Snohomish Fire District 3, Decision 12273 (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 3315, Complainant, vs. SNOHOMISH FIRE DISTRICT 3, Respondent.	CASE 26137-U-13-6686 DECISION 12273 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On December 13, 2013, International Association of Fire Fighters, Local 3315 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission, alleging that Snohomish Fire District 3 (employer) refused to bargain by installing video cameras without providing an opportunity for bargaining. A preliminary ruling was issued on December 19, 2013 finding a legal cause of action. On May 2, 2014, the employer filed a motion for summary judgment and the union filed a motion for summary judgment on June 17, 2014. The Commission assigned the unfair labor practice complaint to Examiner Kristi L. Aravena on July 17, 2014, and I denied the motions for summary judgment on July 22, 2014. I presided over a hearing on September 18, 2014 and the parties filed post-hearing briefs to complete the record.

ISSUE

Did the employer have a duty to bargain the installation of video cameras?

Based on the record as a whole and considering the totality of the circumstances, I find the employer did not refuse to bargain when video cameras were installed at the fire station. When the balancing test is applied to the facts of this case, installation of the cameras was not a mandatory subject of bargaining.

BACKGROUND

The union is the exclusive bargaining representative for a bargaining unit of all full-time battalion chiefs, captains, firefighters, firefighter paramedics, and fire inspectors of the employer. The current collective bargaining agreement is effective from January 1, 2013 through December 31, 2015. The bargaining unit is eligible for interest arbitration under RCW 41.56.430, et seq.

On January 14, 2013, Assistant Fire Chief Steve Guptill became aware that four radios belonging to the employer were missing. After alerting staff and having no success in locating the radios, Guptill contacted the Washington State Auditor's Office to report the radios stolen on January 28, 2013. The replacement value for the radios was about $4,400 each, making any alleged theft a felony.

Fire Chief Jamie Silva contacted Police Chief Tim Quinzer of the City of Monroe Police Department to report the alleged theft. The Monroe Police Department assigned Detective Barry Hatch to investigate the case. Silva, Quinzer and Hatch met in May 2013 to discuss how the investigation would proceed. Ultimately, Hatch decided the best course of action would be to install video cameras in the area where the radios had previously gone missing.

On July 15, 2013, Hatch installed the video cameras in the mezzanine of the apparatus bay area of the fire station. Hatch installed two cameras, one focusing on the equipment rack where the missing radios had been stored and the other on the door where people would enter and exit the area. The video cameras were put into a small pelican box and placed inside a locker that only Hatch had access to. The footage captured by the video cameras was stored on an internal hard drive located inside the pelican box. The police department was the only entity that had access to the footage. The employer did not have access to either the video cameras or the footage.

Hatch suggested a radio, similar to the ones taken, be placed out as bait. A bait radio was placed on the equipment rack by the employer. The plan was for Guptill to notify Hatch if the bait radio went missing. Hatch did not plan to review the video footage unless he was notified the bait radio was missing and a possible theft had occurred. The bait radio was never stolen, but was rather turned in by an employee. There is some discrepancy in the record as to whether another bait radio was placed out but regardless, no theft of a bait radio occurred.

On September 4, 2013, Battalion Chief Michael Dickinson contacted Guptill to inform him employees had discovered the video cameras. After the employer contacted Hatch to notify him that the cameras had been discovered, Hatch removed the video cameras on September 6 or 7, 2013.

On September 9, 2013, the union wrote a letter to the Board of Commissioners alleging that the employer had made a unilateral decision to install surveillance cameras without first notifying or consulting with the union, in violation of Chapter 41.56 RCW. The letter stated the union believed both the decision to install cameras and the impacts and effects of that decision were mandatory subjects of bargaining. The union requested the employer discontinue the use of the video cameras and to destroy and not use any footage obtained from the video cameras for any purpose. The union stated that if the employer wished to use video cameras in the future, it must notify the union and bargain about all mandatory subjects of bargaining. The union also asked for a response to specific questions about the cameras that had been removed.

On September 17, 2013, the Board of Commissioners replied to the union's letter. The response addressed the specific questions the union had asked and verified the video cameras had been removed.

