

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 77,

Complainant,

vs.

CITY OF SEATTLE,

Respondent.

CASE 128533-U-16

DECISION 12809 - PECB

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

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On November 4, 2016, the International Brotherhood of Electrical Workers, Local 77 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission. The complaint alleged that Seattle City Light, a division of the City of Seattle (employer), refused to bargain by unilaterally creating a new bargaining unit position without providing the union with notice and an opportunity for bargaining. The Commission's unfair labor practice manager issued a deficiency notice on December 2, 2016, concluding that the complaint did not describe facts addressing all elements of a unilateral change or other refusal to bargain violation. The union filed an amended complaint on December 7, 2016. On January 6, 2017, the unfair labor practice manager issued a preliminary ruling stating a cause of action existed. Examiner Daniel Comeau held a hearing on June 7 and 8, 2017. The record was closed on September 26, 2017.

ISSUE

The issue, as framed by the preliminary ruling, is as follows:

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 July 2016 by unilaterally establishing the terms and conditions of employment for a newly created Power Structures Mechanic Assigned Crew Coordinator position, without providing the union with notice or an opportunity for bargaining.

Based upon the record, the union's complaint is timely and states a cause of action limited to the effects of the employer's unilateral establishment of the Power Structures Mechanic Assigned Crew Coordinator position since July 2016. The employer unilaterally established these working conditions without providing the union with notice and an opportunity to bargain the effects of creating the position. Therefore, the employer's action was an unlawful *fait accompli*.

### BACKGROUND

#### *The Power Structures Mechanic Assigned Crew Coordinator Position*

The union and the employer were parties to a collective bargaining agreement (CBA) effective from January 23, 2013, to January 22, 2017. The union represents a bargaining unit consisting of the job titles listed in "Schedule A" of the CBA, which also included the positions' corresponding rates of pay. Schedule A included the following:

- Cable Splicer Crew Chief Assigned Crew Coordinator
- Meter Electrician Crew Chief Assigned Crew Coordinator
- Line Crew Chief Assigned Crew Coordinator
- Power Structures Mechanic (PSM)
- Power Structures Mechanic Crew Chief (PSM Crew Chief)

The CBA did not include the title Power Structures Mechanic Crew Chief Assigned Crew Coordinator or Power Structures Mechanic Assigned Crew Coordinator.

PSMs and PSM Crew Chiefs work in the South Field Operations Division of Energy & Delivery Operations, also known as Civil Construction.<sup>1</sup> Civil Construction is responsible for installing and

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<sup>1</sup> During the hearing, the parties referred to this division as "Civil Construction." Civil Construction will be used for the remainder of the decision.

maintaining all of the civil electrical infrastructure, such as underground vaults, conduits, and street lighting, and is the unit managed by South Field Operations Supervisor Gregory Carlson. In 2015, Carlson supervised four PSM Crew Chiefs, each of whom managed a crew consisting of varying numbers of PSMs and Utility Construction Workers. Kristy Tibbetts, a PSM at the time, was listed in a proposed organization chart under Jerri Emunson, one of the four PSM Crew Chiefs who reported to Carlson.<sup>2</sup>

Prior to 2015, each PSM Crew Chief was expected to coordinate with “engineers, contractors, departmental staff and other utility representatives and supervisory staff” to “supervise, plan, coordinate, and monitor the operations and crew members engaged in the construction, installation, and maintenance of underground distribution facilities.” Each PSM Crew Chief was responsible for this coordination as there was no centralized, stand-alone crew coordinator in Civil Construction for civil construction projects across all four of the civil crews. While the record is unclear as to precisely when the coordination workload became more intense, Transmission and Distribution Director Lee Simpkins testified that the workload become more intense due to increased regulation. Thus, there was a need for a stand-alone crew coordinator to handle all of the coordination duties (reviewing plans, ensuring valid permits, etcetera) across the four civil construction crews.

In January 2015, Carlson sought to create a Power Structures Mechanic Crew Chief Assigned Crew Coordinator position to perform a specialized coordination function. He submitted a Position Description Questionnaire to Senior Personnel Analyst Dawn Mitchell to reallocate an existing, vacant Utility Construction Worker position. His reason for the reallocation was “[t]o make more efficient the assignment and tracking of projects assigned through the Engineering group, which [was] streamlined with that of other Coordinators in each work group in [Energy & Delivery Operations] with knowledge and resources unique to Civil Construction.” He further noted that the position would continue to coordinate with various contractors on construction projects and with Line Crew Coordinators for work assignments on a daily basis. Sherman

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<sup>2</sup> The proposed organization chart listed Tibbetts in an out-of-class position. However, the record clearly shows that Tibbetts, prior to serving in that position, was a PSM.

Williams was one such crew coordinator who reviewed work assignment packets from Engineering and forwarded them to the appropriate PSM Crew Chief.

At the time of Carlson's request, the Power Structures Mechanic Assigned Crew Coordinator (PSM Assigned Crew Coordinator) position did not officially exist in the employer's job classification database. As a result, the reallocation could not be approved unless the city council publicly approved and budgeted for the new position. Instead of utilizing that process, Mitchell assumed that the requested position title was a "working title" and identified the PSM Crew Chief job classification as a sufficient match because of the similarity in duties. A working title is an informal title given to a position to more specifically capture the position's function within a department. Talent Acquisition Manager Keith Gulley testified that working titles allow his department to more precisely and effectively advertise for positions to prospective employees, who would be better able to ascertain the job functions.

The employer approved Carlson's reallocation request but officially reallocated the Utility Construction Worker position to a PSM Crew Chief. Mitchell admitted that she did not research or review any other crew coordinator positions within the city's job classification database. Mitchell testified that she believed the other crew coordinator positions performed different bodies of work. Although the employer reallocated the position to a PSM Crew Chief, Gulley testified that the initial job posting used the title Power Structures Mechanic Crew Chief Assigned Crew Coordinator.<sup>3</sup>

The employer posted the announcement for the "Power Structures Mechanic Crew Chief Assigned Crew Coordinator" position in May 2015 but received no applications. Having failed to fill this position, the employer approved a temporary position to perform a "special project" and "[w]ork as an OOC [out-of-class] Civil Coordinator to develop work processes that [would] support Civil Construction operations while creating an efficient team within the Planning and Scheduling Unit."

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<sup>3</sup> Note the distinction between the titles Power Structures Mechanic *Crew Chief* Assigned Crew Coordinator and Power Structures Mechanic Assigned Crew Coordinator, which is the title of the position currently in dispute. The employer did not clarify the need to drop the *Crew Chief* designation from the title when it offered up the permanent position in 2016.

The Planning and Scheduling Unit is where other assigned crew coordinators, such as Williams, perform the coordination work and is a distinct unit from Civil Construction.

Following the approval, Gulley developed a recruitment announcement for a “Power Structures Mechanic Assigned Crew Coordinator OOC.”<sup>4</sup> The employer utilized a competitive process to fill the position and selected Tibbetts for a one-year assignment beginning on July 8, 2015, and ending on July 7, 2016. The employer believed the union was entitled to notice of the position because it was within the union’s bargaining unit. On July 23, 2015, the employer sent the following e-mail to union business agent Joe Simpson and his assistant Nancy Greenup:

Please see the information below for your union notification.

Employee Name: Kristy Tibbetts  
Employee Title: Power Structure Mechanic  
OOO Title: PSM ASG CC  
Dates of Assignment: 7/08/2015 – 7/07/2016

Intermittent or Continuous Assignment: Continuous  
Reason for Assignment: Special Project – Work as an OOC Civil Coordinator to develop work processes that support Civil Crew operations while creating an efficient team within the Planning and Scheduling Unit.

None of the documents relating to the employer’s creation of the position—namely, the Position Description Questionnaire, the Classification Determination Report, the Out-of-Class Assignment Authorization form, or the actual job announcement—were attached to the e-mail.

Although Mitchell claimed the reallocated position fit the PSM Crew Chief job description, the newly reallocated position differed from the existing PSM Crew Chief position. Specifically, the new position was designated as a “working crew chief” when assigned a crew of five people or less. The working crew chief designation signified that the employee in this position was allowed to use the tools of the trade in order to perform the work with and for other crew members. Article 39.3 of the parties’ CBA, however, prohibited PSM Crew Chiefs from doing so and stated that they “shall supervise only and shall not be permitted to use tools except in the case of emergency.”

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<sup>4</sup> This position will hereafter be referred to as the “out-of-class” position.

In addition, the out-of-class job description differed from the information provided to Simpson in the July 23, 2015, e-mail. The e-mail indicated that Tibbetts would be creating an efficient work team in the Planning and Scheduling Unit. However, the job posting for the out-of-class position indicated that the employee would report to the "Civil Construction EC&M Supervisor," which was Carlson at the time.

Simpson, who had been the union's business agent since 2005 and had worked for the employer for 31 years prior to that, testified that he had received the July 23 e-mail. However, his understanding was that the position would only be filled for the duration of a special project. Specifically, Simpson testified that bargaining unit employees sometimes worked out-of-class as supervisors or on special projects in various city departments.

As the end of Tibbetts' special project year approached, her assignment was extended in order to give Gulley and his staff enough time to run an interview process for the permanent PSM Assigned Crew Coordinator position. The extension simply needed approval and not another competitive process, since Tibbetts had been selected as a result of the previous competitive process. Gulley testified that the employer did not believe it needed to notify the union of the extension since the employer had provided the union with notice of the position's creation on July 23, 2015.

The employer posted the announcement for the permanent PSM Assigned Crew Coordinator position in July 2016. After a competitive process, the employer promoted Tibbetts to the position at the rate of \$44.92 per hour. In this position, Tibbetts was still considered a working crew chief when assigned a crew of five people or less, but she reported to Andrew Lee in the Planning and Scheduling Unit rather than Carlson in Civil Construction. Tibbetts began working as the PSM Assigned Crew Coordinator on September 26, 2016, and the employer did not provide the union with notice that this permanent bargaining unit position had been filled.

#### *Union's Discovery of the Position and Disputed Coordination Work*

On October 11, 2016, as Simpson was preparing for a labor-management meeting with the employer, he discovered a Daily Crew Schedule for Civil Construction. He noticed that the schedule listed Tibbetts as "Crew Coordinator" and was unsure why she would be in that position

for the Civil Construction unit. Simpson testified that he did not know the employer had created or filled this position. In the meeting, Simpson asked Chief Administrative Officer Davonna Johnson and Labor Relations Coordinator Mushka Rohani about the position, but neither of them were able to provide a definitive answer. Johnson said that she would investigate and follow up with Simpson.

After reviewing the PSM Crew Chief job description and comparing it with the PSM Assigned Crew Coordinator advertisement, Johnson concluded that the positions were similar. Johnson directed Rohani to send an e-mail to Greenup (not Simpson) with the class specification and job advertisement attached. In the e-mail, Rohani stated, "Ms. Tibbetts's job description falls under the Crew Chief class and has the same duties and responsibilities that are defined in the class specification of Power Structures Mechanic Crew Chief and, additionally she has the same salary range."

The evidence presented by the union at hearing established precedent that the crew chief class series shared job descriptions and pay. For example, a Line Crew Chief and its counterpart Line Crew Chief Assigned Crew Coordinator shared exactly the same job description and the same rate of pay (\$52.06 per hour). The same circumstances existed for the Meter Electrician Working Crew Chiefs, Cable Splicer Crew Chiefs, and Electrician-Constructor Core Crew Chiefs and their respective corresponding assigned crew coordinators. However, Simpson objected to the creation of Tibbetts' position because, he claimed, it had never been bargained with the union and the work that crew coordinators had been performing was removed as a result.

The disputed work concerned the manner in which work project assignments were routed to the Civil Construction crews from Engineering. According to Williams, he received information from Engineering, reviewed it to determine the nature of the work and whether appropriate permits were up to date, decided to which crew the assignment should go, and then sent the assignment to the appropriate PSM Crew Chief. Williams testified that these duties made up a significant portion of his work and that the duties stopped when the employer moved Tibbetts into the position.

Simpkins, however, testified that he did not believe Williams routed Civil Construction assignments, but if Williams did, that work comprised less than 5 percent of Williams' work duties. Simpkins further claimed that Tibbetts had been coordinating Civil Construction work since 2011. However, Simpkins also testified that he did not supervise at the operational level. Furthermore, the 2015 out-of-class authorization form indicated that Tibbetts had not worked in that capacity prior to her 2015 appointment to the out-of-class position.

Since the hearing was held on June 7 and 8, 2017, the timing of Williams' estimate of one year, more or less, lines up with the employer's decision to make Tibbetts a permanent PSM Assigned Crew Coordinator and place her under Lee in the Planning and Scheduling Unit. Williams testified that the employer decided to move Tibbetts' work station into the same location as the other crew coordinators. The testimony provided by Williams in this regard is more consistent with the process outlined by the employer regarding its creation of Tibbetts' current position. Simpkins was not involved in the reallocation, recruitment, and promotion process, and his responsibilities at the time were at a much higher level from the daily operations of the unit.

*Bargaining History Regarding the Creation and Terms and Conditions of New Positions*

As previously mentioned, the CBA did not contain the position of PSM Assigned Crew Coordinator under Schedule A. Simpson testified that the position was not included because the parties were unable to effectively bargain its creation and corresponding working conditions. To support Simpson's testimony, the union presented documents from its working files, including a proposed Civil Coordinator job description from 2003 and a Memorandum of Understanding regarding pay increases for PSM Crew Chiefs.

The Memorandum of Understanding indicated that the union had agreed to a 6 percent pay increase for PSM Crew Chiefs in exchange for the employer making them working crew chiefs. Without this designation, the PSM Crew Chiefs would be prohibited from using tools of the trade and from working alongside crew members. The Memorandum of Understanding expired on January 22, 2009, which meant the PSM Crew Chiefs reverted to non-working crew chiefs.



The parties' CBA specifically prohibited crew coordinators from working as crew chiefs. Article 43.7 stated that "[e]mployees appointed to Crew Coordinator [would] not be assigned to the work of a Crew Chief except in emergencies." Tibbetts' PSM Assigned Crew Coordinator job description indicated that she was a working crew chief when she was assigned a crew of five people or less.

Finally, the parties' CBA contained provisions for the process by which crew coordinator positions would be filled. Specifically, Article 43 provided detailed bidding language for selecting employees into open crew coordinator positions. Article 43.3 mandated that crew coordinator vacancies "shall be filled by *seniority* bid in accordance with Section 28.14 from the Incumbent Non-Working Line Crew Chiefs respectively as of January 23, 1991." (emphasis added). This provision is but one example of the agreed-upon mechanisms for filling a crew coordinator position.<sup>5</sup> The employer presented evidence that it utilized a competitive process instead of seniority bidding to fill the permanent PSM Assigned Crew Coordinator position.

## ANALYSIS

### Applicable Legal Standards

#### *Scope of the Unfair Labor Practice Proceedings*

Once a properly filed complaint charging unfair labor practices is received by the Commission, it goes through the preliminary ruling process under WAC 391-45-110. As explained by the Commission in *King County*, Decision 9075-A (PECB, 2007), the Commission's unfair labor practice manager determines whether the facts of a particular complaint state a cause of action that can be redressed by the statutes this Commission administers. When reviewing a complaint, the unfair labor practice manager assumes that the alleged facts in the complaint are true and provable. *King County*, Decision 9075-A. If one or more allegations in the complaint state a cause of action, the unfair labor practice manager issues a preliminary ruling summarizing the allegation or allegations that will go forward to the hearing. *Id.*; WAC 391-45-110(2). However, if all or part of the alleged facts do not state a cause of action, the unfair labor practice manager issues a

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<sup>5</sup> Article 43.3 provided additional processes for filling crew coordinator vacancies, such as moving on to working crew chiefs by seniority if there were no non-working crew chiefs available to bid on the open crew coordinator position.

deficiency notice identifying the defects in the complaint. *King County*, Decision 9075-A; WAC 391-45-110(1).

After a deficiency notice is issued, the complainant has an opportunity to cure the deficiency by filing additional information in an amended complaint. WAC 391-45-110(1); *Northshore Utility District*, Decision 10304-A (PECB, 2009); *King County*, Decision 9075-A. If the complaining party cures the deficiency, then a preliminary ruling is issued and the case is forwarded to an examiner for hearing. *King County*, Decision 9075-A; WAC 391-45-110(2). If a complainant believes that the preliminary ruling fails to address one or more causes of action it sought to advance, then it must—prior to the issuance of a notice of hearing—seek clarification from the person that issued the preliminary ruling. WAC 391-45-110(2)(b); *Northshore Utility District*, Decision 10304-A.

The preliminary ruling limits the cause of action before an examiner and the Commission. WAC 391-45-110(2)(b). Once an examiner is assigned to hold an evidentiary hearing, the examiner can only rule upon the issues framed by the preliminary ruling. *King County*, Decision 9075-A, *citing King County*, Decision 6994-B (PECB, 2002). As explained in *King County*, Decision 9075-A, the purpose for limiting the cause of action in this way is to provide the responding party with sufficient notice of the facts and issues to be heard by the examiner.

#### *Timeliness of an Unfair Labor Practice Complaint*

An unfair labor practice complaint “shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.” RCW 41.56.160(1). The Commission has uniformly held that the six-month statute of limitations begins to run on, or is triggered by, the date of notice or constructive notice of the complained-of action. *City of Pasco*, Decision 4197-A (PECB, 1994), *citing Port of Seattle*, Decision 2796 (PECB, 1988); *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990). The notice provided by the employer to the union must be clear and unequivocal and communicate enough information about the decision or action to allow for a clear understanding. *City of Bellevue*, Decision 10830-A (PECB, 2012). Conversely, vague or indecisive statements are not adequate to put a party on notice of a decision or action. *Id.*, *citing Community College District 17 (Spokane)*, Decision 9795-A (PSRA, 2008).

