STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 32, Complainant, vs. PORT OF EVERETT, Respondent.	CASE 128465-U-16 DECISION 12641 - PORT ORDER OF DISMISSAL

On September 29, 2016, International Longshore and Warehouse Union, Local 32 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Port of Everett (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on October 26, 2016, indicated that it was not possible to conclude that a cause of action existed at that time. The complainant was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the case.

On November 14, 2016, the union filed an amended complaint. The Unfair Labor Practice Manager reviewed the amended complaint and is dismissing this case for failure to state a cause of action. Specifically, the complaint does not describe a change to a mandatory subject of bargaining that would trigger a bargaining obligation. This is a necessary element of a unilateral change allegation.

DISCUSSION

The allegations of the amended complaint concern:

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)], since April 1, 2016, by:

1. Unilaterally adding work hours to a part-time bargaining unit job position in order make it a full-time floater position that covers unanticipated, short notice shifts, without providing the union with an opportunity for bargaining.

2. Unilaterally decreasing the availability of overtime hours and overtime pay for bargaining unit employees by assigning unanticipated, short notice shifts to the recently created full-time floater position, without providing the union with an opportunity for bargaining.

A unilateral cause of action requires that the employer made a change to a mandatory subject of bargaining. Typically shift staffing levels are considered to be a permissive subject of bargaining. With regard to a refusal to bargain over the effects of shift staffing on employee overtime, the complaint is lacking necessary facts. The complaint does not describe a refusal to engage in bargaining over the effects of the new floater position on overtime opportunities.

LEGAL STANDARDS

Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To state a cause of action for unilateral change, the complainant must allege that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). 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. To decide, 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.* A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978).

Decision vs. Effects Bargaining

The bargaining obligation is applicable to both a decision on a mandatory subject of bargaining and to the effects of that decision, but will only be applicable to the effects of a managerial decision on a permissive subject of bargaining. "The employer may implement decisions within its sole prerogative *(e.g.*, the budget cut at issue in [*Federal Way School District,* Decision 232-A (EDUC, 1977),] or the shift staffing change at issue here) even though required bargaining has not been concluded on the effects of that decision (*e.g.*, layoffs proposed by the employer in *Federal Way*)." *City of Bellevue*, Decision 3343-A (PECB, 1990).

ANALYSIS

The amended complaint alleges that the employer unilaterally converted a part-time bargaining unit position into a full-time floater position on April 1, 2016. The full-time floater position fills-in and covers unanticipated, last minute work shifts as needed on day, swing, and graveyard shifts. The floater position is included in the existing security bargaining unit. The union alleges that the creation of the full-time floater position unilaterally altered the parties' past practice of making unanticipated, last minute open shifts available to bargaining unit employees as overtime opportunities with overtime pay.

In order to state a cause of action for unilateral change the complainant would have to explain how the employer's decision to convert a part-time position into a full-time floater position and increase

the number of full-time employees in its workforce could constitute a mandatory subject of bargaining. Generally, the size of an employer's workforce is a managerial prerogative, and therefore a permissive subject of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011) *citing City of Centralia*, Decision 5282-A (PECB, 1996).

The complaint argues that the employer's decision to increase regularly scheduled staffing by making a full-time floater position had the effect of depriving bargaining unit employees overtime opportunities and overtime pay. In most settings, other than certain public safety jobs, staffing levels are permissive subjects of bargaining. As the Commission explained in *Central Washington University*, Decision 10413-A "[a]lthough staffing levels are generally a management prerogative, and therefore a permissive subject of bargaining, the effects that the decision to lower staffing has on mandatory subjects are still subject to bargaining." Similarly, in cases were the employer decides to increase staffing, the union would have the right to demand effects bargaining over the effect the staffing changes had on existing employees' wages, hours, and working conditions.

The deficiency notice also pointed out that the complaint did not allege refusal to engage in effects bargaining. The amended complaint did not cure this defect. The facts alleged in the amended complaint do not describe employer refusal to engage in effects bargaining, over the impacts on availability of overtime work. Rather, the amended complaint argues that the employers' decision to create a full-time floater position itself should have triggered an obligation to give notice and provide the union with an opportunity to bargain over the related reduction of overtime work opportunities. This interpretation of bargain obligations is inconsistent with Commission case law, which describes employer decisions to adjust staffing levels as a management prerogative.

CONCLUSION

The employer appears to have intentionally increased the number of regularly scheduled staff hours, in order to reduce its need to use overtime to cover shifts. The employer's decision to convert a part-time bargaining unit position into a full-time floater position on April 1, 2016, and use that position to cover unanticipated, last minute open shifts appears to be a managerial

prerogative that would not require prior notice and an opportunity to bargain. The employer would have an obligation to bargain over the effects of its staffing decision on the wages, hours, and working conditions of existing employees, if the union were to make a demand to bargain. At this time, the facts alleged do not describe employer refusal to bargain over the effects on available overtime opportunities.

ORDER

The amended complaint charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 13th day of December, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JESSICA J. BRADLEY, Unfair Labor Practice Manager

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.

COLLECTIVE BARGAINING
PERC
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DECISION 12641 - PORT has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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CASE NUMBER: 128465-U-16

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