn did nothing to correct the misunderstanding, once he learned of it, because he thought Parker preferred working the four ten-hour days in the jail.[6]

While a replacement was found, Parker continued filling the courtroom security position, working from 9:00 am to 5:00 pm. Parker viewed this schedule as a special interim schedule agreed on between Wick and him, and expected his replacement to be working from 9:00 am to 6:00 pm. When the courtroom security assignment was posted and employees questioned Wick about it, he told them: the position was to satisfy the court's needs; work would normally begin at 9:00 am, and the employee would take a lunch break when the court did. He did not tell any potential applicant they would be working until 6:00 pm. In fact, Parker's replacement works 9:00 am to 5:00 pm and receives a paid lunch period.

POSITIONS OF THE PARTIES

The union contends that Parker reasonably believed his work hours were being extended by Wick, who acted as a supervisor and therefore bound the employer. Because shift schedules are a mandatory subject of bargaining, the employer's unilateral action violated the law. Anticipating a defense relying on the parties' collective bargaining agreement, the union argues the clause retaining bargaining rights precludes the employer from unilateral-

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[5] Judging from the witnesses' demeanor and their consistency under cross examination, I conclude that all witnesses were testifying sincerely from their honest recollections.

[6] Subsequently, the employer modified that work week to five eight-hour days, which the union challenged in the case mentioned above at note 2.

ly scheduling work. The union requests an award of attorney's fees, claiming surprise at the employer's defense that Parker's schedule was not actually changed. It argues an attorney fee award is justified because the employer either took advantage of a misunderstanding about Parker's work hours or attempted to create one as a subterfuge.

The first of the employer's defenses is that the employer was merely reinstating Parker's proper working schedule after he had unilaterally adjusted it; alternatively, the collective bargaining agreement permits the employer to adjust shift times so long as the employee continues to work five consecutive eight-hour days. The employer's second major defense attacks the union's ability to bring its charge before the Commission. The employer contends Parker's objection to the perceived schedule change is a grievance which the union can pursue only through the grievance procedure.

DISCUSSION

Union's Ability to Pursue Charge

The employer contends that the union's failure to timely grieve the alleged change to Parker's work hours precludes it from pursuing this unfair labor practice charge. This is discussed first because it is quasi-jurisdictional in effect. That is, the complaint would have to be dismissed regardless of its merits if the employer's argument were correct.

Implied in the employer's argument is the belief that a single cause of action exists for the union in the facts of this case; if that were not the case, no question of waiver or improper forum would arise. The employer cites no direct authority for this contention, noting the Commission has refused to accept jurisdic-

tion of pure contract violation claims.[7] It also argues the union should not be permitted to revive an untimely grievance through unfair labor practice proceedings.

These arguments have been considered and rejected:

> We find no merit in the employer's claims that current Commission policy on "deferral" undermines the effectiveness and validity of grievance arbitration procedures, that the Commission is overruling contractual time limits by applying the statutory six-month statute of limitations to contractual issues, and that a union must make an "election of remedies" between filing a grievance or filing an unfair labor practice. All of these arguments ignore that two separate sets of rights are being invoked.

City of Yakima, supra.

Fact situations like the one in this case may give rise to two separate causes of action: a grievance alleging a breach of a collective bargaining unit, and a charge alleging violation of the law. Although a single incident may have spawned both, the two causes of action exist independently and the grievant/complainant may choose to pursue one or both.

I note the employer could have obtained what it says it wishes, resolution of a contract violation claim through the grievance process, if it had not asserted procedural defenses when the complaint was deferred. Having exercised its right to reject the untimely grievance, the employer cannot now prevent the Commission from processing the charge.

For the reasons stated above, the union has not lost its ability to pursue its unfair labor practice complaint because it failed to timely grieve the alleged change in Parker's work hours.

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[7] City of Walla Walla, supra.

Adjustment of Shift a Mandatory Subject

The time a work shift begins, or ends, is as much a condition of employment, and a mandatory subject of bargaining, as the total number of hours to be worked during that shift. City of Clarkston, Decision 3286 (PECB, 1989); Seattle School District, Decision 2079 (PECB, 1984);[8] RCW 41.56.030(4). Unless the union has contractually waived its rights, an employer must bargain before modifying either the length or the beginning time of an employee's shift.[9]

No Modification by Employer Proven

Upon careful consideration of all the evidence, I conclude the union has failed to prove the employer unilaterally modified Parker's work hours on February 3, 1995.[10] The most the union has proved here is that Parker adjusted his own hours, he objected when told to return to the original schedule, and he appears to have misunderstood Wick on February 3, 1995.

It is important to note that Parker never obtained official approval when he adjusted his work shift from 9:00 am until 5:00 pm to 8:30 am until 4:30 pm. He certainly knew who to approach, for he spoke to Wick about his dislike of filling in for the entire booking crew at lunch time.[11] And he remained on notice of his

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[8] This aspect of the decision not affected by reversal. Seattle School District, Decision 2079-A (PECB, 1985).

[9] See, Seattle School District, Decision 2079-B (PECB, 1986) for discussion of contractual waiver in these circumstances.

[10] As complainant, the union bears the burden of proving the elements of its charge. Pierce County Fire District 9, Decision 4547 (PECB, 1993).

[11] Transcript page 59.

official schedule the entire time, for it was listed on the posted schedules.[12]

At most, the February 3, 1995 discussion between Parker and Wick was a failed effort at communication. The courtroom security assignment was designed from the beginning to accommodate its hours to those of the court; thus Winn and Parker's 1991 discussion about overtime or modifying work hours if courts stayed late or began early. I conclude Wick was just reminding Parker on February 3, 1995, that he needed to stay as long as court was in session, even if that were as late as 6:00 pm. The evidence just does not corroborate the union's claim that Parker was actually being ordered to routinely work more hours than when the job was created.

The employer's pay practices support my conclusion. Parker had a paid lunch period while he was working in the jail. He continued receiving pay for his lunch hour when he became a courtroom security deputy, even after he was told to take his lunch break away from the jail. In fact, Winn testified he would not order an employee to take an unpaid lunch. Thus it is more likely than not that Wick was not talking about paid hours on February 3, 1995, but distinguishing between the number of hours worked and the number of hours at work when he said Parker would not be working nine hours if he took a lunch break. Parker did not seem to receive the message.[13]

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[12] Exhibit 3.

[13] I observed that, even after a caution, Parker frequently answered before the question was completed. He also answered expansively and seemed to leap to conclusions. Transcript pages 21, 35, 39, 53, 55, 56, 59, 62, 63, 116, 117, and 118. Such conversational habits likely increase opportunities for misunderstandings.

Finally, my conclusion is corroborated by at least an appearance of confusion within the union over whether Parker's work hours had actually been changed. In rebuttal, Parker testified:

> Q: [By Mr. Cline] Did you have a discussion with [Wick] after you handed [Exhibit 4] to him?
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> A: [By Mr. Parker] A short discussion that this couldn't -- that -- because I asked then -- I said, therefore I respectfully request an immediate reassignment to the jail staff. And the concern was that it wasn't going to happen immediately. That there would be a period of time when we would have to bring somebody else on board and that in the meantime I would have to work 9:00 to 5:00.
>
> Q: Okay.
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> A: Not at that time. I'm sorry, I misspoke. That I would work the 9:00 to 6:00.

Transcript, pages 116-117 (emphasis added).[14]

Another indication of possible confusion is the alleged change in wording of Parker's original request for reassignment to the jail. Parker testified that, on returning to work the next Monday, he gave Wick Exhibit 4, which reads:

> AFTER CONSIDERING YOUR CHANGE OF THE COURT SECURITY OFFICERS SCHEDULE FROM (0830 TO 1630) TO (0900 TO 1800) WITH A ONE HOUR LUNCH BREAK, I DO NOT WISH TO WORK THOSE HOURS. THEREFORE, I RESPECTFULLY REQUEST AN IMMEDIATE REASSIGNMENT TO THE JAIL STAFF.

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[14] Although it does not appear in the transcript, I noted that Parker corrected his testimony after the employer's attorney whispered to Winn that Parker had said 9:00 to 5:00. Bastian's comment was loud enough for me to hear and could have been heard by Parker.

Wick testified Exhibit 4 was not the memo he received from Parker; the memo he received listed the undesirable hours as from 0900 to 1700. Wick testified he noticed at the time that Parker's request stated an eight-hour work day rather than a nine-hour day, and he mentioned this discrepancy to Winn. The employer did not offer a different version of the document to support Wick's testimony. I would ordinarily view Wick's unsubstantiated claim with some skepticism, but I was aware the employer had difficulties locating other documents, perhaps due to a change of intermediate management.[15]

The last indication of possible confusion within the union appears in the statement of facts. Its original version stated, in pertinent part:

> On February 3, 1995, Parker was called into the office of his supervisor. His supervisor informed him that the had "decided to change" his hours from 8:30 to 4:30 to 9 to 5. Where as [sic] before, Parker had worked an 8-hour schedule and took his lunch during a paid break, the County was changing his schedule so that he would work a 9-hour day with an unpaid, 1-hour lunch period.
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> Statement of Facts, paragraph 2 (emphasis added).

A 9:00 am to 5:00 pm work schedule is an eight-hour schedule. The amended statement of facts, filed in response to the Executive Director's deferral query, stated in pertinent part:

> On February 3, 1995, Parker was called into the office of his supervisor. His supervisor informed him that they had "decided to change" his hours from 8:30 am to 4:30 pm to 9:00 am to 6:00 pm.
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> Amended Statement of Facts, paragraph 2 (emphasis added).

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[15] Transcript of hearing in Case 11597-U-95-2719, pages 138-139. The record of that earlier case was included by stipulation in the record of the present case.

Lack of Violation Precludes Attorney's Fees

The union requested attorney's fees to deter what it calls the employer's "fictional" defense that Parker's hours were not changed, citing City of Tukwila, Decision 2434-A (PECB, 1986).[16] Attorney's fees can only be awarded as part of a remedy for violation of the collective bargaining law. Anacortes School District, Decision 2464-A (EDUC, 1986). Having failed to prove the employer refused to bargain by a unilateral change to Parker's work hours, the union is precluded from an award of attorney's fees.

FINDINGS OF FACT

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

2. Chelan County Deputy Sheriff's Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of what was, on May 18, 1995, an appropriate unit of sheriff's employees, including corrections deputies.

3. The employer created a courtroom security assignment for a corrections deputy in spring, 1991. The employer directed Terry Parker, the deputy who received the courtroom security assignment, to work a 40-hour week with his actual hours accommodated to those of the courts, which were generally 9:00 am to 5:00 pm. When unusual court sessions required earlier or later work, Parker would be compensated by reducing his working hours later in the week or by payment of overtime. At all times, the employer treated Parker's lunch period as paid time.

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[16] Union's post-hearing brief, pages 7-10.

4. During the winter of 1992-1993, Parker began working strictly 8:30 am to 4:30 pm, whether or not the courts began early or ran late. Parker did not inform the employer of this change.

5. The employer discovered Parker's changed hours on February 2, 1995. On February 3, 1995, the employer directed Parker to follow the schedule originally agreed upon, emphasizing that Parker needed to remain at work as long as court sessions continued, even if that were as late as 6:00 pm.

6. Parker understood this to be a direction to work from 9:00 am to 6:00 pm routinely. He requested, and ultimately received, reassignment back to the jail. Until a replacement was assigned, Parker worked as courtroom security deputy from 9:00 am to 5:00 pm.

7. The union did not file a grievance challenging what it regarded as the February 3, 1995 change to Parker's work hours until its unfair labor practice charge was deferred to arbitration. The employer denied the grievance as untimely.

CONCLUSIONS OF LAW

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

2. The Chelan County Deputy Sheriff's Association's failure to timely grieve what it regarded as Chelan County's change to Terry Parker's work hours does not prevent it from pursuing a claim that Chelan County refused to bargain, in violation of RCW 41.56.140, by making that change.

3. The record fails to establish that the employer changed Parker's work hours. Accordingly, the employer has not

refused to bargain about the issue in violation of RCW 41.56.140.

ORDER

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

Entered at Olympia, Washington, on the 11th day of June, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Pamela G. Bradburn

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.