STATE OF WASHINGTON

BEFORE The PUBLIC EMPLOYMENT RELATIONS COMMISSION

KALAMA POLICE GUILD,	)	
	)	CASE 13592-U-97-3324
Complainant,	)	DECISION 6739-A - PECB
	)	
	)	CASE 13593-U-97-3325
	)	DECISION 6740-A - PECB
vs.	)	
	)	CASE 13640-U-98-3338
	)	DECISION 6741-A - PECB
	)	
CITY OF KALAMA,	)	CASE 13878-U-98-3409
	)	DECISION 6853-B - PECB
Respondent.	)	
	)	COMPLIANCE ORDER
	)	

Emmal, Skalbania & Vinnedge, by *Alex Skalbania*, Attorney at Law, appeared for the complainant.

Nelson Law Firm, PLLC, by *David S. Nelson*, Attorney at Law, appeared for the respondent.

The above-captioned matters come before the Commission for rulings on disputes concerning the sufficiency of the compliance tendered by the City of Kalama (employer), in relation to remedial orders issued in those matters. The Commission rules that the compliance tendered by the employer was sufficient.

BACKGROUND

The Kalama Police Guild (union) is the exclusive bargaining representative of the employer's non-supervisory law enforcement officers. It has processed several unfair labor practice complaints under Chapter 391-45 WAC, alleging in each case that the

employer failed or refused to bargain in good faith as required by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

In *City of Kalama*, Decisions 6739, 6740 and 6741 (PECB, 1999), Examiner Frederick J. Rosenberry ruled that the employer had committed unfair labor practices in violation of RCW 41.56.140(4) and (1), by unilaterally changing hours of work and the availability of work opportunities, and by unilaterally changing certain medical and dental insurance benefits. The remedial order contained in that consolidated decision directed the employer to cease and desist from its unlawful conduct, and to return the parties to the situations they occupied prior to the unfair labor practices. The employer did not appeal that order to the Commission, and it tendered compliance with the remedial order.

In *City of Kalama*, Decision 6853 (PECB, 1999), Examiner Rex L. Lacy ruled that the employer committed unfair labor practices in violation of RCW 41.56.140(4) and (1), by unilaterally changing a practice concerning employee use of police vehicles to commute to and from their residences. The remedial order contained in that decision directed the employer to cease and desist from its unlawful conduct. The employer tendered compliance, but the union appealed. In *City of Kalama*, Decision 6853-A (PECB, 2000), the Commission affirmed the finding of a violation and modified the Examiner's remedial order to include a financial make-whole remedy to return the parties to the situations they occupied prior to the unfair labor practices. The employer also tendered compliance with that order.

The union contested the sufficiency of the tendered compliance in three specific areas. A compliance hearing was held on February 7, 2001, with Compliance Officer Katrina I. Boedecker serving as the Hearing Officer for the Commission. The purpose of that hearing

was to receive evidence for the Commission to determine whether the employer has fully complied with the remedial orders previously issued in the above-captioned matters.[1] The parties submitted post hearing briefs by April 9, 2001.

DISCUSSION

The facts and issues concerning each tender of compliance are analyzed separately, under the headings which follow.

Scheduling and Work Opportunities

In *City of Kalama*, Decisions 6739 and 6740, *supra*, Examiner Rosenberry found that the employer's historical practice had been to schedule police officers for four 10-hour days per week (a "four 10's" schedule), to staff all designated shifts, and to offer vacant shifts to its employees on a rotating basis. Employees were paid at the overtime rate for filling vacant shifts; if no employee voluntarily accepted a vacant shift, an employee would be required to work overtime to fill the vacancy. Against that background, the union alleged unilateral changes in regard to:

- The employer's implementation of a schedule that had some employees working five eight-hour days per week (a "five 8's"

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[1] RCW 41.56.160(3) authorizes the Commission to seek court enforcement of its remedial orders. Hence, cases where a remedial order is issued are held on a "compliance" docket until either: (1) compliance is accepted as satisfactory; or (2) the Commission authorizes the Attorney General to seek enforcement of its order. Where a dispute exists as to the sufficiency of a tender of compliance, as in these cases, the Commission assigns a staff member to hold a hearing to obtain an evidentiary record upon which the Commission can decide whether to exercise its authority to seek enforcement.

schedule) during the period from December 1, 1997, to January 16, 1998.[2]

- The employer's discontinuance of the practice of scheduling employees to fill vacant shifts on an overtime basis, and its implementation of a practice of covering vacant shifts by placing an employee on call time.

