

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION,
LOCAL 1576,

Complainant,

vs.

COMMUNITY TRANSIT,

Respondent.

CASE 22253-U-09-5678

DECISION 10647-A - PECB

DECISION OF COMMISSION

Frank Freed Subit & Thomas, LLP, by *Beth Barrett Bloom* and *Cliff Freed*, for the union.

Summit Law Group, PLLC, by *Shannon E. Phillips* and *Bruce L. Schroeder*, for the employer.

On February 5, 2009, the Amalgamated Transit Union, Local 1576 (union) filed a complaint alleging Community Transit (employer) committed an unfair labor practice by insisting to impasse on waiver language. Examiner Joel M. Greene conducted a hearing and found that Article 18.2 of the parties' collective bargaining agreement is a waiver clause, waivers are a permissive subject of bargaining, and that the employer committed an unfair labor practice when it insisted to impasse and sought interest arbitration of a waiver.¹ The employer appeals the Examiner's decision.

ISSUE PRESENTED

Did the employer unlawfully insist to impasse on, and seek interest arbitration of, Article 18.2, which permitted the employer to make changes to the employer's rules and regulations, including the standard operating procedures and performance code?

¹ *Community Transit*, Decision 10647 (PECB, 2010).

For the reasons set forth below, we affirm the Examiner’s decision. The employer insisted to impasse on, and sought interest arbitration of, Article 18.2, which is a waiver. Waivers are permissive subjects of bargaining that cannot be pursued to interest arbitration.

APPLICABLE LEGAL PRINCIPLES

A public employer covered by the Public Employees’ Collective Bargaining Act, Chapter 41.56 RCW, has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). The scope of bargaining under Chapter 41.56 RCW encompasses “grievance procedures and . . . personnel matters, including wages, hours and working conditions.” RCW 41.56.030(4). Both Commission and judicial precedents identify three broad categories of subjects of bargaining. *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997), citing *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958); *Federal Way School District*, Decision 232-A (EDUC, 1977):

- Mandatory subjects, including the “wages, hours and working conditions” of bargaining unit employees, are matters over which employers and unions must bargain in good faith. It is an unfair labor practice for either of them to fail or refuse to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).
- Permissive subjects are management and union prerogatives, along with procedures for bargaining mandatory subjects, over which the parties may negotiate, but each party is free to bargain or not to bargain, and to agree or not to agree. *City of Pasco*, 132 Wn.2d at 460.
- Illegal subjects are matters that parties may not agree upon because of statutory or constitutional prohibitions. Neither party has an obligation to bargain such matters. *City of Seattle*, Decision 4687-B (PECB, 1997), *aff’d*, 93 Wn. App. 235 (1998), *rev. denied*, 137 Wn.2d 1035 (1999).

When determining mandatory subjects, the Commission assesses whether the particular proposal directly impacts wages, hours or working conditions of bargaining unit employees. *Whatcom County*, Decision 7244-B (PECB, 2004), citing *Lower Snoqualmie Valley School District*, Decision 1602 (PECB, 1983), and *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1983).

A party can bargain to impasse and seek interest arbitration of a mandatory subject of bargaining. A party commits an unfair labor practice violation when it bargains to impasse, and seeks interest arbitration of, a permissive subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338 (1986). Non-mandatory subjects of bargaining “must be a product of renewed mutual consent” and expire with the parties’ collective bargaining agreement. *Klauder*, 107 Wn.2d 338. Including a permissive subject of bargaining in a collective bargaining agreement does not render that subject mandatory. See *Chemical Workers v. Pittsburg Glass*, 404 U.S. 157 (1971). Bargaining procedures are not, themselves, mandatory subjects. *Whatcom County*, Decision 7244-B.

A waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). We have held that typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver. *Griffin School District*, Decision 10489-A (PECB, 2010). An employer’s proposal seeking a waiver of a union’s bargaining rights is not a mandatory subject of bargaining. *Whatcom County*, Decision 7244-B.

