City of Seattle, Decision 12102-A (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE MANAGEMENT ASSOCIATION, Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 26458-U-14-6751 DECISION 12102-A - PECB DECISION OF COMMISSION

Snyder & Hoag, L.L.C., by *David A. Snyder*, Attorney at Law, for the union.

Seattle City Attorney Peter S. Holmes, by *Paul A. Olsen*, Assistant City Attorney, for the employer.

The Seattle Police Management Association (union) filed an unfair labor practice complaint alleging that the City of Seattle (employer) refused to bargain when it changed an ordinance to allow the employer to hire employees at the rank of Assistant Chief from outside of the Seattle Police Department. The Unfair Labor Practice Manager dismissed the complaint for failure to state a cause of action. The Unfair Labor Practice Manager concluded that the union lacked standing to file the complaint and the allegations were insufficient to show that the employer had a duty to bargain the decision.[1] The union appealed.

On appeal, the union asserts that it has standing to file the unfair labor practice complaint and that it will be able to show at hearing that the amended ordinance sufficiently impacted bargaining unit employees' wages, hours, and working conditions to be a mandatory subject of bargaining. Therefore, the Unfair Labor Practice Manager erred when he dismissed the complaint. The employer agrees with the Unfair Labor Practice Manager's decision that the

[1] *City of Seattle*, Decision 12102 (PECB, 2014).

union lacked standing and that management can set hiring standards and qualifications for non-unit positions without bargaining.

This appeal presents two issues: (1) whether the union had standing to file the unfair labor practice complaint; and (2) whether the complaint stated a cause of action for employer refusal to bargain the decision to amend an ordinance that limited the promotional opportunities to the rank of assistant chief to members of the bargaining unit represented by the Seattle Police Management Association to allow assistant chiefs to be hired from outside of the Seattle Police Department. The union had standing to file the unfair labor practice complaint and the complaint stated a cause of action.

ANALYSIS

Legal Standards

Standard of Review

In unfair labor practice proceedings, the ultimate burdens of pleading, prosecution, and proof lie with the complainant. *State – Office of the Governor*, Decision 10948-A (PSRA, 2011), *citing City of Seattle*, Decision 8313-B (PECB, 2004). An unfair labor practice complaint will be reviewed under WAC 391-45-110 to determine whether the facts, as alleged, state a cause of action. When a complaint is reviewed under WAC 391-45-110, all alleged facts are assumed to be true and provable. *Whatcom County*, Decision 8246-A (PECB, 2004).

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). Whether a particular item is a mandatory subject of bargaining 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). The decision focuses on which characteristic predominates. *Id.* While the balancing test calls upon the Commission and its Examiners to balance these two principal considerations, the test is more nuanced and 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(3). 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, and the same subject under different facts may be considered permissive.

Application of Standards

The union represents a bargaining unit of captains and lieutenants. The employer and union were parties to a collective bargaining agreement from January 1, 2009 through December 31, 2011. The collective bargaining agreement addresses the selection of employees for the rank of lieutenant and captain, promotions to and within the bargaining unit.

In 1978, the employer enacted an ordinance restricting promotions to the ranks above captain (assistant chief) to captains or lieutenants in the Seattle Police Department. On January 21, 2014, the employer amended the ordinance. On January 28, 2014, the mayor signed the ordinance. The 2014 ordinance allows the employer to appoint individuals to the rank of Assistant Chief from outside of the Seattle Police Department as well as from within.

The union demanded to bargain over the ordinance, as proposed, on December 4, 2013. The employer refused to bargain the decision to amend the ordinance.

The union has standing to file the unfair labor practice complaint.

"A complaint charging that a person has engaged in or is engaging in an unfair labor practice may be filed by any employee, employee organization, employer, or their agents." WAC 391-45-010. The union's complaint alleged that the employer refused to bargain a decision that

changed the working conditions of bargaining unit employees. The union represents a bargaining unit of captains and lieutenants; therefore, the union could file an unfair labor practice complaint alleging a refusal to bargain against the employer.

The union's complaint states a cause of action.

The union's complaint and amended complaint alleged that the employer made a decision to change the eligible pool for promotions to the position of assistant chief. The union does not represent assistant chiefs; however, previously eligibility for promotion to assistant chief was limited to members of the bargaining unit. The union alleged that the standards for promotional opportunities had a direct relationship to the working conditions of bargaining unit employees.

Allegations concerning promotions outside of the bargaining unit have been sufficient to state a cause of action. *City of Tacoma*, Decision 9287 (PECB, 2006).[2] In *City of Tacoma*, Decision 9287, the union represented non-supervisory street maintenance employees and a different union represented street maintenance supervisors. The employer used a promotional list to promote bargaining unit employees to supervisory positions in another bargaining unit. Historically, the list had been limited to internal candidates. The employer notified the union that it would let the current promotional list expire. Subsequently, the employer notified the union that the employer would use an open competitive list, rather than the internal promotional list. The Examiner determined that a change to how the promotional list for a position outside of the bargaining unit was not a mandatory subject of bargaining. The Examiner concluded that, based on the facts before her, the employer's ability to set conditions for promotions to positions outside of the bargaining unit impacted the managerial prerogative more than the bargaining unit employees. Under the facts of that case, the Examiner concluded that the employer did not have a duty to bargain the decision to change promotional opportunities outside of the bargaining unit. The Examiner's decision was not appealed to the Commission.

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[2] The Unfair Labor Practice Manager issued a cause of action for employer interference by a "unilateral change without providing an opportunity for bargaining in use of a promotional list to fill street maintenance supervisor vacancies. . ." The case was assigned to an Examiner, who issued a decision on stipulated facts.

Similar to the allegations made by the union in *City of Tacoma*, Decision 9287, the union, in this case, alleged that the employer made a unilateral change to promotional opportunities. The facts alleged in the complaint are sufficient to find a cause of action for the employer's refusal to bargain the decision to limit promotional opportunities to individuals other than bargaining unit members. Just as the Examiner in *City of Tacoma*, Decision 9287, had to balance the union's and the employer's interests, the assigned Examiner in this case will be required to balance the union's interest in wages, hours, and working conditions with the employer's interest in entrepreneurial control and management prerogatives as required under *International Association of Fire Fighters, Local 1052 v. PERC* (*City of Richland*), 113 Wn.2d 197, 203 (1989), to determine whether the decision to change the candidate pool for assistant chief positions.

CONCLUSION

The union represents a bargaining unit of captains and lieutenants. As a bargaining representative, the union can file unfair labor practices against the employer when the union believes the employer has refused to bargain mandatory subjects of bargaining. Assuming the facts alleged in the union's amended complaint are true and provable, the complaint states a cause of action for employer refusal to bargain.

NOW, THEREFORE, it is

ORDERED

1. The Order of Dismissal issued by Unfair Labor Practice Manager David I. Gedrose is VACATED.

2. Assuming all facts to be to be true and provable, the amended complaint states a cause of action, summarized as follows:

a. Employer refusal to bargain the decision to change an ordinance that limited the promotional opportunities to assistant chiefs to members of the bargaining unit represented by the Seattle Police Management Association to allow assistant chiefs to be hired from outside of the Seattle Police Department.

3. The City of Seattle shall:

File and serve their answer to the allegation listed in paragraph 2 of this Order within 21 days following the date of this Order. An answer shall:

a. Specifically admit, deny, or explain each fact alleged in the amended complaint, as set forth in paragraph 2 of this Order, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

4. The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, the respondent's failure to file an answer within the time specified or failure to file an answer specifically denying or explaining a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

ISSUED at Olympia, Washington, this 25th day of September, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner