Valley Communications Center, Decision 6097 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VALLEY COMMUNICATIONS EMPLOYEES ASSOCIATION,	)	
Complainant,	)	CASE 12939-U-97-3121
vs.	)	DECISION 6097 - PECB
VALLEY COMMUNICATIONS CENTER,	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW, AND ORDER.

Cline and Emmal, by Alex J. Skalbania, Attorney at Law, appeared on behalf of the union.

Garvey, Schubert and Barer, by Ronald J. Knox, Attorney at Law, appeared on behalf of the employer.

On January 22, 1997, the Valley Communications Employees Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Valley Communications Center (employer) had violated RCW 41.56.140(2) and (4) by unilaterally changing practices concerning employee choice between compensatory time off and monetary payment for overtime work. The Executive Director issued a preliminary ruling under WAC 391-45-110 on March 24, 1997, assigning Walter M. Stuteville as Examiner. The employer filed its answer on April 11, 1997. A hearing was held on June 25, 1997, before the Examiner. The parties filed post-hearing briefs.

BACKGROUND

The facts in this case are largely undisputed. The employer provides dispatch services for a variety of police departments,

fire departments and emergency medical services providers in south King County. The cities of Kent, Auburn, Renton, and Tukwila are its primary owners. The center is managed by Director Chris Fischer. Operations Manager Mark Morgan reports to Fischer.

The union represents approximately 75 employees who work at the center. Within that unit: Call receivers answer incoming calls and route them to the appropriate dispatchers; dispatchers obtain additional information from callers and effect radio communications with the appropriate agency(-ies) to respond; and CAD coordinators are responsible for the computers used in dispatching and for other functions within the center. The parties' current collective bargaining agreement is the first contract between the employer and this union. The union president is Mark Shaffer.

Early in 1996, the employer began negotiations with the city of Federal Way, which had recently decided to create its own police department. Rather than having a management team handle the expansion of the employer's dispatching services to include this new department, the employer decided to open the process to interested employees. Eight employees initially indicated an interest in participating in this project.

In an August 16, 1996 letter to the employees who had initially indicated interest in the Federal Way Police project, Operations Manager Morgan made the following reference to overtime:

> ... I have scheduled a meeting on August 26th at 1400 to discuss ideas and start working on the transition. If you are unable to attend that meeting, please let me know as soon as possible. If you would like to coordinate an adjustment with you [sic] Supervisor, do not anticipate the meeting lasting more than an hour. **If an adjustment is not possible, you will receive comp time for your participation.**

[Emphasis by **bold** supplied]

In response to an employee's question at a follow-up meeting on August 26, 1996, Morgan told participating employees that no additional monies were budgeted for the project, and that any overtime work involved would have to be paid as compensatory time off. By that time, the team consisted of seven bargaining unit members, and each team member had been assigned specific duties which the team had identified as required for the transition of the new agency into the center.

Victor Celis is a bargaining unit employee who was a member of the Federal Way Police transition team. On October 15, 1996, Celis approached President Shaffer of the union concerning overtime compensation. According to Shaffer, this was the first that he had notice of this issue. Shaffer instructed Celis to ask Morgan if he could receive monetary compensation for his overtime work on the committee. When Celis approached Morgan on the subject of overtime compensation, Morgan repeated his earlier statement that the work on the committee was voluntary, and that the employer could only provide compensatory time off in lieu of paid overtime. Morgan later repeated that same statement directly to Shaffer.

In a letter sent to the employer on October 15, 1996, Shaffer demanded that the employer rescind any unilateral changes it had instituted concerning overtime compensation. No written reply was received by the union from the employer.

A meeting between employer and union representatives occurred on October 21, 1996. According to union witnesses, Director Fisher stated that she believed the employer had not "done anything wrong", and that the employer was not going to reply to the union's demand for bargaining. Based upon that refusal, the union filed the complaint charging unfair labor practices to initiate this proceeding.

POSITIONS OF THE PARTIES

The union contends the employer violated the law when it instituted a unilateral change in the employees' working conditions, without providing any notice to the union or opportunity to bargain. It also argues that talking directly with the employees concerning compensatory time off in lieu of payment for overtime work was illegal direct dealing, and an interference with employee rights.

The employer asserts that it was not circumventing the union when it announced its intention to form a voluntary employee committee to administer the transition of a new client into its services. It argues that it was, instead, following its past practice of awarding compensatory time for voluntary overtime and was neither negotiating, soliciting, nor requesting concessions on the part of its employees.

DISCUSSION

It is clear that compensation for overtime work is a mandatory subject of bargaining, affecting both the general terms "wages" and "hours" as found in the statute:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, **including wages, hours and working conditions**, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.030(4) [emphasis by **bold** supplied].

The union aptly relies on City of Centralia, Decision 5282-A (PECB, 1996), where it was held that an employer decision which results in a reduction in employee's overtime pay constitutes a mandatory subject of bargaining.

