

*City of Kelso*, Decision 10233-A (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KELSO POLICE ASSOCIATION,

Complainant,

vs.

CITY OF KELSO,

Respondent.

CASE 22046-U-08-5612

DECISION 10233-A - PECB

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

*Jaime B. Goldberg*, Attorney at Law, for the union.

Kenyon Disend, PLLC, by *Steve Victor*, Attorney at Law, for the employer.

On October 20, 2008, the Kelso Police Association (union) filed an unfair labor practice complaint against the City of Kelso (employer) alleging that the employer failed to bargain with the union in violation of RCW 41.56.140(4). Examiner Robin A. Romeo held a hearing on April 8, 2009, and the parties filed post-hearing briefs to complete the record.

ISSUE

Did the employer refuse to bargain with the union when it increased the salary of police officer Ernie Moore without first negotiating the increase with the union?

Based upon the evidence and argument, I find that the employer violated RCW 41.56.140(4) when it increased Moore's salary without first bargaining with the union.

APPLICABLE LEGAL STANDARDS

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees concerning "personnel matters, including wages, hours, and working conditions." RCW 41.56.030(4). Matters affecting the wages, hours, and working conditions of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Wooster Division Borg-Warner.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); 41.56.150(1) and (4). *City of Mukilteo*, Decision 9452-A (PECB, 2008).

The duty to bargain is defined in 41.56.030(4) and enforced through unfair labor practice proceedings under 41.56.140 and 150. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270(1)(a). The burden to establish affirmative defenses lies with the respondent. WAC 391-45-270(1)(b).

The Commission has long held that salary increases are a mandatory subject of bargaining. *Sunnyside Valley Irrigation District*, Decision 314 (PECB, 1977); *Clover Park School District*, Decision 6072-A (EDUC, 1998).

Unilateral Change

Once employees are represented by an exclusive bargaining representative, the employer is prohibited from making decisions to change mandatory subjects of bargaining until it has satisfied its collective bargaining obligations. RCW 41.56.140(4).

An employer may defend its actions in a unilateral change situation by asserting a "waiver by contract" defense. This defense was explained in *City of Edmonds*, Decision 8798 (PECB, 2004) as follows:

An employer will be relieved of its obligation to bargain over a mandatory subject if the matter is fully set forth in the parties' collective bargaining agreement; *Yakima County*, Decision 6594-C and 6595-C (PECB, 1999); *Tacoma-Pierce County Health Department*, Decision 6929-A (PECB, 2001). In other words, once a contract is signed, the parties will have met their obligation to bargain as to the matters set forth in the contract, relieving the parties of their obligation to bargain for the life of the agreement. No unfair labor practice will be found if a party makes changes in a manner consistent with the contract.

....  
In order to prove a waiver by contract, it must be shown that it is clear, unmistakable and knowing. *City of Wenatchee*, Decision 2194 [(PECB, 1985)]. To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter was fully discussed by the parties and that the party relinquishing its rights did so consciously. *Whatcom County*, Decision 7244-B (PECB, 2004).

The Commission affirmed this decision on other grounds in *City of Edmonds*, Decision 8798-A (PECB, 2005).

### ANALYSIS

The employer does not contest the fact that it made a unilateral change in a mandatory subject of bargaining and failed to bargain over the change. The issue to be decided is whether the employer had a valid reason or defense to make the change.

In May 2008, police officer Ernie Moore expressed an intention to retire from his position with the City of Kelso. A replacement for his position was hired. Moore then expressed a preference to stay on the job until the next yearly cost-of-living increases were implemented. The employer, in an attempt to induce him to retire as planned, offered him an increase in pay, equivalent to a cost-of-living increase, for a two-month period. Moore accepted the increase and retired at the original expressed date. The increase was not negotiated with the union.

The union is the exclusive bargaining representative of a unit of police officers and sergeants in the City of Kelso Police Department. The employer and the union are parties to a collective bargaining agreement effective from January 1, 2007, through December 31, 2009. The employer alleges that the collective bargaining agreement allowed it to give the salary increase to Moore without bargaining. The employer argues that the increase is a merit increase and a

provision in the contract that allows for merit increases for sergeants gave it the ability to give Moore a merit increase. The employer also argues that reading the employee handbook together with the contract, gives it the right to grant salary increases to police officers.

The employer has failed to show that the contract allows for the increase and that the union waived its right to bargain any such salary increase. The employer's waiver by contract defense fails.

The contract does not show that the parties have bargained over salary increases for police officers. The contract gives the employer the right to give sergeants merit increases but is silent with regard to police officers. There is nothing in the contract specifically granting merit increases to police officers. That silence in the contract cannot be read as the granting of discretion to the employer to award salary increases.

The employer argues that the contract should be read together with the employee handbook. The employee handbook states that salary ranges have been established to provide flexibility and to reward employees for meritorious service.

The employee handbook does not add anything to the employer's argument. There is no explicit reference in the handbook granting authority to the employer to award discretionary salary increases. There is merely an explanation of the purpose of establishing a salary range.

To effectively waive statutory collective bargaining rights by language in a contract, the union must consciously agree to the waiver and the waiver must be clear and unmistakable; it cannot be implicit. The contract does not meet that test. The salary increase given to Moore was not negotiated with the union and that failure was a violation of the employer's statutory bargaining obligation.

#### Remedy

The union requests attorney's fees and an order granting all employees in the bargaining unit a salary increase. It would not be appropriate to award either of these requests.

The Commission's standard for the awarding of attorney's fees was recently set forth in *Seattle School District*, Decision 10410 (PECB, 2009):

Attorney's fees are appropriate when there is a continuing course of conduct that shows an intentional disregard of the union's collective bargaining rights. *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982).

There has been no allegation of a continued course of conduct by the employer. Attorney's fees are not appropriate.

Granting salary increases to employees is not a remedy consistent with the policy of Chapter 41.56 RCW which requires the parties to engage in collective bargaining over any such increases. The violation here is that the employer has failed to bargain over a merit increase for one employee. Additionally, there has been no showing that this remedy would fairly redress the violation.

The usual remedy for a unilateral change violation is to restore the status quo that existed before the unilateral change. However, in this case it is appropriate that Moore not be denied the salary increase he received because of the employer's improper acts. Since Moore has already retired from service, I also find that it would be administratively onerous to retroactively decrease his salary and adjust his retirement pay. An order requiring the employer to cease and desist from failing to bargain and posting a notice is sufficient to place the employer on notice that such behavior will not be tolerated in the future.

#### FINDINGS OF FACT

1. The City of Kelso is a public employer within the meaning of RCW 41.56.030(1).
2. The Kelso Police Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a unit of police officers and sergeants in the City of Kelso Police Department.

3. The employer and the union are parties to a collective bargaining agreement effective from January 1, 2007, through December 31, 2009.
4. In May 2008, the employer gave police officer Ernie Moore a salary increase for a two-month period without bargaining the increase with the union. The employer's action was a unilateral change in a mandatory subject of bargaining.
5. The collective bargaining agreement described in Finding of Fact 3 does not give authority to the employer to award salary increases to police officers. The employer failed to establish its waiver by contract defense.

#### 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 failing to bargain the increase in salary of Ernie Moore, as described in Findings of Fact 4 and 5, the City of Kelso refused to bargain and violated RCW 41.56.140 (4) and (1).

#### ORDER

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

1. CEASE AND DESIST from:
  - a. Unilaterally granting salary increases to police officers without bargaining with the Kelso Police Association.

- b. In any other way manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.
  - c. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by 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. 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.
  - b. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Kelso, 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.
  - c. 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.
  - d. 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 16th day of February, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Romeo", written over the printed name of the signatory.

ROBIN A. ROMEO, 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**

# 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 KELSO COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY increased the salary of Ernie Moore without bargaining the increase with the Kelso Police Association.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL NOT unilaterally grant salary increases to police officers without bargaining with the Kelso Police Association.

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](http://www.perc.wa.gov).