City of Tukwila, Decision 10536-A (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2088, Complainant, vs. CITY OF TUKWILA, Respondent.	CASE 22646-U-09-5791 DECISION 10536-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On August 17, 2009, International Association of Fire Fighters, Local 2088 (union), filed a complaint against the City of Tukwila (employer) with the Public Employment Relations Commission, alleging unfair labor practices of employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), and refusal to bargain in violation of RCW 41.56.140(4). The allegations of the complaint concern the employer's: (a) unilateral change in the work schedule of the day-shift bargaining unit members working as Fire Prevention Officers, without providing an opportunity for bargaining; and (b) failing or refusing to meet and negotiate with the union concerning the decision and effect of its failure to give notice of the work schedule change.

On August 21, 2009, the Commission's Unfair Labor Practice Manager found that the allegations of the complaint concerning interference and a unilateral change to the work schedule stated a cause of action under WAC 391-45-110(2). At the time, it was not possible to conclude that a cause of action existed for the remaining allegations of the complaint, and a deficiency

notice was issued for those allegations. The union was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the defective allegations. The union did not file any further information.

On September 16, 2009, the Unfair Labor Practice Manager dismissed the defective allegations of the complaint for failure to state a cause of action and found a cause of action for the interference and refusal to bargain allegations of the complaint.[1] The employer filed and served a timely answer to the complaint, and Examiner Lisa A. Hartrich conducted a hearing on January 15, 2010. The parties filed post-hearing briefs to complete the record.

ISSUE PRESENTED

Did the employer unilaterally change the work schedule of the day-shift bargaining unit members working as Fire Prevention Officers and refuse to bargain those changes in violation of RCW 41.56.140(4) and (1)?

Based on the arguments and evidence presented by the parties, the Examiner rules that the employer violated RCW 41.56.140(4) and (1) by unilaterally changing the work schedule of day-shift Fire Prevention Officers, without providing the opportunity to bargain regarding the change.

APPLICABLE LEGAL STANDARDS

Duty to Bargain

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs the relationship between the union and the employer. RCW 41.56.030(4) defines collective bargaining and requires parties to engage in good faith negotiations over mandatory subjects of bargaining:

> (4) 'Collective bargaining' means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions . . . .

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[1] *City of Tukwila*, Decision 10536 (PECB, 2009).

The duty to engage in good faith negotiations over mandatory subjects is enforced through the unfair labor practice provisions in RCW 41.56.140 and .150, and Chapter 391-45 WAC. The Commission generally finds that any employer refusal to bargain violation under RCW 41.56.140(4) inherently interferes with the rights of bargaining unit employees and thus routinely finds a derivative interference violation under RCW 41.56.140(1). *Skagit County*, Decision 8746-A (PECB, 2006). Therefore, an employer violates RCW 41.56.140(1) and (4) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligation.

Unilateral Change

As outlined in *Val Vue Sewer District*, Decision 8963 (PECB, 2005), to prevail on a charge of unilateral change, the union must prove four elements to establish that the employer committed an unfair labor practice:

1. The existence of a relevant status quo or past practice.

2. That the relevant status quo or past practice was a mandatory subject of bargaining.

3. That notice and an opportunity to bargain the proposed change was not given, or that notice was given but an opportunity to bargain was not afforded and/or the change was a *fait accompli.*

4. That there was an actual change to the status quo or past practice.

Mandatory Subjects of Bargaining

Wages, hours and working conditions of bargaining unit employees have been characterized as mandatory subjects of bargaining since *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958). It has been long held in Washington that shift schedules are a mandatory subject of bargaining, as schedules involve the "hours" of employees. *City of Yakima*, Decision 767-A (PECB, 1980); *City of Bremerton*, Decision 2733-A (PECB, 1987).

