Washington State Ferries, Decision 11825 (MRNE, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, Complainant, vs. WASHINGTON STATE FERRIES, Respondent.	CASE 24934-U-12-6375 DECISION 11825 - MRNE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On June 26, 2012, the Inlandboatmen's Union of the Pacific (union) filed an unfair labor practice complaint against the Washington State Ferries (employer). The union alleged the employer refused to bargain in violation of RCW 47.64.130(1)(e) and (a), by its unilateral change at the Kingston Terminal when it eliminated the back lot shed used as a break room, without providing an opportunity to bargain. A preliminary ruling was issued on July 2, 2012, stating a cause of action existed. Examiner Emily Whitney held a hearing on March 19, 2013. The parties submitted post-hearing briefs to complete the record.

ISSUE

Did the employer make a unilateral change at the Kingston Terminal when it eliminated the back lot shed used as a break room, without providing the union an opportunity to bargain?

Based on the record as a whole, the employer did make a unilateral change at the Kingston Terminal when it eliminated the back lot shed used as a break room, without providing the union an opportunity to bargain.

APPLICABLE LEGAL STANDARD

Duty to Bargain

Chapter 47.64 RCW requires a public employer to bargain with the exclusive bargaining representative of its employees. The duty to bargain extends to mandatory subjects of bargaining including wages, hours, and working conditions. RCW 47.64.130(1)(e); *Washington State Ferries*, Decision 11335-A (MRNE, 2012).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. *Washington State Ferries*, Decision 11242 (MRNE, 2011), *citing International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) (*City of Richland*). In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which managerial action is deemed to be an essential management prerogative. *City of Yakima*, Decision 11352-A (PECB, 2013), *citing International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) (*City of Richland*). The inquiry focuses on which characteristic predominates. *City of Richland*, 113 Wn.2d at 200. The Supreme Court in *City of Richland* held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects." *City of Richland*, 113 Wn.2d at 200.

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 (PECB, 2008), *citing Whatcom County*, Decision 7288-A (PECB, 2002).

Unilateral Change

Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. 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 47.64.130(1)(e) and (a) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligation. *Seattle School District*, Decision 10732-A (PECB, 2012); *Washington State Ferries*, Decision 11242 (MRNE, 2011).

It is an unfair labor practice to present a change to a mandatory subject of bargaining as a *fait accompli*. In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole. *King County*, Decision 10576-A (PECB, 2010);

City of Edmonds, Decision 8798-A (PECB, 2005), *citing Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

Although Commission precedents do not require that an employer provide written notice to a union regarding a proposed change in the status quo, an employer's communication to the union must be sufficiently clear to afford the union actual notice of the intended change. Washington Public Power Supply System. The imposition of a change in the status quo as a fait accompli without any prior contact with the employees' authorized bargaining agent is not effective notice, and where an employer presents a decision as a fait accompli, failure on the part of the bargaining agent to request bargaining will not create a waiver by inaction. Washington Public Power Supply System.

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 47.64.130(1)(e) also results in a derivative violation of RCW 47.64.130(1)(a).

ANALYSIS

The union represents all unlicensed employees assigned to the Deck, Terminal, Information Department, and Shoreside Maintenance positions employed by the employer. The employer and union are parties to a collective bargaining agreement effective between July 1, 2011, and June 30, 2013.

Since at least 1992 the employer has provided and maintained a shed type of structure on the back of the Kingston Ferry Terminal lot. The shed was and continues to be used for the storage of materials necessary to carry out the jobs of ticket sellers and traffic attendants. Since 1987 the

employees also used the shed as a break room and shelter from inclement weather when not carrying out job duties.

An annual inspection of the Kingston Ferry Terminal by the employer's maintenance department and operations manager was completed in April 2012. During the inspection, the operations managers noted three appliances plugged into a multi-outlet surge protector. Based on the operations manager's order, immediately after the inspection the supervisors at the Kingston Ferry Terminal posted notices on the shed and in the break room inside the terminal building that employees were no longer allowed to use the shed as a break room. On May 3, 2012, the union sent a letter to the employer demanding to bargain the employer's decision. The employer met with the union on one occasion and heard the union's concerns, but did not change its position of eliminating the shed as a break room. The union now argues the employer unilaterally implemented a change to working conditions by eliminating the back lot shed as a break room.

Duty to Bargain

To determine if a unilateral change occurred, the first issue is whether the use of the shed as a break room is a mandatory subject of bargaining over which the employer and union had a duty to bargain. The union argues that based on case precedent a break room is a mandatory subject of bargaining, thus the parties were required to bargain. The employer argues that there was no duty to bargain because the employer's duty to provide a safe working environment outweighed the union's impact on a working condition.

The employer argues this case is similar to *Snohomish County*, Decision 9291-A (PECB, 2007). In *Snohomish County*, the employer employed corrections officers at a correctional facility. Historically, the corrections officers gained access to the break room by entering one secure door and riding down an elevator. Later the employer opened a new facility which housed the new break room. When the employer moved the break room, it required corrections officers to enter through the new security doors, which increased the travel time significantly. The examiner stated that "break rooms are an important resource which promotes employee safety, rejuvenation, and health. Thus, in general, access to a break room and those things which affect that access are mandatory subjects of bargaining." When the examiner balanced impacts from the employer's changes to working conditions against the managerial prerogative of security, he

found that the managerial prerogative outweighed any impact the new security features had on bargaining unit employee's working conditions. He specifically pointed to the fact that the employer had a duty to contain and control inmates and the security features affecting the correction officers' use of the break room would assist the employer in carrying out that duty. The impact on the corrections officers was only slight because the time to reach the break room was improving significantly, and there were multiple options for spaces where employees could take breaks. Therefore, the Examiner found with that particular set of facts, the managerial prerogative outweighed the impact to employee's working conditions.

The present case is distinguishable from *Snohomish County*. Unlike the employer in *Snohomish County*, the employer here provides transportation services to the public; it does not contain and control inmates. The employer claimed the safety risk was that the shed would burn down because there were multiple appliances plugged into one surge protector. In April 2012, Daniel Ferguson, the North Terminal Operations Manager, accompanied the maintenance department employees during the annual inspection of the Kingston Terminal. Ferguson testified it was the first time he had ever entered the shed, and he was only in the shed under five minutes. While he looked around the shed, he noticed that three appliances, a microwave, coffee pot, and hot plate, were plugged into a multi-outlet surge protector. He mentioned to the maintenance crew his concern regarding three appliances plugged into one surge protector. It was Ferguson's determination that this was a fire hazard. He testified that he was qualified to make these types of determinations because he had recently "complet[ed] a new home of [his] own and [he] did all the electrical installation [himself]. And [he] passed it through the state industrial standards, so [he] felt pretty confident in [his] competency." There was no citation given to the employer for having three appliances plugged into the one surge protector, and no fire expert determined this to be a hazard. The employer's safety argument is based solely on Ferguson, who is not a fire prevention expert, determining the surge protector situation was a safety hazard. The employer's argument does not rise to the level of safety as that found in *Snohomish County*.

The loss of the break room has removed the employees' ability to step out of the elements, store their belongings, and dry their rain gear when they are not carrying out their job duties. When there were no customers entering the terminal lot, the employees could use the shed to watch for

customers entering the lot through a window, facing the lot. This prevented employees from standing in the rain when there were no customers to service. Additionally, the employees were able to use a heater in the shed to dry their rain gear. The current terminal break room does not have a heater the employees can use to dry their rain gear. Having access to the one break room inside the terminal prevents employees from stepping out of the elements and being able to see when they are needed on the lot and does not provide a place for the employees to dry their rain gear.

The employer also argues that based on *Washington State Ferries*, Decision 465 (MEC, 2006), the employer's managerial prerogative to maintain safe and efficient operations outweighs the impact on working conditions. However, *Washington State Ferries*, Decision 465 in no way addresses the safety issue. It explains the employer has the right to manage its business by directing work. Here the employer is not directing work or directing how work is accomplished. In the present case, the employer removed access to a break room. The fact that the employer believes it could close the break room because employees were avoiding job duties does not take away the employees' right to bargain over the mandatory subject of the break room.

Based on the facts of this case, the impact on working conditions outweighs the essential management prerogative. Thus, the use of the shed as a break room is a mandatory subject of bargaining over which the employer is required to bargain.

Past Practice

The parties' collective bargaining agreement does not discuss the use of the shed as a break room. Thus we look to see if the parties had a past practice of using the shed as a break room. There must be an existing prior course of conduct and an understanding by the parties that the conduct was known and mutually accepted by the parties. *City of Pasco*, Decision 9181-A.

Here, the employer has provided employees some version of a shed to use as a break room since at least 1987. In 1987 the employer provided a trailer which had a room employees used as a break room. Around 1992 a shed for employees to take breaks replaced the trailer. The 1992 shed was destroyed when the restaurant, which was located behind the shed, burned down. The

employer first replaced the shed with an ant infested tollbooth and within a week the tollbooth was replaced by the current shed. The employees used each of these sheds as a break room to escape the elements, dry soaked rain gear, and store employees' personal belongings in addition to its use as a storage facility. Thus, the employer has provided a shed to the employees to use as a break room since at least 1987.

Contrary to the employer's argument, evidence shows the employer and union had a mutual understanding that the shed was utilized as a break room. Particularly, the employee's job descriptions specifically acknowledge the shed as a break room stating: "no smoking in the Attendants building" and "the traffic break shed is to be kept neat, clean, & orderly."

Two supervisors also testified that they knew employees were using the shed as a break room and had constant conversations with the employees about being in the shed when employees were not on an official break. Additionally, the notice that was sent to all employees on May 1, 2012, stated, "in [sic] effort to maximize our staff and be readily available to the public we are closing the back lot shed for attendant breaks." This evidence clearly shows there was a prior course of conduct and an understanding of the parties that the conduct was known and mutually accepted by the parties, and thus a past practice existed.

Unilateral Change

Because the break room was a mandatory subject of bargaining and the parties had a past practice of using the shed as a break room, the Examiner must determine if there was a unilateral change. The employer testified that promptly following the inspection, Ferguson notified the supervisors to immediately remove all appliances from the shed. In addition, the employer posted notices informing employees to no longer use the shed as a break room. On May 1, 2012, the employer notified the employees by posting on the bulletin board in the main terminal and distributing in employee mailboxes a notice stating that all "attendant breaks are to be taken in the terminal employee break room. Attendants found taking a break in the back lot shed will be subject to progressive discipline." There is no evidence to show the employer notified the union of the change prior to eliminating the shed as a break room. The evidence clearly shows the employer did not provide the union with an opportunity to bargain prior to the change. There

was a change to the past practice when, after the inspection, the employer immediately stopped the employees from using the shed as a break room. The employer made the change without notifying the union, and there was no time for meaningful bargaining to take place. Thus, the employer provided the union with a *fait accompli* and made a unilateral change without providing the union an opportunity to bargain.

CONCLUSION

The use of the shed as a break room is a mandatory subject of bargaining. The parties established a past practice of using the shed as a break room for many years. When the employer removed the appliances from the shed and no longer allowed the employees to use the shed as a break room, it committed a unilateral change without providing the union an opportunity to bargain. Because the employer committed a unilateral change, it also derivatively interfered with employee rights.

FINDINGS OF FACT

1. Washington State Ferries (employer) is a public employer within the meaning of RCW 47.64.011(4).

2. The Inlandboatmen's Union of the Pacific (union) is a bargaining representative within the meaning of RCW 47.64.011(1), and is the exclusive bargaining representative of all unlicensed employees assigned to the Deck, Terminal, Information Department, and Shoreside Maintenance positions employed by the employer.

3. The union and employer are parties to a collective bargaining agreement effective between July 1, 2011, and June 30, 2013.

4. The employer has provided some version of a shed to the employees of the Kingston Ferry Terminal since at least 1987 and has replaced the shed at least three times between 1987 and 2012.

5. The employees used each of the employer provided sheds for breaks, to get out of the elements, to dry soaked rain gear, and to store employees' personal belongings in addition to storing materials necessary to perform the jobs of ticket sellers and traffic attendants.

6. In April 2012, Daniel Ferguson, the North Terminal Operations Manager, along with 15 other maintenance department employees completed the annual inspection of the Kingston Terminal. Upon entering the shed, Ferguson noticed three appliances, a microwave, coffee pot, and hot plate, were plugged into a multi-outlet surge protector and determined it was a fire hazard.

7. Immediately after the inspection in April 2012, Ferguson reported to the Kingston supervisors that they must immediately remove all appliances and direct employees to cease using the shed as a break room.

8. On May 1, 2012, the employer notified the employees by posting on the bulletin board in the main terminal and distributing in employee mailboxes a notice eliminating the employee's ability to use the back lot shed as a break room.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 47.64 RCW.

2. Based upon Findings of Fact 4 through 8, the employer made a unilateral change at the Kingston Terminal when it eliminated the back lot shed as a break room without providing an opportunity to bargain and violated RCW 47.64.130(1)(e) and (a).

ORDER

WASHINGTON STATE FERRIES, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Refusing to bargain collectively with the Inlandboatmen's Union of the Pacific, as the exclusive bargaining representative, regarding the use of the back lot shed as a break room.

b. In any other manner interfering with, restraining or coercing its 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 47 RCW:

a. Restore the *status quo ante* by reinstating the wages, hours and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change by reinstating the back lot shed break area room as it existed for all affected bargaining unit employees prior to the unilateral change found unlawful in this order.

b. Give notice to and, upon request, negotiate in good faith with the Inlandboatmen's Union of the Pacific, before making changes to the use of the back lot shed as a break area room for bargaining unit employees.

c. 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 members 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.[1]

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[1] There is no governing board at which to read the notice provided by the Compliance Officer, therefore the Examiner will not order a reading of the notice into the record at a regular public meeting. *See State - Office of Financial Management*, Decision 11084-A (PSRA, 2012); *State - Social and Health Services*, Decision 9690-A (PSRA, 2008) (no reading of the notice).

d. 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.

e. 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 17th day of July, 2013.

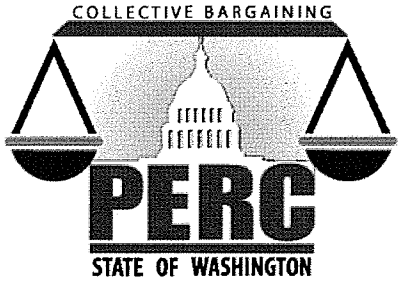
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, 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 24934-U-12-6375
DECISION 11825 - MRNE



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 THE *WASHINGTON STATE FERRIES* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY eliminated the use of the back lot shed as a break room without first bargaining any changes with the union.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL reinstate the back lot shed as a break room, which existed for the affected bargaining unit members prior to the change found unlawful in this order.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our 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:	24934-U-12-06375	FILED:	06/26/2012	FILED BY:	PARTY 2
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BAR UNIT:	MARINE HANDS				
DETAILS:	-				
COMMENTS:					

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