DISCUSSION

In the fall of 2007, the parties began negotiations for a successor bargaining agreement. The parties’ collective bargaining agreement states:

Section 18.2 The Employer agrees to notify the union of any changes in the Employee’s Rule and Regulations, including Standard Operating Procedures (SOP’s) and Performance Code, affecting employees in the Bargaining Unit. The grievance procedure shall not apply to any matters covered by this section, except

as to the Employer administration of such provisions resulting in employee appeal of his/her discharge or suspension only as per Article 14 of this Labor Agreement.

Section 18.3 The Union and/or employees may submit written comments and suggestions within five (5) calendar days of such notice. The Employer will consider such comments and suggestions in issuing such policies in final form.

During bargaining, the union proposed changes to Article 18.2, and the employer proposed that the language continue. The parties sought the assistance of a mediator. During mediation, the union's position was that Article 18.2 was a permissive subject of bargaining. Neither party agreed to the other party's proposal. On March 24, 2009, the mediator certified Article 18.2 as an issue for interest arbitration.

Language similar to Article 18.2 has been in the parties' collective bargaining agreement since 1979. The language at issue was previously contained in Article 19.2 and was the subject of an unfair labor practice complaint. *Community Transit*, Decision 6375 (PECB, 1998). In that matter, the employer argued that language identical to the present Article 18.2 constituted a waiver and that Examiner agreed.

As Examiner Greene noted in his decision, after successfully arguing in the previous proceeding that the language was a waiver, the employer has now changed course, and argues in this proceeding that the language is a management rights clause and, therefore, a mandatory subject of bargaining. The language has not changed and still constitutes a waiver.

The employer argues that Article 18.2 is a management rights clause, rather than the waiver the employer argued it was in 1998. The employer relies on *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450 (1997). According to the employer, the clause at issue in *City of Pasco* and Article 18.2 both grant the employer the right to determine personnel policies, retain the employer's right to set terms and conditions of employment, and are traditional management rights clauses.

The employer's reliance is misplaced. First, in the *City of Pasco*, the Supreme Court was explicit that it did not need to determine whether a waiver of collective bargaining rights is a

mandatory subject of bargaining. Second, the court concluded that the management rights proposal at issue was not a waiver of the union's right to collectively bargain, and was a mandatory subject of bargaining about which the employer could insist to impasse and seek interest arbitration. As the Examiner in this case correctly held, Article 18.2 is a waiver of the union's collective bargaining rights and *City of Pasco* is not applicable.

This case is similar to *Whatcom County*, Decision 7244-B. In *Whatcom County*, the parties' collective bargaining agreement contained language about the employer's rules of operation and provided the union an opportunity to raise objections to the rules. We held that the proposed waivers did not directly involve employees' day-to-day responsibilities or the relationship between the employer and the employees. Rather, the language enabled the employer to change work rules without having to deal with the union. The proposals were waivers about which the employer could not insist to impasse.

The language in Article 18.2 excuses the employer from what would otherwise be its legal duty to bargain with the union on mandatory subjects. Article 18.2 is a waiver and a permissive subject of bargaining.

The inclusion of a permissive subject of bargaining in a collective bargaining agreement does not transform it into a mandatory subject of bargaining. With the expiration of a collective bargaining agreement, the waivers expire and continue only if the parties agree to continue those waivers. *See Klauder v. San Juan*. As the union aptly pointed out in its brief:

It follows that once a contract has expired, a party has no obligation to bargain over a permissive subject even though one or more past contracts contained a provision dealing with the subject.

Higgins, John, *The Developing Labor Law*, Vol. 1 at 1363 (5th ed. 2006). As we stated in *Whatcom County*, "it is simply inconsistent with the purpose of the statute to permit an employer to insist to impasse on the exclusion of the employees' statutory representative from the bargaining process."

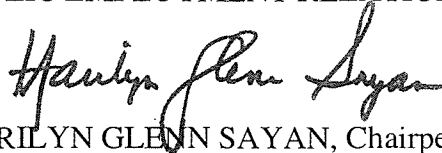
NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 21st day of November, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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PAMELA G. BRADBURN, Commissioner



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