City of Walla Walla, Decision 12348 (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALLA WALLA POLICE GUILD, Complainant, vs. CITY OF WALLA WALLA, Respondent.	CASE 26470-U-14-6755 DECISION 12348 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cline & Casillas, by *James M. Cline*, Attorney at Law, for the Walla Walla Police Guild.

Summit Law Group PLLC, by *Michael Bolasina*, Attorney at Law, for the City of Walla Walla.

On May 12, 2014, the Walla Walla Police Guild (union) filed an unfair labor practice complaint against the City of Walla Walla (employer).[1] The union alleged the employer refused to bargain (and derivatively interfered) in violation of RCW 41.56.140(4) and (1), by its unilateral change regarding bargaining unit members' ownership and carrying of personal firearms, without providing an opportunity for bargaining. A preliminary ruling was issued on May 20, 2014, stating a cause of action existed. Examiner Erin Slone-Gomez held a hearing on December 11 and 12, 2014. The parties submitted post-hearing briefs on March 6, 2015, to complete the record.

ISSUE

Did the employer unilaterally implement a change regarding bargaining unit members' use of personal weapons on off-duty time, an alleged mandatory subject, without providing an opportunity for bargaining?

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[1] The union filed an amended complaint on May 20, 2014, correcting typographical errors found in the initial complaint.

The employer did not unilaterally implement a change regarding bargaining unit members' ownership and carrying of personal firearms without providing an opportunity for bargaining. The employer did change its off-duty weapon policy after providing notice and an opportunity to bargain, which the union waived through inaction.

BACKGROUND

The union represents a bargaining unit of commissioned police officers and sergeants employed by the City of Walla Walla. The union and employer were parties to a collective bargaining agreement effective from January 1, 2011, through December 31, 2012.

Policy History

Prior to 2009 the Walla Walla Police Department (department) used a policy manual that consisted of internally-created policies. This manual included policy 18.01.00 titled 'OFF DUTY WEAPONS,' which stated that "[o]nly a pistol authorized by the department may be carried while off duty."

During 2009 then Police Chief Chuck Fulton decided to move from internally-created police policies to those created by Lexipol. Lexipol is a national company that provides policy examples, training, and other services to police and emergency service organizations. From the time the department chose to utilize Lexipol policies until his retirement, Captain Gary Bainter, one of two captains employed by the department, was tasked with implementing and maintaining the department's policies.

Between 2009 and 2010 the parties engaged in discussions concerning a Lexipol policy that addressed an officer's ability to carry a concealed weapon as a result of his or her being a commissioned law enforcement officer rather than by receipt of a concealed weapons permit. This policy required employees to provide their off-duty weapon to the department for inspection and pass a shooting accuracy test with said weapon to qualify. It is unclear from the testimony whether this policy was implemented in 2009 and rescinded in 2010 at the request of the union as the employer argues, or whether the policy was never implemented but only discussed by the parties

as the union suggests. A determination of whether the policy was actually implemented is not necessary to reach a decision in the instant case.

Due to funding constraints, the department downsized from two captains to one and acknowledges that as a result it did not regularly update its policy manual between 2011 and early 2013. During that time, Lexipol issued seven sets of recommended policy amendments that Captain Terry Heisey was tasked with shepherding through the department's review and implementation process. As part of this work, Heisey discussed a recommended policy change with Chief Scott Bieber regarding the regulation of off-duty weapons. The department did not have a policy to be amended as it was either not adopted or rescinded in 2010. Bieber directed Heisey to include this policy on the list of policies to be implemented and/or amended.

Pre-implementation Policy Discussion

On September 12, 2013, Heisey, Bieber, and Captain Chris Buttice met with the union executive board to discuss the Lexipol updates. On the following day, September 13, Heisey e-mailed the Lexipol updates to Eric Knudson, union president; Michael Moses, union secretary-treasurer; Kevin Braman, union executive board member; and Kevin Bayne, union vice-president. This e-mail consisted of the suggested amendments to existing Lexipol policies and the reasoning behind Lexipol's recommendation. Heisey also created and shared a spreadsheet that listed the policies that would be affected by these updates including a reference to the Lexipol update, with the intention that the parties could mark those policies that required additional discussion. Policy 312.2.3 concerning off-duty firearms was included on this list. Heisey indicated that he had spoken with Knudson about this methodology and asked the other board members to respond by the following Monday (September 16, 2013) with their thoughts on this approach.

