Walla Walla County, Decision 11877 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALLA WALLA COUNTY COMMISSIONED DEPUTY SHERIFF'S ASSOCIATION, Complainant, vs. WALLA WALLA COUNTY, Respondent.	CASE 25173-U-12-6449 DECISION 11877 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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The Walla Walla County Commissioned Deputy Sheriff's Association (union), filed an unfair labor practice complaint on October 1, 2012, against Walla Walla County (employer). The complaint alleges that the employer refused to engage in collective bargaining and interfered with employee rights in violation of RCW 41.56.140(4) and (1) by unilaterally implementing an unpaid lunch hour during training days. The Commission assigned the case to Examiner Erin Slone-Gomez and a hearing was held on April 29, 2013. The parties filed post-hearing briefs.

ISSUE

Did the employer refuse to bargain with the union by unilaterally implementing an unpaid lunch hour during training days, without providing an opportunity for bargaining?

After consideration of the record as a whole, I find the union was unable to prove the existence of a past practice and accordingly the employer did not make a unilateral change to unpaid lunch periods during training days.

BACKGROUND

The union represents all commissioned Sheriff's Deputies employed by the county. The employees in this bargaining unit are eligible for interest arbitration, as defined by RCW 41.56.430 through 41.56.492. The employer and the union were parties to a collective bargaining agreement that was effective between January 1, 2008, and December 31, 2012. In relevant part the agreement states, "Training Time: Any employee who is required to attend job training during off-duty hours whether in the county or outside the county will be given compensatory time on a one and one-half hour basis." There is no explicit mention of how employees will be compensated for lunch breaks on training days.

On January 1, 2011, John Turner assumed the elected position of Sheriff for Walla Walla County. During January and February 2011, Turner negotiated with the union regarding a change in work schedule. The parties reached an agreement to move from a forty-hour, five-day weekly schedule to a "four platoon schedule" also known as a "Pitman schedule." This agreement was memorialized in a memorandum of understanding (MOU) on February 25, 2011. The signing of the MOU was followed by a written directive from Turner, titled 2011-001, to the bargaining unit members that included the following language about meal and rest breaks while on-duty,

> Meal breaks will be a paid forty-five (45) minute period. Two (2) additional fifteen (15) minute breaks may be taken during a work day, one during the first six (6) hours of a shift and one during the second six (6) hours of a shift, provided that call load and work load allows for such breaks. Final break discretion rests with the Squad Sergeant.

The MOU did not address meal breaks during training days. The MOU also highlighted the creation of a "Kelly Payback Day" resulting from the new four-platoon schedule.

> This Kelly Payback Day may be used for training and/or a work day at the discretion of the Sheriff. The Sheriff's preference is to use these payback days for quality ongoing in-service training, however it may be deemed necessary to use [a] payback day during the Walla Walla Frontier Days Fair. Training Days will be posted in advance to give employees proper planning time to ensure participation in their squad's training day.

In accordance with the negotiated MOU, employees would attend a full day of training in order to "payback" an extra day they were previously paid under the new schedule.

On April 18, 2011, Turner distributed schedules for Kelly payback days to be used for training in May, June, and July of 2011. Each schedule outlined eight hours of training time with an hour lunch period for a total of nine hours. Turner testified that he attended many of these training days and that the trainings lasted the entire scheduled period. Other trainings were conducted during the year, however no records of those trainings were submitted as evidence. Testimony indicated that a December 2011 training included a "working lunch" and that the training day was scheduled for a total of eight rather than nine hours. On March 26, 2012, Turner e-mailed a schedule for Kelly payback days to be used for trainings to take place on April 3 and 10, 2012. This schedule also listed eight hours of training and a one-hour meal break. Just like the agendas distributed in 2011 there was no mention on the schedule of whether lunch would be paid or unpaid. Employees attended these trainings and were not provided a paid lunch hour.

After the April 2012 trainings, three deputies submitted overtime slips that requested one hour of overtime compensation for the unpaid lunch period training day. (Neither Barry Blackman, who was the patrol captain at the time, or other witnesses were able offer additional specificity about who requested overtime and the date of the overtime request; the slips were not offered as evidence). Blackman denied these overtime requests.

After union president Tom Cooper heard that overtime slips had been submitted and denied around May of 2012, he met with Turner several times to discuss the unpaid lunch hour on training days. During these conversations, Cooper and Turner discussed the legality of an unpaid lunch period under the federal and/or state compensation laws. In response, Turner e-mailed the bargaining unit members stating he believed the training schedule was in compliance with the Fair Labor Standards Act and that the lunch period is unpaid.

APPLICABLE LEGAL STANDARD

Duty to Bargain

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). Wages, including overtime compensation, and hours of work are mandatory

subjects of bargaining. *City of Pasco*, Decision 9181-A (PECB, 2008); *City of Kalama*, Decision 6773-A (PECB, 2000).

A party asserting an unfair labor practice complaint bears the burden of proving its case. WAC 391-45-270(1)(a).

Unilateral Change

An employer must give a union sufficient notice of possible changes affecting mandatory subjects of bargaining and, upon union request, bargain in good faith until reaching agreement or impasse. *Wapato School District*, Decision 10743-A (PECB, 2011). Therefore, an employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligations. *Seattle School District*, Decision 10732-A (PECB, 2012). No violation exists where there is no change to an established past practice. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995); *City of Pasco*, Decision 4197-A (PECB, 1994).

Past Practice

"The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement." *City of Edmonds*, Decision 8798-A (PECB, 2005), *citing City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). The status quo is defined both by the parties' collective bargaining agreement and by established past practice. As the Commission explained in *Kitsap County*, Decision 8893-A (PECB, 2007):

> Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may reasonably be considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002), (citing *City of Pasco*, Decision 4197-A (PECB, 1994)).

For a past practice to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances. *City of Pasco*, Decision 9181-A, *citing Whatcom County*, Decision 7288-A (PECB, 2002)).

Statute of Limitations

The employer also alleged the affirmative defense that the union did not meet the Commission's statute of limitations. RCW 41.56 160(1) governs the statute of limitations for unfair labor practice complaints, and provides that a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with this Commission. Commission precedents strictly enforce the time limitations contained within RCW 41.56.160. The only exception to strict enforcement occurs in cases where a complainant shows it had no actual or constructive notice of the acts or events, which are the basis of the charges. *City of Bremerton*, Decision 7739-A (PECB, 2003). *City of Seattle*, Decision 4057-A (PECB, 1993).

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. 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

Establishment of Past Practice

As outlined above, the first step to proving an allegation of employer unilateral action is to show that a past practice existed. The union must then prove that the employer made a change that differed from said past practice without negotiating with the union. In the instant case, the union was unable to prove there was a past practice to pay employees for lunch on training days.

Prior to the negotiated shift change in 2011, deputies received training either in-house or attended outside trainings. It is clear from testimony that there was no set standard for how lunch periods were compensated for training days, whether in-house or outside. Trainings were often too short in duration to necessitate a meal break or the schedule was set by an outside entity, *e.g.*, the Criminal Justice Training Commission (CJTC), which allowed for a paid lunch period but more often included an unpaid break. At the hearing several employees testified about their training experience prior to 2011. Blackman testified that trainings typically did not last more than a few hours unless they were held at the CJTC.

Deputy Ian Edwards testified that when he attended the DARE Academy in Las Vegas, NV, the training schedule was 8:00 A.M. to 5:00 P.M. This training included a one-hour lunch break at noon and that he did not request overtime for the lunch hour. Deputy Gerrod Martin, a member of the bargaining unit, testified that when he had attended trainings at the CJTC, his typical schedule was eight hours of training with a one-hour unpaid lunch period. Martin testified he did not request overtime compensation for the lunch period. Martin further testified that when he had attended in-house trainings in the past most trainings were, "anywhere between two to four, maybe five hours at the most. And they were few and far between." Martin did not recall any in-house trainings lasting eight hours or including a lunch period. Sergeant Gary Bolster has been the County's firearms instructor for approximately twenty years, and has provided in-house training to his colleagues during that time period. Bolster testified that past training would typically last less than a full day and the deputies would include the training in their regular schedule without explicit provision of a paid or unpaid lunch period. Bolster testified that when he attended the Firearms Instructor School at CJTC his training schedule was for eight hours, which included a meal break. I credit the members' testimony.

After the negotiated shift change in 2011, the employer continued its practice to not provide paid lunches on training days. As referenced above, Turner distributed copies of training schedules in advance of the trainings conducted. All schedules except one indicated that the training day would last nine hours with a one-hour lunch break. According to testimony, only one training in December lasted eight hours and included a "working lunch." This working lunch had been identified accordingly on the training schedule distributed in advance. The union members knew based on the MOU, Turner's directive referenced above, and through negotiations, that each

member only owed eight hours of time. The evidence reflected that on May 3 and 10, June 28 and July 5, 2011 employees were required to attend an eight-hour training and did not receive a paid lunch.

The union was unable to prove a past practice that employees were historically compensated for their lunch period either before the negotiated shift change to a four-platoon schedule or after the schedule change in 2011. Thus, when the employer did not provide a paid lunch at the April 2012 training, it did not unilaterally change the past practice, but rather maintained current practice of not providing a paid lunch. Without the establishment of a past practice, whereby deputies received a compensable lunch hour during training days, the union is unable to show that the employer created a unilateral change.

Statute of limitations

In its complaint the union alleged that, "Commencing in May 2012, the Sheriff's Office compelled Association members to attend training days for nine (9) hours, but paid the Association members for only eight (8) hours. The Sheriff's Office considered one hour of this time as an 'unpaid lunch' hour." (emphasis added). During the hearing the union focused a considerable part of its argument on establishing when the union had knowledge of the "change" to an unpaid lunch hour on training days. In its brief the union argued, "[i]t took awhile for deputies to understand that lunches would be unpaid." It is clear from the evidence that the alleged change took place on April 3, 2011, the first training day where employees worked eight hours with a one-hour unpaid lunch break. Thus, the union's argument that the employer made a change in May 2012, a change that it acknowledged at hearing actually occurred in April 2011, is inappropriate and designed to bypass the Commission's six-month statute of limitations.

Turner testified he had many discussions with various union members, both rank and file and union leadership, about how the new schedule would work, including the need for eight hours of "Kelly payback time" every two months. Turner further testified he believed through these discussions it was clear that a full day of in-house training would be held during these payback days, and each day would include eight hours of training to satisfy the deputies' mandatory training requirements. Several union members testified that the issue of whether a lunch period would occur and whether or not this lunch period would be compensable was not discussed. Regardless of whether

discussions had taken place, or the existence of an informal or formal agreement, Turner's expectation of an unpaid lunch hour should have been clear to the union on May 3, 2011, the date of the first full-day training as the employees only owed eight hours of time but the training was scheduled to take place over nine hours.

In accordance with the negotiated MOU, employees would attend a full day of training in order to "payback" an extra eight hours they were previously paid under the new schedule. On April 18, 2011, Turner e-mailed union members the schedule for trainings in May and a second in June/July. Each schedule clearly showed a four-hour block of training, a one-hour "lunch break" and an additional four-hour training block. As the union members knew, based on the MOU, Turner's directive referenced above, and through negotiations, each member only owed eight hours of time.

Turner testified that he attended the first meeting on May 3, 2011, and the training lasted the complete time scheduled. Therefore, even if union members did not comprehend that they received an unpaid lunch-hour when first reviewing the schedule, it should have been clear after members completed the first day. It is further evidenced that the employees understood that their lunch period was unpaid as no union member submitted an overtime slip for the nine-hour training day.

Several witnesses testified about discussions amongst union members after the May and June/July trainings further indicating the members' awareness of the discrepancy between the eight hours owed and the nine hours scheduled. For example, Edwards, the union secretary/treasurer at the time, shared:

> Bolisina: Now, at some point, did you come to understand that the training days were set up with a one-hour unpaid lunch in the middle?
>
> Edwards: Yes.
>
> Bolisina: And when is it, at the latest, you came to understand that?
>
> Edwards: Well, it would have been after the -- it would have been after the first one, because I remember speaking with some guys out west. And they were concerned about the fact that the 8-hour training was more like an 11-hour training day and they were wondering whether they were going to get paid for three hours...
>
> Bolisina: And you said that you believed these conversations occurred after the first training session?

Edwards: Yes.

Bolisina: And so May 11th -- May of 2011 was the first training, you think these training sessions occurred after that?

Edwards: Yes, I do.

Bolisina: How soon after May 2011?

Edwards: Probably -- I -- I can't. I'm sorry, I can't give a specific date.

Bolisina: Oh, I understand.

Edwards: I can't say one week later. But knowing my conversations with the guys on my squad, especially one of them, I'm sure it was very soon after this.

Additionally, Martin testified that around July 2011, after discussions with colleagues, he realized he was being compensated for eight hours not nine hours on training days and he took no further action. Bolster testified he became aware of the unpaid lunch hour around "middle end of last year or something," which would have been 2011, but as he is a Detective, on an alternate schedule, he did not take much notice of whether lunch would be paid or not nor did he have discussions with his colleagues about a compensable lunch break.

The union argues, through the testimony of Cooper, that only after members submitted requests for overtime compensation around May 2012, and were denied, was the union put on notice that their lunch period was unpaid and took steps to contact the union's attorney and file an unfair labor complaint. I find this argument to be without merit. Union members, including the current and former union president, current and former union executive board members, and rank and file union members attended the trainings and could have filed a request for overtime in May 2011. The fact that the union members chose not to file overtime until 2012 does not change the date of knowledge of the alleged unfair labor practice. Accordingly, the union's filing of an unfair labor complaint on October 1, 2012, was substantially beyond the restrictions in the statute of limitations.

CONCLUSION

The union was unable to prove the existence of a past practice of compensable lunch periods and thus was unable to show that the employer committed a unilateral change of a mandatory subject of bargaining.

FINDINGS OF FACT

1. Walla Walla County is an employer within the meaning of RCW 41.56.030(12).

2. The Walla Walla Commissioned Deputy Sheriff's Association is a bargaining representative within the meaning of RCW 41.56.030(2).

3. During January and February 2011 the union and the employer discussed and reached an agreement to move from a forty-hour, five-day weekly schedule to a "four platoon schedule." This agreement was memorialized in a memorandum of understanding (MOU) on February 25, 2011.

4. On April 18, 2011, Sheriff John Turner distributed training schedules to bargaining unit members for May, June, and July of 2011. Each schedule outlined eight-hours of training time and an hour lunch period, a total of nine hours.

5. On May 3 and 10, June 28, and July 5, 2011, employees were required to attend an eight-hour training and did not receive a paid lunch.

6. In December 2011, employees attended eight hours of training and received a paid working lunch within that eight hours.

7. On March 26, 2012, Turner e-mailed a schedule for Kelly payback days to be used for trainings to take place on April 3 and 10, 2012. This schedule listed eight hours of training and a one-hour meal break. Employees attended these trainings and were not provided a paid lunch hour.

8. After the April 2012 trainings mentioned in Finding of Fact 7 above, three deputies submitted overtime slips that requested one-hour of overtime compensation for the unpaid lunch period training day.

9. In May 2012, the patrol captain denied the overtime requests mentioned in Finding of Fact 8 above.

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. Based upon the Findings of Facts above, the employer did not make a unilateral change to a mandatory subject of bargaining in violation of RCW 41.56.140(4) and (1).

ORDER

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

ISSUED at Olympia, Washington, this 20th day of September, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Erin J. Slone-Gomez

ERIN J. SLONE-GOMEZ, 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

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DETAILS:	-				
COMMENTS:					

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