The Unilateral Change Allegation

The parties' contract contains language on the appropriate compensation for overtime work:

> ARTICLE V HOURS OF WORK AND OVERTIME
>
> ...
> 5.5 Employees shall be paid at the rate of one and one-half (1-1/2) times their regular straight-time rate of pay for all hours worked in excess of forty (40) hours of work in the employee's regularly scheduled seven (7) day work period or regularly assigned shift. Overtime shall be paid in increments of fifteen (15) minutes with the major portion of fifteen (15) minutes being paid as fifteen (15) minutes. Except for mandatory overtime, paid sick leave or unpaid leave shall not be credited as time worked for purposes of determining overtime.

The union argues that this language gives employees a choice between compensatory time off and monetary payment for overtime work, and "clearly takes precedence over any past practice".

Contract Enforcement Unavailable -
It has long been established that the Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976); City of Fircrest, Decision 5669-A (PECB, 1997). Once the bargaining obligation imposed by RCW 41.56.030(4) and enforced by RCW 41.56.140(4) is satisfied by a negotiated contract, parties must enforce their agreement through the dispute resolution

mechanism negotiated into the contract itself. The grievance and arbitration procedures of the parties' contract is the proper forum for the parties to obtain interpretation or application of the agreement they reached on compensation for overtime work.[1]

Deferral to Arbitration Inappropriate -
Under City of Yakima, Decision 3564-A (PECB, 1991), "unilateral change" allegations can be deferred to arbitration. An arbitrator's finding that the employer's offer of compensatory time off violated the relatively clear terms of the parties' collective bargaining agreement could have yielded a remedy for the union in that proceeding, but would have triggered a simple dismissal of the "unilateral change" allegation in this unfair labor practice case. Normally, neither a union's failure or refusal to pursue a grievance, nor an employer's failure to request deferral, provides a basis for an Examiner to determine a "unilateral change" issue such as that which is raised in this case.

An arbitrator does not have the jurisdiction to determine "circumvention" allegations such as are advanced by the union in this case. Deferral would thus have resulted in a two-hearing process. To avoid an unnecessary expenditure of public resources, deferral is inappropriate where "unilateral change" allegations are mixed in the same complaint with other unfair labor practice types.

Limited Contract Interpretation -
The Examiner is left with the task of interpreting the contract language, to the extent necessary to determine whether the alleged unilateral change is covered by the parties' contract. The

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[1] RCW 41.58.020(4) encourages arbitration of grievances; RCW 41.56.122(2) authorizes inclusion of grievance arbitration provisions in collective bargaining agreements; RCW 41.56.125 even makes the Commission's staff available to serve as arbitrators in some cases.

Examiner has not provided a complete analysis of the employer's defense that the disputed offer of compensatory time in lieu of pay for overtime was consistent with some past practice, but notes that City of Wenatchee, Decision 2194 (PECB, 1985) stands for the proposition that past waivers of bargaining rights by a union do not give an employer a right to make further changes without meeting its notice and bargaining obligations.

In an arbitration hearing, the parties might have presented evidence of discussions had by their negotiators about the meaning and intent of the contract language, but the Examiner is not functioning as an arbitrator. Whatever the intent of the parties might have been when they negotiated that language, the contract language establishes that the parties have, in fact, bargained the issue of overtime and incorporated their agreement into the body of their collective bargaining agreement. Thus, the duty to bargain has been satisfied, and no "unilateral change" violation can be found in this case.

The Circumvention Allegation

RCW 41.56.030(4) imposes a duty on the employer to bargain with the organization designated as the "exclusive bargaining representative" of its employees under RCW 41.56.080, to the exclusion of all others. An employer thus commits a violation of RCW 41.56.140(4), as well as a derivative violation of RCW 41.56.140(1), if it negotiates employee wages, hours or working conditions with any other organization or with individual bargaining unit employees.

From the uncontested facts, it is clear the employer has utilized a method of compensation for overtime work that is different for the participants in this special project than the contract rate, and that it did so without negotiation with the union. Before rushing to judgment on this matter, however, it is necessary to consider the employer's defenses to the charge of direct dealing.

Absence of Negotiation -
The employer argues that it was not bargaining with its employees when it announced its intention to compensate committee participants with compensatory time off for overtime work. It asserts that it was only conveying information in a manner that did not amount to direct dealing.

The record clearly does not sustain a finding that the employer put forth the issue as a part of or as a condition upon its solicitation of employees to participate in the committee being established to implement the expansion to cover the Federal Way Police operation. Both employer and union witnesses agreed that the issue concerning overtime for committee work was initially raised by one of the employees, and that the ensuing discussion was limited to that question and answer.

Absence of Coercion -
The employer argues that its response to the question about overtime compensation was non-coercive. The Examiner notes the existence of some evidence which could support an inference that the response was somewhere beyond being purely informational.

Since it was clear that some of the committee work was to be done on overtime, it could follow that employees understood they would have to accept the employer's unilateral decision on overtime compensation in order to participate on the committee. Mark Morgan, the employer official responsible for organizing the Federal Way Police transition team, is himself a former bargaining unit member and bargaining unit president. He testified that he believed that the way to be promoted at Valley Communications was to volunteer for projects outside the usual scope of responsibilities. Although he was focusing his testimony on the issue of compensatory time off in lieu of pay for overtime work, it was clear from his account of his own employment history that he sees volunteering for extra duty as a way to achieve advancement within

the agency. Therefore, it could have been argued that an employee was jeopardizing career opportunities for promotion by not volunteering for additional committee work or by refusing to take compensatory time as payment for overtime.

The union did not, however, contend or present any evidence that employees reasonably perceived or actually felt any coercion. No employees testified that they believed that they had to accept compensatory time off if they expected to be promoted. Although there may have been some element, even unintended, of pressure in the employer's approach to paying for "voluntary" overtime work in connection with the committee process, the union did not pursue the matter. The burden of proof in an unfair labor practice is on the complainant, and the complainant has not proven that the employer interfered with employee rights in the circumstances of this case. Peninsula School District, Decision 1477 (PECB, 1982).[2] The union's complaint must be dismissed.

FINDINGS OF FACT

1. Valley Communications Center is a public employer within the meaning of RCW 41.56.030(1). The employer provides emergency dispatch services for the cities of Kent, Auburn, Renton, Tukwila and Federal Way, under the direction of Director Chris Fischer and Operations Manager Mark Morgan.

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[2] Although the union checked the box on the complaint form to allege a "domination or assistance of union" violation under RCW 41.56.140(2), that provision of the statute appears to be entirely inapposite to this case. There is no suggestion or evidence that the employer has in any way attempted to set up or support a "company union", or that it has in any way attempted to interfere with the internal affairs of the incumbent union.

2. The Valley Communication Employees Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of approximately 75 employees classified as call receivers, dispatchers, and CAD coordinators. President Mark Shaffer heads the organization.

3. The employer and union are parties to a collective bargaining agreement which requires, at Article V, section 5.5, that employees be paid at a "time and one-half" rate for overtime work.

4. Early in 1996, the employer informed bargaining unit employees that it was looking for volunteers to work on a transition team necessitated by the addition of the Federal Way Police Department to the employer's clients. Eight bargaining unit employees initially showed interest in working on the project.

5. At an August 26, 1996 meeting, in response to a question from one of the bargaining unit employees, Operations Manager Morgan stated that the employees would not be paid for overtime work on the project, but instead would be given compensatory time off.

6. On October 15, 1996, bargaining unit employee and transition team member Victor Celis raised the issue of overtime compensation for the transition team with union President Shaffer. That same day, Shaffer sent the employer a letter demanding that the employer rescind its "unilateral change" in overtime computation.

7. The union's demand for recission of a "unilateral change" was repeated at a meeting on October 21, 1996, where the employer denied that overtime compensation had been unilaterally changed. At that meeting, the employer asserted that it was

following a past practice utilized previously for volunteer projects.

8. The union has not provided argument or evidence that employees reasonably perceived or actually felt coerced or intimidated by the employer's statement on overtime compensation for volunteer projects in general, or for the Federal Way Police transition team project specifically.

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. Payment for overtime worked is a component of employee wages and affects employee hours of work and, as such, is a mandatory subject of bargaining under RCW 41.56.030(4).

3. No violation of RCW 41.56.140 is established by the change of overtime practice alleged in this case, because the language in the parties' collective bargaining agreement indicates that the duty to bargain imposed by RCW 41.56.030(4) has been satisfied as to the subject of overtime compensation, and the Commission does not assert jurisdiction to determine or remedy violations of collective bargaining agreements.

4. The union did not carry its burden of proof that the employer engaged in unlawful circumvention of the exclusive bargaining representative, or that it negotiated a mandatory subject of collective bargaining directly with bargaining unit employees, by the response of an employer official to an employee's question concerning compensation for overtime work on the Federal Way Police transition team, so that no violation of RCW 41.56.140(4) or (1) has been established in this case.

5. The union has not provided any evidence that the employer has dominated or provided unlawful assistance to any organization in RCW 41.56.140(2).

6. The union did not carry its burden of proof that the employer engaged in unlawful coercion of bargaining unit employees in violation of RCW 41.56.140(1) when it told employees that it would only compensate employees working on the Federal Way Police transition team with compensatory time off for overtime work.

ORDER

The complaint charging unfair labor practices filed by the Valley Communications Employees Association is DISMISSED.

Issued at Olympia, Washington, this 31st day of October, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with Commission pursuant to WAC 391-45-350.