The Examiner ruled that the employer committed unfair labor practices in violation of RCW 41.56.140, since the employer neither provided the union with advance notice of the schedule change and curtailment of overtime, nor provide opportunity for collective bargaining on those matters.

The Compliance Controversy -

The Examiner ordered the employer to restore the *status quo ante* which existed with regard to the changes in the December - January period, and to maintain those wages, hours and working conditions until changes, if any, are reached through good faith collective bargaining with the union. In objecting to the compliance tendered by the employer, the union seeks overtime pay for each and every hour on each and every vacant shift between December 1997 and August 1999, amounting to back pay in excess of $80,000.

Analysis and Conclusions -

The employer's continued use of call time to fill vacant shifts after January 16, 1998, is not at issue before us at this time. At the hearing, the union argued that an increased use of call time was not permitted under the status quo, but the employer objected that an issue concerning the ongoing use of call time was not framed in the complaint and was not properly at issue before the

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[2] The employer restored all of the bargaining unit employees to the four 10's schedule on January 16, 1998.

Examiner. In his decision, the Examiner accepted the employer's assertion that the issue concerning the ongoing use of "on call" assignments was not before him, stating:

> On January 1, 1998, Bud Gish took office as mayor. By memorandum dated January 8, 1998, Gish instructed the chief to reinstate the "four 10's" schedule. While "call time" was to be used to maintain 24-hour coverage, overtime was to be kept to a minimum. The chief then reinstated the "four 10's" schedule for all of the officers. The union did not file an amended complaint on those changes.

The Examiner directed the employer not to leave shifts open that were formerly covered with overtime, but that remedial order did not prohibit the employer from covering vacant shifts with call time. The Examiner's rejection of the union's claim became final, in the absence of a timely appeal. The record establishes that the four 10's schedule was back in place by January 16, 1998, and the calculation of back pay must terminate with that date.

Our conclusion that the back pay must terminate with January 16 is justified by review of the documents in a parallel proceeding. Administrative notice is taken of the file for *City of Kalama*, Case 14074-U-98-3480, where the union complained the employer could not force bargaining unit employees to work call time. A deficiency notice was issued in that proceeding, questioning the ability of the union to hold the employer to a "no unilateral change" standard when the documents on file suggested that the union, itself, had changed the practice. That deficiency notice included:

> The complaint alleges that there was a past practice concerning payment of "call time" at a rate of $1.00 per hour. The complaint alleges that the union itself attempted to disavow that practice in January of 1998, but

> fails to allege that action was upon the agreement of both parties. It is difficult to hold the employer to a "no unilateral changes" standard where it is the union itself that appears to have changed a practice, which the employer seems to have implemented according to its historical terms. Thus, the facts concerning past practice are insufficient to state a cause of action.

Therefore, even if the Examiner had allowed testimony on whether the employer could use call time to fill vacant shifts, no violation would have been found because the employer used call time according to its historical practice, and because the union itself changed the practice.

Our conclusion that the back pay must terminate with January 16, 1998, is further justified by a memorandum which was admitted in evidence at the compliance hearing. In that memorandum, the police chief notified the mayor:

> The following shifts are vacant for the month of January 1998 and I believe they should be covered either by overtime or call time:
>
> - January 16, 22, 23, 24, 29 - No night shift coverage
> - January 17, 18, 19, 20, 21, 25, 26, 27, 28, 31 - No call time coverage between 4 a.m. and 8 a.m..
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> *These dates for overtime and call time have been declined by the Guild members.*

(emphasis added).

The union has not refuted the "declined by" statement contained in that memorandum, but it has nevertheless claimed overtime for some of those dates: January 16th - 24 hours; January 17th - 7 hours; January 22nd - 4 hours; January 23rd - 4 hours; January 25th - 4 hours; January 29th - 4 hours. The union's request to assess

overtime for these shifts must be denied. A complainant has a duty to mitigate damages. *Town of Fircrest*, Decision 248-A (PECB, 1977). There was no adequate explanation as to why bargaining unit employees declined these overtime and call time shifts, or of any change of heart by the employees in the succeeding months. We thus infer that their refusal would have continued into the succeeding months.

