Central Washington University, Decision 10967-A (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. CENTRAL WASHINGTON UNIVERSITY, Respondent.	CASE 23263-U-10-5930 DECISION 10967-A - PECB DECISION OF COMMISSION

Jason K McKay, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Alan Smith*, Assistant Attorney General, for the employer.

This case arises from unfair labor practice charges filed by Public School Employees of Washington (union) against Central Washington University (employer). The employer appeals Examiner Jessica J. Bradley's holdings that it interfered with employee rights by failing to maintain the status quo during the pendency of a representation petition when it reduced the work hours of certain employees who were subject to the pending representation petition. She ordered the employer to restore the status quo including reinstatement and back pay.

ISSUES

1. Did the employer interfere with employee rights under RCW 41.56.140(1) and WAC 391-25-140(2) by failing to maintain the status quo when it announced its decision to reduce the work hours of certain employees during the pendency of the union's representation petition?

2. Does the employer have a statutory defense under RCW 41.56.021(4)?

3. What is the appropriate remedy when the employer made the decision to reduce hours during the status quo period, but made actual reductions after the union withdrew its appeal of its pending representation petition, which ended the status quo period?

We affirm the Examiner's decision that the employer altered the status quo and interfered with employee rights when it decided to reduce and announced the reduction in work hours of certain employees in the petitioned-for unit. However, we vacate the Examiner's Order to restore the status quo because the employer's decision was not implemented until after the appeal of the underlying petition had been withdrawn and the relevant status quo period had ended.

BACKGROUND

The timing of events is very important to our decision in this case. On October 15, 2009, the union filed a representation petition seeking to represent a bargaining unit of unrepresented counseling and advising employees, who are exempt from Chapter 41.06 RCW. The petition was amended three times and on May 20, 2010, dismissed by the Executive Director who found that no appropriate unit existed. *Central Washington University*, Decision 10765 (PECB, 2010). On May 21, 2010, the union appealed the dismissal and put the employer on notice that an appeal was filed. The union withdrew its appeal on June 4, 2010.

In May of 2010, before the union withdrew its appeal, the employer made and announced its decision to reduce the hours of certain employees who were the subject of the October 15, 2009 petition. This decision was not implemented until July 1, 2010, after the union withdrew its appeal.

On June 3, 2010, the union filed the unfair labor practice complaint that is the subject of this appeal and that concerns the petition filed in October of 2009. The employer action complained

of was its decision to reduce the work hours of certain employees who were the subject of the petition and who work cyclic hours.[1]

The next day, June 4, 2010, the union withdrew its appeal. Also, on June 4, 2010, the union filed a new and separate representation petition seeking to organize all of the employer's exempt counseling and advising staff.[2]

Also noted above, on July 1, 2010, the employer implemented its decision to reduce the cyclical hours of certain petitioned-for employees.

LEGAL STANDARDS

Most appeals to the Commission present mixed questions of law and fact. The Commission reviews an examiner's interpretation of the law de novo and thus is not bound by it. *Clover Park Technical College*, Decision 8534-A (PECB, 2004). However, when reviewing findings of fact, the scope of the Commission's review is to determine whether there is substantial evidence in the record to support those findings, and to determine whether those findings support the conclusions of law. *C-Tran*, Decision 7087-B and 7088-B (PECB, 2002). Substantial evidence exists if the record contains sufficient evidence of the quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College,* Decision 7441-A (CCOL, 2002), *citing PERC v. City of Vancouver*, 107 Wn. App. 694 (1991). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001). Generally, if the appealing party fails to assign error to a specific finding of fact, that unchallenged finding is considered to be true on appeal. *C-Tran*, Decision 7087-B and 7088-B.

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[1] Cyclic year positions are positions which are scheduled to work less than twelve full months each year, but which are permanent positions. WAC 357-19-295.

[2] On September 24, 2010, election results were tallied with the majority selecting "No Representation." *Central Washington University*, Decision 10938-A (PECB, 2010).

Interference with Bargaining Obligations

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires employers to bargain collectively with unions representing their employees. It allows employees to organize and choose a representative (union) for purposes of collective bargaining free from interference. RCW 41.56.040; RCW 41.56.140(1). However, prior to certification by the Commission, unrepresented employees who are the subject of a representation petition do not have a collective bargaining representative. *State – Attorney General*, Decision 10733 (PSRA, 2011), *citing Central Washington University*, Decision 10967 (PECB, 2011). Thus, at that point there is no duty for the employer to bargain with the union. *State – Attorney General*, Decision 10733.

Nevertheless, a union that files a representation petition acquires some status in the employment relationship. Specifically, it is entitled to file and prosecute unfair labor practice charges on "interference" claims under RCW 41.56.140(1) affecting employees in the petitioned-for bargaining unit. *King County,* Decision 6063-A (PECB, 1998). RCW 41.56.140(1) provides that "[i]t shall be an unfair labor practice for a public employer … [t]o interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter." Thus, when an employer changes the status quo, this can amount to interference.

A party alleging interference by a change to the status quo meets its burden of proof when it establishes that the employer unlawfully altered the status quo. *State – Attorney General*, Decision 10733-A (PSRA, 2011). It need not establish that a typical employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit associated with the employee's union activity. *State – Attorney General*, Decision 10733-A. A showing of intent or motivation is not required to find an interference violation. *State – Attorney General*, Decision 10733, *citing King County*, Decision 6063-A.

Status Quo

Where a new bargaining unit is concerned, the relevant status quo is determined as of the date of the filing of the union's petition for representation. *Val Vue Sewer District*, Decision 8963 (PECB, 2005). WAC 391-25-140(2) provides that:

> Changes of the status quo concerning wages, hours or other terms and conditions of employment of employees in the bargaining unit are prohibited during the period that a petition is pending before the commission....

When an order of dismissal issued under WAC 391-25-390(1)(a) is served upon the parties, the obligations to maintain the status quo under subsection (2) of this section are lifted. WAC 391-25-140(5). Under WAC 391-25-140(5)(a):

> If a party to the proceeding files a timely notice of appeal of the order of dismissal, then the obligations under subsections (2) ... shall be reinstated once the parties to the proceeding are served the notice of appeal. Those obligations shall remain in effect until a final order is issued by the commission under WAC 391-25-670, unless governed by (b) of this subsection.

Thus, the obligation to maintain the status quo applies from the date that a representation petition is filed up to the point that either the petition is finally dismissed or the union is certified as the exclusive bargaining representative of the at-issue employees. WAC 391-25-140(2); *State – Attorney General*, Decision 10733. The rationale for the rule is that changes by the employer to "mandatory subjects" while a representation petition is pending improperly affect the "laboratory conditions" necessary to the employees' free exercise of their right to vote. *State – Attorney General*, Decision 10733, *citing Mason County*, Decision 1699 (PECB, 1983).

Furthermore, WAC 391-25-140(5)(b) provides that where a timely filed notice of appeal reinstates the obligation to maintain the status quo, any party to the proceeding may petition the Commission to stay its status quo obligations where the petitioning party demonstrates a need for a change in terms and conditions of employment due to circumstances that are beyond the party's control.

Dynamic Status Quo

While some situations involve a "static" status quo, Commission precedent recognizes that in other situations employers are required to maintain the "dynamic" status quo. This concept recognizes that occasionally circumstances exist where changes determined and set in motion by the employer prior to the filing of a representation petition do not disrupt a bargaining relationship or undermine support for a union because the petitioned-for employees expect the

changes to occur. *Adams County*, Decision 7961 (PECB, 2002); *King County*, Decision 6063-A, *citing NLRB v. Katz*, 396 U.S. 736 (1962).

For example, where wage increases are previously scheduled, they are part of the dynamic status quo, and it would be unlawful to withhold them just because a representation petition was later filed. *Lewis County PUD*, Decision 7277-A (PECB, 2002), *aff'd*, Decision 7277-B (PECB, 2002). Step increases have been considered part of the dynamic status quo because the employer has no discretion about granting the annual award and the employees expect those increases. *City of Anacortes*, Decision 9004-A (PECB, 2007), *citing Lewis County PUD*, Decision 7277-A, *aff'd*, Decision 7277-B. However, general wage increases have not been considered part of the dynamic status quo because they are usually far less concrete, do not follow an established or fixed formula, and allow the employer discretion as to whether to grant an increase at all. *Val Vue Sewer District*, Decision 8963 (PECB, 2005), *citing Lewis County PUD*, Decision 7277-A, *aff'd*, Decision 7277-B. Conversely, if changes the employees may view as negative merely carry out a dynamic status quo no violation will be found. *King County*, Decision 6063-A.

Subjects of Bargaining

Once certified, the statute requires public employers to engage in collective bargaining with the exclusive representative over wages, hours, and working conditions. RCW 41.56.100; RCW 41.56.030(4). These topics are called "mandatory subjects."

The Washington State Legislature enacted RCW 41.56.021 in 2007 to extend collective bargaining rights to certain employees of institutions of higher education who are exempted from civil service pursuant to RCW 41.06.070(2). However, the Legislature also limited the scope of bargaining under Chapter 41.56 RCW in this context. RCW 41.56.021(4) states that:

> Institutions of higher education and the exclusive bargaining representative shall not bargain over rights of management that, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:
> (a) The functions and programs of the institution, the use of technology, and the structure of the organization;

> (b) The institution's budget and the size of its workforce, including determining the financial basis for layoff;
> (c) The right to direct and supervise employees;
> (d) The right to take whatever actions are deemed necessary to carry out the mission of the state and the institutions of higher education during emergencies....

Thus, the subjects covered by RCW 41.56.021(4) are not part of the status quo and where applicable, the employer is privileged to make changes to those subjects at any time, including during the pendency of a representation petition. *State – Attorney General*, Decision 10733-A.[3]

The employer has the burden of proof on affirmative defenses. WAC 391-45-270(1)(b). Both statutory management rights and economic necessity are affirmative defenses.

ANALYSIS

The union asserts that the employer made changes to the status quo while a representation petition concerning certain employees was pending. The employer makes several arguments concerning why it did not commit an interference violation, and asserts affirmative defensives. We find that the union met its burden of proof concerning the interference violation and that the employer did not meet its burden of proof with respect to its affirmative defenses.

Status Quo Altered During Pendency

First, the employer assigns error to Finding of Fact 8 and asserts that the record demonstrates that it decided in 2009 to reduce the petitioned-for employees' hours before the petition was filed. In its brief, the employer argues that the "May 14, 2010," date in Finding of Fact 8 is in error and that the correct date is "May 14, 2009." The employer asserts that this is significant because it shows that the challenged changes are part of the dynamic status quo. Although the correct date of the e-mail is "May 14, 2009" we agree with the Examiner that this e-mail shows

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[3] The language of RCW 41.56.021(4) is substantially similar to the language in RCW 41.80.040. Thus, cases decided under Chapter 41.80 RCW are applicable to cases decided under Chapter 41.56 RCW unless the provisions of Chapter 41.56 RCW provide otherwise. *See Central Washington University*, Decision 10118-A (PSRA, 2010).

nothing more than the fact that the decision was made sometime after the e-mail was sent. As Finding of Fact 8 notes:

> Once we have completed our review and have received more information from OFM [Office of Financial Management], we will make a full announcement of proposals. If we determine that we can provide voluntary incentives and if there is adequate response to them, additional reductions – to include leave or furlough, layoff, or other restructuring - may be unnecessary.

What sets the dynamic status quo in motion is the employer's decision to which it is bound and at which point it no longer has discretion, and therefore, its action or inaction is expected by the employees. The May 14, 2009 e-mail does not meet this standard.

In fact, almost a year later, the April 12, 2010 e-mail from James L. Gaudino, the president of Central Washington University, referenced in Finding of Fact 7, which stated that salary cuts could be met without furloughs, also stated:

> I have initiated a process to develop a reduced operating budget for next year, and I have set a goal of May 1st to complete that work. A university-wide briefing is scheduled for the end of the month.
>
> I want to thank you for your patience during the long period of waiting for this budget news. While the news is not good, it is also not as bad as I had feared it could be....

Thus, this April 12, 2010 e-mail also supports the Examiner's Finding of Fact 11 that the employer's decision was made in May 2010 when the representation petition was pending.

