City of Burlington, Decision 5841-A (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BURLINGTON POLICE EMPLOYEES GUILD,	)	
Complainant,	)	CASE 12587-U-96-2995
vs.	)	DECISION 5841-A - PECB
CITY OF BURLINGTON,	)	DECISION OF COMMISSION
Respondent.	)	

Cline & Emmal, by Roger C. Cartwright, Attorney at Law, appeared on behalf of the union.

Heller Ehrman White & McAuliffe, by Bruce L. Schroeder, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on a petition for review filed by the City of Burlington, seeking to overturn a decision issued by Examiner Pamela G. Bradburn.[1]

BACKGROUND

The City of Burlington (employer) and the Burlington Police Employees Guild (union) have had a collective bargaining relationship since January 11, 1991, when the union was certified

[1] City of Burlington, Decision 4841 (PECB, 1997). This complaint was processed with three other complaints. See, City of Burlington, Decisions 5840, 5842, and 5843 (PECB, 1997). Petitions for review were not filed on the decisions in the companion cases.

as exclusive bargaining representative of a unit of police department employees, including dispatchers and uniformed law enforcement officers up to and including the rank of sergeant.

Ed Goodman was Burlington's police chief from 1981 through December of 1994. By oral agreement, at an unidentified time prior to 1994, Goodman allowed Police Officer Bob Wischhusen to commute between his home and work with a D.A.R.E. vehicle, a round trip of six to eight miles.

Gerald Bowers became police chief in April of 1995, and Scott Myhre was selected to replace Wischhusen as D.A.R.E. officer in February of 1996. Bowers told Myhre that he would not be allowed to commute in the D.A.R.E. vehicle, because he lived more than 15 miles from police headquarters and in another county. Myhre agreed with Bowers, and added that he did not care to take the vehicle home because of the ease of handling personal matters in his own car while commuting between work and home.[2] After Myhre took the D.A.R.E. training, he did not teach any D.A.R.E. classes and planned to leave his employment. Wischhusen was asked to take over the D.A.R.E. program again.

On July 3, 1996, the union filed an unfair labor practice complaint alleging that the employer unilaterally changed the practice of allowing the police officer assigned to the D.A.R.E. program to use the program's vehicle for commuting between home and work, and thereby refused to bargain in violation of RCW 41.56.140(4).

Examiner Pamela G. Bradburn held a hearing on October 21, 1996, and issued her decision on February 19, 1997. The Examiner found that

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[2] Myhre also told Bowers that using the D.A.R.E. vehicle to commute was not important to him.

the employer had established a practice of permitting the D.A.R.E. officer to commute between home and work in the D.A.R.E. vehicle, and that the employer refused to bargain in violation of RCW 41.56.140(4) when Bowers told Myhre he could not use the vehicle for commuting. The Examiner ordered the employer to restore the status quo ante by permitting the present D.A.R.E. officer to commute with the D.A.R.E. vehicle, and to compensate any D.A.R.E. officer for expenses incurred as a result of not being permitted to commute in the vehicle from June 12, 1996 until compliance is tended. The Examiner also ordered the employer to publish a notice for 30 days in a daily or weekly newspaper of general circulation within the boundaries of the city of Burlington.

POSITIONS OF THE PARTIES

The employer argues that Wischhusen's use of the vehicle solely as a personal accommodation was an aberration from the general rule, and that the agreement should not constitute an enforceable practice for all subsequent employees. The employer takes issue with the Examiner's order requiring it to publish the notice in a newspaper, contending the approach is inconsistent with historical remedies and unsupported by circumstances in this case. The employer requests the Commission to reverse the Examiner's decision.

The union argues that the employer unilaterally changed an established past practice and the actions violate the law, no matter how many bargaining unit employees are affected. The union contends that the police chief approached Wischhusen about using the D.A.R.E. vehicle as a commuter car for purposes of the program's visibility. The union urges the Commission to affirm the

Examiner's decision, but did not comment on the remedy requiring publication of a notice in a newspaper.

DISCUSSION

Mandatory Subject of Bargaining

RCW 41.56.030(4) requires a public employer and the exclusive bargaining representative of its employees to "execute a written agreement with respect to ... personnel matters, including wages, hours and working conditions". Matters within the terms "wages, hours and working conditions" are characterized as "mandatory" subjects of collective bargaining. See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, WPERR CD-57 (King County Superior Court, 1978). A police officer's use of an employer's vehicle for commuting purposes is generally considered a mandatory subject of bargaining. See, e.g., City of Brier, Decision 5089-A (PECB, 1995).

When an employer desires to change existing wages, hours and working conditions, it must first give notice to the exclusive bargaining representative and, upon request, bargain in good faith with that organization prior to making or implementing the contemplated change. Lake Washington Technical College, Decision 4721-A (PECB, 1995). A violation of the duty to bargain can arise from a unilateral change that affects only a small number of employees, but the change must be one which represents a departure from established practice. King County, Decision 4258-A (PECB, 1994).

