City of Vancouver, Decision 10616 (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF VANCOUVER, Complainant, vs. VANCOUVER POLICE OFFICERS GUILD, Respondent.	CASE 22246-U-09-5675 DECISION 10616 – PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

City Attorney Ted H. Gathe, by *Terry M. Weiner,* Assistant City Attorney, for the employer.

Snyder & Hoag, LLC, by *David A. Snyder,* Attorney at Law, for the union.

On February 2, 2009, the City of Vancouver (employer) filed an unfair labor practice complaint against the Vancouver Police Officers Guild (union). The Commission issued a preliminary ruling finding a cause of action for a union refusal to bargain violation. Examiner J. Martin Smith conducted a hearing on April 27, 2009. The parties filed post-hearing briefs to complete the record.

ISSUES PRESENTED

1. Did the parties' Memorandum of Understanding on the Neighborhood Police Officer (NPO) program involve a mandatory subject of bargaining?

2. Did the union refuse to bargain in good faith an extension to the Memorandum of Understanding concerning the NPO program?

The Memorandum of Understanding on the NPO program concerns work hours for NPOs, and involves a mandatory subject of bargaining. By escalating its bargaining demands late in the negotiation process for an extension to the Memorandum of Understanding on the NPO program, the union violated its good faith bargaining obligations and committed a refusal to bargain unfair labor practice.

APPLICABLE LAW

The union and employer generally negotiate under sections -430 to -490 of Chapter 41.56 RCW, the Public Employees' Collective Bargaining Act. Those sections apply to uniformed personnel, including law enforcement officers employed by a city. Although certain time lines and processes of mediation are unique, and interest arbitration is allowed after a reasonable period of negotiations and mediation, the parties are still required to meet, confer, and negotiate in good faith as per RCW 41.56.030(4).

Mandatory Subjects of Bargaining

RCW 41.56.030(4) defines "collective bargaining" as 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. . . ." (emphasis added) As was made clear in *City of Seattle*, Decision 4687-B (PECB, 1997), personnel matters are categorized as *mandatory* subjects of bargaining if they affect wages, hours, and working conditions of bargaining unit employees, *illegal* subjects in circumstances where the topics might contravene applicable statutes or court decisions, and *permissive subjects* where the matters are remote from conditions of employment and are therefore left to the prerogative of the employer or the union.

Parties are only obligated to negotiate on mandatory subjects of bargaining. The Commission uses a balancing test to determine whether a particular proposal or topic is a mandatory subject of bargaining. *International Association of Fire Fighters, Local 1052 v. Public Employment*

Relations Commission (City of Richland) 113 Wn. 2d 197 (1989). The Washington Supreme Court explained the balancing test in *City of Richland* as:

> On one side of the balance is the relationship the subject bears to "wages, hours and working conditions". On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. [citations omitted] Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. [citation omitted]

City of Richland requires application of the balancing test to the particular facts of the case at hand. In general, Commission precedent has held that proposals affecting hours of work for unit employees are mandatory subjects of bargaining. *City of Yakima*, Decision 767-A (PECB, 1980); *City of Clarkston*, Decision 3286 (PECB, 1989); *City of Moses Lake*, Decision 6328 (PECB, 1998); *City of Kalama*, Decision 6739 (PECB, 1999).

Mid-Term Bargaining

Once a collective bargaining agreement has been implemented, there may be items or even new issues and concerns which have not been addressed by language in the agreement. In some cases, the employer may, at mid-term, ask to re-open the agreement to negotiate certain changes, or additions. In most cases the parties reduce those amendments or additions to writing. A "memorandum of understanding" or appendices to the agreement are two common forms of these amendments. Generally an employer tries to avoid a "unilateral change" to a mandatory subject of bargaining, since it may result in a ruling that the employer refused to negotiate in good faith under RCW 41.56.140(4). *City of Sumner*, Decision 1839-A (PECB, 1984) (paydays of employees).

Chapter 41.56 RCW contemplates a written agreement which results from the collective negotiations and conferral of the parties. The agreement need not fit any particular form or outline. *Naches Valley School District*, Decision 2516 (EDUC, 1987) *aff'd* Decision 2516-A (EDUC, 1987).

Although the employer and union may use the interest arbitration procedure of RCW 41.56.450 to effect final resolution of their contracts, they remain subject to the obligations to bargain in good faith, both during regular negotiations and during the mediation process. *City of Pasco (International Association of Fire Fighters, Local 1433),* Decision 3641 (PECB, 1990); *City of Clarkston,* Decision 3246 (PECB, 1989*); Spokane County Fire District 1,* Decision 3447-A (PECB, 1990). As an examiner stated in *City of Fircrest*, Decision 5669-A (PECB, 1997): "During the term of a collective bargaining agreement, the duty to bargain continues to exist between the employer and union as to matters which are mandatory subjects of bargaining but are not covered by the specific terms and conditions of the collective bargaining agreement."

ANALYSIS

The parties in this proceeding have a history of negotiations since 1976. Their most recent collective bargaining agreement covers the period January 1, 2007, through December 31, 2009, and at all times discussed or referenced in this case, the parties have been subject to the terms of that agreement. The union is recognized as exclusive bargaining representative for all police officers, corporals, and sergeants in the Police Department of the City of Vancouver.

Soon after bargaining concluded for the agreement in 2006, the employer concluded a search for a new police chief, and hired Clifford Cook. Cook took his desk in April 2007. During 2007, several discussions took place between Cook and the union regarding shift schedules for police officers, and whether there could be some flexibility to the 8 hour days, 5 days on/2 days off (5/2) work schedule, or the 10-hour days, 4 days on, 3 days off (4/3) schedule which many officers worked.

Cook wanted to make a change in the "community policing" model then at work in the City of Vancouver, and use one similar to his experience with an NPO program in Fort Worth, Texas. He noticed that the Vancouver system worked well enough, but emphasized patrol by time and shift, rather than territory and neighborhoods of the metropolitan area. Cook noted that few regions or neighborhoods had coverage 24 hours a day under the existing community policing system.

On May 7, 2007, Cook and other employees of the police department held a command retreat to study the Fort Worth model for an NPO program, as well as School Resource Officer (SRO) programs, and the "territorial command" structure. Corporal Jeff Kipp, four police officers and four sergeants attended this conference as well as lieutenants, commanders, and Chiefs Barker and Cook. Kipp is the union president. The police officers, sergeants, and Kipp are members of the bargaining unit represented by the union. Calling the new police officers "NPOs," the retreat participants decided: to classify the NPOs as corporals who would report to lieutenants; that NPOs would probably work a 4/3 schedule rather than the 5/2; and that NPOs would have take-home cars. A selection procedure was designed to choose the first NPOs. The new NPOs were not to be call-responsive, but there was an emphasis on making the NPOs available for evening school meetings, community meetings, and so on.

On June 6, 2007, a memorandum was issued to police department employees stating that new SRO and NPO positions would be staffed and hired. Under NPOs, the memo stated:

> There will be four NPO's . . . each assigned to a 'district'. Each precinct will be divided into two geographical districts. NPO's will be chosen from our current list of Corporals. This position will act as a liaison between the community and the police department. They will participate as team leaders, identifying resources and coordinating problem solving responses to issues within our neighborhoods. The person interested in this position must be aware of the need for flexibility of schedule to facilitate response to events occurring after normal business hours.

July 2007 Memorandum of Understanding on NPO Program

Chief Cook and the union moved forward to develop a Memorandum of Understanding (MOU) that would amend the 2007-09 collective bargaining agreement, and in particular Article 11.6 regarding work schedules. The MOU was apparently designed to fit within the 2007-09 time period, and end at December 31, 2008, even though another year would be remaining in the collective bargaining agreement. Chief Cook and union president Kipp signed the MOU, which reads:

MEMORANDUM OF UNDERSTANDING BETWEEN THE VANCOUVER POLICE OFFICERS GUILD AND THE CITY OF VANCOUVER

Neighborhood Police Officer (NPO) Work Schedule

The City of Vancouver, a municipal corporation of the State of Washington (Employer) and the Vancouver Police Officers Guild, a labor organization (Guild), agree to the following Memorandum of Understanding concerning the Neighborhood Police Officer work schedule:

For employees assigned to the Neighborhood Police Officer position, the normal work week shall be based on a 4/3 schedule, not to exceed 40 hours per week, including a one-half hour paid lunch. The normal assigned work week shall be scheduled on Monday through Thursday or Tuesday through Friday. In order to meet the operational needs of the unit, and in accordance with Article 11.6 of the VPOG [union] contract, the work schedule may be adjusted to include working alternate days and/or hours based on the reasonable needs of the Department.

This memorandum of understanding shall be considered an addendum to the current collective bargaining agreement. Any dispute between the Employer and the Guild or an employee concerning the interpretation, application or alleged violation of any term or this Memorandum of Understanding shall be subject to the Grievance Procedure set forth in Article 27 of the parties' collective bargaining agreement.

This agreement shall expire on December 31, 2008 unless mutually agreed to by both parties.

For the employer
Clifford Cook, Chief of Police
Date 7-13-07

For the Guild
Jeff Kipp, VPOG Pres.
Date 7-16-07

By August 1, 2007, four police officers had been selected to act as the new NPO contingent. As per the MOU, the NPOs were placed on the 4/3 schedule. They were assigned marked cars but not required to respond to police "call-outs" or emergency situations.

Continuing through 2008, the four NPOs carried forth their duties. There was no indication that the program as written (or even the alternative 4/3 schedules) posed any operational problems for the department. Chief Cook testified that he was very pleased with the program, which was using a miniscule amount of overtime:

> I was very pleased with the results. The four NPO's accomplished quite a bit in that first year. I heard from quite a few community groups, council members, business owners, that they were not only impressed with the program but felt that it was one of the best [we] had put out . . . .

Cook hoped to expand the NPO program from four to eight officers, but budget problems intervened.

Mandatory Subject of Bargaining?

In order to make out a refusal to bargain violation by the union under RCW 41.56.150(4), the employer must encounter the "balancing test" to determine whether the subjects involved in the MOU were mandatory topics of bargaining. PERC uses the balancing test as per *City of Richland*, 113 Wn.2d 197 (1989):

> on one side of the balance is the relationship the subject bears to wages, hours and working conditions.
>
> on the other side is the extent to which the subject lies "at the core of entrepreneurial control or is a management prerogative.

The questions to be applied here are, how does the MOU affect bargaining unit employees' wages, hours or working conditions? And secondly, does the MOU itself lie at the "core of entrepreneurial control" or is it a management prerogative?

While the creation of the NPO program itself may be a management prerogative, the gist of the MOU was to establish new shifts and hours of work for bargaining unit employees who were promoted to the ranks of corporal and NPO assignments. All of those items are mandatory subjects. "Special assignment policies" were ruled to be mandatory topics in *Yakima County*, Decision 6594-C (PECB, 1999); and promotions within the bargaining unit were held to be mandatory subjects in *City of Wenatchee,* Decision 2216 (PECB 1985) and *City of Anacortes*, Decision 5668 (PECB, 1996).

But most important is hours of work. The new shifts developed for the NPO program in 2007 and 2008 have changes in hours and shifts of work, which have been held to be mandatory

subjects of bargaining in *City of Yakima*, Decision 767-A (PECB, 1980), *City of Clarkston*, Decision 3286 (PECB, 1989), and *City of Kalama*, Decision 6739 (PECB, 1999)

The conclusion is clear that the MOU is about work hours for the NPOs and "hours" is part of the "wages, hours and working conditions" definition of mandatory subjects under RCW 41.56.030(4).

Negotiations to Extend MOU on NPO Program

In late November 2008, Cook talked to union president Kipp, who assured him that the union would renew the MOU on the NPO program, and that the union realized positive community support might lead to long-term funding for the police department.

Cook also heard "dissenting" voices from union members who indicated that the extension of the MOU would require "something in return." Cook had a brief meeting in early December 2008 with Pat Moore and Scott Creager from the union's executive board, who were in favor of an extension without further bargaining.

On Thursday, December 11, 2008, Cook sent an e-mail to Debby Campbell in his office, asking her to prepare "a new, updated copy of the current . . . MOU on the NPO schedules: Can you get this to me on Monday and ask that Kipp come by to sign it?"