LEGAL STANDARDS

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). The duty to bargain in

good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *City of Mountlake Terrace,* Decision 11702-A (PECB, 2014); *University of Washington*, Decision 11414-A (PSRA, 2013).

The determination as to whether a duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. In deciding whether a duty to bargain exists, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to the wages, hours and working conditions" of employees, and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *City of Seattle*, Decision 12060-A (PECB, 2014). *International Association of Fire Fighters, Local 1052 v. PERC* (*City of Richland*), 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

While the balancing test calls upon the Commission and its examiners to balance these two principal considerations, the test is more nuanced and is not a strict black and white application. Subjects of bargaining fall along a continuum. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours and working conditions, also known as mandatory subjects of bargaining." RCW 41.56.030(4). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives. *International Association of Fire Fighters, Local 1052 v. PERC* (*City of Richland*), 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of the case. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. *City of Seattle*, Decision 12060-A.

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *City of Mountlake Terrace,* Decision 11702-A; *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1). A finding that a party has refused to bargain in good

faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978).

Unilateral Change

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *City of Seattle*, Decision 12060-A; *Kitsap* County, Decision 8292-B (PECB, 2007); *METRO (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). The duty to bargain requires an employer considering changes that affect a mandatory subject of bargaining to give notice to the exclusive bargaining representative of its employees prior to making that decision. *City of Mountlake Terrace,* Decision 11702-A; *City of Yakima*, Decision 11352-A (PECB, 2013); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). Formal notice is not required; however, in the absence of a formal notice, the employer must show that the union had actual, timely knowledge of the contemplated change. *City of Mountlake Terrace,* Decision 11702-A; *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

To be timely, notice must be given sufficiently in advance of the decision or the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A. The notice would not be considered timely if the employer's action has already occurred when the employer notified the union (a *fait accompli*). *Washington Public Power Supply System*, Decision 6058-A. If a *fait accompli* is found to exist, the union will be excused from requesting bargaining. *Id.* A *fait accompli* will not be found if an opportunity for bargaining existed and the employer's behavior does not seem inconsistent with a willingness to bargain upon request. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College,* Decision 4721-A. The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *City of Mountlake Terrace,* Decision 11702-A; *Washington Public Power Supply System*, Decision 6058-A.

If bargaining unit employees are eligible for interest arbitration, an employer may not unilaterally implement its desired change to a mandatory subject of bargaining without

bargaining to impasse and obtaining an award through interest arbitration. *City of Mountlake Terrace,* Decision 11702-A; *Snohomish County*, Decision 9770-A (PECB, 2008). Interest arbitration is applicable when an employer desires to make a mid-term contract change to a mandatory subject of bargaining. *City of Mountlake Terrace,* Decision 11702-A; *City of Yakima*, Decision 9062-B (PECB, 2008).

ANALYSIS

Balancing Test to Determine if Camera Installation is a Mandatory Subject of Bargaining

In determining whether an obligation to bargain exists, the balancing test must be conducted on a case-by-case basis and the facts of each particular case must be evaluated on its merits. When a subject relates to both conditions of employment and managerial prerogatives, the focus of inquiry is to determine which of these characteristics predominates. In this case, the employer's interests regarding safety and security must be balanced against the employees' interests in discipline.

Employee Interests

Discipline

Discipline has a direct impact on an employee's wages, hours and working conditions. There is no question that in most cases, the installation of video cameras has been considered a mandatory subject of bargaining. Employees have a strong interest in maintaining their employment and anything that could lead to discipline threatens that. In the present case, the union argues that if an employee were caught stealing on the video tape, they would have been disciplined and likely terminated from employment. Chief Silva testified that by contacting the police department "I would hope that they would conduct a criminal investigation and catch a thief, hopefully they would be prosecuted." The employer has rules of conduct which state that employees shall not steal. Silva testified that if he came into possession of evidence that an employee was stealing district equipment, he would administer the appropriate level of discipline. The union had a genuine interest that any evidence produced from the video cameras could lead to discipline of employees.

Monroe Police Department was acting as an agent of the employer

The union argues the Monroe Police Department was acting on behalf of the employer when the police department installed the video cameras and involvement of the employer was necessary to turn the cameras into a useful investigatory tool. The union believes the employer made a voluntary decision to initiate contact with the police department to start the investigation. The union argues the employer then followed the advice of an outside expert to allow installation of the video cameras without any legal obligation to do so. After the cameras were installed, the employer played a role in monitoring the investigation. Detective Hatch relied on the employer to let him know if the bait radio was stolen. Until he received word that something was stolen, Hatch did not intend to review the video. When the video cameras were discovered, Hatch removed them after being contacted by the employer. The union argues this gave employees the perception that the police department was acting on the employer's behalf.

Employer Interests

Reporting theft to the State Auditor's Office

The employer has a duty to report alleged thefts to the State Auditor's Office and to take necessary steps to recover public property. Assistant Chief Guptill testified the employer had recently received a management letter advising the employer that the previous audit showed their asset inventory was not up to standard. The employer believed they needed to do a better job of tracking inventory to meet compliance standards at the time they discovered the missing radios. The employer had legitimate interests in safety and security when they contacted the police department to identify the best course of action to investigate the thefts.

Compliance with a criminal investigation conducted by the City of Monroe Police Department

- The police department controlled the investigation, not the employer

  The police department owned and installed the video cameras. Hatch testified he made the decision to install the cameras and where they would be placed. Although Hatch and Silva discussed other investigative methods, Hatch credibly testified he would not have selected any other option than the video surveillance, even if requested by the employer, because it was not for someone else to decide. Hatch wanted to involve the employer in the discussion about options but retained control of the investigation at all times.

- The employer had no access to the video footage

  A critical component of this case is the fact that the employer did not have access to the video cameras or the video footage. Hatch credibly testified that the cameras were the exclusive property of the police department and at no time did the employer have access to either the video cameras or the footage. Hatch was not monitoring the cameras on an ongoing basis and would only have looked at footage if Guptill informed him that someone had taken the bait radio. That does not equate to the employer controlling the video footage. Hatch testified that he typically uses victims to help in his investigations. Hatch did not have the time to constantly review the video footage so he determined using the bait radio, with the help of the employer, was the most effective way to conduct the investigation.

  Had a theft been caught on video, the footage likely would have been used by the police in their criminal investigation and by the prosecutor. That investigation could have led to criminal charges and possible conviction of an employee, which likely would have led to discipline. The employer would not have used the video footage to invoke discipline, as they did not have access to it. Had an employee been charged with a felony, it would have been the criminal charges or the conviction that would have led to employee discipline, not the video footage itself.

- Police investigation would have been compromised if notice was given to the union

  Although the union argues the employer should have bargained the camera installation once the decision was made by the police department to install them, this defies the logic of a criminal investigation. The employer reasonably argues that if they had contacted the union regarding the installation of the video cameras, employees likely would have learned of the cameras which would have compromised the criminal investigation.

The cameras were in a common area with no expectation of privacy

Testimony as well as a site tour to the apparatus bay area of the fire station, during the hearing, leads me to conclude that there was no expectation of privacy in the area the video cameras monitored. Testimony was provided that this was a common area for employees, volunteers and

even the general public to freely enter and exit. Employees did not have an expectation of privacy when they were in the bay area.

Police Department not an agent of the employer

The Commission applies the common law principals of agency when determining whether acts of an individual not employed by an employer can be imputed to the employer. An agent's authority to bind his principal may be either actual or apparent. *Community College District 13 (Lower Columbia Community College)*, Decision 8117-B (PSRA, 2005); *Deers, Inc., v. DeRuyter*, 9 Wn. App. 240, 242 (1973) (citing 3 Am.Jur.2d Agency sec. 71) (1962). With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person or party. *Smith v. Hansen, Hansen, Johnson, Inc.*, 63 Wn. App. 355, 363 (1991), *review denied*, 118 Wn.2d 1023 (1992). Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. Washington courts have held that the "authority to perform particular services for a principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services." *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351 (1966).

Hatch credibly testified that he made the decisions he typically makes as a detective. He was given guidance and assistance by the employer which is common practice for Hatch during a criminal investigation. Hatch made the decision to use the video cameras. He installed the video equipment and was the only one with access to either the video equipment or the footage. Hatch removed the equipment after being advised the investigation had been compromised because the union discovered the cameras. Hatch testified that he was not acting as an agent of the employer but rather following typical protocol when investigating a potential felony. Although the employer was consulted on the case and provided input to the police department, final decisions about how to conduct the investigation were made by Hatch. Hatch was not acting as an agent of the employer when he installed the video cameras at the fire station.

Relevant Case Law

The parties cite relevant case law which I will discuss to compare and contrast to the facts of the present case.

In *King County*, Decision 9495-A (PECB, 2008), the Commission affirmed an Examiner's ruling that the employer was required to bargain a change in the use of video cameras when the employer went from using cameras to observe customers to surveillance of employees for the purpose of discipline. In this case, the employer installed video cameras and communicated to the union that the cameras would not be used for employee discipline. The employer decided to install additional cameras and use the cameras for employee discipline. The employer's decision to begin using the cameras for discipline impacted employees' terms and conditions of employment and obligated the employer to bargain.

The present case is distinguishable from *King County*. The video cameras and footage were not controlled by the employer in the present case. The Monroe Police Department had complete control of the video cameras from installation to review of the footage. Additionally, the video cameras in the present case were installed for a criminal investigation, not for the purpose of employee discipline.

In *City of Mountlake Terrace*, Decision 11702-A, the employer had a public safety camera system installed in 2010. At that time, the employer's stated intention was not to use the cameras for discipline. In 2011, during the course of an investigation, images were obtained through the cameras that were used in employee discipline. When the employer decided to change the intent of the cameras from public safety to employee discipline, that triggered an obligation to provide the union with an opportunity to bargain the decision. The Commission affirmed the Examiner's ruling that the employer had refused to bargain when it unilaterally changed how the cameras would be used.

In *King County and City of Mountlake Terrace*, the video cameras and footage were controlled by the employer and the cameras were installed for the purpose of employee discipline. Neither factor is true in the present case. Had the intent of the video cameras shifted from safety and

security to employee discipline, that may have triggered the employer's duty to bargain. Since that shift in intent never occurred, the duty to bargain was not triggered.

In *Snohomish County*, Decision 9678 (PECB, 2007), the facts indicated that information obtained by the employer through video cameras was not used to initiate disciplinary action against an employee, but only to corroborate information obtained through other measures. The employer showed no intent to institute a policy of using the video cameras for employee discipline. The video recording was corroborative, circumstantial evidence in an investigation regarding a breach of jail security by inmates. The totality of the circumstances did not show a unilateral change of working conditions.

In contrast to *Snohomish County*, information obtained from the video in the present case would have been used by the police department in their investigation, not by the employer. This may have led prosecutors to use it as one piece of evidence in a criminal prosecution. Since the present case did not produce any video that would be helpful in a criminal investigation, it is speculative to guess as to what the outcome would have been or how the video might have been used.

In *Washington State Ferries*, Decision 437 (MRNE, 2005), an investigation by the employer indicated that there was suspected criminal activity, the theft of public funds by ticket sellers at automobile ticket tollbooths. The employer notified the Washington State Patrol and was advised to install a video monitoring system in the ticket sellers' booths. The employer purchased the video monitoring equipment and hired someone to install it. The video tapes were monitored and the tapes ultimately led to the arrest of four employees. The decision of when and where to arrest the four employees was made by the State Patrol. The Marine Employees' Commission concluded there was no duty to bargain over the decision to install video surveillance because the decision was not made by the employer but by an outside entity (State Patrol) in response to a criminal investigation. The Marine Employees' Commission also concluded that even if the decision were made by the employer, because there was no expectation of privacy in the area the cameras were installed, the impact on employee working conditions was minimal.

Washington State Ferries is most similar to the present case. In both cases, the investigation into criminal activity was done by an outside law enforcement agency. In *Washington State Ferries,* protocol required the employer to notify law enforcement. While the present case does not have a protocol that explicitly required the employer to notify law enforcement of a theft, such notification is implied as a best practice in required paperwork the employer must submit to the State Auditor's Office. In *Washington State Ferries*, the employer purchased and installed the cameras, controlling much of the investigation. In the present case, the Monroe Police Department had complete control of the video cameras and footage. Although the employer had some input into the investigation, it was clearly controlled by the police department. In both the *Washington State Ferries* case and the present case, there was no expectation of privacy by employees.

CONCLUSION

In the present case, employer interests regarding safety and security outweigh the employees' interests in discipline. The employer's managerial prerogatives in allowing the police department to install and monitor video cameras to detect possible criminal activity, predominate over the effects of the cameras on employee conditions of employment. The installation of video cameras was not a mandatory subject of bargaining. As this dispute did not involve a mandatory subject, the employer's decision to install video cameras did not give rise to a duty to bargain. Absent a duty to bargain, there can be no unilateral change violation by the employer. The union's complaint is dismissed.

FINDINGS OF FACT

1. Snohomish Fire District 3 is a public employer within the meaning of RCW 41.56.030(12).

2. International Association of Fire Fighters, Local 3315 (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union is the exclusive bargaining representative for a bargaining unit of all full-time battalion chiefs, captains, firefighters, firefighter paramedics, and fire inspectors of the employer.

4. On January 14, 2013, Assistant Fire Chief Steve Guptill became aware that four radios belonging to the employer were missing.

5. The replacement value for the radios was about $4,400 each, making any alleged theft a felony.

6. Fire Chief Jamie Silva contacted Police Chief Tim Quinzer of the City of Monroe Police Department to report the alleged theft. The Monroe Police Department assigned Detective Barry Hatch to investigate the case.

7. Silva, Quinzer and Hatch met in May 2013 to discuss how the investigation would proceed. Ultimately, Hatch decided the best course of action would be to install video cameras in the area where the radios had previously gone missing.

8. On July 15, 2013, Hatch installed the video cameras in the mezzanine of the apparatus bay area of the fire station. Hatch installed two cameras, one focusing on the equipment rack where the missing radios had been stored and the other on the door where people would enter and exit the area.

9. The video cameras were put into a small pelican box and placed inside a locker that only Hatch had access to. The employer did not have access to either the video cameras or the footage.

10. On September 4, 2013, Battalion Chief Michael Dickinson contacted Guptill to inform him employees had discovered the video cameras. After the employer contacted Hatch to notify him that the cameras had been discovered, Hatch removed the video cameras on September 6 or 7, 2013.

11. On September 9, 2013, the union wrote a letter to the Board of Commissioners alleging that the employer had made a unilateral decision to install surveillance cameras without first notifying or consulting with the union, in violation of Chapter 41.56 RCW.

12. On September 17, 2013, the Board of Commissioners replied to the union's letter.

13. The video cameras were installed for a criminal investigation, not for the purpose of employee discipline. Detective Hatch of the City of Monroe Police Department retained control of the investigation at all times.

14. Hatch credibly testified that the cameras were the exclusive property of the police department and at no time did the employer have access to either the video cameras or the footage.

15. There was no expectation of privacy in the area the video cameras monitored.

16. Hatch was not acting as an agent of the employer when he installed the video cameras at the fire station.

17. In the present case, employer interests regarding safety and security outweigh the employees' interests in discipline. The employer's managerial prerogatives in allowing the police department to install and monitor video cameras to detect possible criminal activity, predominate over the effects of the cameras on employee conditions of employment. The installation of video cameras was not a mandatory subject of bargaining.

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. By its installation of video cameras, as described in Findings of Fact 4 through 17, the employer did not refuse to bargain or violate RCW 41.56.140(4) or (1).

ORDER

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

ISSUED at Olympia, Washington, this 19th day of February, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kristi Aravena

KRISTI L. ARAVENA, 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/ DIANE THOVSEN

CASE NUMBER:	26137-U-13-06686	FILED:	12/13/2013	FILED BY:	PARTY 2
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BAR UNIT:	FIREFIGHTERS				
DETAILS:	-				
COMMENTS:					

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