The Commission has strictly enforced the statute of limitations, except in cases where the complainant had no actual or constructive notice of the acts or events forming the basis of the unfair labor practice complaint. *City of Bremerton*, Decision 7739-A (PECB, 2003), citing *City of Pasco*, Decision 4197-A. Under the “discovery rule,” the statute of limitations period does not begin to run until the complainant, using reasonable diligence, discovers the cause of action. *City of Renton*, Decision 12563-A (PECB, 2016), citing *U.S. Oil and Refining Co. v. State Department of Ecology*, 96 Wn.2d 85, 92 (1981).

An assertion that a complaint is untimely is an affirmative defense, placing the burden to establish the defense on the party asserting it. *City of Walla Walla*, Decision 12348-A (PECB, 2015). Similarly, the party asserting the applicability of equitable tolling bears the burden to prove the statute should be tolled. *City of Renton*, Decision 12563-A, citing *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379 (2009).

#### *Subjects of Bargaining and Unilateral Change*

Under Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). “[P]ersonnel matters, including 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, *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate. *Pasco Police Officers’ Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

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 a good faith impasse concerning a 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 prove a unilateral change, the complainant must prove 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). The complainant must also establish the existence of a relevant status quo or past practice and that a meaningful change to a mandatory subject of bargaining occurred. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), citing *King County*, Decision 4893-A (PECB, 1995).

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects of that decision. However, if a permissive subject of bargaining is at issue, the bargaining obligation only applies to the effects of a managerial decision concerning the permissive subject. *Central Washington University*, Decision 10413-A (PSRA, 2011), citing *Skagit County*, Decision 6348 (PECB, 1998); *City of Kelso*, Decision 2120-A (PECB, 1985) (finding the decision to contract out bargaining unit work and the effects of the decision on the employees are mandatory subjects of bargaining); *City of Kelso*, Decision 2633-A (PECB, 1988) (finding the decision to merge operations with another employer is an entrepreneurial decision that is a permissive subject of bargaining, and only the effects of that decision on employee wages, hours, and working conditions are mandatory subjects of bargaining). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such a decision could constitute mandatory subjects of bargaining. See *Wenatchee School District*, Decision 3240-A (PECB, 1990).

An employer is not required to delay implementation of a decision on a permissive subject of bargaining while effects bargaining occurs. *City of Bellevue*, Decision 3343-A (PECB, 1990); *Federal Way School District*, Decision 232-A. An employer cannot refuse to commence effects bargaining until after the permissive decision is implemented. *Spokane County Fire District 9*,

Decision 3661-A (PECB, 1991). When the effects are sufficiently foreseeable before implementation of a permissive decision, a bargaining obligation can arise. *Id.*

Notice must be given sufficiently in advance of the decision or the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *City of Mountlake Terrace*, Decision 11702-A (PECB, 2014), citing *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). The notice would not be considered timely if the employer's action has already occurred when the employer notifies the union (a *fait accompli*). *City of Mountlake Terrace*, Decision 11702-A. If a *fait accompli* is found to exist, the union will be excused from requesting bargaining. *Id.* A *fait accompli* will not be found if an opportunity for bargaining existed and the employer's behavior does not seem inconsistent with a willingness to bargain upon request. *Id.*, citing *Washington Public Power Supply System*, Decision 6058-A; See also *Lake Washington Technical College*, Decision 4712-A (PECB, 1995). The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *City of Mountlake Terrace*, Decision 11702-A.

#### Application of Standards

*The cause of action is limited to the effects of the employer's unilateral establishment of the PSM Assigned Crew Coordinator position.*

The January 6, 2017, preliminary ruling limits the cause of action in this case. Specifically, the preliminary ruling stated the cause of action as employer refusal to bargain "since July 2016 by unilaterally establishing the terms and conditions of employment for a newly created Power Structures Mechanic Assigned Crew Coordinator position, without providing the union with notice or an opportunity for bargaining." Therefore, the union's cause of action is limited to the effects of the establishment of the position.

The unfair labor practice manager reviewed the union's original complaint under WAC 391-45-110 and issued a deficiency notice on December 2, 2016. The unfair labor practice manager indicated the union's complaint was facially deficient because the facts alleged could not support the finding that creating the new position was a mandatory subject of bargaining. Instead, the creation of a new position is generally a permissive subject of bargaining, but the effects of

creating the new position on wages, hours, and working conditions could trigger an employer obligation to bargain.

The unfair labor practice manager went on to explain that a viable claim could be stated if sufficient facts were alleged that could either (1) prove the decision to create the new position was a mandatory subject of bargaining or (2) prove the employer's refusal to engage in effects bargaining. The union filed an amended complaint on December 7, 2016, alleging new facts related to the parties' bargaining of a PSM Assigned Crew Coordinator position. The union maintained its assertion that the creation of the new position was a mandatory subject of bargaining. In spite of these new allegations, the unfair labor practice manager limited the issue to effects bargaining in the January 6, 2017, preliminary ruling.<sup>6</sup>

The employer filed its answer on January 27, 2017, and a notice of hearing was issued on April 13, 2017. At no time following the preliminary ruling or before the notice of hearing did the union seek from the unfair labor practice manager a clarification or reconsideration of the preliminary ruling. Therefore, the preliminary ruling states the only cause of action to be decided by the examiner.

*The union's complaint is timely under the statute.*

The employer claims that the union's complaint is untimely. Thus, the employer has the burden to prove that the union had actual or constructive knowledge of the events forming the basis of the unfair labor practice complaint. *City of Walla Walla*, Decision 12348-A. For notice to be sufficient, it must be clear and unequivocal and it must provide enough information about the decision or action to allow for clear understanding. *City of Bellevue*, Decision 10830-A. Therefore, a vague or indecisive statement is not adequate to put a party on notice of a decision or action. *Id.*, citing *Community College District 17 (Spokane)*, Decision 9795-A.

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<sup>6</sup> WAC 391-45-550 prohibits parties from conferring the status of a mandatory subject on a permissive subject, including conferring such status through a practice of bargaining over the subject. Thus, the parties' bargaining history is irrelevant to any determination that creating the PSM Assigned Crew Coordinator position is a mandatory subject of bargaining.

In the present case, the complained-of action is the unilateral establishment of the working conditions for the PSM Assigned Crew Coordinator position “since July 2016.” The employer contends that the July 23, 2015, e-mail to the union regarding the temporary out-of-class position was sufficient to place the union on actual or constructive notice of the employer’s decision to create and utilize a permanent PSM Assigned Crew Coordinator position in late 2016. The employer’s argument, however, is not persuasive under these circumstances.

The out-of-class position was distinct from the position at issue in this case. The out-of-class position was temporary and created to perform a “special project” and “develop work processes that [would] support Civil Construction operations while creating an efficient team within the Planning and Scheduling Unit.” The PSM Assigned Crew Coordinator position at issue is a permanent position that serves as a centralized, stand-alone coordinator for Civil Construction crews.

The July 23, 2015, e-mail provided information pertaining *only* to the out-of-class position and provided no information regarding a permanent PSM Assigned Crew Coordinator. Based on the information provided, Simpson believed the position was only a temporary special project position. By not demanding bargaining at that time, Simpson was, at most, waiving any right for the union to bargain the working conditions of that particular out-of-class position in 2015 only. The working conditions of that position, however, are not at issue in this case.

The employer was in the best position to guard against any ambiguity in notifying the union of its intent to create and utilize a centralized coordinator position for Civil Construction. The employer’s process created a paper trail, which included a Position Description Questionnaire, a Classification Determination Report, and an updated job description relating to the newly reallocated PSM Crew Chief (that continued to be referred to as the PSM Assigned Crew Coordinator).<sup>7</sup> None of these documents were provided to the union or attached to the July 23, 2015, e-mail.

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<sup>7</sup> The distinction between the PSM Crew Chief and the PSM Assigned Crew Coordinator positions is discussed below in response to the employer’s argument that the two positions are the same.

Thus, the employer failed to meet its burden of proving that the July 23, 2015, e-mail placed the union on notice that the employer would unilaterally set the working conditions of a permanent PSM Assigned Crew Coordinator position in 2016.

*The unilateral establishment of wages and working conditions was an unlawful fait accompli.*

To prove a unilateral change, the complainant must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A; *City of Kalama*, Decision 6773-A; *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B. Since the cause of action in this case is limited to the employer's unilateral establishment of working conditions for the permanent PSM Assigned Crew Coordinator, the union's burden is to prove that the establishment of those working conditions resulted in a meaningful change to a mandatory subject of bargaining.

First, wages are mandatory subjects of bargaining under RCW 41.56.030(4). The employer unilaterally set the wage rate for the PSM Assigned Crew Coordinator at \$44.92 per hour, which changed the status quo. Previously, the employer had not utilized a department-specific coordinator in Civil Construction. Furthermore, the Line Crew Chief Assigned Crew Coordinators that had been doing this work were paid at the higher wage rate of \$52.06 per hour.

Second, the parties' CBA outlined their agreement on how crew coordinator positions would be filled. Specifically, Article 43 provided a detailed seniority bidding process to fill crew coordinator positions from the ranks of the existing crew chiefs. The employer did not utilize the seniority bid concept but instead engaged in a competitive process by posting and accepting applications for the position. The employer decided to appoint Tibbetts, who had never officially served as a PSM Crew Chief.<sup>8</sup>

As Gulley testified, Tibbetts' selection for this position was a promotion and placed her within the bargaining unit. Promotions within bargaining units have been found to be mandatory subjects of bargaining because they provide bargaining unit employees opportunities for improved wages and

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<sup>8</sup> Tibbetts previously served as a PSM and an out-of-class PSM Assigned Crew Coordinator prior to her appointment to the permanent position on September 26, 2016.



benefits. *See City of Anacortes*, Decision 5668 (PECB, 1996), *citing City of Hoquiam*, Decision 745 (PECB, 1979). By appointing Tibbetts to the PSM Assigned Crew Coordinator position in the manner that it did, the employer changed the seniority bidding procedures and adversely impacted promotional opportunities for existing crew chiefs.

The employer did not notify the union when it appointed Tibbetts to the position on September 26, 2016, because it erroneously believed that the July 23, 2015, e-mail was sufficient to place the union on notice for the 2016 PSM Assigned Crew Coordinator position. However, that e-mail was not sufficient notice for the establishment of the wages and working conditions of the 2016 position. Without notice, the union was unable to identify the effects of the position's creation on mandatory subjects and demand bargaining. Therefore, the employer's establishment of the position's working conditions was an unlawful *fait accompli*.

*The employer did not simply create an additional PSM Crew Chief position.*

The employer contends that the disputed position is simply a PSM Crew Chief performing the same duties that PSM Crew Chiefs have always performed. In its brief, the employer claims that those duties include "obtaining permits, taking care of phone calls if there are no locates on the job site, and coordinating and monitoring the operations of crews engaged in civil construction work." The employer argues that these facts illustrate that there was no change to any relevant status quo.

However, the evidence does not support the employer's argument. First, the reallocation did not simply create an additional PSM Crew Chief position. The PSM Crew Chief position that existed in the employer's job classification database was not a working crew chief, whereas the newly reallocated PSM Crew Chief was designated as a working crew chief. Moreover, the purported, newly created PSM Crew Chief is not utilized as PSM Crew Chiefs have historically been utilized. Previously, each of the four PSM Crew Chiefs were responsible for some form of coordinating *for their own individual crews*, as Simpkins testified. After the employer promoted Tibbetts in September 2016, the position became permanent and centralized in its coordination duties *across all of the civil crews*.

In addition, the employer's argument fails because it is inconsistent with the employer's actions. Carlson requested to reallocate a Utility Construction Worker position to a PSM Crew Chief Assigned Crew Coordinator. If he wanted a PSM Crew Chief, then he could have clearly requested that position title in his 2015 Position Description Questionnaire since the PSM Crew Chief position already existed. However, he did not request a PSM Crew Chief, and the title and description of the position he was seeking described something distinct and unique to Civil Construction. This unique position was intended "[t]o make more efficient the assignment and tracking of projects assigned through the Engineering group, which [was] streamlined with that of other Coordinators in each work group in [Energy & Delivery Operations] with knowledge and resources unique to Civil Construction."

PSM Crew Chiefs had not previously performed the streamlined and centralized coordination function. If the employer simply wanted an additional PSM Crew Chief, then the amount of time, effort, and energy it expended to establish the position was unnecessary. Instead, the evidence strongly suggest that the employer wanted to create a position distinct from its traditional PSM Crew Chief job classification.

### CONCLUSION

The union's complaint is timely and states a cause of action limited to the employer's unilateral establishment of working conditions for the PSM Assigned Crew Coordinator since July 2016. The employer unilaterally established these working conditions without providing the union with notice and an opportunity for bargaining the effects of creating the position. Therefore, the employer's action was an unlawful *fait accompli*.

### FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.030(12).
2. The International Brotherhood of Electrical Workers, Local 77 (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit

consisting of the job titles listed in “Schedule A” of the parties’ collective bargaining agreement, including crew chiefs and crew coordinators.

3. The union and the employer were parties to a collective bargaining agreement effective from January 23, 2013, through January 22, 2017.
4. The South Field Operations Division of Energy & Delivery Operations, or Civil Construction, is responsible for installing and maintaining all of the civil electrical infrastructure, such as underground vaults, conduits, and street lighting.
5. Civil Construction is managed by the South Field Operations Supervisor, who supervises four Power Structures Mechanic Crew Chiefs (PSM Crew Chiefs).
6. The PSM Crew Chiefs manage civil construction crews made up of various Power Structures Mechanics (PSM) and Utility Construction Workers.
7. In or before January 2015, increased regulation of Civil Construction work caused an increase in workload intensity for PSM Crew Chiefs and their civil crews.
8. This increased workload intensity necessitated a centralized coordinator for Civil Construction work projects and assignments.
9. In 2015, the employer reallocated a position to serve as a centralized coordinator for Civil Construction.
10. After unsuccessfully recruiting to fill the position to perform the coordination function for Civil Construction, the employer approved a temporary Power Structures Mechanic Assigned Crew Coordinator Out-of-Class position to perform a special project.
11. The effective dates for the out-of-class position assignment were July 8, 2015, through July 7, 2016, during which the position would be used to develop work processes and create efficiencies in coordinating Civil Construction work.

12. On July 23, 2015, the employer sent an e-mail to the union briefly explaining the nature of the out-of-class position and that Kristy Tibbetts had been appointed to the position.
13. The July 23, 2015, e-mail provided no information regarding a permanent Power Structures Mechanic Assigned Crew Coordinator (PSM Assigned Crew Coordinator) position or its wages and working conditions.
14. The employer posted the announcement for the permanent PSM Assigned Crew Coordinator position in July 2016.
15. The employer promoted Tibbetts on September 26, 2016, to the permanent PSM Assigned Crew Coordinator position at the wage rate of \$44.92 per hour.
16. Tibbetts' essential function was to coordinate work assignments for all Civil Construction work crews.
17. Prior to Tibbetts' appointment, Civil Construction coordination duties had been performed by other crew coordinators in the Planning and Scheduling Unit and by the individual PSM Crew Chiefs themselves.
18. Since there had been no permanent PSM Assigned Crew Coordinator position prior to September 26, 2016, there was no agreed-upon wage for the position.
19. The other crew coordinators performing this work, such as Line Crew Chief Assigned Crew Coordinators, were paid at the higher wage rate of \$52.06 per hour.
20. The employer unilaterally set the wage rate for the PSM Assigned Crew Coordinator position and changed the status quo.
21. Tibbetts' previous work experience with the employer had included service as a PSM and as a PSM Assigned Crew Coordinator Out-of-Class in a temporary, special project appointment.

22. The parties' collective bargaining agreement provided detailed seniority bidding procedures to fill crew coordinator positions from the ranks of the existing crew chiefs.
23. The employer did not utilize the seniority bidding procedures but utilized a competitive hiring process to select and appoint Tibbetts to the PSM Assigned Crew Coordinator position.
24. The selection procedure for filling the PSM Assigned Crew Coordinator position is a working condition of that position.
25. The employer unilaterally established the competitive hiring procedures for filling the PSM Assigned Crew Coordinator position and changed the status quo.
26. The employer did not provide the union with notice in 2016 of the PSM Assigned Crew Coordinator position's wages and working conditions.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By unilaterally establishing the wage rate for the PSM Assigned Crew Coordinator position without providing the union with notice and an opportunity for bargaining effects as described in Findings of Fact 13, 15, 18, 19, 20, and 26, the employer refused to bargain and violated RCW 41.56.140(4) and (1).
3. By unilaterally establishing the selection procedures to fill the permanent PSM Assigned Crew Coordinator position without providing the union with notice and an opportunity for bargaining effects as described in Findings of Fact 22 through 26, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

ORDER

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

1. CEASE AND DESIST from:
  - a. Refusing to bargain the effects of the establishment of the Power Structures Mechanic Assigned Crew Coordinator (PSM Assigned Crew Coordinator) position represented by the International Brotherhood of Electrical Workers, Local 77.
  - 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. Upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, Local 77 regarding the effects, including wages and working conditions, of the newly created PSM Assigned Crew Coordinator position.
  - b. 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.

- c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Seattle, 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.
- d. 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.
- e. 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 the Compliance Officer with a signed copy of the notice provided by the Compliance Officer.

ISSUED at Olympia, Washington, this 26th day of December, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DANIEL J. COMEAU, 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

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MARK R. BUSTO, COMMISSIONER  
MIKE SELLARS, EXECUTIVE DIRECTOR

### RECORD OF SERVICE - ISSUED 12/26/2017

DECISION 12809 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

  
BY: DEBBIE BATES

CASE NUMBER: 128533-U-16

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