Clark County (Clark County Deputy Sheriff's Guild), Decision 11346 (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CLARK COUNTY, Complainant, vs. CLARK COUNTY DEPUTY SHERIFF'S GUILD, Respondent.	CASE 24074-U-11-6157 DECISION 11346 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Summit Law Group PLLC, by *Bruce L. Schroeder,* Attorney at Law, for the employer.

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On June 27, 2011, Clark County (employer) filed an unfair labor practice complaint against the Clark County Deputy Sheriff's Guild (union). The complaint alleged that the union refused to bargain by insisting to impasse on non-mandatory subjects of bargaining. Agency staff issued a preliminary ruling on June 30, 2011. The union filed a timely answer, and Examiner Lisa A. Hartrich conducted a hearing on October 27, 2011. The parties submitted post-hearing briefs to complete the record.

ISSUE PRESENTED

Did the union refuse to bargain in good faith by insisting to impasse on, and seeking interest arbitration of, proposals related to reserve deputies who are not bargaining unit employees?

Based on the arguments, testimony, and evidence presented by the parties, the Examiner rules that the union committed a refusal to bargain unfair labor practice by insisting to impasse and seeking interest arbitration of proposals related to non-bargaining unit employees.

APPLICABLE LEGAL STANDARDS

Under the Public Employees' Collective Bargaining Act (PECBA), public employers and bargaining representatives are required to bargain in good faith over mandatory subjects of bargaining. RCW 41.56.140 and .150. Wages, hours and working conditions of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958); RCW 41.56.030(4).

Permissive (or non-mandatory) subjects of bargaining are regarded as the prerogative of the employer or union. The parties may negotiate over permissive subjects, but each party is free to bargain or not to bargain, and to agree or not to agree. *Pasco Police Officers Association v. City of Pasco*, 132 Wn.2d 450 (1997).

When subjects relate to both conditions of employment and managerial prerogatives, the Commission uses a balancing test to determine whether a particular matter is a mandatory subject of bargaining, on a case-by-case basis. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989); *Yakima County*, Decision 10204-A (PECB, 2011).

A party can bargain to impasse and seek interest arbitration of a mandatory subject of bargaining. However, a party commits an unfair labor practice violation when it bargains to impasse, and seeks interest arbitration of, a permissive subject of bargaining. *Community Transit*, Decision 10647-A (PECB, 2011).

A party claiming that a proposal being advanced to interest arbitration is not a mandatory subject of bargaining must communicate its concerns to the other party during bilateral negotiations and/or mediation. If the party advancing the proposal does not withdraw the proposal or modify it to eliminate the claimed illegality, the objecting party must file and process an unfair labor practice complaint under Chapter 391-45 WAC prior to the conclusion of the interest arbitration proceedings. WAC 391-55-265(1)(a).

A party which engages in collective bargaining with respect to a particular issue does not, and cannot, confer the status of a mandatory subject on a non-mandatory subject. WAC 391-45-550.

ANALYSIS

The union is the exclusive bargaining representative of a bargaining unit of approximately 125 full-time regular deputies and sergeants in the sheriff's office. The bargaining unit is eligible for interest arbitration under the provisions of RCW 41.56.030(13)(a) and 41.56.430 *et seq.* The employer and union were parties to a collective bargaining agreement dated January 1, 2006, to December 31, 2008. The parties began bargaining a successor agreement in the fall of 2008.

Since the 1950s, the employer has maintained a volunteer reserve deputies unit. The reserve unit is made up of approximately 30 fully-sworn peace officers who support the full-time regular deputies and provide a variety of community services. The reserve deputies serve at the will of the sheriff. In 2010, the reserve unit volunteered a total of 12,533 hours.

Reserve applicants undergo the same background investigation, physical examination, drug screening, psychological examination, and polygraph examination as the regular deputies. Reserve deputy recruits attend a six-month Reserve Academy where they receive approximately 300 hours of training in areas such as criminal law and procedure, crisis intervention, firearms, patrol procedures, communication skills, traffic enforcement, and criminal investigation. After completing the training, the reserve deputies enter a one-year field training program under the direction of field training officers (FTOs). FTOs are members of the regular deputies bargaining unit. FTOs are expected to complete daily observation reports for the reserve deputies after every patrol shift.

After successful completion of the field training program, reserve deputies can ride with any regular deputy or another reserve deputy. Reserve deputies wear the same uniforms as regular deputies.

In 2006, the union filed a unit clarification petition with the Commission, seeking to accrete the reserve deputies into the regular deputies' bargaining unit. The union asserted that the reserve

deputies performed some of the same duties as the full-time regular deputies and sergeants, and therefore belonged in the same bargaining unit. The executive director dismissed the petition, finding that the reserve deputies were not "uniformed personnel" as defined by RCW 41.56.030, and therefore were not eligible for interest arbitration. *Clark County*, Decision 9654 (PECB, 2007). Employees who are not eligible for interest arbitration cannot be included in a bargaining unit with employees who are eligible for interest arbitration. WAC 391-35-310.

Most of the work performed by the reserve deputies is volunteer, unpaid work. However, there is one category of work where reserve deputies are eligible for paid "extra duty" work. Opportunities for extra duty work occur when separate entities such as the Amphitheater at Clark County[1] or the Clark County Fair request security, over and above what the employer would normally provide to tax-paying entities. In those circumstances, the sheriff's office contracts with the entity to provide security for events likely to attract large crowds, and the resulting extra duty slots are made available to regular deputies and reserve deputies. Reserve deputies, normally unpaid, are compensated for extra duty work. The amount paid is determined by the commander of the reserve unit and the employer.

Opportunities for extra duty work have notably increased over the years as the community has grown. In 2003, the union and employer signed a memorandum of understanding governing how extra duty work would be allocated. The parties agreed that extra duty work would be distributed 70 percent to regular deputies and 30 percent to reserve deputies. Evidence presented at hearing showed that the parties have generally complied with that agreement. For example, in 2005, regular deputy hours for extra duty work were 1265 (82 percent) and reserve deputy hours were 280 (18 percent). In 2009, regular deputies worked 89 percent of the extra duty hours, and reserve deputies worked 11 percent of the hours.

During negotiations for the parties' successor collective bargaining agreement, the union advanced a proposal for a new section to the agreement embodied in Article 19.6, "Reserve Deputy Sheriff Program." The proposal included language addressing the testing and selection

[1] The amphitheater is now known as the Sleep Country Amphitheater. The 18,000-seat music venue was built in 2002.

process of reserve deputies, as well as language specifically stating that reserve deputies were to be "unpaid volunteers," including for any extra duty work. Early in the negotiation process, the employer objected to including items related to reserve deputies in the collective bargaining agreement.

The parties continued to bargain throughout 2009. The union maintained its Article 19.6 proposal regarding reserve deputies, although the proposal took on various forms during the bargaining process. At a bargaining session on January 25, 2010, the employer clearly notified the union that it believed the subject of reserve deputies was not a mandatory subject of bargaining. In response, the union suggested the employer file an unfair labor practice complaint if it believed the union was insisting on bargaining over a non-mandatory subject of bargaining.

Commission staff met with the parties in mediation in June and August 2010. However, the parties were unable to reach agreement on several items. The executive director certified those items, including Article 19.6, for interest arbitration on November 4, 2010.

An interest arbitration hearing was set for July 7 and 8, 2011. The parties continued to try to reach an agreement prior to the hearing. On June 24, 2011, the employer gave written notice to the union that portions of the union's Article 19.6 proposal contained permissive subjects of bargaining. At that time, the union's proposed Article 19.6 was as follows:

> 19.6 Reserve Deputy Sheriff Program
>
> A. The parties agree that a Reserve Deputy Sheriff program exists and may be continued by the Sheriff's Office. The Sheriff's Office may fill Reserve Deputy Sheriff positions using a testing and selection process that will include successful completion of a thorough background investigation. Reserve Deputy Sheriff's (sic) are unpaid volunteers.
>
> B. Reserve Deputy Sheriffs will not be used for primary patrol, traffic, or investigative duties. The duties of Reserve Deputy Sheriffs may include:
>
> 1. Response to priority calls, less than a level 2, at the discretion of the supervisor or precinct commander.
> 2. Response to priority 1 or 2 calls in a support capacity at the request of the supervisor or precinct commander.