Finally, the union's request for over $80,000 in back pay appears to be punitive in nature. While the Commission has broad jurisdiction to fashion equitable remedies, under *Pasco Housing Authority v. PERC*, 98 Wn. App. 809 (2000), the remedial orders issued by the Commission are designed to put the employee(s) affected by unfair labor practices back to the same position they would have enjoyed if no unfair labor practice had been committed. *City of Kalama*, Decision 6853-A (PECB, 2000). The purpose of a remedial order is to remedy, not to punish. *Okanogan County*, Decision 2252 (PECB, 1985). The amount requested here equates to 27% of the entire budget of the Kalama Police Department for 1999, while the employer documented that the overtime hours for 1997 were far less than those claimed by the union for 1998.[3]

For the month of December 1997, the union seeks back pay in an amount of $5,994.69, calculated as follows:

242 overtime hours	$5,749.92
4 call out hours	$ 95.04
65 call time hours	$ 65.00
Shift differential	$ 74.73

[3] For example, only 50 overtime hours were worked in March 1997, yet the union claims 181 overtime hours for March 1998, after the four-10's schedule was put back in place.

The employer contended the claim of 242 overtime hours was suspect, but it has not established a sufficient record to support that contention.

For the month of January 1998, the union seeks back pay in an amount of $4,134.97, calculated as follows:

160 overtime hours	$3,801.60
10 call out hours	$ 237.60
38 call time hours	$ 38.00
Shift differential	$ 57.77

Inasmuch as the four-10's schedule was restored on January 16th, the union is only entitled to one-half of the amount claimed, or $2,067.49.

To fully comply with the remedial orders in the above-captioned proceedings, the employer must provide back pay for the December 1997 - January 1998 period in the amount of $8,062.18, plus interest as directed by WAC 391-45-410(3).

Medical Insurance

For an undisclosed period of time prior to December 1996, the employer provided full family medical and dental insurance benefits for employees in this bargaining unit through the Oregon Teamster Employer Trust. The employer paid the entire cost of those benefits. After this union became the exclusive bargaining representative of the bargaining unit, the plan administrator notified the employer that its participation in the Oregon Teamster Employer Trust plans would be terminated by January 31, 1997, because the bargaining unit was no longer represented by Teamsters Local 58.

Effective February 1, 1997, the employer enrolled the members of this bargaining unit in medical and dental plans offered by Regence Blue Shield. The new plans offered benefits generally similar to the Oregon Teamster Employer Trust plans, but some features of the new plans provided lesser benefits than those provided by the Teamsters plans. Effective February 1, 1997, the employer also unilaterally implemented a self-insured program of making payments to its employees to cover the "gap" between their former and current benefits.[4]

By memorandum dated December 31, 1997, the employer notified the union that it was discontinuing the self-insured "gap" supplement as of January 1, 1998, and that health benefits for employees in this bargaining unit would thereafter be limited to the benefits provided by Regence Blue Shield. The employer did not provide advance notice of those changes to the union, or provide opportunity for collective bargaining on either the decision or its effects. The union filed unfair labor practice charges.

In *City of Kalama*, Decision 6741, *supra*, Examiner Rosenberry found the employer had altered a wage-related benefit that was a mandatory subject of collective bargaining, and that it created a new status quo for purposes of implementing its collective bargaining obligations under RCW 41.56.030(4), when it unilaterally implemented the self-insured "gap" benefit in February 1997. It thus committed unfair labor practices under RCW 41.56.140(4) and (1) when it unilaterally discontinued the self-insured "gap" benefit on and after January 1, 1998. The Examiner ordered the

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[4] Although the record indicates the employer intended the supplemental benefit to be a temporary arrangement pending the completion of collective bargaining with this union, it did not have the agreement of the union on that matter.

employer to restore the *status quo ante* which existed with regard to the self-insured "gap" benefits made available through most of 1997, and to: "Make all employees adversely affected by the unilateral changes whole for all losses they suffered as a result of the unilateral changes."

The Compliance Controversy -

The record establishes that the employer has already reimbursed those employees that provided receipts for out-of-pocket expenses they incurred which the Teamsters plan would have covered. At the compliance hearing, the union raised only one issue involving the "gap" benefit: Former officer Mike Wren claimed a right for reimbursement of $110.41 for prescription payments. The employer responded that $47.65 of the amount claimed was incurred after the termination of Wren's employment in the bargaining unit, and that Wren did not submit timely documentation for the remaining amount.

