City of Kelso, Decision 11321 (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KELSO POLICE BENEFIT ASSOCIATION, Complainant, vs. CITY OF KELSO, Respondent.	CASE 23888-U-11-6102 DECISION 11321 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Makler, Lemoine and Goldberg, by *Jaime B. Goldberg,* for the union.

Janean Z. Parker, Attorney at Law, for the employer.

On March 28, 2011, the Kelso Police Benefit Association (union) filed an unfair labor practice complaint against the City of Kelso (employer). The union alleged that the employer refused to bargain in violation of RCW 41.56.140(4) when the employer implemented a change to Kelso Police Department Policy 216 (Policy 216), which changed the staffing level and subsequently affected employee use of discretionary leave. A preliminary ruling was issued on April 11, 2011. Examiner Karyl Elinski held a hearing on October 25, 2011. The parties submitted post-hearing briefs to complete the record.

ISSUE

Did the Employer refuse to bargain by unilaterally changing the minimum staffing level, which affected employees' ability to use discretionary leave?

I find the employer did not violate its bargaining obligation when it lowered the minimum staffing level, which affected the employees' ability to use discretionary leave.

LEGAL STANDARD

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). An employer or union commits an unfair labor practice when either fails or refuses to bargain in good faith on a mandatory subject of bargaining. RCW 41.56.150(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded, International Association of Fire Fighters v. PERC*, 113 Wn.2d 197 (1989) (*City of Richland*); *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Even when employers do not have a duty to bargain a specific decision, they are required to bargain the effects of a decision that impact the wages, hours, or working conditions of represented employees. *Seattle School District*, Decision 5755-A (PECB, 1998).

When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test, on a case-by-case basis, to determine whether an issue is a mandatory subject of bargaining, focusing on which characteristic predominates. *International Association of Fire Fighters v. PERC*, 113 Wn.2d 197, 203 (1989) (*City of Richland*). The Commission has long held that leave use is a mandatory subject of bargaining. *City of Seattle*, Decision 9173 (PECB, 2005); *City of Yakima*, Decision 3564-A (PECB, 1991); *City of Clarkston,* Decision 3286 (PECB, 1989). At the same time, the Commission has held that the size of an employer's workforce and changes in shift staffing are managerial prerogatives, and therefore permissive subjects of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011) citing *City of Centralia*, Decision 5282-A (PECB, 1996).[1]

An employer commits an unfair labor practice if it implements a unilateral change to a mandatory subject of bargaining without giving the union advance notice and a reasonable

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[1] Staffing levels can be a mandatory subject of bargaining if the levels affect employee safety. *City of Centralia*, Decision 5282-A (PECB, 1996). In the present case, the union presented no evidence that the employer's change in staffing levels affected employee's safety, and the union did not argue this issue in its brief.

opportunity to bargain. *Grays Harbor County,* Decision 8043-A (PECB, 2004); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

In determining whether a party committed an unfair labor practice, the examiner must analyze the "totality of the circumstances." *City of Wenatchee*, Decision 8028 (PECB, 2003), (citing *City of Mercer Island*, Decision 1457 (PECB, 1982)); *Walla Walla County*, Decision 2932-A (PECB, 1988).

Waiver

Through the collective bargaining process, parties make agreements which sometimes waive or alter their statutory bargaining rights. To effectively waive statutory collective bargaining rights, the parties must consciously agree to the waiver, and the waiver must be clear and unmistakable; waivers cannot be implicit. *City of Wenatchee*, Decision 8802-A (PECB, 2006). Absent a waiver by the union of its statutory right to notice and opportunity to bargain, the employer is prohibited from making unilateral changes to mandatory subjects. When a clear and unmistakable agreement on a specific subject is set forth in a collective bargaining agreement, a "waiver by contract" will exist as to that subject for the life of the agreement. A party who asserts a waiver by contract defense has the burden of proof to show a clear and unmistakable waiver of its bargaining duty. WAC 391-45-270(1)(b); *State – Social and Health Services*, Decision 9690 (PSRA, 2007) citing *Yakima County*, Decision 6594-C (PECB, 1999).

A waiver by inaction occurs when a party has knowledge of a proposed change but fails to make a timely request to engage in collective bargaining. *See Lake Washington Technical College*, Decision 4721-A (PECB, 1995) (union filed a grievance under a collective bargaining agreement, but never requested bargaining); *City of Yakima*, Decision 1124-A (PECB, 1981) (union responded to notice of a bargaining opportunity with a public information campaign, but never requested bargaining).

Derivative Interference

When the Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights. *Mason*

County, Decision 10798-A (PECB, 2011); *Battle Ground School District*, Decision 2449-A (PECB, 1986). When an employer commits a refusal to bargain violation by making a unilateral change, the Commission finds that the action has "an intimidating and coercive effect" on employees. *Battle Ground School District*, Decision 2449-A (PECB, 1986). Thus, if an employer unlawfully implements a unilateral change to a mandatory subject of bargaining, the employer's violation of RCW 41.56.140(4) also results in a derivative violation of RCW 41.56.140(1).

ANALYSIS

The employer and union are parties to a collective bargaining agreement (CBA) effective January 1, 2007, through December 31, 2009. The parties negotiated a memorandum of understanding (MOU) effective January 1, 2011, through December 31, 2011. The MOU modified a few provisions in the CBA and extended the term of the 2007-2009 CBA.

Prior to the negotiation of the MOU, in mid-2010, to ensure proper supervision was available for all shifts, the parties agreed to the original version of Policy 216. The policy established minimum staffing levels, consistent with past practice, at two patrol officers and one supervisor.

The present case involves the effect that changes in minimum staffing levels have on "discretionary leave." The CBA does not define discretionary leave. The parties use discretionary leave to refer to employees' use of leave authorized by the CBA.

Prior to January 2011, the police department's minimum staffing level consisted of three employees, two patrol officers and one supervisor. Although three employees was the minimum, the department generally scheduled four employees almost every shift. Chief Andrew Hamilton testified that, prior to January 2011, the department routinely granted requests for discretionary leave by the first employee who requested it. If one employee requested the use of discretionary leave, the leave was approved and another employee would be assigned to work overtime to replace the employee on leave. If multiple requests for discretionary leave caused more than one employee to work a shift on overtime, the second employee's request for discretionary leave was not granted except on a limited case-by-case basis.

Toward the end of 2010, due to revenue shortfall in the city's budget, the city required Hamilton to reduce $856,000 from the police department's budget. One of the ways to meet the budget reduction goal was to reduce overtime expenses and to reduce discretionary time off that resulted in additional overtime expenses. To reduce overtime costs, the employer and union bargained for and entered into an MOU effective for calendar year 2011, which granted the employer the right to approve or deny an employee's request for discretionary leave:

> The Association recognizes that the Kelso Police Administration reserves the right to monitor discretionary time use. The Association understands that discretionary time off may not be approved if it creates overtime cost. . . . Vacation may not be approved if a scheduled medical issue already requires the shift to be reduced to below 3 officers.

The department would continue to schedule three to four employees, at minimum two patrol officers and one supervisor, but the department changed how it would respond to requests for discretionary leave. The department would continue to grant requests for emergency use of discretionary leave. To avoid incurring overtime costs for a replacement employee, the department would deny non-emergent requests to use discretionary leave if the request would decrease the number of employees working that shift from four to three.

To continue to meet budget reduction goals, Hamilton and Captain Darr Kirk discussed changing Policy 216 to lower the staffing level from two patrol officers and one supervisor to one patrol officer and one supervisor between the hours of 0300 and 1830. Between 1830 and 0300 there would continue to be two officers and one supervisor.

Kirk was in charge of drafting the changes to Policy 216 on the Lexipol system. The employer used Lexipol to publish its policies. Kirk testified that Lexipol is a web-based program with offline and online sides. The offline side is for all drafts and works in progress. Police department administrators with access to the Lexipol system can save, edit, and share information on the offline side with other administrators. The online side is for final draft documents which, when created, are immediately distributed to everyone who has access to the Lexipol system, including union members.

On January 25, 2011, Kirk drafted changes to Policy 216 and erroneously placed them on the online side of Lexipol, instead of the offline side. Lexipol immediately distributed notices to everyone in the union that there would be a policy change. On January 28, 2011, Kirk sent a memorandum providing formal notice of the change to Policy 216, including an explanation that he erroneously sent a draft on January 25, 2011. On January 28, 2011, Kirk sent an additional memorandum notifying the union about the changes to Policy 216 which would take effect after a 30 day review period in accordance with article 2(2) of the CBA. Article 2(2) in the CBA requires the employer to give the union 30 days written notice of intent to implement a revision to an existing policy so the union can provide "input on the proposed implementation or change."

The union did not request bargaining and 40 days later, on March 9, 2011, the changes to Policy 216 took effect. On March 9, 2011, the police department's minimum staffing levels for the 0300 to 1820 shift was two employees, one patrol officer and one supervisor. The department would continue to schedule three employees, two patrol officers and one supervisor, and the department continued to follow how it responded to requests for discretionary leave according to the MOU. The department would continue to grant requests for emergency use of discretionary leave. To avoid incurring overtime costs for a replacement employee, the department would deny non-emergent requests to use discretionary leave if the request would decrease the number of employees working that shift from three to two. There was no change to the minimum staffing of two patrol officers and one supervisor between the hours of 1830 and 0300.

The threshold question in this analysis is whether the employer made a unilateral change to a mandatory subject without bargaining.

City of Richland requires application of a balancing test to determine whether the minimum staffing level in Policy 216 is a mandatory subject of bargaining. On the one side of the balance test is the extent to which changes in staffing levels impact employee wages, hours, and working conditions. The union argues the changes to Policy 216 affected working conditions by limiting the employee's use of discretionary leave, a mandatory subject of bargaining. The employer's past practice was to deny leave if it created more than one overtime slot to meet the minimum staffing level of three, unless it was for an emergent need. The new policy is to deny leave if it creates more than one overtime slot to meet the minimum staffing level to two during certain

hours, unless it is for an emergent need. Thus the policy does not affect the employee's discretionary leave, or working conditions, any differently than under original Policy 216. On the other side of the balance test is the extent to which changes in staffing levels are essential management prerogatives. The purpose of the change to Policy 216 was to reduce the minimum staffing level during certain shifts in order to reduce overtime usage to meet budget targets. Applying the balancing test, I find the management prerogatives predominate over conditions of employment, and the change to staffing levels in Policy 216 is a permissive, not a mandatory subject of bargaining. This conclusion is supported by numerous Commission decisions that analyzed facts in specific situations and held changes in shift staffing are permissive subjects. *Central Washington University*, Decision 10413-A (PSRA, 2011); *City of Tacoma*, 6929-A (PECB 2001).

If staffing level changes were a mandatory subject, which they are not, the employer would be required to bargain changes to them. In the present case the union bargained and entered into the MOU, and the employer met its obligation to give notice and an opportunity to bargain prior to its implementation of changes to Policy 216.

The union argues that the changes in staffing here are a mandatory subject because the changes impact the employees' ability to use leave, which is a mandatory subject of bargaining. Similar to the facts of *State – Social and Health Services*, the management rights clause and the MOU in the present case demonstrate that the parties clearly and unequivocally granted the employer the right to make changes to the staffing level and deny employee requests for discretionary leave. The management rights clause in article 2(1)(C) of the CBA grants the employer the right to "determine the methods, means, number of personnel (e.g., total personnel per shift and per equipment) needed to carry out the Department's mission." In the MOU, the union agreed the employer could deny requests for discretionary leave that triggered overtime costs. I find that when the union executed the CBA and MOU, it contractually waived its right to bargain employer changes to staffing levels and the employee use of discretionary leave.

Even if there is no waiver by contract, the union waived its right by inaction. In article 2(2) of the CBA, the parties agreed the employer would provide 30 days written notice to the union of any intent to implement a new written policy or to revise a current written policy. The employer

gave the union proper notice and 40 days to bargain the proposed changes to staffing levels in Policy 216. The union did not request bargaining and waived its right to bargain through inaction.

Finally, the union argues the prevailing rights clause in article 18 of the CBA prevented the employer from changing the minimum staffing levels. In essence, article 18 states the CBA does not affect past practices, which remain valid and effective during the term of the CBA. The union overlooks article 19 of the CBA, titled "Additional Negotiations," which authorizes amendments of the CBA "at any time upon mutual consent of both parties." The parties complied with article 19 by negotiating and signing the MOU, which gave the employer the right to deny employee requests to use discretionary leave time. The union negotiated and agreed to change the past practice for employee use of discretionary leave.

CONCLUSION

Based on the totality of the circumstances and the record as a whole, I find the employer did not commit an unfair labor practice when it implemented changes to Policy 216, which affected employee use of discretionary leave. The employer was not required to negotiate its decision to change Policy 216 because a change in shift staffing is a permissive, not mandatory, subject of bargaining. In addition, the union waived its right to bargain the effect on discretionary leave both by contract and by inaction. Because the employer did not refuse to bargain and did not violate RCW 41.56.140(4), the employer did not commit a derivative interference violation of RCW 41.56.140(1).

FINDINGS OF FACT

1. The City of Kelso (employer) is an employer within the meaning of RCW 41.56.030(12).

2. The Kelso Police Benefit Association (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The employer and union are parties to a collective bargaining agreement effective January 1, 2007, through December 31, 2009.

4. The employer and union are parties to a Memorandum of Understanding (MOU), effective January 1, 2011, through December 31, 2011. The MOU extended the term of the 2007-2009 CBA. In the MOU, the union recognized that the Kelso Police Administration reserved the right to deny discretionary time.

5. In mid-2010 the parties agreed to the original version of Policy 216, which established minimum staffing levels as two patrol officers and one supervisor.

6. Toward the end of 2010, due to revenue shortfall in the city's budget, the city required Chief Andrew Hamilton to reduce $856,000 from the police department's budget. One method to meet the budget goal was to reduce overtime expenses and to reduce discretionary time off that resulted in additional overtime expenses.

7. To continue to meet budget reduction goals, Hamilton and Captain Darr Kirk discussed changing Policy 216 by lowering the staffing level to one patrol officer and one supervisor between the hours of 0300 and 1830.

8. On January 25, 2011, Kirk drafted changes to Policy 216 and erroneously placed them on the online side of Lexipol immediately notifying everyone in the union that there would be a policy change.

9. On January 28, 2011, Kirk sent out formal notice to the union of the changes to Policy 216 which would take effect after a 30 day review period. On the same day, Kirk sent an additional memorandum which explained that he erroneously sent a draft on January 25, 2011.

10. During the 30 day period, the union never made a bargaining demand over the changes to Policy 216. Forty days later, on March 9, 2011, the changes to Policy 216 took effect.

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 its actions described in the above findings of fact, the employer did not refuse to bargain and did not violate RCW 41.56.140(4) when it changed the staffing levels in Policy 216.

ORDER

The union's complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 21st day of March, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S/ ROBBIE DUFFIELD

CASE NUMBER:	23888-U-11-06102	FILED:	03/28/2011	FILED BY:	PARTY 2
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DETAILS:	-				
COMMENTS:					

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