University of Washington, Decision 11600 (PSRA, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 24580-U-12-6291 DECISION 11600 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Attorney General Robert M. McKenna, by *Mark K. Yamashita*, Assistant Attorney General, for the employer.

On February 21, 2012, Service Employees International Union, Local 925 (union) filed an unfair labor practice complaint against the University of Washington (employer). The complaint alleged the employer committed a refusal to bargain violation when it made a unilateral change in shift assignments without bargaining in good faith with the union.

Agency staff issued a preliminary ruling on February 28, 2012, finding a cause of action. On June 20, 2012, the union filed a motion to amend its complaint to include an additional remedy request. Examiner Lisa A. Hartrich granted the motion to amend the complaint and held a hearing on July 10, 2012. The parties submitted post-hearing briefs to complete the record.

ISSUES

1. Did the employer unilaterally change shift assignments without providing an opportunity to bargain?

2. Did the employer circumvent the union through direct dealing when it informed and discussed the changes to shift assignments with employees without notifying the union?

3. Did the employer breach its good faith bargaining obligations with the union over the changes in shift assignments?

Based on the arguments, testimony, and evidence presented by the parties, the Examiner rules that the employer did not commit an unfair labor practice by making a unilateral change in shift assignments because the union contractually waived its right to bargain the decision to make that change. The employer did not circumvent the union by discussing changes in shift assignments with employees. The employer did not breach its good faith bargaining obligations with the union over changes in shift assignments.

ISSUE 1 – Did the employer unilaterally change shift assignments without providing an opportunity to bargain?

Applicable Legal Standards

A public employer cannot lawfully make a unilateral change to a mandatory subject of bargaining without providing the union with notice and an opportunity to bargain. RCW 41.80.110(1)(e). Wages, hours, and working conditions of bargaining unit employees are characterized as mandatory subjects of bargaining. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958). The Commission has long held that shift schedules, including a change from "fixed" shift schedules to "rotating" shift schedules, are mandatory subjects of bargaining, as shifts involve the "hours" of employees. *City of Tukwila*, Decision 10536-A (PECB, 2010); *City of Bremerton*, Decision 2733-A (PECB, 1987); *City of Yakima*, Decision 767-A (PECB, 1980).[1]

[1] The preliminary ruling states the union alleged a unilateral change in "shift assignments," which in this case, means a change from allowing employees to bid by seniority on their shift of choice for each bid cycle, to requiring that employees rotate between day, swing, and graveyard shifts after completing a bid cycle. *City of Bremerton*, Decision 2733-A similarly addresses a change from "fixed" to "rotating" schedules, and held the employer committed an unfair labor practice when it changed from fixed to rotating schedules without giving the union notice and opportunity to bargain.

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. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v. PERC (City of Richland)*, 113 Wn.2d 197 (1989); *King County*, Decision 10547-A (PECB, 2010).

A union can waive its statutory rights to notice and opportunity to bargain over a mandatory subject. To effectively waive these rights, the union and employer must consciously agree to the waiver and the waiver must be clear and unmistakable. *City of Wenatchee*, Decision 8802-A (PECB, 2006). When parties agree to a contractual waiver, the employer can make lawful unilateral changes as long as the changes conform to the contractual waiver. The party alleging the existence of a waiver has the burden of proof. *State – Social and Health Services*, Decision 9690-A (PSRA, 2008).

Typical management rights clauses tend to be too general and fail to meet the high standards for finding a waiver. *Griffin School District*, Decision 10489-A (PECB, 2010). On the other hand, management rights clauses containing specifically itemized subjects are waivers and are within the employer's prerogative to change without bargaining. *City of Wenatchee*, Decision 8802-A.

Background

The union represents approximately eight dispatchers in the employer's police department. The dispatchers are covered by a university-wide, non-supervisory collective bargaining agreement (CBA), effective July 1, 2009, through June 30, 2011. The parties agreed to extend the CBA until June 30, 2012. The dispatchers respond to incoming emergency phone calls and public safety requests on the university campus, and dispatch police officers in response to those calls. The dispatch center, which operates 24 hours a day, seven days a week, has three shifts: day shift, swing shift, and graveyard shift.

In March 2011, Sue Carr became the technical services manager (supervisor) of the dispatch center. Upon Carr's arrival, the dispatchers were working schedules of two 12-hour days and

two eight-hour days. In June 2011, the dispatchers began working four 10-hour shifts per week. Every three months, the dispatchers bid for their shift assignments by seniority.

Soon after Carr arrived at the dispatch center, she began to talk about ways to improve service and safety within the center. Based on her experience with other employers, and after discussions with her colleagues, Carr decided it would be beneficial for the dispatchers to rotate shifts instead of consistently bidding on the same shift. Carr testified that "several of the dispatchers had been long term on the same shifts," and she wanted the dispatchers to understand and be exposed to different shifts for a variety of operational reasons.

On November 1, 2011, Carr sent an e-mail to all dispatchers, notifying them of a mandatory meeting on November 9, 2011. On November 3, 2011, Carr sent the dispatchers a tentative schedule for the next shift bid, which was to occur prior to or at the November 9 meeting. On November 5, 2011, Carr sent a more detailed shift bid chart to the dispatchers. The chart included blank three-month shift schedules for the quarterly periods November 28, 2011, through February 19, 2012, February 20, 2012, through May 13, 2012, May 14, 2012, through August 5, 2012, and August 6, 2012, through October 28, 2012. The schedule listed two day shifts (0600-1600), two swing shifts (1200-2200 and 1400-2400), and two graveyard shifts (2000-0600).

The shift bid chart Carr sent to the dispatchers on November 5, 2011, contained the following note:

> Bid Guidelines
> 1. 4 – 3 month rotations, total of 12 months
> 2. First bid must not be current shift
> 3. Cannot bid for the same shift (Day, Swing, Grave) for 2 consecutive rotations
> 4. Bid to be completed by: 11/9/11

The accompanying e-mail stated "Please be prepared to complete the bid at the [November 9] meeting."

This new schedule required the dispatchers to rotate shifts every three months (quarterly). For example, a dispatcher currently working the day shift had to bid for either swing or graveyard shift, regardless of seniority. Previously, the dispatchers were not required to rotate shifts.

On November 7, 2011, the union sent the employer a "formal Demand to Bargain notice" regarding the change to rotating shifts. The union requested that the employer suspend implementation of the new shift rotation requirement until after the parties could meet to bargain the change.

On November 9, 2011, Carr met with all of the dispatchers. The dispatchers completed the bid process for the new schedule following the new bid guidelines, which required dispatchers to bid for a shift that was not their current shift. For example, dispatcher Kelly Miller, who consistently worked the graveyard shift for the previous five years, was now required to bid on either day or swing shift. Miller, who was the third most senior dispatcher, bid on the day shift.

On November 21, 2011, the employer met with union representatives regarding the shift rotation issue. The union provided the employer with a proposal requesting that the employer maintain the status quo for bidding on the dispatcher shifts, and requesting regular labor-management committee meetings.[2] After some discussion, the employer declared impasse on the shift rotation issue and indicated it would implement the change. The employer also agreed to schedule labor-management committee meetings to address effects of the change to rotating shifts. According to union representative Dan Gilman, who attended the meeting, the union did not believe that the parties were at impasse because they had only met once to discuss the issue.

Later in the day on November 21, Gilman sent the employer a letter reiterating the union's proposal that the employer "cease and desist" from making the schedule changes, and requesting information so the parties could "resume productive negotiations." The employer fulfilled the information request, but the parties did not meet again to discuss the shift rotation issue. The

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[2] Testimony at the hearing clarified that the proposed committee was not a general labor-management committee, but a committee to address and mitigate the impact of changing from fixed shifts to rotating shifts, or finding alternative ways to address the employer's reasons for wanting to implement rotating shifts.

union filed its unfair labor practice complaint, which is the subject of this decision, on February 21, 2012.

The new schedule became effective on November 28, 2011. Dispatcher Miller did not return to work after the new schedule was implemented, leaving one of the two day shifts uncovered.[3] Because of Miller's subsequent prolonged absence, the record suggests the new schedule was only operational for three weeks.

On December 13, 2011, Carr notified the dispatchers that there would "likely be a schedule change to cover Kelly Miller's current leave." On December 16, 2011, Carr sent the dispatchers a "short term schedule to cover the holiday period," effective December 19, 2011, through January 1, 2012. Carr also indicated her intent was to eventually reassign everyone back to the shifts bid on November 9 (*i.e.* the rotating schedule) after Miller returned to work.

On December 21, 2011, Carr notified the dispatchers of schedule changes for December 26, 2011, through January 22, 2012. Miller still had not returned when the dispatchers bid on the January 23, 2012 schedule, and they were not required to rotate shifts. As of the date of hearing, Miller had not yet returned to work.

Analysis

The union argues that the employer unilaterally implemented a change in shift assignments, a mandatory subject of bargaining, without providing notice to the union and an opportunity to bargain, and therefore presented the change as a *fait accompli*.

The employer argues that, while work schedules and shift assignments may be mandatory subjects of bargaining, the union waived its right to bargain those subjects. The employer contends that Article 8.8 of the CBA gives the employer the right to rotate employees through different shift assignments by limiting the shifts that employees can bid for by seniority during each bid cycle.

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[3] Miller testified that her healthcare provider wanted her to remain on the graveyard shift.

The union counters that Article 8.8 of the CBA only addresses notification requirements when an employee's schedule is changed, and does not waive the union's right to bargain the decision to require rotating shifts.

Shift Assignments are Mandatory Subjects of Bargaining

As stated above, the Commission has long held that shift schedules, including a change from fixed shift schedules to rotating shift schedules, are mandatory subjects of bargaining. Nevertheless, *City of Richland* recognizes that every case presents unique circumstances. As a result, the balancing test will be applied to the facts of this case to determine whether conditions of employment or managerial prerogatives prevail.

The employer cites many reasons why requiring employees to rotate shifts is important to running the operation of a dispatch center. Carr testified that rotating dispatchers through shifts provides for well-rounded dispatchers, increases public safety, increases customer service, and increases job understanding and awareness. She also stated that rotating shifts increases the employer's ability to provide feedback to employees. These are significant managerial prerogatives.

On the other hand, it is difficult to imagine a more disruptive impact on working conditions and hours of employment than requiring employees to rotate shifts every three months. The union argues that rotating shift schedules can have a significant effect on employee health issues, personal relationships, childcare options, and educational opportunities. On the whole, the Examiner finds that requiring employees to rotate shifts is a mandatory subject of bargaining because the impact on the working conditions and hours of employees outweighs the employer's managerial prerogatives.

Waiver by Contract

The CBA contains the following relevant language:

> Article 8.8 – Change in Work Schedule Notification
>
> The Employer agrees to provide a minimum of fourteen (14) calendar days notice to an employee in the event of an Employer-directed permanent change in the employee's shift assignment or work schedule.

> . . . .
> The assignment of employees in various shifts within each work group or department shall be determined by the employing official, provided that when qualifications are substantially equal in the judgment of the employing department, seniority shall be a factor in determining shift assignment. This criteria does not apply to positions deemed by the employer to require a rotational shift.

On its face, the language "shall be determined by the employing official" in Article 8.8 explicitly gives the employer the right to assign employees to "various shifts within each work group or department." Furthermore, Article 8.8 states that the employer agrees to give notice to an employee "in the event of an Employer-directed permanent change in the employee's shift assignment or work schedule," which acknowledges the employer has the right to change work schedules. Article 8.8 also states that seniority does not apply to rotational shifts, which recognizes the employer can change rotational shifts without considering seniority as a factor.

In addition to Article 8.8 above, Article 32 – Management Rights and Responsibilities, specifically includes, as part of an itemized list, the employer's right to "the establishment of work schedules." Article 8.8 and Article 32 support the employer's contention that the union contractually waived its right to bargain employer changes to employee shift assignments.

Conclusion

The Examiner finds Article 8.8 and Article 32 are sufficiently specific to demonstrate the union waived its right to bargain the employer's decision to require rotating shift assignments. The union's allegation that the employer unlawfully changed employee shift assignments without providing notice and an opportunity to bargain is dismissed.

ISSUE 2 – Did the employer circumvent the union through direct dealing when it informed and discussed the changes to shift assignments with employees without notifying the union?

Applicable Legal Standards

It is unlawful for an employer to negotiate wages, hours, or working conditions directly with employees who are represented by a union. *State – Social and Health Services*, Decision 9690-A (PSRA, 2008); *Whatcom County*, Decision 7244-B (PECB, 2004). The law does not completely

preclude direct communications between employers and their union-represented employees. *City of Seattle*, Decision 3566-A (PECB, 1991). Employers maintain the right to communicate directly with their employees who are represented by a union, provided the communication does not amount to bargaining or other unlawful activity. *State – Social and Health Services*, Decision 9690-A.

Analysis

The union argues that the employer engaged in direct dealing with bargaining unit employees over shift assignments, a mandatory subject of bargaining, in violation of RCW 41.80.110(1)(e). The employer argues that it did not bargain with employees to the exclusion of their union representatives. The employer admits it discussed how rotational shifts would be implemented, asked for feedback, notified the employees when the rotation would begin, and added bid instructions to the bid sheet.

Carr testified that, soon after becoming the technical services manager and after consulting with the chief of police and other colleagues, she made the decision to change to rotating shifts. Carr testified that she did not contact the union about making the decision to require rotating shifts, and believed she had the authority to implement rotating shifts without notifying the union. However, Carr spoke with all of the dispatchers about making the change on "several instances," including at a dispatcher meeting in June 2011, and also in one-on-one conversations. Carr asked the dispatchers for their feedback, concerns, complaints, or questions about the proposed change.

The employer was not required to bargain with the union over rotating shifts because the union contractually waived its right to bargain. Had there not been a contract waiver, the employer would have been required to provide the union with notice and an opportunity to bargain before making the decision.

Conclusion

The Examiner finds the employer did not circumvent the union when Carr discussed her decision with the dispatchers to require rotating shifts. Because the union contractually waived its right to

bargain changes in shift assignments, the employer had no obligation to bargain with the union. The union's allegation that the employer circumvented the union by direct dealing with employees is dismissed.

ISSUE 3 – Did the employer breach its good faith bargaining obligations with the union over the changes in shift assignments?

Applicable Legal Standards

An employer or union that fails or refuses to bargain in good faith over a mandatory subject of bargaining commits an unfair labor practice. *Port of Walla Walla*, Decision 9061-A (PECB, 2006). The bargaining obligation is not onerous and does not mandate agreement. There is no duty to agree, but the process of communication between labor and management must be given a chance to operate. *State – Social and Health Services*, Decision 9551-A (PSRA, 2008).

The bargaining obligation may extend to the effects of an employer's decision, even when the union has waived its right to bargain the decision. *State – Social and Health Services*, Decision 9690-A (PSRA, 2008).

Analysis

In its post-hearing brief, the union argues that the employer failed to bargain in good faith over the effects of the change to rotating shifts. The employer argues that it met its bargaining obligations by providing the union with the information it requested after the November 21, 2012 meeting, and by agreeing to the union's proposal to schedule labor-management committee meetings to address the effects of the shift rotations.

Union representative Gilman testified that the union wanted to bargain the decision to change to rotating shifts with the employer at the November 21, 2011 meeting. He also testified that there were discussions about the impact of what the schedule change would do to employees. Gilman stated, "It was pretty clear that the university was not interested in dialoguing with us, negotiating over how we might do this differently."

Peter Denis, assistant vice president of human resources who represented the employer in meetings with the union, testified that his approach to the November 21 meeting was that the employer did not have to bargain the decision to change to rotating shifts, but he thought the effects of the decision "ought to be bargained." At that meeting, the employer agreed to form a labor-management committee to periodically review "what went well, what didn't go well" once the rotating shifts were implemented, but clearly disagreed with the union's request to maintain the status quo.

The record contains no evidence that the union requested further meetings after the November 21, 2011 meeting to discuss effects bargaining over the decision to change to rotating shifts.

The employer was not obligated to bargain the decision to require rotating shifts because the union contractually waived that right. By agreeing to hold labor-management meetings with the union to discuss the union's concerns about the effects of changing to rotating shifts, the employer demonstrated its willingness to bargain the effects of its decision.

Conclusion

The Examiner finds the record indicates the employer was willing to bargain in good faith over the effects of its decision to require rotating shifts. The union's allegation that the employer breached its good faith bargaining obligation is dismissed.

FINDINGS OF FACT

1. The University of Washington (employer) is an employer within the meaning of RCW 41.80.005(8).

2. Service Employees International Union, Local 925 (union) is an exclusive bargaining representative under RCW 41.80.005(9). The union represents approximately eight dispatchers in the employer's police department.

3. The employer and union were parties to a collective bargaining agreement (CBA) effective July 1, 2009, through June 30, 2011, and extended by the parties until June 30, 2012.

4. The CBA contains language in Article 8.8 and Article 32 that specifically acknowledges the employer's right to establish work schedules, including rotating shifts.

5. In March 2011, Sue Carr became the technical services manager (supervisor) of the dispatch center. Soon after Carr became the supervisor, she decided to make a change in the way dispatchers bid for their shifts.

6. On November 9, 2011, Carr met with all of the dispatchers to complete the bid process for a new schedule, which required the dispatchers to bid for a shift that was not their current shift. The dispatchers bid for quarterly shifts, and were not allowed to bid for the same shift for two consecutive rotations, but rather had to rotate between shifts.

7. On November 21, 2011, the employer met with union representatives regarding the shift rotation issue. The union provided the employer with a proposal requesting that the employer maintain the status quo for bidding on the dispatcher shifts, and requesting regular labor-management committee meetings.

8. The employer declared impasse on the shift rotation issue and indicated it would implement the change. The employer agreed to schedule labor-management committee meetings to address effects of the change to rotating shifts.

9. On November 21, 2011, the union made an information request related to the shift rotation issue. The employer fulfilled the information request.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.80 and WAC 391-45.

2. As described in Finding of Fact 4, the union contractually waived its right to bargain the decision to make changes in shift assignments, and therefore, the employer did not violate RCW 41.80.110(1)(e).

3. As described in Findings of Fact 4, the employer did not circumvent the union through direct dealing with employees and did not violate RCW 41.80.110(1)(e).

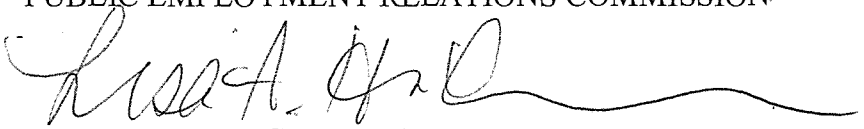
4. As described in Findings of Fact 7, 8, and 9, the employer did not breach its good faith bargaining obligations with the union over changes in shift assignments, and therefore did not violate RCW 41.80.110(1)(e).

ORDER

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

ISSUED at Olympia, Washington, this 18th day of December, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24580-U-12-06291	FILED:	02/21/2012	FILED BY:	PARTY 2
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BAR UNIT:	DISPATCHERS				
DETAILS:	Non-Supervisory				
COMMENTS:					

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