3. Barricade/traffic control.
4. Fireworks enforcement.
5. Crime scene protection.
6. Prisoner transport.
7. Search and Rescue.

C. Reserve Deputy Sheriffs will be authorized to carry firearms and will have powers of arrest as prescribed by RCW.
D. Reserve Deputy Sheriffs will not be counted for purposes of meeting established patrol staffing levels.
E. Overtime or extra duty assignments may only be worked by members of the Guild; however, if Guild members do not accept the available overtime or extra duty after it has been posted for at least seven (7) days, that work may be performed by a Reserve Deputy Sheriff in a volunteer, unpaid capacity.
F. No positions within the bargaining unit will be eliminated because of creating or filling volunteer unpaid Reserve Deputy Sheriff positions.
G. In the event of a critical incident involving a Reserve Deputy Sheriff and a represented member of the Guild, at the time of the commencement of the investigation of the critical incident, the County shall inform the involved Reserve Deputy Sheriff that for the duration of the critical incident investigation associated with an administrative review and/or determination by the Prosecuting Attorney as to whether the critical incident was within policy and justified by law, the Reserve Deputy Sheriff shall be represented by the Guild and the County shall provide representation of the Reserve Deputy Sheriff at the hourly rate of $200.00 plus costs, to a maximum of $10,000 per Reserve Deputy Sheriff per critical incident. This representation by the Guild is not considered criminal defense representation to the involved Reserve Deputy Sheriff.

The employer objected to Section A because it addressed the testing and selection process for reserve deputies, and because it mandated that the reserve deputies be unpaid. The employer also objected to Sections E and F because they mandate that the reserve deputies are unpaid. Finally, the employer objected to Section G.

As a result of conversations between the union and employer, the union revised its Article 19.6 proposal by removing Section G. However, the revision did not relieve all of the employer's concerns. The union's proposal still contained items related to the testing and selection process of the reserves, as well as language mandating that the reserves be unpaid volunteers, even for extra duty work. Therefore, the employer filed this unfair labor practice complaint on June 27, 2011, and Article 19.6 was blocked from proceeding to interest arbitration by the Executive

Director on June 30, 2011, until the mandatory or permissive nature of the proposal was resolved. The parties settled all other issues prior to the interest arbitration hearing, and so the hearing did not take place.

The employer contends that the union unlawfully insisted to impasse on a proposal regarding compensation for individuals outside the bargaining unit, a permissive subject of bargaining. Additionally, the employer asserts that the testing and selection of volunteer reserve deputies is a permissive subject of bargaining.

The union argues that its proposal was specifically and narrowly written to relate to mandatory subjects of bargaining, specifically compensation for bargaining unit employees, skimming of bargaining unit work, and the safety of bargaining unit employees. The union further argues that the employer did not comply with WAC 391-55-265(1)(a) because it did not notify the union of its position that Article 19.6 contained non-mandatory subjects until just prior to the interest arbitration hearing.

Compensation for Bargaining Unit Employees

The employer argues that the union cannot demand to bargain over compensation for employees who are not in the bargaining unit. The union argues that by proposing that reserve deputies should receive no extra duty pay at all, the union was in effect making a proposal to modify the 70/30 split to a 100/0 split. The union argues that its proposal was intended to curtail and eliminate the ability of reserve deputies from "taking compensation away" from regular deputies.

Testimony by the union's witnesses showed that there was a misperception and some confusion among bargaining unit employees as to how the employer allotted extra duty work, and a sense that opportunities to sign up for extra duty work and obtain overtime were being "taken away" from them by reserve deputies. On the contrary, the evidence shows that the employer was following the memorandum of understanding between the union and employer by maintaining the 70/30 split.

The union could have chosen to make a proposal to increase the percentage split, so that more, or even all, of the extra duty work was allocated to the regular deputies. Instead, the union made a proposal stating the reserve deputies must be "unpaid volunteers," even though the union's proposal still contemplated that there might be situations where extra duty assignments could be performed by reserve deputies.

It is within the employer's managerial rights to determine the amount it pays to reserve deputies for extra duty work. Reserve deputies are not bargaining unit employees. The issue of pay for reserve deputies is a permissive subject of bargaining.

Skimming of Bargaining Unit Work

The union argues that its Article 19.6 proposal relates to skimming of bargaining unit work, and therefore is a mandatory subject of bargaining.

Skimming occurs where an employer transfers bargaining unit work away from the unit without first bargaining with the union, and is an unfair labor practice. *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001). Both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees *may* be mandatory subjects of bargaining. *City of Anacortes*, Decision 6863-B (PECB, 2001).

The employer did not object to the portion of the union's proposal that sought to limit the duties of reserve deputies. The proposal states that the reserves "will not be used for primary patrol, traffic, or investigative duties."

If the union was concerned about reserve deputies taking regular deputies' work, the union should have focused on increasing the work for regular deputies, not the amount paid to the reserve deputies.

The union's skimming argument fails because the employer has not made a unilateral transfer of bargaining unit work. The union and employer bargained an agreement to allocate a 70/30 split of the work. If the union wanted to alter that agreement, it should have bargained with the

employer to try and reclaim the work it previously conceded, so that the work could be performed exclusively by bargaining unit employees.

Again, the union does not represent the reserve deputies, and cannot bargain over their wages, or whether they are paid or unpaid. An employer has no duty to bargain with a union about work or positions outside of the bargaining unit represented by that union. *Kitsap County Fire District 7*, Decision 7064-A.

Safety of Bargaining Unit Employees

The employer objected to language in the union's proposal that would require the employer to use a testing and selection process for reserve deputies, including a "thorough background investigation." The union argues that the use of reserve deputies creates safety issues for regular deputies, because reserve deputies are often partnered with regular deputies.

The Commission has ruled that safety of bargaining unit employees may be a mandatory subject of bargaining when it constitutes a "working condition." *Spokane International Airport*, Decision 7889-A (PECB, 2003). At hearing, the union attempted to link its proposal regarding the testing and selection process of reserve deputies to safety issues for the union's bargaining unit employees. For example, the record shows that reserve deputies frequently serve alongside regular deputies. Deputy Doug Paulson, who serves as a field training officer, testified that it can be burdensome to have a reserve deputy with him on duty.

Paulson testified that he was unaware or without knowledge as to how reserve deputies were selected, the background investigation process used for reserves, or that the reserve deputies have to submit to polygraph exams and psychological testing. In fact, the process used for reserve deputies is exactly the same as it is for the regular deputies.

Chief Deputy Mike Evans oversees the regular deputies and the reserve commander reports directly to him. He has worked for the employer since 1978 and as chief deputy since 1999. Evans testified that he was not aware of any instances where a reserve deputy caused harm to a regular deputy because of the reserve deputy's actions.

Evans testified that the background investigations for reserve deputies and regular deputies are the same. Psychological testing and polygraph examinations are administered by the same provider.

The Examiner is not convinced that the union's proposal regarding the testing and selection of reserves affects the safety of the regular deputies. On balance, it is the employer's prerogative to determine the testing and selection process of the reserve deputies, not the union's.

Notice Requirements

The union argues that the employer did not file a timely complaint. The union asserts that the employer did not communicate its concerns that the union was advancing permissive subjects to interest arbitration until after the parties filed final proposals with the arbitrator.

WAC 391-55-265(1)(a) requires a party claiming that a proposal being advanced to interest arbitration is not a mandatory subject of bargaining "must communicate its concerns to the other party during bilateral negotiations and/or mediation." WAC 391-55-265(1)(b) states that the party making such a claim must file and process the complaint charging unfair labor practices "prior to the conclusion of the interest arbitration proceedings."

The employer communicated its concerns regarding the reserve proposals throughout the lengthy bargaining process. Specifically, a transcript of a bargaining session on January 25, 2010, makes this crystal clear, if it was not evident to the union prior to that. The employer filed the complaint before the conclusion of the interest arbitration proceedings, and therefore the complaint was timely filed.

Based on the evidence and testimony presented at hearing, the Examiner concludes that the union was well-aware of the employer's position regarding its reserve proposal. While the union objected to the employer's position on several occasions, not agreeing with the employer is not the same as a lack of notice of the employer's position.

CONCLUSION

The union committed a refusal to bargain unfair labor practice when it insisted to impasse on, and sought interest arbitration of, permissive subjects of bargaining related to reserve deputies who are not in the bargaining unit.

REMEDY

WAC 391-55-265(2)(a) states that an issue found to have been unlawfully advanced to interest arbitration shall be stricken from the certification under WAC 391-55-200, and the party advancing the proposal shall only be permitted to advance a modified proposal in compliance with the order in the unfair labor practice proceedings. Therefore, the portions of the union's proposal deemed permissive in this decision cannot be advanced to interest arbitration.

FINDINGS OF FACT

1. Clark County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Clark County Deputy Sheriff's Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2), and is the exclusive bargaining representative for a bargaining unit of approximately 125 full-time regular deputies and sergeants in the sheriff's office.

3. The employer and union were parties to a collective bargaining agreement dated January 1, 2006, to December 31, 2008.

4. Since the 1950s, the employer has maintained a volunteer reserve deputies unit. The reserve deputies support the regular deputies and provide a variety of community services. Reserve deputies are not bargaining unit employees.

5. The reserve deputies currently undergo the same background investigation, physical examination, drug screening, psychological examination, and polygraph examination as the regular deputies.

6. While most of the work performed by the reserve deputies is volunteer, unpaid work, the reserve deputies are eligible for paid "extra duty" work. Extra duty work becomes available when the employer contracts with entities for security over and above what the employer would normally provide.

7. In 2003, the employer and union signed a memorandum of understanding governing how extra duty work would be allocated. The parties agreed that extra duty work would be distributed 70 percent to regular deputies and 30 percent to reserve deputies.

8. During negotiations for the parties' successor collective bargaining agreement, the union advanced a proposal, embodied in Article 19.6, including language addressing the testing and selection process of reserve deputies, as well as language stating that reserve deputies were to be "unpaid volunteers."

9. On November 4, 2010, the Executive Director certified certain items for interest arbitration, including Article 19.6.

10. Prior to the interest arbitration hearing set for July 7 and 8, 2011, the employer notified the union in writing on June 24, 2011, that portions of its Article 19.6 proposal were not mandatory subjects of bargaining. In response, the union revised its Article 19.6 proposal. However, the union's revision did not relieve all of the employer's concerns regarding the portions the employer believed were not mandatory subjects of bargaining.

11. The employer filed this unfair labor practice complaint on June 27, 2011, and Article 19.6 was blocked from proceeding to interest arbitration by the Executive Director on June 30, 2011, until the mandatory or permissive nature of the proposal was resolved.

12. The union's revised Article 19.6 proposal contained permissive subjects of bargaining under RCW 41.56.030(4).

CONCLUSIONS OF LAW

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

2. By insisting to impasse on and seeking interest arbitration of Article 19.6, as described in Findings of Fact 10 and 12, the union refused to bargain in violation of RCW 41.56.150(4) and (1).

ORDER

Clark County Deputy Sheriff's Guild, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Insisting to impasse on, and seeking interest arbitration of, proposals related to non-bargaining unit employees; and

   b. In any other manner interfering with, restraining or coercing bargaining unit 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. 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 notices to all bargaining unit employees are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

b. Read the notice provided by the Compliance Officer at a regular meeting of the Clark County Deputy Sheriff's Guild.

c. Notify the complainant, 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 complainant with a signed copy of the notice provided by the Compliance Officer.

d. Notify the Compliance Officer, 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 18th day of April, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

LISA A. HARTRICH, 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.

CASE 24074-U-11-6157
DECISION 11346 - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *CLARK COUNTY DEPUTY SHERIFF'S GUILD* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY insisted to impasse on, and sought interest arbitration of, proposals related to reserve deputies, who are not bargaining unit employees.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL NOT insist to impasse on or seek interest arbitration of permissive subjects of bargaining.

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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER:	24074-U-11-06157	FILED:	06/27/2011	FILED BY:	EMPLOYER
DISPUTE:	UN GOOD FAITH				
BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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