Analysis and Conclusions -

The employer contended there is no evidence the Teamsters plan would have continued payment after an employee was terminated from employment. The union did not build a record to refute this claim. Therefore, Wren is not entitled to reimbursement for that $47.65.

The remaining portion of the union's claim on behalf of Wren must also be rejected. The record establishes that, despite repeated requests, no treatment record was submitted to the employer to support the remaining charges claimed by Wren. At the compliance hearing, Wren claimed to have the original receipts, but he did not have them with him at that time. The union, therefore, did not submit them into evidence. The employer cannot be held responsible for providing self-insured benefits on a claim that should have been submitted to it long before the compliance hearing, and

certainly should have been documented at the compliance hearing held on February 7, 2001.[5]

The employer has tendered sufficient compliance on the portions of the remedial order involving the self-insured "gap" benefit.

Take-Home Cars

Although work schedules could vary to some extent prior to March 31, 1998, there was a discernable typical work week for bargaining unit members. An employee assigned to work on the day shift would generally be:

- On call from 4 a.m. to 8 a.m. for three days in a row;
- On active duty from 8 a.m. to 6 p.m. on each of those three days; and
- Off duty from 6 p.m. to 4 a.m. on each of those days.

The employees could use a patrol car to commute between their residences and the police station, and could keep that patrol car at their residence for the 6 p.m. to 8 a.m. periods between their active duty shifts. The employer unilaterally changed its take-home car policy on March 31, 1998, and the union filed unfair labor practices.

In *City of Kalama*, Decision 6853-A (PECB, 2000), the Commission upheld the decision of Examiner Rex L. Lacy that the take-home car policy constituted an economic benefit to the bargaining unit employees. The Commission amended the Examiner's remedial order to include:

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[5] The union supplied copies of the receipts to the Commission on February 15, 2001, after the compliance hearing was closed. That tardy submission is simply too late.

> Make whole all bargaining unit members for their expenses for commuting between work and home during the period from the effective date of termination of the take-home-car policy on or about March 31, 1998, until the effective date of the reinstatement of the take-home-car policy pursuant to the Examiner's order, by payment to them at the business milage rate(s) in effect at that time under regulations of the federal Internal Revenue Service multiplied by their round-trip mileage.

We reasoned that, "Simply putting the take-home-car policy back in place after a gap of about 19 months fails to restore the employees for the financial benefit they lost." Thus, a financial make-whole remedy was necessary to effectuate the purposes of the Public Employees' Collective Bargaining Act, since the duty to bargain under that statute obligated the employer to give notice to the union and to bargain in good faith prior to altering a take-home-car policy. A rate of $0.31 per mile was specified, by reference to Internal Revenue Service (IRS) Revenue Procedure 98-63.[6]

The Compliance Controversy -

The compliance tendered by the employer includes reimbursements to employees totaling $4,607.03, including interest. The union contends that the bargaining unit employees are entitled to a total of $6,927.02 plus an additional $96.41. Thus, a $2,416.38 amount, plus interest, remains in dispute.

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[6] *City of Kalama*, Decision 6853-A included:

> The federal Internal Revenue Service monitors, and from time to time adjusts, a "standard" allowance for business use of personal vehicles. Although there may have been variances among the situations of individual employees, we deem the federal standard to be appropriate for application to all affected employees in this case.

Analysis and Conclusions -

The employer contends it does not owe bargaining unit employees reimbursement for driving personal vehicles to work on occasions when they were assigned to work active duty shifts for two or more consecutive days and were on call at some point before, between, or after their active duty shift. The employer contends the employees were still allowed to take patrol cars home during times when they were on call, and it reasoned in computing its tender of compliance that employees assigned to work three days in a row, as described above, only needed to make one round trip in their personal vehicles for each three-day period. In other words, the employer assumed that employees would only use their personal vehicles to commute to the police station at the beginning of the three-day period and to go home from the police station at the end of the three-day period, so that some of the personal vehicle trips claimed by the union were unnecessary.

The union responds that the employer's contention ignores the realities of the situation created by the change of the take-home car program. The union argues that, under the mayor's memo, bargaining unit employees were not allowed to have patrol cars in their possession when they were neither "on call" nor assigned to work an active duty shift. Since day shift employees were completely off duty between 6 p.m. and 4 a.m. each day, the union reasons they were never allowed to take a patrol car home between consecutive work days. The union also advances that the employees were never told their interpretation of the policy was inaccurate, and that the individual who was the police chief at the time confirmed to the employees that he interpreted the mayor's new take-home car policy in the same way they did.

The calculation of the remedy for elimination of the take-home cars is straightforward. The evidence showed the employer had a patrol

car for each bargaining unit employee, and that only one employee was to be on-call on any particular day. The operative memorandum, which was sent by Mayor Gish to Police Chief Michael Pennington on March 30, 1998, stated in full:

> In an effort to reduce expenses and wear and tear, city vehicles will no longer be used for transportation to and from personal residences except when an employee is on call and expected to respond directly from personal residence. City vehicles and equipment shall remain at city departments and not be used for other than city use.

The mayor's memo clearly allowed on-call officers to take a patrol car home at the end of their shift, and to keep it at their residence for that night.

The union's interpretation of the mayor's memo as directing that an officer could only use (or have possession of) a patrol car during the exact hours when they were on call is a tortured reading of the directive, is disingenuous, and would produce an illogical result: Under the union's interpretation, a police officer who wanted to have a patrol car at home while on call between 4 a.m. and 8 a.m. would have had to drive a personal vehicle to the police station at 4 a.m. to pick up a patrol car, and would have had to drive the patrol car home only to drive it back to the police station when reporting for an active duty shift at 8 a.m. the same day. There is no evidence supporting such a hyper-literal interpretation of the mayor's directive.

It is disturbing that the interpretation of the mayor's memo now advanced by the union was supported by Pennington, who was then the police chief at Kalama. However, it is clear from the records in all these cases that there was tension between the chief and the mayor. Additionally, we are mindful of earlier arguments by this

union that Pennington had minimal authority to act on behalf of the employer. *City of Kalama*, Decision 5778-A (PECB, 1998), arose out of the representation proceedings by which this union acquired status as exclusive bargaining representative of this bargaining unit. The petition for investigation of a question concerning representation was filed on October 9, 1996. Teamsters Union, Local 58, disclaimed the bargaining unit, but an issue was framed because this union claimed the police chief was merely a working foreman who was properly included in the bargaining unit.[7] At a hearing held on dates in March, May, and July of 1997, Pennington testified that his duties and benefits primarily mirrored those of the rank-and-file police officers, and he indicated a preference for being included in the bargaining unit. While the police chief position was excluded from the bargaining unit by a decision issued in January 1998, Pennington's evident connection with and loyalty to the union during the previous year provides basis for concern about whether he was speaking for the employer on and after March 30, 1998.[8] It would not be a stretch to conclude that Pennington purposely twisted his reading of the memo, as did the other police officers. Even if the mayor's directions were unclear, a simple telephone call could have clarified the issue.

A complainant cannot create a remedy entitlement by refusing an available right, status or benefit, and then claim that it was unlawfully deprived of that right, status or benefit. The employer's tender of compliance allows a round-trip by personal vehicle for each multi-day schedule of work days which includes

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[7] Pennington began work as the chief of police in Kalama on March 1, 1994. His position was excluded from the bargaining unit while it was represented by Local 58.

[8] Michael Pennington was no longer employed by the City of Kalama at the time of the compliance hearing, and was not called as a witness by either party.

being on call, and appears to be a fair estimation of the remedy to which the bargaining unit employees are entitled.

The additional $96.41 sought by the union is a claim on behalf of former employee Wren. The record establishes that a demand for reimbursement was submitted on his behalf previously and paid in full, but the union now contends that Wren only claimed one-half of the trips for which he was entitled to reimbursement. A complainant has a duty to exercise responsibility in making and documenting claims. Because Wren was reimbursed for all that he claimed in a timely manner, the matter is closed.[9]

The employer has tendered sufficient compliance on the portions of the remedial order involving the take-home-car policy.

NOW, THEREFORE, it is

ORDERED

The City of Kalama, its officers and agents, shall immediately take the following actions to complete satisfactory compliance with the remedial order issued in the above-captioned matters:

1. Provide back pay in the amount of $8,062.18, to make its employees whole for the loss of overtime opportunities they suffered in the December 1997 - January 1998 period, with interest as directed by WAC 391-45-410(3).

2. Notify the complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to

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[9] The possibility also exists that Wren's original claim merely reflected his interpretation of the mayor's memo in the same way as we interpret it, above.

comply with this order, and at the same time provide the complainant with copies of all calculations used in effecting compliance with this order.

3. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with copies of all calculations used in effecting compliance with this order.

Issued at Olympia, Washington, the 12th day of July, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner