STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALLA WALLA POLICE GUILD, Complainant, vs. CITY OF WALLA WALLA, Respondent.	CASE 26470-U-14 DECISION 12348-A - PECB DECISION OF COMMISSION

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

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The Walla Walla Police Guild (union) filed an unfair labor practice complaint alleging that the City of Walla Walla (employer) unilaterally changed employees' ability to own and carry firearms when off-duty by unilaterally implementing policy 312.2.3 (Authorized Off-Duty Firearm). Examiner Erin Slone-Gomez conducted a hearing and issued a decision finding that the employer unilaterally changed a mandatory subject of bargaining but dismissed the complaint, concluding the union waived by inaction its right to bargain.[1] The union appealed the conclusion that it waived by inaction its right to bargain.

The only issue before the Commission is whether substantial evidence supports the Examiner's conclusion that the union waived by inaction its right to bargain policy 312.2.3. Substantial evidence does not support the Examiner's conclusion that the union waived by inaction its right to bargain. The facts of this case demonstrate that the parties were negotiating policy 312.2.3 when the employer unilaterally implemented the policy. The union did not waive by inaction its right to bargain. We reverse the Examiner.

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1 *City of Walla Walla*, Decision 12348 (PECB, 2015).

BACKGROUND

The union represents a unit of commissioned police officers who are uniformed personnel under RCW 41.56.030(13). The union and the employer were parties to a series of collective bargaining agreements. Since 2012, Scott Bieber had been chief of the Walla Walla Police Department. The employer and union had a relaxed and informal relationship. Bieber met frequently with the union executive board for coffee. Union officers availed themselves of the Chief's open-door policy to discuss labor management issues.

In September 2013, the employer wanted to update many provisions of its policy manual. The changes sought by the employer included a change to policy 312.2.3 (Authorized Off-Duty Firearm). As discussed in more detail below, on December 24, 2013, the employer implemented a change in that policy after some discussions with the union and exchanges of proposals but without the union's agreement.

ANALYSIS

Legal Standards

Standard of Review

The Commission reviews conclusions and applications of law, as well as interpretation of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Waiver by Inaction

When given notice of a contemplated change that affects a mandatory subject of bargaining, a union desiring to influence the employer's decision must make a timely request for bargaining or

it waives its right to bargain by inaction. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). A key ingredient to finding a waiver by inaction is a finding that the employer gave adequate notice to the union. *Id.*

Waiver by inaction is an affirmative defense. *Lakewood School District*, Decision 755-A (PECB, 1980). An employer asserting that a union waived its bargaining rights by inaction bears the burden of proof. *City of Yakima*, Decision 11352-A (PECB, 2013). 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 (PECB, 2004).

Application of Legal Standards

The Examiner concluded that the employer unilaterally changed a mandatory subject of bargaining when it implemented policy 312.2.3. The Examiner found that the union waived by inaction its right to bargain the policy and dismissed the unfair labor practice complaint.

Waiver by inaction is an affirmative defense. Affirmative defenses are raised in the answer to the complaint. The burden of proving an affirmative defense is on the party asserting the defense.

There are at least two reasons why the waiver by inaction theory raised in the employer's briefing lacks merit. Initially, it must be noted that the employer did not plead waiver by inaction as an affirmative defense. That failure alone should doom the attempted application of a waiver by inaction. At no time during the hearing did the employer defend the complaint on the ground that the union waived by inaction its right to bargain policy 312.2.3. In its answer, the employer raised two affirmative defenses: the complaint failed to state a cause of action and waiver by contract.

Even more remarkable to the analysis and application of the newly minted waiver by inaction argument is that it is completely inconsistent with both the employer's opening statement and testimony from the employer's witnesses. In his opening statement, counsel for the employer asserted, "When you look at the whole process here, you will see that the City complied with all

its obligations to propose the amendments, to negotiate over them, and only implementing this policy when they were clearly at impasse."[2] Bieber testified that the parties negotiated the policy.[3]

The employer did not meet its burden of proving waiver by inaction. Substantial evidence does not support the Examiner's conclusion that the union waived by inaction its right to bargain.

The Parties Negotiated Policy 312.2.3.

The employer first discussed updating its policy manual with the union on September 12, 2013. The next day, Captain Terry Heisey e-mailed the union to confirm a system for proceeding with updating the policy manual and attached a number of updates provided by Lexipol in June 2013, and an Excel spreadsheet identifying over 100 of the Lexipol policies the employer wanted to update.[4] Lexipol is a company that compiles and sells policies and procedures for law enforcement agencies. The attachment presented into the record did not contain policy 312.2.3 among the updates from Lexipol.[5] Having received no response to his September 13 e-mail, Heisey followed up with union Secretary-Treasurer Michael Moses on September 17, 2013, to confirm that the union agreed to the proposed system.

The Examiner wrote, "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." There is no other evidence of communication between the parties between September 17, 2013, and November 24, 2013. Neither party communicated via e-mail or testified to specifics of discussions the parties had about updating the policy manual. Thus, there is a void of communication.

On November 24, 2013, Heisey e-mailed the union seven Lexipol policy update release notes, an Excel spreadsheet, a policy adopted August 16, 2010, and a draft policy with incorporated changes

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2 Tr. 34:22-35:1.

3 Tr. 306:6-9; 315:21-24; 320:19-24; 323:2-7; 330:2-7.

4 Exhibit 1. The attachments to the e-mail were not included with Exhibit 1. The spreadsheet, admitted as Exhibit 28, identifies policy 312.2.3, but it is not possible to conclude that the policy was included in the attachments to Exhibit 1.

5 Exhibit 28.

dated November 24, 2013.[6] In that e-mail, Heisey noted that he anticipated the union would want to discuss policy 312.2.3 Authorized Off-Duty Firearm.[7] Not all of those attachments are part of the record; thus, there is no way to confirm policy 312.2.3 was attached. We are unable to determine the date the employer first gave the union a draft of policy 312.2.3.

When Heisey returned from a vacation, he heard the union and some members had concerns with policy 312.2.3. Heisey scheduled a meeting to discuss the policy with the union.

On December 5, 2013, the union and employer met and discussed policy 312.2.3. The union explained why it objected to the inclusion of policy 312.2.3 in the policy manual. On December 8, 2013, the employer provided the union an editable version of policy 312.2.3. Based on the evidence presented in the case, this was the first written proposal made by the employer showing the changes it wanted to make to policy 312.2.3. Sometime between the union's receipt of the employer's proposal and December 19, 2013, the union e-mailed the employer a written counterproposal on policy 312.2.3.

No further proposals were exchanged until the employer e-mailed the union on December 19, 2013. Heisey e-mailed the union with the employer's amended policy 312.2.3 attached.[8] Rather than sending a modified policy 312.2.3 as a proposal, the employer told the union that policy 312.2.3 would "be inserted into [its] policy manual with amended wording . . . ."[9]

On December 24, 2013, the employer notified all employees that the policy manual had been updated and instructed employees how to log in and review the manual.[10] The employer thought the parties were at impasse and implemented the policy manual on December 24, 2013.

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6 Exhibit 3.

7 *Id.* Exhibit 3 did not include any of the attachments to the original e-mail.

8 Exhibit 7.

9 *Id.*

10 Exhibit 13.

The Examiner concluded that the employer proved "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." We disagree.

First, in this case the amount of time between when the employer initially provided the union with a list of policies the employer wanted to update and when the parties met is not fatal because it is unclear when the union actually received policy 312.2.3. There is no evidence that the union was provided a copy of policy 312.2.3 on September 13, 2013 or November 24, 2013.

Because the record does not contain all of the attachments to Heisey's September 13, 2013, and November 24, 2013, e-mails,[11] there is no way to discern whether policy 312.2.3 was included in the attachments. Exhibit 28 consists of two documents that were attached to the September 13, 2013, e-mail: the June 2013 Lexipol policy manual update release notes and the spreadsheet identifying the policies the employer wanted to update. Exhibit 43 is the spreadsheet identifying the policies the employer wanted to update with changes. Both versions of the spreadsheet identified policy 312.2.3 as a policy the employer wanted to update; however, the June 2013 Lexipol policy manual update release notes did not include policy 312.2.3.

Thus, there is no evidence that the union was provided a copy of policy 312.2.3 on September 13, 2013, or November 24, 2013. Based on the record, it is not clear when the union had a copy of policy 312.2.3 and the employer did not meet its burden of proving waiver by inaction.

Second, a finding of waiver by inaction is not supported by substantial evidence because the parties negotiated policy 312.2.3. The employer proposed implementing policy 312.2.3. The parties met and discussed the policy. The union voiced its opposition to the policy.[12] The union made a proposal. The employer modified policy 312.2.3 but did not offer its modifications as a proposal.

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[11] Exhibits 1 and 3.

[12] The union's rationale for its position is not germane to determining whether the parties negotiated policy 312.2.3. Rather, the union's position is to be judged by an arbitrator should interest arbitration be necessary.

Rather, the employer implemented the policy. Albeit brief, the parties actively bargained policy 312.2.3.