On September 17, 2013, Heisey e-mailed Moses and Bayne indicating that he had not received a response to his September 13 e-mail and again asked for their thoughts on methodology moving forward. Moses responded that same day indicating that the method Heisey suggested "would be as easy as any other method."

On November 24, 2013, Heisey e-mailed Knudson and copied the other three board members confirming that in their discussion on November 22, 2013, Heisey indicated that he would like to finish the department's policy update process by December 15 in order to avoid Lexipol's software update that could compromise the work they had completed. The e-mail also indicated that Knudson had agreed to post the updates, spreadsheet (updated by Heisey to list the type of change suggested, *i.e.* due to law changes, best practice, or typographical error), current policies, and draft policies with incorporated updates, so that "Guild members" could review the information. In this same e-mail Heisey highlighted the off-duty firearm policy in particular, stating:

> There is one policy that I anticipate the Guild may want to discuss with the Chief. That is policy 312.2.3 Authorized Off-Duty Firearm, as this was a point of contention when Capt. Bainter did the last policy revision at which time this section was removed from our policy manual. Chief Bieber would like this section reinserted into the manual, with the understanding that this is not an attempt to curtail an officer's right to bear arms, but that the restrictions contained in the policy section apply only if an officer is carrying a department issued firearm off-duty or is carrying a personal firearm off-duty simply by virtue of being a police officer (carrying concealed without a permit).

Shortly after sending the November 24 e-mail Heisey was out of the office on leave. During that time Buttice e-mailed the four board members expressing that he was available to field any questions while Heisey was away.

When Heisey returned to the office he received feedback that union members had expressed concerns about the off-duty firearm policy. As a result, Heisey scheduled a meeting between himself and the union board members to take place on December 5, 2013. In his e-mailed meeting request, which was sent to the union board members as well as Tim Bennett, union past president, Heisey said:

> I understand that last week while I was gone there were numerous comments of concern about 312.2.3 (the off-duty concealed carry policy). In an attempt to keep the process rolling I'd like to touch base with you as a group to hear what feedback/concerns you have received so far.
>
> And to hear your suggestions for edits to 312.2.3 in order to clarify the Chief's intent is not to infringe on anybody's 2nd Amendment rights, but only to put reasonable restrictions on the use of department owned weapons carried off duty.

> And for concealed weapons carried off duty solely by virtue of our employment as a [Walla Walla Police Department] Officer (absent a Concealed Pistol License). If we are carrying our own firearm by virtue [of] a Concealed Pistol License, then this policy section would not apply to us.

At the December 5 meeting Heisey met with several board members as well as union members Marlon Calton and Miguel Sanchez. The union members expressed concern that the proposed off-duty firearm policy violated their "Second Amendment rights" and the Law Enforcement Officers Safety Act (LEOSA), 18 USC §926B. LEOSA, a federal law enacted in 2004 and amended in 2010 and 2013, concerns certain current or retired law enforcement officers and their ability to carry a concealed weapon with or without a concealed weapon permit.

On December 8, 2013, Heisey e-mailed the four board members and Bennett with an editable copy of the 312.2.3 policy and asked that they markup the policy with their suggested changes and forward the markup to him. Heisey also indicated that he would leave copies of the information provided by Calton and Sanchez with Bieber and Buttice for review.

Sometime after December 8 but prior to December 19 the union provided Heisey with a revised version of the policy, which he discussed with Bieber and Buttice. This proposed revision included minimal language changes; however, it importantly limited the proposal to department-owned firearms, excluding personal firearms. Heisey testified that this is the only written proposal the union provided to him.

On December 19, 2013, Heisey e-mailed the same four board members and Bennett and included a bill-draft version of the off-duty firearm policy. He also highlighted conversations he had with the executive board and union members about the off-duty firearm policy:

> [I]t is my understanding that the Guild feels this policy section infringes on our officers [sic] 2nd Amendment rights to carry firearms; and that the restrictions contained in the policy are contrary to your understanding of the [LEOSA]. You provided me with copies of three documents (attached above) addressing LEOSA. The Guild's suggestion was to limit that this policy, [i]f inserted back into our policy manual, would apply only to department owned weapons used by officers (see attached Guild proposed wording of 312.2.3).

