Spokane County, Decision 6073-A (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, COUNCIL 2, AND LOCAL 1135, AFSCME, AFL-CIO,		
Complainant,		CASE 13352-U-97-3259
vs.		DECISION 6073-A - PECB
SPOKANE COUNTY,		FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER
Respondent.		

Audrey B. Eide, Attorney at Law, appeared for the Complainant.

James R. Sweetser, Prosecuting Attorney, by Martin F. Muench, Senior Deputy Prosecuting Attorney, appeared for the Respondent.

On August 21, 1997, Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, and its Local 1135 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Spokane County (employer) had violated RCW 41.56 140(4) with regard to the implementation of performance appraisals for bargaining unit employees. The Executive Director reviewed the complaint under WAC 391-45-110, and found a cause of action to exist. The employer subsequently filed both an answer and a motion for summary judgement. The motion was denied by the Examiner. A hearing was held on March 20, 1998, before Examiner Vincent M. Helm. The parties filed post-hearing briefs.

BACKGROUND

The union and employer were parties to master and supplemental agreements. Their supplemental agreement specifically covered union-represented employees working for the employer's Public Works Department.

Prior to January 1995, a number of different job evaluation forms were utilized by the employer for various groups among its union-represented employees. Union Staff Representative Bill Keenan testified that the employer and union negotiated for approximately two years with respect to developing a uniform appraisal form. The union took the position that performance appraisals and evaluations may be developed by the employer without negotiations, except to the extent that they impacted matters dealt with in the parties' collective bargaining agreement. In the union's view, the evaluation plan initially developed by the employer to replace existing plans contained references to withholding of contractual step increases and imposition of discipline, which were matters dealt with by the collective bargaining agreement. The union advised the employer that it was not interested in negotiating the content of the forms, if the evaluations were not used for discipline or to withhold step increases. According to Keenan, exhibits four and five in this record represent the results of the parties' negotiations. Those forms were implemented in March of 1996. On their face, they indicate that performance evaluations were to not be used as the basis for discipline or withholding of step increases.

Testifying for the employer, Labor Relations Manager Gary Carlson stated that the evaluation form in exhibits four and five was to be used only to evaluate employee performance where the employee

worked in a job classification which had a written job description. Employees in the Public Works Department and Road Department do not have written job descriptions, so it was Carlson's view that exhibits four and five were not applicable to them.

The evaluation form at issue in this proceeding was developed by Gerry Gemmill, who is the administrative manager for the Public Works Department and is responsible for labor relations in that department. He stated that it was intended by the employer to be applied exclusively to employees in the Public Works Department and Road Department, as a supplement to a one-page form which had been used on a more or less haphazard basis. Gemmill prepared an agenda for a March 6, 1996 meeting of the parties' labor management committee, on which performance evaluation was listed as one of the subjects of discussion.

Keenan testified that the evaluation form presented by Gemmill at the March 6, 1996 meeting, is the one which was marked as exhibit one in the unions' complaint. After reviewing the document in March of 1996, the union advised the employer that the evaluation form impacted upon employee discipline, as presented, because it indicated that marked improvement was required on a follow-up evaluation within two months following an unsatisfactory rating, if discipline was to be avoided. Keenan recalled Gemmill stating the employer would not negotiate the matter, but was interested in the unions' suggestions. Gemmill agreed with Keenan's recollection.

Gemmill stated that, as a result of the unions' comments, the form ultimately adopted by the employer deviated from the document originally submitted to the union. Those modifications included deletion of references to discipline and sick leave usage, and the addition of material relative to documentation. According to

Gemmill, the union was advised, in March of 1996, that the employer intended to use the form in future employee evaluations.

Keenan testified that he was unaware of actual implementation of the Public Works evaluation form until January of 1997.[1] Keenan then became aware of the use of the disputed evaluation form when a bargaining unit employee, Ed Farwell, presented his evaluation at a union executive committee meeting, in January of 1997, and complained that the evaluation constituted discipline. That document, which is in evidence as exhibit 12, is dated November, 1996, and appears to cover the period from August of 1989 to November of 1996. The union agreed, and assured Farwell that it would discuss the matter with the employer.[2]

The union raised the issue of Farwell's evaluation at a labor-management meeting held on March 7, 1997. According to union witnesses, Gemmill's response was that neither the forms nor their specific content were negotiable or grievable. Gemmill does not recall making those remarks, and now admits that employee discipline is grievable. A letter summarizing discussions at the meeting was prepared by Keenan and was handed to Gemmill during the meeting. That letter basically conforms to Keenan's testimony, and was not responded to by the employer.

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[1] He indicated that he was under the impression that the employer would again discuss the subject with the union, after review of the union's comments.

[2] There is no substantive evidence as to how many bargaining unit employees, other than Farwell, were evaluated on the basis of the form which is at issue herein.

POSITIONS OF THE PARTIES

The union contends the employer refused to bargain, as required by RCW 41.56.030, when it refused, in the labor-management meeting held in March of 1997, to negotiate about an evaluation form which the union contends is a mandatory bargaining subject of bargaining. In the union's view, the form affects employee discipline and wage increases as utilized in the case of Farwell, and thereby impacts the parties' collective bargaining agreement. The union concedes that the employer is not required to negotiate the content of evaluation forms, so long as they do not impact the parties' collective bargaining agreement. In the unions' view, the violation of the statute occurred with the refusal of the employer to negotiate the evaluation procedure in March of 1997, rather than with the use of the disputed form in the evaluation of Farwell the previous November, so that this complaint filed in August of 1997 was timely.

Relying upon Pierce County Fire District 3, Decision 4146 (PECB, 1992), the employer contends that the union has the burden of proof to establish that the disputed action involves a mandatory subject of bargaining, and that the employer's action created a duty to bargain with respect to either the action or the impact of the action. The employer also relies upon City of Seattle, Decision 359 (PECB, 1978), for the proposition that the employer has an inherent right to unilaterally develop and maintain employee performance evaluations. The employer contends, in addition to its defense on the merits, that this complaint should be dismissed as untimely. In the employer's judgment, the six-month period allowed by RCW 41.56.160 for the filing of a complaint began to run no later than January 31, 1997, since the union conceded that it became aware of the Farwell evaluation sometime in January of 1997.

Citing NLRB decisions as well as Commission precedent, the employer contends that the limitation period set forth in the statute is jurisdictional, and requires a complainant to file charges within six months of either the actual occurrence or the time when the party had actual or constructive notice of the event if it be shown that either the respondent concealed its actions or that there is a continuing violation. In the employer's judgment, under the light most favorable to the union, the complaint herein was not filed in a timely manner. Lastly, the employer contends that, even if a duty to bargain exists, it was excused by the unions' failure to request negotiations after the labor-management meeting in March of 1996, when the employer gave notice of its intent to implement the evaluation procedure.

DISCUSSION

The Timeliness and Waiver Defenses

The questions as to whether the complaint is timely and as to whether there has been a waiver of union bargaining rights may only be answered after analysis of all of the relevant facts herein. Those questions are nevertheless addressed first, because the answers could obviate the need to address other issues raised.

RCW 41.56.160(1) both authorizes and limits the processing of unfair labor practice complaints. Precedent implementing the six-month limitation includes: Spokane County, Decision 2377 (PECB, 1986); Port of Seattle, Decision 2796 (PECB, 1987); City of Kent, Decision 5417 (PECB, 1996); and City of Prosser, Decision 6028 (PECB, 1997). To be timely, a complaint must be filed within six months following the complained-of occurrence, or within six months

after the injured party has actual or constructive notice of the occurrence. Timeliness challenges are affirmative defenses, on which the respondents have the burden of proof.

If an unfair labor practice were to be predicated upon a unilateral implementation of the evaluation procedure herein, no probative evidence was introduced as to the precise date of such an implementation. The employer presented a draft evaluation procedure to the union at the labor-management meeting held in March of 1996, and it indicated an intent to implement some version of that procedure, but it did not give a precise date for such action. Moreover, testimony of the employer representative, Gemmill, indicated that the draft procedure was subsequently revised to incorporate some suggestions made by the union at the meeting held in March of 1996. The earliest possible date that can be pointed to for implementation of the disputed evaluation form is the Farwell evaluation dated November 15, 1996. Under that analysis, this complaint filed in August of 1997 would have to be dismissed as untimely.

There is no evidence that any union official received actual notice of the employer's utilization of the disputed evaluation form until some time in January of 1997, when Farwell presented it to the union. Since Farwell is not a union official, and there is no probative evidence that any employee holding a union office ever received an evaluation using the disputed form, the earliest time that notice of the disputed evaluation form can be imputed to the union is January of 1997. Under that analysis, this complaint filed in August of 1997 would again have to be dismissed as untimely.

It is equally plausible, in the context of this case, to view each evaluation made with the disputed form as a new violation of the

statute. Under this rationale, however, this particular complaint would have to be dismissed as untimely, inasmuch as the only operative dates would be either the date in November of 1996, when Farwell received the disputed evaluation, or the date in January of 1997 when the union first became aware of the employer's use of the evaluation form. This is true because the record fails to show any actual use of the disputed form other than in connection with the Farwell evaluation, so there is no basis to conclude that a change of practice implemented at that time was consistently pursued thereafter.

One other theory upon which an unfair labor practice might be predicated arises out of the employer's duty to give notice, to provide opportunity for bargaining, and to bargain in good faith, all before implementing changes of employee wages, hours and working conditions. Assuming, arguendo, that the employer was obligated to bargain the impacts of its evaluation form, upon request, the employer's unequivocal refusal to bargain following the March 7, 1997 labor-management meeting, might be considered as the operative event giving rise to a cause of action. Further, the employer implemented the disputed evaluation procedure without notice to the union and an opportunity to bargain being provided. Thus, the union was placed in the position of requesting negotiations after the fact. This it did, in the March 1997 meeting, and it filed its unfair labor practice complaint within six months after that meeting.

The employer, in connection with a "waiver" defense, relies on Island County, Decision 5388 (PECB, 1995) and cases cited therein, as well as Pierce County Fire District 3, supra, and cases cited therein. As acknowledged by the employer, however, the party asserting a waiver of a statutory right bears the burden of proof.