Third, it is impossible to overlook how the parties characterized the activities they were engaged in. Both union and employer witnesses testified that they were bargaining over policy 312.2.3.[13] For example, Bieber testified, "At this point I was a little frustrated in the process because I believed we had been negotiating those policies and their impacts all along since September."[14] He further stated, "My understanding is that we reached impasse in our negotiations over that policy."[15] In light of the evidence, we are unable to conclude that the union waived by inaction its right to bargain. Substantial evidence does not support such a finding and only supports finding that the parties were negotiating and the union did not waive its right to bargain.

Statutory Obligations for Interest Arbitration Eligible Employees

Where a bargaining unit of employees is 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. *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 Yakima*, Decision 9062-A (PECB, 2006).

The employees are commissioned law enforcement officers eligible for interest arbitration. RCW 41.56.030(13). The Examiner found policy 312.2.3 to be a mandatory subject of bargaining.[16] The employer was not at liberty to implement policy 312.2.3 without fulfilling its collective bargaining obligations, including proceeding to mediation and, if necessary, interest arbitration. For interest arbitration eligible employees, all changes to mandatory subjects of bargaining must

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[13] Tr. 117:13; 168:1-5; 179:23-180:9; 306:6-9; 315:21-24; 320:19-24; 323:2-7; 330:2-7.

[14] Tr. 306:6-9.

[15] Tr. 315:21-22.

[16] Neither party appealed the Examiner's conclusion that policy 312.2.3 was a mandatory subject of bargaining.

be made through agreement or the statutory impasse procedures. The requirements of RCW 41.56.440 include mid-contract changes.

The employer wanted to change a mandatory subject of bargaining. The employer and union negotiated policy 312.2.3. The employer was required to, and did, negotiate with the union. The parties did not reach an agreement. The next step was for the parties to submit the matter for mediation. If the parties could not reach an agreement during mediation, then the mediator could recommend to the Executive Director that the parties be certified for interest arbitration. RCW 41.56.440; WAC 391-55-200. On December 24, 2013, the employer implemented policy 312.2.3. By implementing policy 312.2.3, the employer did not meet its duty to bargain.

CONCLUSION

Waiver by inaction is an affirmative defense. The burden is on the employer to prove waiver by inaction. In this case, the employer did not plead waiver by inaction or meet its burden to prove that the union waived by inaction its right to bargain. Rather, substantial evidence supports finding that the parties were negotiating and the employer unilaterally implemented the policy before bargaining had concluded.

ORDER

Findings of Fact 1 through 6, 8 through 13, and 16 through 27 issued by Examiner Erin Slone-Gomez are AFFIRMED and adopted as Findings of Fact of the Commission. Findings of Fact 7, 14, and 15 are VACATED and the following Findings of Fact are substituted. The Commission makes the following Finding of Fact 28.

7. On September 13, 2013, Heisey e-mailed the union to confirm a system for proceeding with updating the policy manual and attached a number of Lexipol updates, but not policy 312.2.3, and an Excel spreadsheet identifying over 100 policies the employer wanted to update. The record does not contain all of the attachments to Heisey's September 13, 2013, e-mail. The Lexipol updates presented into the record did not contain policy 312.2.3.

14. After receiving a copy of policy 312.2.3 from the employer, the union proposed changes to the policy. The union provided its proposal on policy 312.2.3 sometime after December 8, 2013.

15. On December 19, 2013, Heisey e-mailed the union. Heisey included an amended policy 312.2.3, which the employer had not previously provided to the union. Heisey communicated the employer's intent to include policy 312.2.3 in the policy manual.

28. On December 24, 2013, the employer implemented the revised policy manual, including policy 312.2.3.

Conclusion of Law 1 issued by Examiner Slone-Gomez is AFFIRMED and adopted as the Conclusion of Law of the Commission. Conclusion of Law 2 issued by Examiner Slone-Gomez is VACATED and the following Conclusion of Law is substituted.

2. By its actions described in Findings of Fact 15 and 28, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

ORDER

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

1. CEASE AND DESIST from:

   a. Changing policy 312.2.3 without bargaining and, if necessary, engaging in the statutory procedures for interest arbitration eligible employees, including mediation.

   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 rescinding policy 312.2.3 (Authorized Off-Duty Firearm). Make the bargaining unit employees whole by compensating them for any costs and interest associated with qualifying their personally owned firearms in compliance with policy 312.2.3. Interest should be computed from the time the employee made the expenditure until the time he or she is reimbursed at the rate which would accrue on a civil judgment of the Washington State courts.

b. Give notice to and, upon request, negotiate in good faith with the Walla Walla Police Guild, including mediation and interest arbitration if necessary, before implementing policy 312.2.3.

c. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer 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 Walla Walla, 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, 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 her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 4th day of December, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

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DECISION 12348-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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