> Chief Bieber took your concerns into consideration and researched the issues related to infringement of officers [sic] 2nd Amendment rights and running afoul of LEOSA. . . .
>
> After considering all input Chief Bieber feels the Department does have the authority to place reasonable qualification standards on the carrying of concealed firearms off duty, where the concealed firearm is being carried without a Concealed Pistol License and solely by virtue of their employment as a police officer. . . .
>
> If you have any questions or concerns with the above decision I know the Chief would be more than willing to meet and discuss it with you.

At the hearing Heisey testified that he was never informed that the union had additional concerns with the policy beyond those highlighted by Heisey in his December 19 e-mail. In an e-mail from Heisey to the board on December 20, Heisey indicated that Bieber would be willing to attend the next union meeting to discuss the off-duty firearm policy as the board members had suggested; the union did not invite Bieber to their next meeting. On December 21 Moses responded to Heisey's December 20 e-mail with comments about several of the proposed policy modifications, none of which related to the off-duty firearms policy. On December 23 Heisey informed the union members that Lexipol had decided to delay its software update, eliminating Heisey's concern about the software change impacting the parties' work on policy updates. Heisey stated, "However I plan to go ahead with implementing the updates we have worked through so we can get them behind us." Heisey testified that the union did not ask him to delay implementation, and implementation occurred on December 24, 2013.

Post-implementation Policy Discussion

On December 28, 2013, the union presented Bieber with a six-page grievance memorandum expressing concern with several new or updated policies; much of the grievance was focused on the off-duty firearm policy. The grievance stated that "[t]he Department's attempt to place new governing rules related to [off-duty firearms] exceeds its authority on lawful private conduct, and is not supported by state or federal law." The union highlighted RCW 9.41.060, which the union interprets to exempt Washington law enforcement officers from the requirement to possess a concealed weapons permit. The grievance also discussed the union's interpretation of LEOSA saying "The disagreement between the parties centers around the [LEOSA]. The Guilds [sic]

position is the LEOSA law doesn't give, and in fact prohibits the Department to govern personally owned firearms in a concealed carry capacity."

The House of Representatives Judiciary Committee's 87-page report concerning LEOSA was included as an attachment to the grievance. The union suggested the remedy for this grievance was "to remove any language that governs, restricts or prohibits lawful possession and conduct of a personally owned gun of any Guild member."

On January 2, 2014, attorney Mark Makler e-mailed Bieber identifying himself as a colleague of Jaime Goldberg, the union's primary attorney at that time, and stating that his e-mail was a demand to bargain. Makler's e-mail also stated:

> In addition, as you may know, once the [union] has initiated and informed you and the [department] as a PECBA (41.56) demand to bargain the unilateral implementation of such matters is [an unfair labor practice (ULP)] – so this email is also a request that the [department] cease and desist from committing ULPs and return to the status quo until the PECBA impasse resolution processes have been utilized or until the parties have bargained and reached agreement as to the issues associated with this demand to bargain.

Later that same day Bieber responded to Makler informing him of the parties' past discussions and that he would respond to the union's grievance as outlined in the parties' collective bargaining agreement. In response to Makler's assertion concerning the department's duty to bargain, Bieber wrote:

> I am aware of the department's obligation to negotiate changes in hours, wages and working conditions that these policy changes might create. Failure to do so might in fact be determined by PERC to be a ULP. However, at this point, no one from the Guild has indicated to me or [Heisey] in his discussions what specific impacts these policy changes have on hours, wages, and working conditions. Additionally, in reading the Guild's grievance dated 12-28-13, I cannot recall any of the arguments indicating that any of the listed policy changes had impacts on hours, wages, or working conditions.

Bieber forwarded this e-mail conversation to Knudson, which he had been carbon-copied on, asking to meet "so we can negotiate the impacts" of the policy changes. Knudson responded and the two men set a time to meet the following week, on January 10, 2014. On January 8, 2014,

Bieber issued his response to the union's grievance, in which he denied that the new policy was in conflict with either LEOSA or state law and thus denied the grievance.

Bieber, Heisey, Buttice, and several union members attended the meeting on January 10, 2014. At the meeting, Bieber indicated he believed the policy would reduce risk to the department and because an officer would be carrying a concealed weapon under the color of his or her badge, that the department had the ability to insure that the weapon and owner met certain requirements. The union offered that its members would not take any law enforcement actions with their privately-owned weapons; Bieber indicated that this would not fully mitigate the department's liability. The union again asserted that the policy was in violation of officers' constitutional rights and LEOSA.

On January 21, 2014, the union withdrew its grievance regarding the off-duty firearm policy and indicated it would pursue the matter as an unfair labor practice complaint.

APPLICABLE 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." *International Association of Fire Fighters, Local 1052 v. PERC (City of Richland)*, 113 Wn.2d 197, 203 (1989).

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 (PECB, 2014).

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *City of Mountlake Terrace,* Decision 11702-A; *citing 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).

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. *Kitsap* County, Decision 8292-B (PECB, 2007), *citing 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*). *Id.* 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. *Id.*, *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).

Waiver by Inaction

The respondent has the burden of demonstrating that the complainant waived its right to bargain. *Lakewood School District*, Decision 755-A (PECB, 1980); WAC 391-45-270(1)(b). The Commission explained waiver by inaction in *City of Anacortes*, Decision 9004-A (PECB, 2007) (footnote omitted):

> Prior to any changes to mandatory subjects of bargaining, employers must give unions advance notice of the potential change, so as to provide unions time to

> request bargaining, and upon such requests, bargain in good faith to resolution or lawful impasse prior to implementing the change.
>
> However, once notice of a change has been given, it is the union's responsibility to make a timely request to bargain the issue. A "waiver by inaction" defense is appropriate where notice is given of a proposed change to a mandatory subject of bargaining and the party receiving the notice does not timely request bargaining.

The employer must prove that the union's conduct is such that the only reasonable interference is that the union has abandoned its rights to negotiate. *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

Effects Bargaining

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects or impacts of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University,* Decision 10413-A (PSRA, 2011), *citing Skagit County,* Decision 6348 (PECB, 1998); *City of Kelso,* Decision 2120-A (PECB, 1985); *City of Kelso*, Decision 2633-A (PECB, 1988). An employer must bargain the effects of the permissive decision on mandatory subjects of bargaining. *Wenatchee School District*, Decision 3240-A (PECB, 1990). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decisions could constitute mandatory subjects of bargaining. *See Wenatchee School District,* Decision 3240-A.

An employer is not required to delay implementation of a decision on a permissive subject of bargaining while impact or effects bargaining occurs. *City of Bellevue*, Decision 3343-A (PECB, 1990); *Federal Way School District*, Decision 232-A (EDUC, 1977). An employer cannot refuse to commence effects bargaining until after the permissive decision is implemented. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). When the effects are sufficiently foreseeable before implementation of a permissive decision, a bargaining obligation can arise. *Id.*

ANALYSIS

Is a policy addressing the off-duty use of personal weapons a mandatory subject of bargaining?

In its brief the employer argues that the off-duty firearm policy is not a mandatory subject of bargaining because it only remotely impacts personnel matters. Instead, it is a decision by management on how to best to accomplish the department's core function of providing public safety. The union argues that the off-duty firearm policy significantly impacts an officer's safety and is accordingly a mandatory subject of bargaining.

In determining whether a subject is mandatory or permissive, the Commission applies a balancing test in which a subject is determined to be more closely aligned with wages, hours, and working conditions, and thus a mandatory subject, or more closely aligned with decisions that are management prerogatives. In this case the employer's off-duty firearm policy directly impacts officer safety. Credible testimony was provided at the hearing concerning threats to officer safety and times when an officer is off duty but still expected to respond to public safety emergencies. Testimony was also provided concerning an officer choosing to carry a personal weapon in a concealed rather than open fashion due to safety concerns. Whether on or off duty, a firearm is an important tool that impacts an officer's ability to safely perform his or her duties. In its brief the union appropriately highlights that the Commission has consistently recognized that changes having a direct relationship to the safety of emergency personnel are, in general and under appropriate circumstances, mandatory subjects. *International Association of Fire Fighters, Local 1052 v. PERC,* 113 Wn.2d 197, 200 (1989); *Spokane International Airport,* Decision 7889-A (PECB, 2003). In the instant case the off-duty firearm policy is a mandatory subject of bargaining.

Did the employer change this mandatory subject without providing notice and an opportunity to bargain?

An employer's duty to bargain necessitates that when an employer is making a change that involves a mandatory subject of bargaining, the employer must first provide notice to the bargaining representative and provide an opportunity for the union to request and engage in collective bargaining. *City of Mountlake Terrace,* Decision 11702-A.

The record is replete with instances of the employer notifying the union of its interest in instituting a version of Lexipol's off-duty firearm policy. The first instance of this notification occurred on September 13, 2013, when the employer provided several members of union leadership with copies

of seven Lexipol updates. These updates included Policy 312.2.3, the off-duty firearm policy, and a spreadsheet created by Heisey listing it as one of the impacted policies. In his notification Heisey acknowledged that review of these policies would require a substantial amount of work from both the union and management and that he hoped this work could be completed by December 15, 2013. Heisey solicited feedback from the union on how best to work through the policy changes and indicated that he remained open and available for discussion with the union.

By November 24, more than two months after being provided with notice about the policy changes, the union had not indicated which, if any, policies it would have liked to discuss, nor had they requested additional time to review the proposed policy changes. In his November 24 e-mail Heisey explicitly flagged the off-duty firearm policy as one of the policies the union would likely be interested in discussing. Heisey arranged for another member of management to be available during the week he was going to be absent in order to move the process forward. Heisey thanked the union executive board for helping to keep the policy review process moving "as we draw near completion." Only after Heisey's e-mail did the union first raise any concerns about the off-duty firearm policy.

When Heisey returned from his absence he learned that several union members were concerned about the firearm policy, specifically that the policy would infringe on officers' "2nd Amendment rights." Heisey promptly arranged a meeting and met with the union executive board as well as two additional union members on December 5, 2013. According to testimony from Heisey and Moses, the concerns expressed at the meeting were about the Second Amendment and LEOSA. Heisey relayed these concerns to Bieber. In an e-mail dated December 8 Heisey also asked the union to propose a revised version of the policy and promptly provided the union with an editable version of the policy. He reminded the union about Lexipol's upcoming software change on December 15, which the department was using as its policy revision completion date as he had previously indicated.

Sometime during the week after the December 5 meeting the union provided its first and only written proposal regarding the off-duty firearm policy. This revision, which limited the policy to department-owned firearms only in order to avoid the union's concerns about the Second

Amendment and LEOSA, was finally provided almost three months after the employer notified the union about the change in policy.

On December 19, 2013, Heisey responded to the union, indicating that Bieber had considered the union's concerns about the Second Amendment and LEOSA. Bieber had decided that the off-duty policy was lawful and that the department would be moving forward with its implementation. At no point in the preceding three months had the union articulated a concern that the policy or its effects involved or impacted mandatory subjects of bargaining or that the union had any concerns about the policy beyond its perceived violation of federal law.

After the department implemented the off-duty firearm policy, the union filed a grievance about the policy change. This grievance again focused on the policy's perceived incompatibility with LEOSA and did not include any mention of the employer's responsibility to engage in collective bargaining as required by Chapter 41.56 RCW. On January 2, 2014, the union, through its attorney, finally issued a demand to bargain regarding the policy change. This demand came almost four months after the union was notified of the proposed policy change, after the union was notified of the intended policy implementation, and after the policy had been implemented.

Did the union waive its right to bargain through inaction?

In its brief the employer appropriately states that a union may waive its right to bargain through inaction. An employer asserting that a union waived by inaction its bargaining rights bears a heavy burden of proof. *City of Mountlake Terrace,* Decision 11702-A. The employer must prove that the union's conduct is such that the only reasonable inference is that the union has abandoned its right to negotiate. *Clover Park Technical College,* Decision 8534-A. After receiving notice of a contemplated change affecting a mandatory subject of bargaining, a union desiring to influence the employer's decision must make a timely request for bargaining. Failure to make a timely request for bargaining waives a union's right to bargain by inaction. *Washington Public Power Supply System*, Decision 6058-A.

During the preceding four months the employer, acting through Heisey, provided ample opportunity to bargain. Heisey not only provided the union with the policy but also provided the

union with organizing tools to assist the union during its review. Heisey followed up with the union several times, despite the union's non-responsiveness during the period between September 13, 2013, and November 24, 2013. Heisey promptly responded to the union's concerns regarding non-bargaining issues, even responding during the weekend and evening hours, and repeatedly made himself available for discussion about the policies. It is clear from the record that Heisey dedicated significant time and effort to the policy revision process and took particular pains to engage the union in discussion.

The employer was able to show that, despite being provided substantial opportunity to bargain over the anticipated policy changes, which included active solicitation by the employer, the union never engaged in bargaining over how the policy impacted employees' wages, hours, and working conditions. The union's sole complaint, which it repeated unremittingly between November 24, 2013, and its December 28, 2013, grievance, was that the policy violated LEOSA and the Second Amendment. The union's argument concerning a supposed violation of federal law is not bargaining and is a matter outside the jurisdiction of this Examiner. The absence of any attempt to engage in collective bargaining over several months, despite ample opportunity and invitation, cannot be viewed in any other way except as an abandonment of the union's right to negotiate.

As the union failed to utilize any of the opportunities it had to engage in bargaining as required by Chapter 41.56 RCW, it was not entitled to engage in negotiations to impasse and avail itself of the interest arbitration process as discussed above.

After the policy was implemented the employer tried to engage in conversations with the union about the impacts of the policy. Following Makler's e-mail Bieber contacted the union to discuss any impacts the policy may have had on mandatory subjects. Bieber also invited the union to bring its attorney to these discussions, which the union did not do. At this post-implementation discussion, the union again reiterated its contention that the policy violated LEOSA and the Second Amendment. The union did not notify the employer that it would have liked to engage in negotiations about any of the effects of the policy. These effects were not thoroughly discussed until the hearing and included ammunition cost and firing range availability, among other issues. The employer does not dispute that the cost of ammunition and other aspects of the policy are

bargainable issues and insists it would have engaged in good faith bargaining if the union had brought up the issues at any time prior to the hearing on this unfair labor practice case.

CONCLUSION

Based on the totality of the evidence, the employer did not commit an unfair labor practice, and thus did not derivatively interfere, as the union waived its right to bargain by inaction.

FINDINGS OF FACT

1. The City of Walla Walla (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The Walla Walla Police Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union and employer were parties to a collective bargaining agreement (CBA) effective from January 1, 2011, through December 31, 2012.

4. Prior to 2009 the Walla Walla Police Department (department) used a policy manual that consisted of internally-created policies. This manual included policy 18.01.00 titled 'OFF DUTY WEAPONS,' which stated that "[o]nly a pistol authorized by the department may be carried while off duty." During 2009 then Police Chief Chuck Fulton decided to move from internally-created police policies to those created by Lexipol.

5. Due to funding constraints, the department downsized from two captains to one and acknowledges that as a result it did not regularly update its policy manual between 2011 and early 2013. During that time, Lexipol issued seven sets of recommended policy amendments that Captain Terry Heisey was tasked with shepherding through the department's review and implementation process.

6. On September 12, 2013, Heisey, Bieber, and Captain Chris Buttice met with the union executive board to discuss the Lexipol updates.

7. On the following day, September 13, Heisey e-mailed the Lexipol updates to Eric Knudson, union president; Michael Moses, union secretary-treasurer; Kevin Braman, union executive board member; and Kevin Bayne, union vice-president. This e-mail consisted of the suggested amendments to existing Lexipol policies and the reasoning behind Lexipol's recommendation. Heisey also created and shared a spreadsheet that listed the policies that would be affected by these updates including a reference to the Lexipol update, with the intention that the parties could mark those policies that required additional discussion. Policy 312.2.3 concerning off-duty firearms was included on this list. In this same email Heisey indicated that he had spoken with Knudson about this methodology and asked the other board members to respond by the following Monday (September 16, 2013) with their thoughts on this approach.

8. On September 17, 2013, Heisey e-mailed Moses and Bayne indicating that he had not received a response to his September 13 e-mail and again asked for their thoughts on methodology moving forward. Moses responded that same day indicating that the method Heisey suggested "would be as easy as any other method."

9. On November 24, 2013, Heisey e-mailed Knudson and copyied the other three board members confirming that in their discussion on November 22, 2013, Heisey indicated that he would like to finish the department's policy update process by December 15 in order to avoid Lexipol's software update that could compromise the work they had completed. The e-mail also indicated that Knudson had agreed to post the updates, spreadsheet (updated by Heisey to list the type of change suggested, *i.e.* due to law changes, best practice, or typographical error), current policies, and draft policies with incorporated updates, so that "Guild members" could review the information. In this same e-mail Heisey highlighted the off-duty firearm policy in particular, stating

> There is one policy that I anticipate the Guild may want to discuss with the Chief. That is policy 312.2.3 Authorized Off-Duty Firearm, as this was a

> point of contention when Capt. Bainter did the last policy revision at which time this section was removed from our policy manual. Chief Bieber would like this section reinserted into the manual, with the understanding that this is not an attempt to curtail an officer's right to bear arms, but that the restrictions contained in the policy section apply only if an officer is carrying a department issued firearm off-duty or is carrying a personal firearm off-duty simply by virtue of being a police officer (carrying concealed without a permit).

10. Shortly after sending the November 24 e-mail Heisey was out of the office on leave. During that time Buttice e-mailed the four board members expressing that he was available to field any questions while Heisey was away.

11. When Heisey returned to the office he received feedback that union members had expressed concerns about the off-duty firearm policy. As a result, Heisey scheduled a meeting between himself and the union board members to take place on December 5, 2013. In his e-mailed meeting request, which was sent to the union board members as well as Tim Bennett, Heisey said:

> I understand that last week while I was gone there were numerous comments of concern about 312.2.3 (the off-duty concealed carry policy). In an attempt to keep the process rolling I'd like to touch base with you as a group to hear what feedback/concerns you have received so far.
>
> And to hear your suggestions for edits to 312.2.3 in order to clarify the Chief's intent is not to infringe on anybody's 2nd Amendment rights, but only to put reasonable restrictions on the use of department owned weapons carried off duty. And for concealed weapons carried off duty solely by virtue of our employment as a [Walla Walla Police Department] Officer (absent a Concealed Pistol License). If we are carrying our own firearm by virtue [of] a Concealed Pistol License, then this policy section would not apply to us.

12. At the December 5 meeting Heisey met with several board members as well as union members Marlon Calton and Miguel Sanchez. The union members expressed concern that the proposed off-duty firearm policy violated their "Second Amendment rights" and the Law Enforcement Officers Safety Act (LEOSA), 18 USC §926B. LEOSA, a federal law enacted in 2004 and amended in 2010 and 2013, concerns certain current or retired law

enforcement officers and their ability to carry a concealed weapon with or without a concealed weapon permit.

13. On December 8, 2013, Heisey e-mailed the four board members and Bennett with an editable copy of the 312.2.3 policy and asked that they markup the policy with their suggested changes and forward the markup to him. Heisey also indicated that he would leave copies of the information provided by Calton and Sanchez with Bieber and Buttice for review.

14. Sometime after December 8 but prior to December 19 the union provided Heisey with a revised version of the policy, which he discussed with Bieber and Buttice. This proposed revision included minimal language changes; however, it importantly limited the proposal to department-owned firearms, excluding personal firearms. Heisey credibly testified that this is the only written proposal the union provided to him.

15. On December 19, 2013, Heisey e-mailed the same four board members and Bennett and included a bill-draft version of the off-duty firearm policy. He also highlighted conversations he had with the executive board and union members about the off-duty firearm policy:

> [I]t is my understanding that the Guild feels this policy section infringes on our officers [sic] 2nd Amendment rights to carry firearms; and that the restrictions contained in the policy are contrary to your understanding of the [LEOSA]. You provided me with copies of three documents (attached above) addressing LEOSA. The Guild's suggestion was to limit that this policy, [i]f inserted back into our policy manual, would apply only to department owned weapons used by officers (see attached Guild proposed wording of 312.2.3).
>
> Chief Bieber took your concerns into consideration and researched the issues related to infringement of officers [sic] 2nd Amendment rights and running afoul of LEOSA. . . .
>
> After considering all input Chief Bieber feels the Department does have the authority to place reasonable qualification standards on the carrying of concealed firearms off duty, where the concealed firearm is being carried

> without a Concealed Pistol License and solely by virtue of their employment as a police officer. . . .
>
> If you have any questions or concerns with the above decision I know the Chief would be more than willing to meet and discuss it with you.

16. At the hearing Heisey testified that he was never informed that the union had additional concerns with the policy beyond those highlighted by Heisey in his December 19 e-mail.

17. In an e-mail from Heisey to the board on December 20, Heisey indicated that Bieber would be willing to attend the next union meeting to discuss the off-duty firearm policy as the board members had suggested; the union did not invite Bieber to their next meeting.