Fait Accompli

An employer contemplating a change to a mandatory subject of bargaining must give adequate notice to the union prior to making a decision, sufficiently in advance in order to allow for a

reasonable opportunity to bargain. If the employer acts without providing adequate notice, the union is excused from demanding to bargain over the issue, because the action was presented as a "fait accompli." *Lake Washington Technical College*, Decision 4721-A (PECB, 1995); *City of Edmonds*, Decision 8798-A (PECB, 2005). In order to determine whether a fait accompli occurred, the Commission looks at the circumstances as a whole, and whether the opportunity for meaningful bargaining existed. *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

ANALYSIS

In January of 1992, the employer issued Policy 02.05.12, which established its employees' "normal work hours are eight (8) hours, from 8:30 a.m. to 5:00 p.m., with a one-half (1/2) hour lunch period." Employees engaged in shift work or working in Public Works Maintenance were not covered by this policy.

In March of 1994, the employer issued Policy 02.05.20, which established a procedure for implementing flexible-time (modified) work schedules. Among the definitions the employer provided for a flexible-time work schedule was a work schedule that consisted of four 10-hour days (the 4/10 schedule) over a one-week period. Testimony received from union and employer witnesses indicated that day-shift Fire Prevention Officers worked the 4/10 schedule at least since 1994. Testimony indicated that, in addition to working four 10-hour shifts Monday through Friday, Fire Prevention Officers also served as on-call fire investigators during the weekends on a rotating basis.

In a memo to department heads on February 17, 2009, Tukwila Mayor Jim Haggerton related his expectations regarding work schedules for employees whose regular schedule was a 40-hour work week. The memo stated, in part, that "all employees currently working 4/10 schedules are expected to begin working a 5/8 schedule effective March 1, 2009," and that department heads were to "approach the scheduling with the mind-set that ALL staff are returning to the regular 5/8 schedule." (*emphasis in original.*)

Testimony received from Haggerton and union witnesses indicated that there was no discussion between the employer and the union prior to the memo being issued in February, nor was there

discussion prior to implementation of the new work schedules less than two weeks later. A union official testified that the two sides' first subsequent communication about the change was during a labor-management committee meeting in the first half of March 2009, after the new schedules took effect. The union filed a grievance with the employer on the matter on March 24, 2009.

The union argues that the 4/10 work schedule for day-shift Fire Prevention Officers has been in place for upwards of 20 years. The union asserts that the employer's decision to mandate a 5/8 work schedule for these employees changed the status quo, and that the employer made this change without providing the union the opportunity to bargain, thus presenting the change to the union as a *fait accompli*.

Element 1: Relevant Status Quo

The union is the exclusive bargaining representative of the employer's uniformed fire fighter employees. The parties are operating under a collective bargaining agreement that runs from January 1, 2009, through December 31, 2011. Article 13 of the current contract pertains to hours of work, and includes the following sections:

> (C) The non-shift personnel shall work forty (40) hours per week, exclusive of lunch time. Except for emergencies, these hours shall be worked between Monday – Friday, excluding weekends, unless mutually agreed upon by the employee and the Employer. All non-shift personnel will continue to be allowed to leave their work station during scheduled work hours for the purpose of a non-paid meal break. Emergency call back to duty by the employee's supervisor during the employee's scheduled meal break shall be compensated by (1) adjusting the employee's schedule that day or the following work day, or (2) payment of time worked, at the option of the employee.
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> (D) Nothing in this article shall prohibit the Employer and any employee from reaching mutual agreement on a modified work schedule which will be most advantageous in the completion of special assignments.

Thus, aside from stating that the regular work week for non-shift personnel consists of 40 hours from Monday through Friday, the contract is silent as to how those 40-hour weeks are configured. Testimony received from union and employer witnesses revealed that the 4/10 schedule for day-shift Fire Prevention Officers was utilized as early as 1988 and was the status

quo for those employees from 1994 until the employer implemented the 5/8 schedule on March 1, 2009.

Element 2: Mandatory Subject of Bargaining

As stated above, hours of work are a mandatory subject of bargaining, and any changes made must either be done pursuant to the parties' collective bargaining agreement or must be negotiated with the certified bargaining agent.

Element 3: Notice and Opportunity to Bargain

Less than two weeks after signing the current collective bargaining agreement on February 4, 2009, without prior notice to the union, the mayor issued the memo of February 17, 2009, that detailed the employer's intent to change the 4/10 schedule to a 5/8 schedule. No opportunity to bargain was presented to the union before the memo's distribution and the implementation of the change on March 1, 2009. Both union and employer witnesses testified that the employer neither provided notice nor the opportunity to bargain the change from a 4/10 schedule to a 5/8 schedule for the day-shift Fire Prevention Officers.

On March 24, 2009, Union Vice President John Borden sent a letter to Fire Chief Nick Olivas in which he stated the union's position that the schedule change violated the contract, and he informed the chief of a grievance that had been filed. On May 14, 2009, City Administrative Services Director Viki L. Jessop responded to Borden with a letter that stated it was the employer's decision to deny the grievance.

The Examiner finds that the employer did not give the union sufficient notice of the schedule change to allow for a reasonable opportunity for bargaining between the parties. The notice was issued less than two weeks prior to implementation of the change, and just after the contract was signed. Thus, the employer presented the change as a *fait accompli*.

Element 4: Change to the Relevant Status Quo

It is clear from testimony that the 4/10 schedule was the status quo for day-shift Fire Prevention Officers for many years. It is also clear that the status quo was changed on March 1, 2009, when the employer required those employees on 4/10 schedules to switch to 5/8 schedules.

Employer Defense – Waiver by Contract

The employer presented an affirmative defense that its actions were supported by the language of the current contract, which states that schedule changes require "mutual agreement" between the parties. The employer argues that once it withdrew from mutual agreement on the 4/10 schedule, the work schedule automatically reverted to the 5/8 schedule. However, there is no evidence to show that the parties mutually agreed to change to the 5/8 schedule.

CONCLUSION

The union has established that: (1) the 4/10 schedule for day-shift bargaining unit members working as Fire Prevention Officers was part of the status quo; (2) the change in work schedules concerned hours, a mandatory subject of bargaining; (3) the employer's memo announcing the work schedule change did not provide for an opportunity to bargain and was a *fait accompli*; and (4) that the employer made an actual change to the status quo. The employer unilaterally changed employee work schedules in violation of RCW 41.56.140(4) and (1).

FINDINGS OF FACT

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

2. International Association of Fire Fighters, Local 2088, is a bargaining representative within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of the uniformed fire fighter employees of the City of Tukwila.

3. On February 4, 2009, the union and employer signed a collective bargaining agreement for a term of January 1, 2009, through December 31, 2011.

4. On February 17, 2009, the employer announced that employees whose work week consisted of four 10-hour shifts would have their work schedules changed to five eight-hour shifts beginning March 1, 2009. The employer presented the change as a *fait accompli.*

5. On February 17, 2009, all day-shift bargaining unit members working as Fire Prevention Officers were working schedules that consisted of four 10-hour shifts.

6. On March 1, 2009, the work schedule for day-shift Fire Prevention Officers was changed to five eight-hour shifts.

7. Employee work schedules concern hours and are a mandatory subject of bargaining.

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 unilaterally changing the work schedule of day-shift Fire Prevention Officers without providing the opportunity for bargaining, as described in Findings of Fact 4 through 7, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

ORDER

The City of Tukwila, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Requiring day-shift Fire Prevention Officers to work a schedule consisting of five eight-hour shifts without first bargaining any changes in hours of work with the union.

   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 41.56 RCW:

a. Restore the *status quo ante* by reinstating the hours of work which existed for the day-shift Fire Prevention Officers prior to the unilateral change in work schedules found unlawful in this order.

b. Give notice to and, upon request, negotiate in good faith with International Association of Fire Fighters, Local 2088, before making changes in work schedules 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.

d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Tukwila, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. 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.

f. Notify the Compliance Officer of the Public Employment Relations Commission, 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 Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 1st day of June, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Lisa A. Hartrich

LISA A. HARTRICH, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

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DECISION 10536-A - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *CITY OF TUKWILA* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY required day-shift Fire Prevention Officers to work a schedule consisting of five eight-hour shifts without first bargaining any changes in hours of work with the union.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL reinstate the 4/10 work schedule which existed for the day-shift Fire Prevention Officers prior to the change found unlawful in this order.

WE WILL give notice to and, upon request, negotiate in good faith with the International Association of Fire Fighters, Local 2088, before making changes in work schedules for bargaining unit employees.

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.