In this case, there is absolutely no probative evidence of a widespread use of the disputed evaluation form over a sustained period of time, as would be necessary to give rise to an inference that the union waived its statutory right to bargain upon the matter.

In view of the foregoing, the Examiner makes the following conclusions with respect to the employer's timeliness and waiver defenses:

1. No violation may be predicated upon the actual adoption of the evaluation form by the employer, because of time constraints imposed by the statute.

2. This complaint was timely, under City of Pasco, Decision 4197-A (PECB, 1994), with respect to an alleged refusal of the employer to bargain upon the impact of the Farwell job evaluation or to negotiate upon impacts generally. The operative date of such an allegation would be March 7, 1997.

3. The waiver defense asserted by the employer is without merit, in view of the paucity of evidence as to the actual use of the disputed evaluation form. See, City of Seattle, Decision 1667-A (PECB, 1984).

In view of these conclusions, the Examiner must proceed with analysis of other issues raised by the parties.

There is no Duty to Bargain

The employer maintains, the union concedes, and Commission precedent establishes, that employers have a fundamental right to

evaluate their operations and employees. See, Spokane County Fire District 9, Decision 3661-A (PECB, 1991). The union argues, however, that the evaluation form at issue in this case impacts upon the collective bargaining agreement through the content of supervisory input upon the form with respect to discipline and wage increases. Therefore, the union would have the Examiner find that the content of each employee evaluation must be negotiated with the union, upon request. This contention is absolutely without merit.

The form itself contains nothing which impacts, in any fashion, upon the parties' collective bargaining agreement. Any evaluation set forth on the form by a supervisor with respect to a particular bargaining unit employee does not impact per se upon the parties' collective bargaining agreement. The completed form does not provide for discipline, nor does it affect step increases. The descriptive material set forth in the form summarizes conduct which the employer may ultimately view as giving rise to discipline or to withholding of step increases. Should either of these eventualities occur, however, the union would have recourse through the grievance and arbitration procedure of the parties' collective bargaining agreement.

Even in a grievance or arbitration proceeding which might follow an evaluation, the matters set forth in the evaluation form do not constitute evidence of the conduct described in the form. Whether the conduct set forth is accurately described, and whether any action taken by the employer relative to such conduct is appropriate, are each proper subjects for debate and resolution in the grievance and arbitration proceedings.

Neither the evaluation form, nor the material set forth therein, gave rise to any bargaining obligation on the part of the employer.

FINDINGS OF FACT

1. Spokane County is a political subdivision of the state of Washington, and is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1).

2. Washington State Council of County and City Employees, Council 2, and AFSCME Local 1135, AFL-CIO are bargaining representatives within the meaning of RCW 41.56.030(3), and are the exclusive bargaining representative of certain employees in the public works and road department of Spokane County.

3. Some time prior to November 15, 1996, the employer adopted a form to be used in evaluating the job performance of its employees, including employees represented by the union. That form contains nothing which impacts, in any fashion, upon the parties' collective bargaining agreement. Any evaluation form completed by a supervisor with respect to a particular bargaining unit employee does not, per se, provide for discipline or affect step increases.

4. The evaluation form described in paragraph 3 of these findings of fact was adopted without notice to the union. The record does not establish the precise date of that implementation, nor does it establish that the form was used on a consistent or widespread basis sufficient to give rise to an inference that the union knew or should have known of its use.

5. During or about January of 1997, the union became aware that the evaluation form described in paragraph 3 of these findings of fact had been utilized by the employer in its evaluation of the work performance of a bargaining unit employee.

6. On March 7, 1997, the union requested that the employer negotiate job evaluation procedures with respect to the evaluation referenced in paragraph 5 of these findings of fact. The employer refused that request.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The complaint charging unfair labor practices filed in this matter on August 21, 1997, was timely under RCW 41.56.160, with regard to the conduct described in paragraph 6 of the foregoing findings of fact.

3. The record in this proceeding is insufficient to sustain a finding that the union waived its statutory bargaining rights under RCW 41.56.030(4) after having had actual or constructive notice of the employer's adoption of the evaluation form described in paragraph 3 of the foregoing findings of fact.

4. The evaluation form described in the foregoing findings of fact does not alter or affect the wages, hours, or working conditions of employees represented by the union, so that the employer's adoption and use of that form did not give rise to a bargaining obligation under RCW 41.56.030(4), and the employer has not committed an unfair labor practice under RCW 41.56.140.

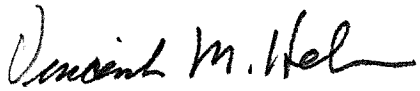
NOW THEREFORE, on the basis of the above and foregoing findings of fact and conclusions of law, the Examiner makes the following:

ORDER

The complaint charging unfair labor practices filed in this matter is hereby DISMISSED.

Issued at Olympia, Washington, this 13th day of July, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



VINCENT M. HELM, Examiner

This order will be the final order of the agency unless appealed to the Commission under WAC 391-45-350.