On the next Monday, Campbell forwarded Cook's e-mail to union president Kipp, stating "the current MOU expires 12/31/08. I'm assuming it's acceptable to extend through 12/31/09. I'll retype it with that date and have it ready to sign later this afternoon."

Kipp responded in the afternoon on December 15 saying "I have a different MOU that I need the Chief to review before I come by to sign this. I'll get it to him today or tomorrow and get back to you."

Campbell and Kipp exchanged additional e-mails during the afternoon of December 15. Campbell related to Kipp "A different NPO MOU or something separate from that? I have two copies of this revision printed and signed by the chief." Kipp responded to Campbell "It is different . . . about vacation accessibility."

On December 22, Kipp informed the Chief that the union's executive board had decided to place the vacation accessibility issue before the signing of the NPO MOU. On December 31, the union informed the Chief that since the NPO program was still part of the patrol division and hence covered by Article 11.6 of the agreement, the union was under no further obligation "to bargain a different [work] schedule with the City."

Was Union's December 2008 Response a Late Hit?

In *Whatcom County*, Decision 7244-B (PECB, 2004), the Commission voiced its disfavor to a bargaining behavior where regressive late-hits arrive from either side of the bargaining table. As in American football, late hits are designed to injure and harm the possibilities of resolution towards a positive outcome. And they are usually penalized. The suggestion by the union that they had to have a change in the 2007-2009 agreement regarding vacation accessibility is a late hit.

The union made a major change in position late in negotiations that frustrated the collective bargaining process. This change by the union was designed to avoid reaching an agreement on extending the MOU beyond December 31, 2008.

Parties are not free to hide their positions on issues, then spring them out to the bargaining table very late in the bargaining process. In *City of Clarkston (International Association of Fire Fighters Local 2299)*, Decision 3246 (PECB, 1989), the interest-arbitration eligible bargaining representative changed its set of comparables without notifying the employer. With a new set of comparables, the union's wage proposals escalated its bargaining demands.

With the extension of the MOU awaiting his signature, union president Kipp certainly waited until the last moment to demand "something for it." Like the situation in *City of Clarkston,* the

union's demand for a new vacation accessibility provision escalated the union's bargaining demands and was inappropriate. The employer did not have the right to renew the NPO program. The employer did have a right to expect good faith bargaining conduct by the union, without regressive bargaining.

The union here demonstrates several of the strategies deployed by the parties in *City of Pasco (International Association of Firefighters Local 1433)*, Decision 3641 (PECB, 1990) and *City of Yakima,* Decision 3564 (PECB, 1990). In *City of Yakima*, the employer sought some changes in the management rights clause of the agreement which allowed it to make scheduling changes. The union agreed to the changes. The union was not made aware of the employer's intent that the changes also granted to the employer control over the scheduling of "Kelly" days off, vacation days off and acting assignment pay. The Examiner there set out some ground rules that ought to be followed in all collective bargaining negotiations:

> [T]here is no evidence of any objective manifestations showing that the union agreed to abdicate employee rights or union rights by accepting the language change. The intent of Chapter 41.56 RCW is to enable public employees the right to bargain in a meaningful way with their employer on matters concerning wages, hours, and working conditions. This obligation is not to be easily disregarded. Employees are not to be "blind-sided" by clever contract provisions fashioned to conceal a hidden agenda of making real changes in working conditions. *South Columbia Irrigation District/East Columbia Irrigation District*, Decision 1404-A (PECB, 1982). A "deal" to give up rights must be consciously delivered. "*Gotcha*" has no place in labor relations, and is not conducive to the public interest in stable employment relationships.

In *City of Pasco* case, the employer sought removal of the fire code enforcement work from the bargaining unit. After much discussion but without any counterproposal from the union, the parties were certified to interest arbitration. Eventually the union offered to remove fire code inspection work from the unit, in return for added pay and benefits for remaining employees of the unit. The Examiner ruled that the union's conduct prevented settlement of the issue and evidenced a refusal to bargain in good faith. The union's attempts to address the code enforcement issue were far too late in the collective bargaining process to be meaningful.

Just as unions must not be blind-sided by an employer's hidden agenda, likewise a union cannot blind-side an employer. If the union was proposing that changes were needed in the vacation accessibility language of the agreement before it could agree to extend the MOU, the union was required to bring forth that proposal early on in the negotiations process.