Furthermore, although the employer argues that the dynamic status quo started before the representation petition was filed, it only assigned error to Finding of Fact 8 in full regarding the May 14, 2009 e-mail and not to the portions of Findings of Fact 11 and 12 wherein the Examiner found that in May of 2010 the employer decided and announced its decision to reduce the cyclical hours of certain employees in the petitioned-for unit. Thus, these portions of Finding of Fact 11 and 12 stand as verities on appeal.

The employer had a duty to maintain the status quo as it existed on October 15, 2009, regarding wages, hours and working conditions, until June 4, 2010 when the union withdrew its appeal. The decision and official announcement that employee work hours would be reduced was made by the employer in May of 2010 while the representation petition was pending, and these actions interfered with employee rights by altering the status quo as it existed on October 15, 2009, because they improperly affected the "laboratory conditions" necessary to the employees' free exercise of their right to vote.

Management Rights

Second, the employer argues that it need not bargain over its budget and the size of its workforce, including the financial basis for layoff. It asserts that it was prohibited under RCW 41.56.021(4) from bargaining over its decision to reduce the work hours of the at-issue employees in this case. The employer claims that it made partial layoffs constituting permanent reductions in the size of the employer's workforce and that the reductions targeted only those staff positions funded by the state because it needed to reduce its budget as required by reduced state appropriations. Conversely, the union argues that the employer made changes to mandatory subjects during the pendency of a representation petition. It asserts that because the employer did not eliminate any positions, it therefore did not permanently reduce its workforce by reducing the work year and compensation of existing employees.

While it is correct that the employer need not bargain over "the institution's budget," it does not follow that a determination as occurred here, i.e., deciding to reduce the work hours of certain employees, is bargaining over the institution's budget. We are also not persuaded by the employer's argument that it permanently reduced the cyclic hours of the petitioned-for employees, and consequently, that its reduction: (1) permanently reduced the size of the employer's workforce, and (2) was the actual equivalent of a layoff under RCW 41.56.021(4)(b). The record does not support such a finding. In this case, the employees involved did not lose their jobs as a result of the employer's actions; they continued working for the employer but worked fewer hours than when the representation petition was filed.

The employer cites *State - Attorney General*, Decision 10733 and *Central Washington University*, Decision 10413 (PSRA, 2009), as two factually similar cases under which the management rights clause of RCW 41.80.040 applied. These cases are distinguished by the fact that they dealt with positions that had actually been eliminated. Thus, again we are not persuaded that the facts of this case sufficiently fit under RCW 41.56.021(4). We find that the employer has not met its burden of proof.

Economic Necessity

Third, the employer argues that its decision was proper in light of an emergency situation. It argues that as part of an emergency response of unprecedented scope, it exercised its management right under RCW 41.56.021(4)(d). The employer's communication to employees lacks indications of an emergency. The April 12, 2010 e-mail from Gaudino, referenced above and in Finding of Fact 7, stated that the budget was not as bad as he feared it could be. Again, the employer has not met its burden of proof.

Furthermore, we agree with the Examiner that "[i]f the employer felt it needed to make reductions in hours due to cuts in the state higher education budget, the employer should have exercised its right under WAC 391-25-140(5)(b) to petition the Commission to stay its obligation to maintain the status quo." However, as the Examiner noted, "the employer did not attempt to utilize this procedure."

In summary, we affirm the Examiner's finding that the employer's decision to reduce the work hours of certain employees, announced during the status quo period, was improper interference.

REMEDY

The typical remedy orders the offending party to cease and desist from its illegal activity and, if necessary, return the aggrieved party to the conditions that existed before the unfair labor practice. *Skagit County*, Decision 8746-A (PECB, 2006). When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish its purpose. *METRO v. PERC,* 118

Wn.2d 621 (1992). With that purpose in mind, the Supreme Court interpreted the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute and to make the Commission's lawful orders effective. *METRO v. PERC,* 118 Wn.2d 621.

Here, the employer unlawfully altered the status quo during the pendency of a representation petition. Thus, we find that it needs to cease and desist from this illegal activity and mail the petitioned-for employees a copy of the notice provided by the Compliance Officer so these employees are aware that their rights have been violated.

Nevertheless, on June 4, 2010, when the union withdrew its appeal of the petition, the Executive Director's dismissal became the final order of the agency. The union was on notice that this would be the case. The Executive Director's Order of Dismissal stated, "[t]his order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660." By withdrawing its appeal, the union ended the relevant status quo period for this case. Thus, the employer's July 1, 2010 reduction in work hours and wages occurred after the end of the relevant status quo period. In the circumstances of this case, when the union filed a new petition on June 4, 2010, a new status quo began. The new petition did not extend the status quo obligation of the original petition.

CONCLUSION

The employer altered the status quo and interfered with employee rights in violation of RCW 41.56.140(1) when it decided and announced in May 2010 that it would reduce the work hours of certain employees in the petitioned-for unit. Because there was no actual change in employee work hours during the pendency of the representation petition, the remedy of restoration of the status quo by reinstating the petitioned-for employees' work hours, and resulting wages and benefits that existed prior to the filing of the representation petition is inappropriate. We are, therefore constrained by the actions of the union from awarding reinstatement and back pay. Instead, we are ordering the employer to mail to each of the petitioned-for employees a copy of the Order to be issued by the Compliance Officer. This will inform these employees of the

employer's violation of its legal obligations and help effectuate the purposes of Chapter 41.56 RCW.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner Jessica Bradley are AFFIRMED and adopted as the Findings of Fact of the Commission, except that:

   a) Finding of Fact 7 is amended to include at the end of the paragraph: "I have initiated a process to develop a reduced operating budget for next year, and I have set a goal of May 1st to complete that work. A university-wide briefing is scheduled for the end of the month. I want to thank you for your patience during the long period of waiting for this budget news. While the news is not good, it is also not as bad as I had feared it could be....;"

   b) Finding of Fact 8 is corrected to read "May 14, 2009" and is now numbered 3;

   c) Finding of Fact 14 is amended to read "Findings of Fact 4 through 6" instead of "Findings of Fact 3 through 5;"

   d) Finding of Fact 15 is amended to read "employer announced reduced work hours" instead of "employer reduced work hours;"

   e) Finding of Facts 3 through 8 are renumbered to account for these changes.

2. The Conclusions of Law issued by Examiner Jessica Bradley are AFFIRMED and adopted as the Conclusions of Law of the Commission, except that Conclusion of Law 2 is amended to read "Finding of Fact 11, 12 and 15" instead of "Finding of Fact 11 through 13."

3. The Order issued by Examiner Jessica Bradley is AFFIRMED in part and VACATED in part as the Order of the Commission, striking paragraphs 2.a and 2.b; adding a new paragraph 2.a to read: "Mail a copy of the notice provided by the Compliance Officer to C. White, Clarice Tan, Davida Stafford, Edward Esparza, Janine Graves, Juana Rios, Lawren Lutrin, Lisa Berthon, Robert Spencer, and Roslyn Moes;" renumbering the paragraphs that follow to account for these changes.

ISSUED at Olympia, Washington, this 3rd day of August, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

CASE 23263-U-10-5930
DECISION 10967-A - PECB

COLLECTIVE BARGAINING

PERC

STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *CENTRAL WASHINGTON UNIVERSITY* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with employee rights by deciding and announcing our decision to reduce the cyclic work hours and wages of certain counselors, advisors, coordinators, and recruiters in the Departments of International Studies, Academic Achievement, and Academic Advising on the main campus of the university while they were the subject of a representation petition pending before PERC.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL mail C. White, Clarice Tan, Davida Stafford, Edward Esparza, Janine Graves, Juana Rios, Lawren Lutrin, Lisa Berthon, Robert Spencer, and Roslyn Moes a copy of the notice provided by the Compliance Officer.

WE WILL NOT make changes to employees' wages, hours or other terms and conditions of employment while employees are the subject of a pending representation petition.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE. AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23263-U-10-05930	FILED:	06/03/2010	FILED BY:	PARTY 2
DISPUTE:	ER INTERFERENCE				
BAR UNIT:	PROFESSIONAL				
DETAILS:	Hours reduction				
COMMENTS:					

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