The Examiner concluded that a past practice of allowing Wischhusen to take a vehicle home was enforceable for later employees. We find the record insufficient on which to base a conclusion that the agreement with Wischhusen constituted an enforceable practice for subsequent employees.

Unilateral Change

Origins of the Permission to Commute in D.A.R.E. Vehicle - The Examiner reached her conclusions that the past practice was enforceable for later employees by finding that the existence of the practice did not depend on who initiated it. The Examiner then found that the commuting privilege attached to the position or classification of the D.A.R.E. officer, not to Wischhusen or Myhre as individuals. A reasonable first step to reach such a conclusion in this case would, however, require a finding that a practice existed predominantly to meet the needs of the department. To fully grasp the nature of the agreement, we must look to its origins; to do so, we are compelled to resolve conflicts between the testimony of Wischhusen and Goodman.[3]

We agree with the Examiner's assessment of Wischhusen's testimony as contradictory and imprecise. Wischhusen testified with considerable uncertainty. For example, he testified that:

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[3] The Examiner did not resolve these conflicts. Since we find the resolution of those conflicts to be critical to this case, we make our own findings in regard to that testimony. While the Commission attaches considerable weight to the factual findings and inferences made by Examiners, the Commission may also make its own inferences and draw conclusions that are supported by the record. See, Seattle School District, Decision 5237-B (EDUC, 1996), and Port of Tacoma, Decision 4626-A and 4627-A (PECB, 1994).

> There was an initial time period in the beginning that I was not [using the vehicle to commute between home and work]. And at some point there after Chief Goodman and I discussed it, but I can't recall what the details were, and I began taking it home. [Tr., p.35.]

The remainder of Wischhusen's testimony relating to the original discussions about use of the vehicle was equally evasive. When asked if he had any recollection of the time when he had the conversation with Chief Goodman about using the car to commute, he replied, "No, I can't recall that as well." [Tr., p. 36.] He did recall there was a conversation, however, and he recalled "bits and pieces" of it. He stated:

> The only thing that I can remember specifically was that D.A.R.E. is a high profile type thing and that Chief Goodman wanted the visibility of the vehicle, and because I was doing some other functions that it made it easier for me to go ahead and have the vehicle and to take it home, back and forth to work. [Tr., p. 36.]

Wischhusen testified that the idea for him to commute in a D.A.R.E. patrol car originated with Chief Goodman, but considering the general lack of clarity of his testimony, we are unable to credit his responses in areas where the subject is in dispute. The Examiner's comments on Wischhusen's credibility support this view.

Goodman, on the other hand, testified with greater certainty. He testified that Wischhusen came to him wanting to drive the vehicle home because his car was a "gas guzzler", and that upon Wischhusen's request, Goodman visited the dealer which owned the car, and inquired about the feasibility of the officer driving to and from work. Goodman recalled clearly that there were two

conversations with Wischhusen, one concerning Wischhusen's request, and one after he had talked to the dealer. During the second conversation, Goodman told Wischhusen that commuting would be permissible, as long as the mileage was kept under 3,000 miles, for purposes of resale.[4]

Goodman acknowledged that the city gained a benefit from having the car visible, but did not indicate that the visibility of the vehicle was a subject of discussion with Wischhusen or a reason for allowing him to commute with the vehicle. He testified that there were no discussions concerning Wischhusen using the vehicle for the purposes of the police department.[5]

Goodman testified that there was further discussion after Wischhusen's wife had twins in 1993, and it was hard for her to get up in the morning. At that time, Wischhusen requested use of a detective's car when he did not have a car, but Goodman refused that request.[6] This discussion is consistent with a view that Wischhusen had made earlier requests regarding his use of the employer's automobile.

A clear and substantial benefit accrues to an employee in commuting with a vehicle assigned by the employer. We credit Goodman's testimony, and find that a personal favor was the primary reason Wischhusen was permitted to use the D.A.R.E. vehicle for travel to and from home. Any benefits to the employer in terms of visibility were secondary. Since a personal favor predominated, we are not

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[4] Wischhusen acknowledged that he and Goodman discussed the requirement to keep the mileage low, for purposes of resale.

[5] Tr., p. 173.

[6] Tr., pp. 172-173.

convinced the employer should be required to continue allowing commuting privileges for D.A.R.E. officers, particularly in light of the surrounding circumstances.

Material Effect Required -

In order for there to be a unilateral change giving rise to a duty to bargain, there must have been some change in the status quo. See, Kitsap County Fire District 7, Decision 2872-A (PECB, 1988), and Pierce County Fire District 3, Decision 4146 (PECB, 1992).