CONCLUSION

By seeking concessions from the employer concerning vacation accessibility, the union made a major change of position late in the negotiations process. The union escalated its bargaining demands at an advanced stage of negotiations in an effort designed to avoid agreement. The union imposed unreasonable conditions on reaching an agreement which frustrated the collective bargaining process. The union's conduct violated its obligations to bargain in good faith under RCW 41.56.150(4).

FINDINGS OF FACT

1. The City of Vancouver is a public employer within the meaning of RCW 41.56.030(1).

2. The Vancouver Police Officers Guild, a bargaining representative under RCW 41.56.030(3) is the exclusive bargaining representative for all police officers, corporals, and sergeants in the Police Department of the City of Vancouver.

3. The parties' most recent collective bargaining agreement covers the period from January 1, 2007, through December 31, 2009.

4. The Neighborhood Police Officer (NPO) program emphasizes patrol by regions or neighborhoods. The NPOs are classified as corporals, report to lieutenants, and were assigned take-home cars. The NPOs are not call-responsive but there is an emphasis on making the NPOs available for evening school meetings, community meetings, and so on.

5. In July 2007, the employer and union signed a Memorandum of Understanding (MOU) on the NPO program. The MOU stated that NPOs would work a 4/3 schedule. The MOU expired on December 31, 2008. Chief of Police Clifford Cook signed the MOU on behalf of the employer, and union president Jeff Kipp signed for the union.

6. In late November 2008, Kipp assured Cook that the union would renew the MOU on the NPO program. In early December 2008, Cook met with union executive board members Pat Moore and Scott Creager who were in favor of an extension of the MOU without further bargaining. On December 15, 2008, Kipp proposed a MOU to Cook containing language about vacation accessibility.

7. The MOU on the NPO program is about work hours for the NPOs, and "hours" is a mandatory subject of bargaining under RCW 41.56. 030(4).

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. By seeking concessions from the employer concerning vacation accessibility late in the negotiations process, as described in Findings of Fact 4 through 7, the Vancouver Police Officers Guild escalated its bargaining demands in violation of its good faith bargaining obligations and violated RCW 41.56.150(4) and (1).

ORDER

Vancouver Police Officers Guild, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Refusing to bargain in good faith concerning extension of a Memorandum of Understanding on the Neighborhood Police Officer program.

b. In any other manner interfering with, restraining or coercing employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Negotiate in good faith with the City of Vancouver, concerning the extension of a Memorandum of Understanding on the Neighborhood Police Officer program.

b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where union notices to all bargaining unit employees are usually posted. These notices shall be duly signed by an authorized representative of the Vancouver Police Officers Guild, and shall remain posted for 60 consecutive days from the date of initial posting. The Guild shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice provided by the Compliance Officer at a meeting of all employees in the bargaining unit represented by the Vancouver Police Officers Guild..

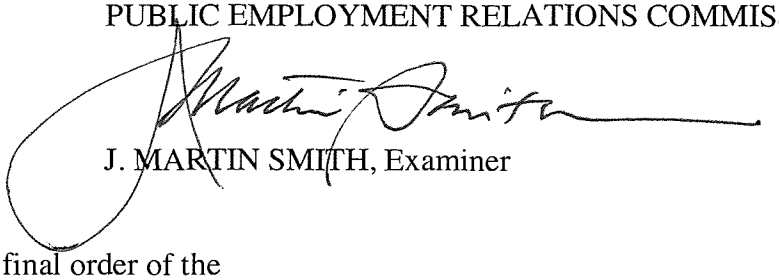
d. Notify the City of Vancouver, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the City with a signed copy of the notice provided by the Compliance Officer.

e. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 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 Compliance Officer with a signed copy of the notice he provided.

ISSUED at Olympia, Washington, this 4th day of December, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *VANCOUVER POLICE OFFICERS GUILD* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to bargain in good faith concerning extension of a Memorandum of Understanding on the Neighborhood Police Officer program.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL negotiate in good faith with the City of Vancouver concerning extension of a Memorandum of Understanding on the Neighborhood Police Officer program.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.