18. On December 21 Moses responded to Heisey's December 20 e-mail with comments about several of the proposed policy modifications, none of which related to the off-duty firearms policy.

19. On December 23 Heisey informed the union members that Lexipol had decided to delay its software update, eliminating Heisey's concern about the software change impacting the parties' work on policy updates. Heisey stated, "However I plan to go ahead with implementing the updates we have worked through so we can get them behind us." Heisey credibly testified that the union did not ask him to delay implementation, and implementation occurred on December 24, 2013.

20. On December 28, 2013, the union presented Bieber with a six-page grievance memorandum expressing concern with several new or updated policies; much of the grievance was focused on the off-duty firearm policy. The grievance stated that, "[t]he Department's attempt to place new governing rules related to [off-duty firearms] exceeds its authority on lawful private conduct, and is not supported by state or federal law." The union highlighted RCW 9.41.060, which the union interprets to exempt Washington law enforcement officers from the requirement to possess a concealed weapons permit. The grievance also discussed the union's interpretation of LEOSA saying "The disagreement between the parties centers around the [LEOSA]. The Guilds [sic] position is the LEOSA

law doesn't give, and in fact prohibits the Department to govern personally owned firearms in a concealed carry capacity."

21. The House of Representatives Judiciary Committee's 87-page report concerning LEOSA was included as an attachment to the grievance. The union suggested the remedy for this grievance was "to remove any language that governs, restricts or prohibits lawful possession and conduct of a personally owned gun of any Guild member."

22. On January 2, 2014, attorney Mark Makler e-mailed Bieber identifying himself as a colleague of Jaime Goldberg, the union's primary attorney at that time, and stating that his e-mail was a demand to bargain. Makler's e-mail also stated:

> In addition, as you may know, once the [union] has initiated and informed you and the [department] as a PECBA (41.56) demand to bargain the unilateral implementation of such matters is [an unfair labor practice (ULP)] – so this email is also a request that the [department] cease and desist from committing ULPs and return to the status quo until the PECBA impasse resolution processes have been utilized or until the parties have bargained and reached agreement as to the issues associated with this demand to bargain.

23. On January 2, 2014, Bieber responded to Makler informing him of the parties' past discussions and that he would respond to the union's grievance as outlined in the parties' collective bargaining agreement. In response to Makler's assertion concerning the department's duty to bargain, Bieber wrote:

> I am aware of the department's obligation to negotiate changes in hours, wages and working conditions that these policy changes might create. Failure to do so might in fact be determined by PERC to be a ULP. However, at this point, no one from the Guild has indicated to me or [Heisey] in his discussions what specific impacts these policy changes have on hours, wages, and working conditions. Additionally, in reading the Guild's grievance dated 12-28-13, I cannot recall any of the arguments indicating that any of the listed policy changes had impacts on hours, wages, or working conditions.

24. Bieber forwarded his e-mail conversation with Makler to Knudson, which he had been carbon-copied on, asking to meet "so we can negotiate the impacts" of the policy changes.

Knudson responded and the two men set a time to meet the following week, on January 10, 2014.

25. On January 8, 2014, Bieber issued his response to the union's grievance, in which he denied that the new policy was in conflict with either LEOSA or state law and thus denied the grievance.

26. Bieber, Heisey, Buttice, and several union members attended the meeting on January 10, 2014. At the meeting, Bieber indicated he believed the policy would reduce risk to the department and because an officer would be carrying a concealed weapon under the color of his or her badge, that the department had the ability to insure that the weapon and owner met certain requirements. The union offered that its members would not take any law enforcement actions with their privately-owned weapons; Bieber indicated that this would not fully mitigate the department's liability. The union again asserted that the policy was in violation of officers' constitutional rights and LEOSA.

27. On January 21, 2014, the union withdrew its grievance regarding the off-duty firearm policy and indicated it would pursue the matter as an unfair labor practice complaint.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By the actions described in Findings of Fact 4 through 27, the union failed to sustain its burden of proof to establish that the employer unilaterally implemented a change regarding a mandatory subject (and derivatively interfered) 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 4th day of June, 2015.

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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The attached document identified as: DECISION 12348 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ DIANE THOVSEN

CASE NUMBER:	26470-U-14-06755	FILED:	05/12/2014	FILED BY:	PARTY 2
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BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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