The National Labor Relations Board (NLRB) holds that a unilateral change must be "material, substantial, and significant" for it to be unlawful.[7] No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours or working conditions. Clark County Fire District 6, Decision 3428 (PECB, 1990); City of Yakima, Decision 3564-A (PECB, 1991); Evergreen School District, Decision 3954 (PECB, 1991); and Green River Community College, Decision 4008-A (CCOL, 1993). The Commission has found unfair labor practices where unilateral changes result in significant adverse affects on employees. See, e.g., Lake Chelan School District, Decision 4940-A (EDUC, 1995) and Spokane Fire District 9, Decision 3482-A (PECB, 1991). The Commission has declined, on the other hand, to find a violation where a change caused only minor impacts to members of the bargaining unit. King County, Decision 4893-A (PECB, 1994). While the Commission held that eliminating commuting privileges in patrol officers is an unfair labor practice in City of Brier, supra, the case at hand comes to us with different facts.

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[7] See, e.g., Litton Microwave Cooking Products, 300 NLRB 324, 331 (1990); Civil Service Employees Association, Local 1000, 311 NLRB 6 (New York, 1993); and Goren Printing, 280 NLRB 1120 (1986). See, also, Westinghouse Electric Corporation, 150 NLRB 1574 (1965).

In Brier, new police officers had routinely been told in interviews that they would be authorized to use patrol vehicles for commuting purposes because of the low pay of the position in comparison to other cities. The officers worked a 12-hour day, with 3 days on and 3 days off, and were significantly affected by a new mayor's unilateral proclamation that patrol cars would no longer be taken home. In the case at hand, it appears the employer intended to make some change, but there is nothing in the record to show that a change was, in fact, ever implemented. Scott Myhre took steps to become the D.A.R.E. officer, and took the training, but did not teach any class outside the training, and went to work elsewhere.[8]

If we were to consider that the conversation with Myhre was sufficient to cause a change, we find no basis for a finding that the change was significant. When Bowers pointed out the problem of having the vehicle crossing the county line, Myhre agreed. Myhre even told the police chief he did not care to take the D.A.R.E. vehicle home. Myhre had other personal matters to handle on the way home, and "it was not a big deal" to him. The union appears to have based its unilateral change allegation only on the discussion between Bowers and Myhre, and we have difficulty, considering the circumstances of that discussion, finding that bargaining unit employees were impaired in any way as a result of the change. Even the affected employee found the matter insignificant.

Erroneous enforcement of a rule by one supervisor does not, by itself, change the rule or create a new status quo. City of

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[8] Wischhusen was asked to teach the program again, but the parties did not litigate what happened with Wischhusen's commuting privileges when he returned to the D.A.R.E. assignment. These facts raise a question whether the union's underlying interest is a change in Wischhusen's privileges to commute with the D.A.R.E. vehicle, but that issue is not before us.

Yakima, Decision 3564-A (PECB, 1991). Arbitral decisions support a conclusion that isolated accommodations based on individual circumstances do not constitute past practices. See, e.g., Midwest Power, 101 LA 471 (Thornell, 1993).[9]

Circumvention and Waiver by Inaction

A union may waive its bargaining rights by inaction. See, Mukilteo School District, Decision 3795-A (PECB, 1992) and Lake Washington Technical College, Decision 4721-A (PECB, 1995).[10] The issue was not raised by the parties, but the record compels us to question whether the union waived its right to bargain by its inaction at the time the employer made the individual agreement with Wischhusen.

An employer may commit a refusal to bargain violation if it negotiates a mandatory subject of collective bargaining directly with a bargaining unit member in circumvention of the exclusive bargaining representative. See, City of Pasco, Decision 4197-A (PECB, 1994). Generally, individual agreements are not binding, once the employees have exercised their right to organize. Snohomish County Fire District 3, Decision 4336-A (PECB, 1994).

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[9] We agree with the Examiner that "past practice" serves a different purpose in arbitration. The Commission has been reluctant to use arbitrators' decisions as precedent where the matter involved the interpretation of an existing collective bargaining agreement. See, Snohomish County Fire District 3, Decision 4336-A (PECB, 1994). Arbitral decisions have been used as supporting authority, however, where they assist in administering enforcement of the collective bargaining statute. See, e.g., Okanogan County, Decision 2252-A (PECB, 1986).

[10] See, also Green River Community College, 4008-A (PECB, 1993) and Spokane Fire District 9, Decision 3021-A (PECB, 1990).

Goodman and Wischhusen made a special agreement unique to one incumbent of the D.A.R.E. officer position, indicating a cause of action could have existed for an unfair labor practice at the time the employer entered the agreement with Wischhusen.

The Examiner found the oral agreement between Wischhusen and Goodman occurred some time before 1994. Prior to Sergeant Heenan's presidency in 1996, Wischhusen served as president of the union for some two year period. He was involved in negotiations, and assisted Heenan in union affairs thereafter. The record provides a basis to infer that the union knew or should have known of the individual agreement made in circumvention of the exclusive bargaining representative. Inaction on the part of the union at the time of the oral agreement or soon thereafter would have given rise to a legitimate waiver-by-inaction defense had the union filed an unfair labor practice at the time. With the record we have before us, which is devoid of evidence that the union placed the issue on the bargaining table in contract negotiations, we can make a strong inference that the union may have waived its right to bargain the subject of commuting privileges of the D.A.R.E. police officer or the agreement between Wischhusen and the employer.

Remedy

Since we find no unfair labor practice, the union is not entitled to any remedy. We nevertheless discuss the portion of the Examiner's order which required that notice to be "published for 30 days in a daily or weekly newspaper of general circulation delivered to subscribers within the boundaries of the CITY OF BURLINGTON". Had we affirmed the finding of an unfair labor practice, we would still have reversed that portion of the Examiner's order as unwarranted in this case.

Thirty days of publication of a notice in a newspaper could be unnecessarily costly to the employer. In addition, the remedy is excessive as a deterrent, and borders on a penalty, which the statute does not authorize the Commission to administer. As we said recently in Seattle School District, Decision 5542-C (PECB, 1997), some creativity might be appropriate in a case that otherwise meets the criteria for an "extraordinary" remedy, but extraordinary remedies are used sparingly, and ordered only when a defense is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation.[11] Even if we were to find an unfair labor practice, the record in this case does not show the employer's arguments were frivolous or that any employer actions consisted of the types of repeated, pervasive, flagrant, or outrageous violations that support an extraordinary remedy and warrant a publication order.[12]

NOW, THEREFORE, it is

ORDERED

1. Paragraph 6 of the Examiner's Findings of Fact is amended to read as follows:

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[11] As the employer states, the NLRB also reserves publication for cases in which the violations are flagrant and repeated. See, NLRB v. Union Nacional De Trabajadores, 540 F.2d 1 (1st Cir., 1976), cert. denied, 429 U.S. 1039 (1976) and Teamsters Local 115 v. NLRB, 640 F.2d 392 (D.C. Cir., 1981).

[12] The same remedial order applied to violations found in the companion cases, although neither party petitioned for review. For the reasons indicated herein, we would not be disposed to bring our "enforcement" powers to bear under RCW 41.56.160 to compel compliance with this aspect of an order, merely because it was not appealed.

6. The City of Burlington has had a D.A.R.E. program with an officer assigned to it since 1990. Bob Wischhusen served in this capacity from 1991 through the end of the 1995-1996 school year as the third D.A.R.E. officer. Then-chief Goodman and Wischhusen orally agreed some time before 1994 that Wischhusen could use the department's D.A.R.E. vehicle for commuting the six to eight mile round trip between his home and police headquarters. Wischhusen was the only officer of the three assigned to the D.A.R.E. program to be allowed to use the D.A.R.E. vehicle for commuting. The primary reason for Wischhusen using the vehicle to travel to and from home was as a personal accommodation to the employee.

2. Paragraph 7 of the Examiner's Findings of Fact is amended to read as follows:

7. Officer Scott Myhre was appointed in 1996 to succeed Wischhusen as D.A.R.E. officer. Chief Bowers told Myhre on June 12, 1996, that he would not be allowed to commute in the D.A.R.E. vehicle because he lived more than 15 miles from police headquarters and in another county. Myhre agreed with Bowers, and added that he did not care to take the vehicle home because of the ease of handling personal matters in his own car on the way home, and that using the D.A.R.E. vehicle to commute was not important to him. Bowers told Myhre that Wischhusen was allowed to drive the D.A.R.E. vehicle in lieu of taking overtime, and that because Myhre would not be taking the car home, he was to record any

overtime hours. After Myhre took the D.A.R.E. training, he did not teach any classes and planned to leave his employment. Wischhusen was asked to take over the program again.

3. Paragraph 3 of the Examiner's Conclusions of Law is amended to read as follows:

> 3. The record fails to establish that the employer unilaterally changed a practice of the D.A.R.E. officer commuting between home and work in the D.A.R.E. vehicle. Thus, the City of Burlington did not refuse to bargain in violation of RCW 41.56.140(4) when Police Chief Gerald Bowers told Officer Scott Myhre he could not use the D.A.R.E. vehicle for commuting after he was appointed D.A.R.E. officer.

4. Paragraph 3 of the Examiner's Order is reversed, and the complaint charging unfair labor practices filed in Case 12587-U-96-2995 is DISMISSED.

Issued at Olympia, Washington, on the 2nd day of July, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner