STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY CORRECTIONS GUILD, Complainant, vs. SNOHOMISH COUNTY, Respondent.	CASE 130652-U-18 DECISION 13098 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On May 23, 2018, the Snohomish County Corrections Guild (union) filed an unfair labor practice complaint against Snohomish County (employer) with the Public Employment Relations Commission (Commission). The union filed an amended complaint on June 13, 2018. A preliminary ruling was issued on June 21, 2018, and an answer was filed on July 12, 2018. A hearing was conducted on June 11, 12, 13, 18, and 19, 2019, before the undersigned examiner. The parties filed post-hearing briefs on August 16, 2019, to complete the record.

ISSUES

The instant dispute centers on the employer's implementation of a new Lexipol policy manual and a new social media practice in 2018. The issues, as framed by the preliminary ruling, include:

1. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by unilaterally implementing a Lexipol policy manual without providing the union an opportunity to bargain?[1]

2. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by refusing to provide relevant information requested by the union related to the policy manual?

3. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by circumventing the union through direct dealing with bargaining unit members when it solicited comments and recommendations regarding the policy manual?

4. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by unilaterally implementing a new social media policy without providing the union an opportunity for bargaining?

5. Did the employer fail and refuse to meet and negotiate a new social media policy in violation of RCW 41.56.140(4) and (1)?

6. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by refusing to provide relevant information requested by the union related to the social media policy?

7. Did the employer refuse to bargain in violation of RCW 41.56.140(4) by circumventing the union through direct dealing with bargaining unit members when it solicited comments regarding the social media policy?[2]

Based on the evidence presented, I find that the employer has committed two of the alleged violations. I find that the employer made unilateral changes to mandatory subjects when it

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[1] When the Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights. *Mason County*, Decision 10798-A (PECB, 2011).

[2] The preliminary ruling certified two additional causes of action. The union withdrew these claims at hearing.

implemented four policies in the Lexipol manual. The employer also failed to properly respond to the union's information requests related to the Lexipol manual.

The remainder of the claims are dismissed. I find that the employer's communication with employees regarding the Lexipol policies did not rise to the level of unlawful direct dealing. The employer's implementation of a new Internet access practice did not constitute an unlawful unilateral change because it did not involve a mandatory subject of bargaining. There is insufficient evidence to show that the employer failed and refused to meet with the union or failed to provide relevant information regarding the Internet access policy. The employer did not engage in unlawful direct dealing regarding the social media policy, as the policy was not a mandatory subject of bargaining.

BACKGROUND

The employer is a public employer as defined by RCW 41.56.030(12). The union is the exclusive bargaining representative for a bargaining unit of all full-time and part-time corrections deputies below the rank of sergeant employed by the Snohomish County Sheriff's Office Corrections Bureau.[3] The parties' most recent collective bargaining agreement was effective from January 1, 2015, through December 31, 2017.

History regarding Employer Policies

Prior to 2018, there was no one place where employees could find all of the workplace policies and procedures utilized by the employer's Corrections Bureau. There were two policy manuals dating from different eras of employer governance, one from around 2006–07 and one from 2009. Each contained some policies and standard operating procedures that remained in effect until 2018. The employer had a Microsoft SharePoint platform and a software program called PolicyTech, that contained additional effective policies and directives. Because the employer's policies were so decentralized, at times, employees had to rely on searches of their e-mail to figure out which

[3] The Corrections Bureau is one of two main subdivisions of the Snohomish County Sheriff's Office. The other main subdivision or "side" of the Sheriff's Office is a patrol division.

authority on a given subject should prevail based on which they had been directed to follow most recently.

Certain policies in effect before January 1, 2018, are described below.

Annual Inspections and Policy Review

Prior to 2018, the employer was obligated by the Snohomish County Code to have an annual facilities inspection conducted by a qualified third party. However, before 2018, the employer had no formal written policy providing expectations and procedures for the inspection. There is no evidence that the employer's annual inspections before 2018 involved reviews of records and policies.

Affirmatively Promoting a Positive Public Image

The employer had a written policy entitled "Affirmatively Promoting a Positive Public Image," which set certain standards of conduct for corrections deputies to help maintain the reputation of the employer in the community. The policy applied to both off-duty and on-duty conduct. Specifically, there was evidence presented at hearing of discipline issued for violations of the policy before 2018 in which the conduct in question had occurred wholly inside the employer's facility for incidents involving mental health counselors and inmates.

Insubordination

The employer had a detailed written policy against insubordination. The policy generally stated that employees must observe and obey lawful employer directives, whether verbal or in writing. No language in the policy stated that an employee had to engage in a continuing pattern of defiance to be found insubordinate. The policy also contained examples of violations and non-violations. Examples of violations included "[r]efusing to report to a place of duty at the designated time and location," "[r]efusing to perform assigned work duties or tasks for the position being held," "[r]efusing to turn in a report as specifically directed to do so," and "[h]abitually challenging written directives."

Union president Charles Carrell testified that his understanding of the practice under the employer's policy was that an employee was typically warned when at risk of being found insubordinate for failing to obey, and only disciplined if the course of conduct continued.

Sick Leave

Prior to 2018, the employer maintained a written sick leave usage policy that stated that corrections deputies could be disciplined if their sick leave balances consistently dropped below 16 hours. Carrell testified that at some point before 2018, he had discussions with employer representatives about forthcoming changes in state law that would render the 16-hour rule within the employer policy unlawful, but there is no evidence that the employer changed its policy or practice before 2018.

Fitness for Duty

Language from the parties' last collective bargaining agreement and an employer policy set the parties' expectations regarding fitness for duty examinations prior to 2018. The employer could require employees to undergo physical and psychological fitness for duty examinations when there was "reasonable cause" to believe they were unfit. Employees were only required to provide their medical information to the examining medical professional. In turn, the examining professional's report to the employer was limited to stating whether the employee was fit or unfit for duty, and if unfit, to stating any prognosis, recovery period, and workplace accommodations that could assist the employee.

Drug Testing

The employer maintained a five-page written drug testing policy. The policy contained different standards for screenings before and during employment. Current employees were only subject to screenings upon "reasonable suspicion" of their violation of the employer's drug and alcohol policy, unless otherwise agreed to by contract. Employees ordered to undergo testing had the right to affirmative notice that they could have union representation present for such testing.

The urinalysis and sample processing procedures the employer would follow for drug testing were spelled out in detail in the policy. For example, the policy dictated that a supervisor would

transport the employee to the collection site and contained rules for when during the testing the supervisor and union representative should be present. The policy dictated which clinic would process the urine sample and gave the employee the right to a second, independent sample analysis upon request.

The parties' respective rights related to Breathalyzer testing for alcohol use were also dictated. For example, the policy required that such tests be performed in the presence of a supervisor by a "state certified BAC operator using a BAC verifier datamaster machine following protocols established by the State Toxicologist."

Reporting Arrests

Prior to 2018, the employer maintained a written policy that required employees to "report any criminal action including arrest that they are subject to [sic] their immediate supervisor within 24 hours." At hearing, Major Jamie Kane testified that this policy set the employer's expectations. Carrell testified that the employer's practice prior to 2018 was more lenient than written. He stated that employees were only expected to report arrests occurring in the immediate vicinity of Snohomish County and arrests that could impair employees' ability to perform their work (e.g., if a deputy lost firearms rights as the result of arrest).

Early Identification and Intervention System

Prior to 2018, there was no "early identification and intervention system" in place to flag potential employee performance problems on the Corrections Bureau side of the Sheriff's Office. The Sheriff's Office of Professional Accountability had a handbook that laid out such a system, but there is no evidence that it was ever used to monitor or coach deputies within the Corrections Bureau before 2018.

Administrative Searches

The employer maintains a locker system outside the secure portion of the facility but in an area not accessible to the public. It is used by employees to store items that they are prohibited from carrying on the job, such as cell phones. The union also has use of two lockers, with its own keys to the lockers. Union officials use the lockers to store documents, laptop computers, and other

items that they may need for meetings inside the facility. These can, at times, include the union's attorney-client communications.

At all relevant time periods, the Snohomish County Code has dictated that "[a]ny item or person entering or leaving a department facility shall be subject to search." In practice at the Corrections Bureau, however, Carrell testified that employees, including union officials, have historically enjoyed some expectation of privacy as to items placed in the lockers. Carrell stated that he believed the standard previously employed for a search was "probable cause." At least, if the employer was going to search the lockers for routine purposes, it provided some notice in advance. In the limited instances in which the employer had invaded the privacy of the lockers, the union had objected and "filed complaints."

Employee Speech

Before 2018, the Sheriff's Office had issued several written policies regarding social media use and online speech. The policies contained content related both to the operation of official employer social media accounts and employees' posts on social media from their own accounts. The policies prohibited certain types of speech, including speech that "impair[s] working relationships of this Office for which loyalty and confidentiality are important, impede[s] the performance of duties, . . . or negatively affect[s] the public perception of the Office," speech that could undermine an officer's credibility as a witness, and other types of online disclosures that could compromise the safety and security of the employer's employees. The policies contained carve-outs if the employer's policies conflicted with "state law or binding employment contracts to the contrary."

Carrell testified that the only online speech policy he was aware of was one prohibiting employees from endorsing products online in their official capacity.

Background Checks

Since at least 2014, the Sheriff's Office had a Prison Rape Elimination Act (PREA) policy that contained a section on background checks. The policy called for background checks for employees at least every five years. The policy also called for candidates for promotion to agree to a background check. Carrell lacked knowledge of the policy.

Disciplinary Segregation

The employer utilizes disciplinary segregation as a punishment for some inmates who violate facility rules. When inmates are in disciplinary segregation, they are confined individually, have less recreation time than the general population, and are only allowed out of their cells one at a time. They are allowed to be confined up to 23 hours per day.

Prior to 2018, the employer did not have a written policy that required the specific logging of the inmates in disciplinary segregation and their activities. Instead, corrections deputies assigned to a disciplinary segregation module of the facility would receive a disciplinary segregation letter that contained only basic information about the inmate.

Inmate Showers

Prior to 2018, the practice at the employer's facility was for inmates to be provided showers during recreation time. Inmates did not necessarily get immediate access to a shower upon assignment to a housing unit absent exceptional circumstances.

Recreation Logs and Inspection

Before 2018, there was no written or enforced requirement that employees log the beginning and end of each recreation period or inspect recreation areas when inmates came and went from the recreation area. Under existing practice, on warm days, inmates in the general population were allowed to come and go from the recreation space freely.

Culinary Tools

Before 2018, there was no effective written policy regarding the storage or utilization of culinary tools within the employer's facility. The practices regarding knives used by inmates working in the facility's kitchen included the knives being chained to the wall. They were not logged when used by inmates.

At one point in time there was a policy that called for employees to count the sporks provided to inmates before meals. Thereafter, however, the practice of how inmate meals were packaged changed, and by the time that employees received meal trays to serve inmates, the sporks were

already placed on the meal trays, with the meal trays stacked atop one another. Corrections deputies did try to count the sporks when they received the empty trays back from inmates.

Development of Lexipol Manual

The employer set a goal of creating one universal policy manual, and particularly, became interested in creating one with Lexipol. Lexipol is a private company that leases a web-based policy manual product to law enforcement and corrections agencies. Lexipol provides purchasers a generic policy manual filled with recommended policies and procedures on topics ranging from general employment matters to industry-specific practices. Purchasers can customize the Lexipol manual's content by editing the generic policies and/or adding their own policies to Lexipol's template. Both are done within Lexipol's online system.

Once a manual is created, Lexipol hosts the manual in an online portal. Licensed end users are provided log-in credentials to the system. Lexipol provides e-mail notifications to end users when policies are updated and when new policies are added to their employer's manual.

The employer began leasing Lexipol as early as 2011 and assigned an employee to create a Lexipol manual for the Corrections Bureau. The project was slow-going and eventually reassigned to Kane in 2014 or 2015. Kane's process of creating the Lexipol manual content involved reviewing the generic policies provided by Lexipol, seeking out existing policies and practices on a given topic, comparing the two, line by line, on two computer screens, and editing the Lexipol policy as desired to reflect certain existing related practices and procedures. Kane conferred with other employer officials as needed.

Announcement of Lexipol Manual to Union

The union became aware of the employer's interest in creating a Lexipol policy manual in 2016. Carrell sent a letter to Sheriff Ty Trenary at that time demanding to bargain regarding "Lexipol policies." The employer responded, indicating that it would be premature for the parties to bargain any prospective Lexipol policy changes at that time, as policies were still in the process of being developed. No further substantive discussion was had between the parties about Lexipol for some months.

In July 2017, the union received a notice from Bureau Chief Aston, which stated:

> The purpose of this memorandum is to notify the Guild Executive Board of the upcoming roll-out of the new Sheriff's Office Lexipol Policy Manual. We anticipate the implementation on October 15th 2017. The reformatted policy manual contains the overall principles, rules, and guidelines for the Corrections Bureau. Standard operating procedures are still being developed to address the step-by-step processes for daily operations of the Bureau.
>
> Please consider this letter a request for information to identify any effects or impacts of the protocol the Guild wishes to bargain.

Carrell responded on July 21, acknowledging receipt of Aston's notice and stating, in relevant part:

> The Guild hasn't been provided a copy of these new policies, nor have we been included in any discussions of what is being changed, so we don't know what these impacts will be at this time.
>
> However, the Guild is renewing our demand to bargain over the lexipol policies . . . . The Guild would request that you negotiate the decision to make this change as well as all as the effects and impacts of this change.
>
> We are also requesting that a copy of these new policies be provided to the Guild as soon as possible. This will allow us to review them and identify any potential impacts to our members prior to any face to face meetings. This will help both parties be able to negotiate this matter more efficiently.
>
> We would also request that until our negotiations are completed that the status quo on this issue be maintained.

On July 28, Aston responded, attaching a series of documents that he called "the complete Lexipol policy manual in draft form." Aston stated:

> This is a work that will require edits as they come in throughout many chapters. We invite your suggestions to this product. . . . Any and all suggestions / edits/ or corrections should be sent to Major Kane directly at this time. It is anticipated that we will have to resend updated versions to be discussed as we move forward. We look forward to working with your membership on this project.

The documents attached to Aston's e-mail totaled over 2,000 pages and included draft chapters of the Lexipol manual along with two generic policy manuals provided by Lexipol that the employer had used as a starting point for its work but did not intend to implement as employer policies. While the generic policy manuals were watermarked with the word "SAMPLE," Aston's e-mail did not identify that the documents were not policies that the employer was proposing to implement.

Carrell reviewed Aston's e-mail and drew the conclusion that the documents transmitted did not amount to final draft policies demonstrating which policies the employer proposed to implement. He recalled sending an e-mail back to the employer stating something to the effect that there appeared to be some errors and problems in the documents, that the documents sent clearly were not the final Lexipol policies, and that the employer should let the Guild know when the employer had final versions for the Guild to review. Carrell also asked for the policies in "bill draft" format so that the Guild could clearly identify what the employer was proposing to change from existing policy. That said, Carrell also instructed union officials to set to work reviewing the versions of the policies provided by the employer.

At hearing, Kane testified that it was not possible for the employer to provide bill draft versions of the new Lexipol policies, given how the manual had been drafted. However, the employer did not respond to Carrell's e-mail to tell him so. Kane testified that he had a speech that he "would tell the labor groups" about that, and that he had informed some union representatives this during a meeting in 2017, but he could not recall the specific setting, date, or name of the union representative he believed he had informed.[4]

Events Leading up to Implementation of Lexipol Manual

On August 25, 2017, the parties had a labor-management meeting. The parties discussed a long list of items at the meeting; among them, the union sought clarification of a draft Lexipol policy regarding taser use within the facility and whether it was intended to be a change of policy. The

[4] The employer had other labor groups (i.e., bargaining units of represented employees) to whom the Lexipol manual's policies would apply.

employer indicated that it would be a change of policy, and the employer agreed to review the draft Lexipol policy to ensure that change was clearly stated.

On September 25, 2017, Aston sent an e-mail to Carrell. It stated, in relevant part:

> The Lexipol manual has been reviewed by the division heads and supervisors to ascertain any changes that needed addressing. To date it would appear that the vast majority of corrections are grammatical in nature. Since sending the Guild a copy of the manual in July we have yet to receive any concerns, recommendations, or changes involving content. . . .
>
> In the interest of collaboration we agree to push out the implementation date for Lexipol to Jan. 1st 2018. This will give us more time to discuss any substantive changes you may consider needing to bargain. Please keep in mind that this document is a living product and will experience updates and corrections as time moves on. This may be dependent from everything to change of laws and policies to culture. The County will continue to send the Guild dates to meet for whichever venue (Demand to Bargain, or Labor Management) you choose. . . . We are committed to resolving all labor issues and look forward to your response.

There is no evidence that the union responded directly to Aston's e-mail.

Carrell testified that between July and December, he received intermittent e-mail notifications from the online Lexipol system informing him that he had new policies. However, he was repeatedly unable to log into the system with the credentials he had been given. Carrell informed Aston of this problem by e-mail on October 13 and testified that he let Captain Kevin Young know as well.

Carrell also testified that he had a series of conversations with employer representatives during the fall of 2017, including Lieutenant Mark Simonson, continuing to try to obtain final draft policies in bill draft format. He memorialized such a conversation in an e-mail to Simonson on October 13, 2017. There is no evidence of any employer response to the e-mail. Carrell testified that Simonson had stated verbally during their conversation that the employer's final draft versions of the policies were not yet ready.

In November 2017, Young sent an e-mail to employees informing them that a prior policy tool, PolicyTech, was being phased out to make room for a Lexipol manual "[i]n early 2018." Carrell responded to Young and stated that he continued to await a "finished copy" of the Lexipol policies in bill draft form. Carrell testified that he had a similar conversation with Young in person around that time, and the purpose of his e-mail was to memorialize the discussion. Carrell testified that Young also acknowledged that the employer did not have final versions of the Lexipol policies ready for review yet.

On December 5, 2017, Kane sent an e-mail to an "all hands" employee e-mail distribution list. Kane announced to employees that the employer would be moving forward with an online Lexipol policy manual, which was "set to go into effect on January 1st, 2018." He stated that staff would soon receive log-in credentials so that employees could begin to review the new policies. Kane also remarked on the state of the Lexipol manual, telling employees, in relevant part:

> This is a policy manual, which at this point has few procedures, and lacks post orders (which many of you have been asking for). Once the initial version is released, our team will immediately begin work on adding everything that is not and should be in there. . . .
>
> [T]here will still be other e-mails and directives floating out there that we didn't find or address. Please bring these to our attention through the process we define in future correspondence on this topic. . .
>
> Please be nice to us and kindly point out typos or formatting errors... We will be setting up a SCR-Lexipol e-mail address for you to send these to when you run across them. . .
>
> I look forward to getting it out there and hearing your feedback.

On December 8, 2017, Carrell sent a letter to the employer's labor negotiator Rob Sprague. Carrell indicated that he was sending the letter at Sprague's request on November 27, 2017, that all items the union was demanding to bargain be routed through him. Carrell identified a list of 22 items comprising the union's "current list of [its] demand to bargains [sic] with the Sheriff's office" and asserted that all of the items constituted mandatory subjects of bargaining over which the union wished to bargain the decision and effects. The Lexipol policy manual implementation was the

first item on Carrell's list. Carrell told Sprague that "the Guild [had] requested a copy of the policy changes in bill draft form" and "still [hadn't] received them."

Carrell informed Sprague of Kane's e-mail stating that the policies would go into effect in January 2018. He reiterated his request that the employer maintain the status quo until negotiations could be completed. Carrell offered to either fold some of the union's open demands to bargain into the parties' ongoing contract negotiations or set up a series of separate meetings to discuss them. Carrell did not recall receiving any response from Sprague.

Implementation of Lexipol Manual

Carrell's letter to Sprague did not cause the employer to delay its planned implementation of the Lexipol manual effective January 1, 2018.

Carrell continued to have issues accessing Lexipol through December 2017 and into January 2018. He recalled bringing this up again to Simonson, who acknowledged that the employer was having issues with the Lexipol system. Carrell was first able to access the online Lexipol system in mid-January 2018, after the employer policies went into effect.

At that point, by the text of the Lexipol manual and the employer's December 5, 2017, e-mail, the following Lexipol policies were in effect:

Annual Inspections and Policy Review (Policy 201)

The Lexipol manual includes a new policy calling for an annual inspection of the employer's facilities, records, and policies, to be overseen by the bureau chief. The policy is generally written and does not specify in writing who is to perform the inspection beyond the bureau chief, "key program staff and service providers," and "program managers." The policy does not specify the standards that would apply during the inspection or the specific consequences to employees of any deficiencies found. It did, however, require that "discrepancies" and "correction" found during the inspection be noted and that a report of some kind ultimately be compiled.

Affirmatively Promoting a Positive Public Image (Policy 403.3)

The employer imported the existing "Affirmatively Promoting a Positive Public Image" policy into the Lexipol manual nearly word for word. Carrell testified at hearing that he believed the employer's application of the policy broadened after the implementation of Lexipol, resulting in more examples of discipline issued for incidents occurring inside the employer's facility, rather than out in the community. Carrell gave one example that involved discipline issued under the policy when a deputy made "a smart-aleck comment" to a superior officer's wife inside the facility.

Insubordination (Policy 403.9)

When the employer adopted Lexipol, it imported its pre-existing insubordination policy without change. Carrell testified that at some point before the Lexipol manual implementation, around October 2016, the employer began expanding its practice of disciplining for insubordination. He testified that "a lot of things were now being considered insubordination that previously wouldn't have been considered insubordination," including failing to complete trainings on time. According to Carrell, the expansion of the practice continued when the employer adopted Lexipol. More disciplines for insubordination were issued in 2018 than in the five preceding years.

Sick Leave (Policy 403.15)

The employer imported its pre-existing sick leave policy word for word into the Lexipol manual, including the rule that allows for discipline if an employee's sick leave balance consistently remains below 16 hours. Since the implementation of the Lexipol manual, and at the request of the union in grievance meetings, the employer has agreed to rescind discipline for violations of the 16-hour portion of the policy and not to enforce that portion of the policy until it can seek legal advice regarding the change in law.

Fitness for Duty (Policy 408.6)

The Lexipol manual contains a new policy regarding fitness for duty examinations that goes into significantly greater detail than the employer's preceding policy. This policy calls for fitness for duty examinations "[w]henever circumstances reasonably indicate that the employee may be unfit for duty." The policy states that if an employee's condition was put into question in an administrative proceeding or grievance following the examination, the examining physician "may

be required to disclose any information that is relevant to such proceedings." The policy additionally permits the employer to keep the employee's medical information on file, though treated as confidential and kept in a separate medical file. It also states that employees can be disciplined for failing to sign releases of their medical information.

Drug Testing (Policy 409)

The drug testing policy in the new Lexipol manual is three pages in length. It allows for testing in three circumstances: if a supervisor "reasonably believes, based upon objective facts" that the employee is violating the drug and alcohol policy, if an employee discharges a firearm except if on accident, and in certain circumstances in which the employee has an on-duty motor vehicle crash. The policy contains no mention of an employer obligation to notify the employee of a right to union representation during the testing and contains no written protocols for the taking and testing of urine samples or Breathalyzer tests.

Reporting Arrests (Policy 411.5)

The employer's Lexipol policy on reporting arrests requires employees to immediately notify their supervisors of "any criminal detention, arrest, charge or conviction" regardless of the jurisdiction in which the matter is pending. The policy also requires employees to report proceedings or court orders that would prevent them from possessing firearms.

Early Identification and Intervention System (Policy 413.3)

New Lexipol policy 413.3, a subset of the "personnel complaints" section of Lexipol, imported an "early identification and intervention system" that was previously used on the patrol side of the Sheriff's Office to the Corrections Bureau. Policy language describes the system as a way for the employer to track and intervene in "problematic behavior" by employees. A need for intervention is flagged when an employee has three "indicators" in one quarter-year or four per year. Indicators can include such things as citizen complaints against employees (including those that are found to be "non-sustained") and use-of-force reports involving the employee. Once flagged, the policy calls for the employee to be counseled and trained, which the policy says is "not discipline."

However, the counseling and/or training should be reported on a performance incident report (PIR).[5]

Administrative Searches (Policy 413.8)

Lexipol policy 413.8 permits the employer to search the employer's lockers, among other workspaces, "upon a reasonable suspicion of misconduct." The policy also permits the employer to search lockers at "any time" for "non-investigative purposes" and provides the example of when the employer is looking for needed documents or equipment.

Following the employer's implementation of policy 413.8, there have been several instances in which the union has discovered employer officials searching the lockers with no prior notice.

Employee Speech (Policy 415)

The employer adopted a new policy entitled "Employee Speech, Expression and Social Networking" when it implemented Lexipol. The policy has several parts. First, the policy provides certain cautions regarding the dangers of social media to employees. The policy prohibits certain types of speech, in some instances whether from employer social media accounts or personal accounts. Examples of prohibited speech include "[s]peech or expression that . . . is significantly linked to, or related to, the Office and tends to compromise or damage the mission, function, reputation or professionalism of the Office or its employees." Speech that could compromise the employee's ability to be a credible witness and statements that could be reasonably foreseen to harm the safety of employees of the jail are other examples.

The policy prohibits employee endorsements that could be reasonably be perceived as endorsements by the employer. It also contains rules for the use of official employer social media accounts. The policy carves out exceptions for "speech [that] is otherwise protected" by law.

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[5] An addendum to the Lexipol manual describes performance incident reports and their uses by the employer. The addendum indicates that performance incident reports are meant to document performance "that is substantially above or below what is expected of a trained and experienced employee." One negative PIR appears to result in "an action plan to remedy the matter" and repeated negative PIRs on a similar topic "may be considered misconduct" by the employer.

Background Checks (Policy 501.18)

The employer imported the background check language from its 2014 PREA policy directly into the Lexipol manual.

Disciplinary Segregation Watch Logs (Policy 701)

The Lexipol manual contains a new policy governing certain procedures related to keeping inmates in disciplinary segregation. Particularly, the policy requires that employees document certain information related to inmates in disciplinary segregation and their activities, such as inmate identifying information, the date admitted to disciplinary segregation and reason(s) for admission, the dates and times the inmate entered and exited their cell, and any counseling given for the inmate's behavior.

Inmate Showers (Policy 707.7)

The Lexipol policy contains a statement that "[i]nmates shall be permitted to shower upon assignment to a housing unit, at least every other day thereafter and more often if practicable."

Recreation Logs and Inspection (Policy 1103)

This new employer policy requires employees to log the beginning and start of the recreation times for inmates in the general population and the employee's offer of recreation time to each inmate in more restrictive housing settings. The policy also calls for employees to inspect recreation equipment and to prevent inmates from utilizing broken items in an unsafe condition.

Culinary Tools (Policy 1401)

The employer's new Lexipol policy contains several new requirements regarding culinary tools. First, the policy calls for kitchen tools such as knives to be stored in a locked cabinet between uses. Employees are instructed to individually assign such tools to inmates and to log which inmate has which tool. The policy contains procedures for the return of the tools and what should happen if a tool is missing.

The policy also calls for employees to count the sporks provided to inmates for meals prior to and at the completion of each meal. The policy contains instructions for what should happen if any sporks are missing.

Internet and Social Media Use from Work Computers

History of Employees' Internet Use

Corrections deputies are provided access to employer-owned computers while on duty. The key work purposes of the computers are to run the employer's electronic jail management system and to provide employees access to the employer's e-mail and online training systems. Over the last several decades, the employer has had a series of policies regarding computer use. Generally speaking, the policies called for employees to use employer-provided computers for work purposes with some *de minimis* personal use allowed.

In the Corrections Bureau, until 2009, there was a firewall system that limited Internet access from workplace computers. The employer then decided to eliminate its firewall restrictions and give employees access to the Internet, subject to employer policies.

Some years later, the employer began to notice that employees' use of workplace computers for non-work purposes had escalated to the point that employees were openly and frequently engaging in personal business while on duty. This gave employer officials concern. Because the practice was so widespread, the employer decided not to initiate disciplinary investigations and instead began looking into the idea of blocking employees' access to non-work-related websites again.

Communications between the Parties

On February 1, 2018, Aston sent the following e-mail to the union:

> This is to advise of the county's interest in reducing access of non-work related social media within Corrections. We anticipate this to take place in the beginning of April 2018. It is our belief that such a protocol is within the core of the Sheriff Office's entrepreneurial control over corrections operations. We therefore do not consider the decision to implement such a protocol a mandatory subject of bargaining. We also believe the protocol does not have any significant impact or effect on the wages, hours, or working conditions of Custody Deputies. Please

> consider this letter a request for information to identify any effects or impacts of the protocol the Guild wishes to bargain.

Carrell responded that day, writing in part:

> This doesn't give us enough information for us to determine if this is a mandatory subject of bargain, or impact bargaining.
>
> What are you specifically referring to when you state "reducing access of non-work related social media within Corrections ". [sic] What specific policy\or policies are you intending to change, and what specific language is being proposed to change the policy\policies?

Carrell also stated that the union considered the change to involve a mandatory subject and demanded to bargain the decision and impacts of the change.

Aston stated the following by e-mail on February 14, 2018:

> The reduction of non-work related social media access within Corrections refers to the elimination of contact with certain websites on county issued computers. It is not our intent to block access to the county owned public Wi-Fi, therefore allowing employees to acquire web browsing from their personal devices while on break outside of the secure areas of the jail. There is no change in policy or said language therein. We hope this information clarifies our position, we are committed to resolving all labor issues and look forward to your response.

There is no indication that the union responded to Aston's e-mail.

Around the same time period, the union and employer were trying to find dates to bargain other open demands by the union, and apparently, sought to discuss the Internet-access change at such meetings. For example, on February 9, Kane sent an e-mail to union representatives including Carrell offering some dates and times to address "a variety of demand to bargain items" raised by the union. Another union representative informed Kane that Carrell was on vacation. Kane responded in part, "Either way, the offer is extended to your board."

When Carrell returned, he sent a lengthy e-mail back to Kane. He complained that Kane had sent his e-mail offering bargaining dates while Carrell was on vacation, and that of the dates offered, two were during his vacation and another was the date of a prescheduled joint labor-management training. Carrell informed Kane that only the president and 2nd vice president had the authority to negotiate on behalf of the union, and that the 2nd vice president's graveyard schedule made meetings during the employer's suggested meeting times difficult.

On March 1, Kane e-mailed Carrell. He stated that he thought the dates offered had accommodated the majority of the union's executive board and that with members on all three shifts, scheduling was a challenge. Kane thanked Carrell for his clarification of who was empowered to bargain for the union and stated that, given past approaches by a variety of different union representatives, "Quite frankly, we are never completely sure who can do what and when on behalf of the Guild." Kane further stated that the employer also had some items it would like to discuss with the union but that "upcoming vacations for multiple members of command . . . [would] put it out a little bit."

There was no further communication between the parties about scheduling bargaining sessions. The parties may have briefly discussed the Internet access subject "during a grievance meeting or something," but did not engage in formal bargaining.

Employer's Implementation of Change

Meanwhile, it took the employer some time to determine the scope of the websites it wished to ban. The employer gathered data from the county's Department of Information Services to help determine how much data Corrections Bureau staff was using on certain social media platforms.[6]

Eventually, an incident occurred that prompted the employer to action. The employer became aware of certain circumstances surrounding an in-custody death and came to believe that a

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[6] For example, in March 2018, the Department of Information Services ran a report comparing the Corrections Bureau's data usage on Facebook and YouTube to other county departments. The report showed that the Corrections Bureau was using vastly more data on each than other departments. The Corrections Bureau had used 43 gigabytes of data on Facebook during the same time period in which other departments were using 5–630 megabytes, and the Corrections Bureau staff had used 54 gigabytes on YouTube, compared to 10 megabytes–8 gigabytes by other departments. There are 1,024 megabytes in 1 gigabyte.

corrections deputy had been watching YouTube videos on the computer in his module throughout his shift, instead of doing required inmate-welfare checks. The employee had not checked on an inmate who was very ill. During the next shift, the inmate's condition was discovered, and he was transported to the hospital, where he died. The employer decided that it needed to address excessive Internet use urgently.

Soon thereafter, on May 16, Aston sent an "all hands" e-mail stating:

> This is to remind us all of the reduction of Non-work related Social Media access within the secure area of the jail. This will eliminate contact with certain websites from county issued computers. Please understand we will not be blocking the access to the county controlled public Wi-Fi, therefore allowing employees to acquire web browsing from their personal devices while outside of the secure area. This will take effective [sic] May 21st 2018.
>
> If you believe that access to a website has been discontinued that is essential to performing work related functions please send the information forward via your chain of command.

Later that day, Aston sent the union a list of the sites the employer intended to block. It is not clear whether the union responded, though some informal discussions were eventually had about some blocked websites that employees used for work purposes (to which the employer ultimately restored some access).

The employer enacted its Internet restrictions as planned on May 21, 2018. The employer continued to offer dates to meet with the union. For example, on June 28, 2018, Aston sent an e-mail to the union offering bargaining dates for later that summer. There is no indication whether the union responded.

ANALYSIS

Applicable Legal Standards

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). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *Vancouver School District*, Decision 11791-A (PECB, 2013).

A party may violate its duty to bargain in good faith by one per se violation, such as a refusal to meet at reasonable times and places or refusing to make counterproposals. *Snohomish County*, Decision 9834-B (PECB, 2008). A party may also violate its duty to bargain in good faith through a series of questionable acts that when examined as a whole demonstrate a lack of good faith bargaining but none of which by itself would be a per se violation. *Id.* When analyzing conduct during negotiations, the Commission examines the totality of the circumstances to determine whether an unfair labor practice has occurred. *Kitsap County*, Decision 11675-A (PECB, 2013), *citing Shelton School District*, Decision 579-B (EDUC, 1984).

Unilateral Changes

The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or terms of a collective bargaining agreement. *King County*, Decision 12451-A (PECB, 2016), *citing City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd, City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). 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 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). A complaint alleging a unilateral change 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 (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 Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the employer's action has already occurred when the employer notifies the union (a *fait accompli*), the notice would not be considered timely and the union would be excused from the need to demand bargaining. *Id.* If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining that could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Id.*, *citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

If the bargaining unit employees are eligible for interest arbitration, an employer may not unilaterally change a mandatory subject of bargaining without bargaining to impasse and obtaining an award through interest arbitration. *King County*, Decision 12632-A (PECB, 2017), *citing Snohomish County*, Decision 9770-A (PECB, 2008); *City of Walla Walla*, Decision 12348 (PECB, 2015). Interest arbitration is applicable when an employer desires to make a midterm contract change to a mandatory subject of bargaining. *City of Yakima*, Decision 9062-A (PECB, 2006).

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. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.* Recognizing that public sector employers are not "entrepreneurs" in the same sense as private sector employers, entrepreneurial control concerns the right of an employer to control the management and direction of government. *Central Washington University*, Decision 12305-A (PSRA, 2016), *citing Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission*, 81 Wis.2d 89, 95 (1977).

For mandatory subjects of bargaining, the parties have a duty to bargain over the decision and the effects of that decision. *Central Washington University*, Decision 10413-A (PSRA, 2011); *King County*, Decision 10547-A (PECB, 2010); *Kitsap County*, Decision 8402-B (PECB, 2007). For permissive subjects of bargaining, the parties only have a duty to bargain the mandatory impacts of the decision. *Central Washington University*, Decision 10413-A; *King County*, Decision 10547-A; *Kitsap County*, Decision 8402-B.

An employer is not required to delay implementation of a decision on a permissive subject of bargaining while impact or effects bargaining occurs. *City of Bellevue*, Decision 3343-A (PECB, 1990); *Federal Way School District*, Decision 232-A (EDUC, 1977). An employer cannot refuse to commence effects bargaining until after the permissive decision is implemented. *Spokane County Fire District 9*, Decision 3661-A.

Waiver

A party may waive its right to bargain in one of two ways: waiver by contract or waiver by inaction. Waiver is an affirmative defense and the burden of proving such waiver is on the party asserting it. *Lakewood School District*, Decision 755-A (PECB, 1980). An employer asserting a waiver by inaction defense carries a heavy burden in that it must establish that the only reasonable inference

is that the union has abandoned its right to negotiate. *City of Mountlake Terrace*, Decision 11702-A (PECB, 2014), *citing Clover Park Technical College*, Decision 8534-A (PECB, 2004). The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Id.*, *citing Seattle School District*, Decision 5733-B (PECB, 1998).

Refusal to Provide Information

The duty to provide information does not compel a party to create records that do not exist; however, a party does have an obligation to make a reasonable good faith effort to locate the information requested. *Kitsap County*, Decision 9326-B (PECB, 2010); *Seattle School District*, Decision 9628-A (PECB, 2008). The duty to locate the requested information also includes a duty to communicate with the requesting party to ensure that the information being gathered is the type of information that is being sought through its request. *See City of Seattle*, Decision 10249 (PECB, 2008), *aff'd City of Seattle*, Decision 10249-A (PECB, 2009). A party may not refuse to respond to an ambiguous or overbroad request, but rather that party is required to request clarification and/or comply to the extent that the request for information clearly asks for necessary and relevant information. *Kitsap County*, Decision 9326-B, *citing Keauhou Beach Hotel*, 298 NLRB 702 (1990). Similarly, if a requesting party does not believe the information provided sufficiently responds to the intent and/or purpose of the original request, the requesting party also has a duty to contact the responding party and engage in meaningful discussion about what kinds of information it is seeking so that the other party can comply with the request. *Id.*

Direct Dealing

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees over mandatory subjects of bargaining. *Central Washington University*, Decision 12305-A; *Royal School District*, Decision 1419-A (PECB, 1982). However, chapter 41.56 RCW does not preclude direct communications between employers and their union-represented employees. Employers retain the right to communicate directly with employees who are represented, provided that the communication does not amount to bargaining or other unlawful activity. *See Kitsap Transit*, Decision 11098-A (PECB, 2012), *aff'd on other grounds*, Decision 11098-B (PECB, 2013) (employer memorandum to

employees announcing a unilateral change was not circumvention); *Vancouver School District*, Decision 10561 (EDUC, 2009), *aff'd*, Decision 10561-A (EDUC, 2011) (employer communication of the employer's bargaining proposal to bargaining unit employees was not circumvention or direct dealing); *University of Washington*, Decision 10490-C (PSRA, 2011) (employer did not circumvent the union when it met with bargaining unit employees and listened to their concerns).

Whether communications between the employer and bargaining unit employees circumvent the exclusive bargaining representative is a fine line. *Central Washington University*, Decision 12305-A. Direct dealing need not take the form of actual bargaining. *Id.*

Application of Standards

Unilateral Change Allegations regarding Lexipol Policies

The parties each offer arguments that would treat the entire 900-page Lexipol manual monolithically and dictate one outcome for the entire manual. For the reasons stated below, I reject each of these arguments and find that a policy-by-policy approach to the analysis is instead warranted.

First, the union argues that because the Lexipol policy manual constitutes a set of work rules and work rules have sometimes been held to be mandatory subjects, the manual's adoption, in whole, was a change that the employer was required to bargain. I am not persuaded that the whole manual can be dealt with summarily. The Lexipol manual contains scores of policies on subjects as diverse as employee benefits, workplace protocols for supervising inmates, and facilities inspection requirements for the employer. The implications of each policy vary in type and intensity, and some may affect the employer more while others may affect employees more. To properly weigh the interests of each party in the alleged changes, as the *City of Richland* test requires, I find that a policy-by-policy analysis is most appropriate.

Next, the employer argues that the Lexipol manual, on the whole, did not result in even a single change of employer policy, and that the union's claim regarding the manual should be dismissed in full. I reject this argument as well.

The employer contends—relying on the testimony of Kane—that the Lexipol policy manual was merely a restatement of the employer's existing policies and practices and that, even where written policy language changed via Lexipol, the employer did not intend to enforce the new language or change its practices. The weight of the evidence contradicts the employer's argument. First, the Lexipol manual declares its import and effect in numerous places:

- "Your job, your future, and in many instances your family's future and security depends upon your . . . compliance with these policies, rules, and procedures."
- "All members are to conform to the provisions of this manual. All prior and existing manuals, orders and regulations which are in conflict with this manual are revoked, except to the extent that [an outside document covers subject(s) not covered by or in conflict with] this manual."
- "Employees of the Office shall be subject to disciplinary action in accordance with the provisions of this manual and for violations of the rules and regulations set forth herein."

A corrections deputy reading the passages above—as each was required by the employer to do when it unveiled the Lexipol manual—would reasonably believe that adhering to the language of the policies, whether old or new, was required.

The employer's rollout of the manual likewise suggests new policy content. For example, both Aston's July e-mails with the union and Kane's December "all hands" e-mail emphasized the employer's need to draft new procedures and post orders to fully implement the Lexipol policies. The employer offers no alternative explanation as to why new procedures would be needed if the underlying policies were not changing.

For these reasons, I apply the unilateral change analysis to each Lexipol policy raised by the parties individually.

Annual Inspections and Policy Review

The parties dispute whether this policy involves a mandatory subject of bargaining. The employer contends that its new policy, which requires an annual facilities, documents, and policies

inspection and dictates the scope and certain processes for such inspections, was not a mandatory subject. The employer calls the subject "an inherently permissive subject," which impacts the employer's "ability to self-examine [its] own operations." The union articulates no nexus to wages, hours, and working conditions except for speculating whether the policy "would impact working conditions."

The policy is written very generally, such that the policy does not appear to specifically place duties, responsibilities, or expectations onto corrections deputies. Because evidence affirmatively connecting the policy to corrections deputies' wages, hours, and working conditions is absent, I find that the policy is not a mandatory subject of bargaining. The employer did not err by unilaterally implementing the policy.

Affirmatively Promoting a Positive Public Image

The employer does not appear to dispute whether this policy implicates a mandatory subject of bargaining. However, the union has not proven a material, substantial change occurred as to this policy. The union concedes that the full, existing policy was imported into Lexipol but contends that the employer's practice under the policy changed and that the employer thereafter applied the policy more frequently to incidents inside the facility not involving the public. I do not find evidence of this. Carrell cited one example in which a corrections deputy was disciplined under the policy after January 1, 2018, for a remark made inside the facility to a superior officer's wife. The union fails to explain how this application of the policy is substantially different from the employer's prior application of the policy to incidents involving other members of the community inside the employer's facility, such as those involving mental health counselors and inmates.

Because the burden of proof is on the union to show a meaningful change from the *status quo* and the union has not, I dismiss this claim.

Insubordination

The employer does not dispute whether this policy implicates a mandatory subject of bargaining. The union has not proven any timely, meaningful change regarding the employer's insubordination policy, though. First, when questioned regarding a potential change to the employer's policy,

Carrell testified that he observed a change in the employer's conduct around October 2016. This is well outside the six-month statute of limitations for this case, which was filed in May 2018. RCW 41.56.160(1).

Within the timely period, there is insufficient evidence that the employer made any meaningful change. The employer did not change its written insubordination policy when it implemented Lexipol, and the union offered insufficient evidence that the employer's practice changed in a tangible way after or as a result of its Lexipol implementation. The union offered only Carrell's general perception that "a lot of things were now being considered insubordination that previously wouldn't have been considered insubordination," and a spreadsheet that appears to show an increased number of insubordination disciplines in 2018 by comparison to prior years. However, the union failed to show a meaningful contrast between the employer's application of its policy to particular situations before and after the implementation of the Lexipol manual, for example, by concretely explaining the examples in its spreadsheet. As the record was left, there are other possible narratives that could account for additional insubordination disciplines being issued (e.g., an increased rate of insubordinate acts).

The union bears the burden of proving a meaningful change from the *status quo*. I find that the union has not met its burden as to this policy.

Sick Leave

The employer does not appear to dispute that the employer's sick leave policy involves a mandatory subject. However, the union has not proven any change to the policy. The union concedes that the employer maintained its existing policy when it switched to Lexipol. At hearing, the union raised a different argument as to the employer's sick leave policy, contending that it violated state sick leave law. The union is limited to causes of action that it properly pleaded and was granted a preliminary ruling on which to proceed. WAC 391-45-270; WAC 391-45-110. To the extent that this new argument would fall within the purview of the Commission's jurisdiction, it was not properly raised, and I do not consider it.

Fitness for Duty

I find that the employer's imposition of a new fitness for duty examination policy constitutes a unilateral change from the *status quo*. The employer does not appear to dispute that this issue involves a mandatory subject of bargaining. The employer concedes that there are "literal" differences between the *status quo* and the Lexipol policy but contends that the practical differences are insubstantial. The evidence does not support this argument; I find that the union has proven a material, substantial change from the *status quo*.

The parties had previously negotiated specific collective bargaining language that protected employees from the disclosure of their medical information to the employer. Without bargaining, the employer imposed a new policy that revokes this protection and instead dictates that the employer can demand an employee's medical information from an examining physician in the context of certain proceedings. The policy allows the employer to retain employee medical information, albeit in an undefined "medical file," without clear limitations on the use of the information. The policy also calls for discipline if an employee refuses to sign requested medical releases. These changes constitute a significant change of a bargained-for right, over which the employer is obliged to bargain both the decision and the effects of that decision.

Drug Testing

The employer's revision of its drug testing policy also constitutes an unlawful unilateral change from the *status quo*.

The employer does not appear to dispute that this policy involves a mandatory subject.

The employer's changes to the *status quo* were significant. The employer gutted a lengthy drug testing policy when it switched to Lexipol, omitting many specific protections previously afforded to employees. These protections included, for example, the express right to be notified of the right to union representation before a drug test; guarantees about where, how, and by whom drug and alcohol testing could be conducted; and the employee's right to an independent second specimen processing of a urinalysis sample upon request. The new policy also adjusted the language of the "reasonable suspicion" standard and created two express independent circumstances that did not

previously exist, which would allow the employer to order testing of an employee. These changes required notice and an opportunity to bargain over the decision and the effects of that decision.

Reporting Arrests

The employer does not appear to dispute that this policy involves a mandatory subject. The union has not proven the other elements of a unilateral change, however.

Both before and after the Lexipol implementation, the employer's written policy required employees to report arrests or other criminal actions to their supervisors promptly. Despite this, the union claims that the employer's practice prior to 2018 was lenient and only required employees to report arrests in the immediate vicinity or that impaired their ability to perform their work (e.g., if a deputy lost firearms rights as the result of arrest). The union contends that the employer's new language calling for the reporting of all arrests (regardless of the jurisdiction in which the arrest occurred), would, thus, significantly change its practice. The evidence for and against this claim is in equipoise. Union witness Carrell testified in support of the union's argument, but employer witness Kane also testified credibly that its expectations prior to 2018 about the scope of criminal actions to be reported were as written in the policy (i.e., would pertain to any jurisdiction). The union carries the burden of proving a material, substantial change from the *status quo*. Based upon the record, I do not find that the union met that burden.

Early Identification and Intervention System

The parties dispute whether this policy involves a mandatory subject. The union contends that the policy should be found a mandatory subject because it imposes a new system under which employee conduct is monitored by the employer, beyond the scope of the existing discipline and performance evaluation structures. The union argues that the early identification and intervention system does not contain the same investigation-protection rights that the union has achieved in formal misconduct/discipline investigations and that it could be used to sidestep the established discipline process. The union contends that by the letter of the policy, corrections deputies assigned to certain posts that routinely require uses of force to perform their work (booking, for example) would nearly always be flagged for follow-up through the early identification and intervention system.

On the other hand, the employer points to language in the policy calling the early identification and intervention system a non-disciplinary process. The employer contends that not only is the system non-disciplinary, it is not "even an indictment of an employee's performance." The employer cites *Snohomish County*, Decision 9291-A (PECB, 2007) for the proposition that processes "designed to assist the employer in supervising employees" are managerial prerogatives.

Considering both parties' interests and arguments, I find that the union's interests predominate and that the early identification and intervention system contemplated by the policy constitutes a mandatory subject. First, reviewing the evidence, I am not persuaded that the early identification and intervention system is wholly non-disciplinary. The policy states that early intervention by the employer should be documented on a PIR. Assuming the resulting PIR would be a negative PIR (as the early identification and intervention system flags perceived "problematic behavior"), multiple such reports "may be considered misconduct" by the employer, per an addendum to the Lexipol manual describing the uses of PIRs. That addendum also indicates that PIRs are used in performance evaluations, which undermines the employer's claim that being flagged by the new system is not "an indictment of an employee's performance."[7]

Based on the foregoing, I am persuaded that the early identification and intervention system has crossover with the established disciplinary and performance evaluation systems for corrections deputies. The employer certainly has some interest in being able to manage and evaluate the performance of its employees, but I find that the union's stated interests in being able to safeguard established protocols related to potential misconduct predominate, based on the risks to employees cited by the union. The policy is a mandatory subject of bargaining.

For some of the reasons stated above, I also find that the policy constitutes a meaningful change from the *status quo*. The evidence was clear that the early identification and intervention system had never before been applied on the Corrections Bureau "side" of the Sheriff's Office to monitor

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[7] The employer's citation to *Snohomish County*, Decision 9291-A, does not bolster its argument, as the quotation presented by the employer is taken out of context. Other portions of that decision address whether something is or is not a mandatory subject of bargaining, but the portion cited by the employer appears to relate to a different issue: whether or not a Weingarten violation occurred.

corrections deputies. The new policy systematizes indicators that pull employees into a scheme of monitoring, counseling, and potentially, discipline for misconduct or negative performance reviews that may have career-lasting impacts on employees. This was a change for which notice and a meaningful opportunity for bargaining both the decision and its effects was required.

Administrative Searches

The employer does not appear to dispute that this policy involves a mandatory subject.

With respect to the *status quo* before 2018, I do not find that the employer had a specific "probable cause" standard for locker searches before 2018, as the union contends. The union offered no policy, collective bargaining agreement provision, or other source to demonstrate the mutually acknowledged use of such a specific standard. I do find that the union produced credible testimony that the employer lacked an acknowledged right to search lockers for routine purposes with no prior notice to employees or the union, though.[8]

By the language of Lexipol policy 413.8, the employer sought to unilaterally grant itself an expanded right to conduct searches of employee belongings. This is a meaningful change and thus a change that the employer was obligated to bargain.

Employee Speech

The parties do not appear to dispute whether the policy is a mandatory subject. However, the union has not met its burden of proving that the policy constituted a material and substantial change. The union bases its argument that a meaningful change occurred on Carrell's testimony that the only relevant expectation of employees prior to the Lexipol manual was a prohibition on endorsing products in employees' official capacities. Following Carrell's testimony, though, the employer produced several written social media policies pre-dating 2018 and presented testimony that the policies had been in effect. The union failed to address this evidence in its rebuttal case

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[8] The employer provided brief testimony from Kane that implied that when he had been a rank-and-file employee, he did not consider himself to have an expectation of privacy when using employer lockers. His unexplained, subjective perception does not rebut the more robust and specific testimony about the prior practice offered by the union.

or post-hearing brief. I do not conclude that the endorsement prohibition was the only online speech policy in effect before Lexipol.

The pre-existing and Lexipol policies, though different in appearance and specific text, cover much of the same terrain. Both sets of policies include guidelines for the operation of the employer's official social media accounts, words of caution regarding social media use, and prohibitions on certain types of online speech (e.g., speech that would harm the employer's operational functionality and mission, undermine employees' credibility as witnesses, and speech that could jeopardize other employees' safety). The union fails to point out any material and substantial changes between the two sets of policies, and thus, has not met its burden of proof regarding this Lexipol policy.

Background Checks

The employer does not appear to dispute that its background checks policy involves a mandatory subject. The union has failed to meet its burden of proving that the employer's Lexipol policy constitutes a change from the *status quo*, though. Carrell testified during the union's case in chief that he didn't believe the employer had a prior policy calling for background checks after an employee's initial hiring. The employer then introduced its written PREA policy from 2014, which was directly copied into the Lexipol manual, calling for employee background checks at least every five years and upon promotion. The union offered no other evidence to support its claim and, consequently, has not met its burden of proof.

Disciplinary Segregation Watch Logs

The employer contends that its Lexipol policy requiring employees to log certain activities of inmates held in disciplinary segregation is not a mandatory subject of bargaining. The employer's interest in the policy is to ensure that the employer meets its legal obligations to inmates in disciplinary segregation and can defend against civil rights lawsuits alleging improper inmate treatment. Because of the restrictive nature of disciplinary segregation, the employer argues that its interest in ensuring proper recordkeeping is heightened. By comparison, the union's stated interest is whether the policy is logistically feasible based on one reading of what the policy could

require. Failure to abide by the policy could also conceivably lead to discipline per the portions of the manual cited above.

Weighing both interests, I find that the employer's interest in setting employee recordkeeping standards to safeguard its legal risk more closely relates to "the right of an employer to control the management and direction of government" than the union's interest relates to the fundamental interests of employees in wages, hours, and working conditions. *Central Washington University*, Decision 12305-A. Managing legal risk is, in part, an operational choice designed to conserve resources. Whether a public entity meets its legal obligations to inmates can also impact the reputation of the agency, and I find this is something that the management should rightly be able to manage.

Because I find that this Lexipol policy does not involve a mandatory subject, the employer was not obliged to bargain its decision before implementing the policy; however, it would be obligated to bargain any impacts on mandatory subjects.

Inmate Showers

The parties dispute whether Lexipol policy 707.7, prescribing when inmates shall be given showers, is a mandatory subject of bargaining. The employer contends that the timing and frequency of inmate showers is a managerial prerogative that affects its fulfillment of its core mission to safely and humanely house inmates. The union points out that the policy "created confusion over working conditions" and gave the union concerns that "jailhouse lawyers" may manipulate the policy if interpreted strictly to grant an inmate shower rights immediately upon assignment to a housing unit, rather than when practicable after assignment. This shows only a vague nexus to employees' core interests in wages, hours, and working conditions.

Weighing both interests, I find that the employer's interest in setting standards to ensure safe and hygienic conditions for inmates predominates. The policy does not involve a mandatory subject, and the union's claim regarding the policy fails.

Recreation Logs and Inspection

The parties dispute whether this employer policy, imposing requirements for the inspection of inmate recreation equipment and logging of inmate recreation time, constitutes a mandatory subject. The union contends that the practice it interprets the policy to require would not be logistically feasible.[9] The union also cites the risk of discipline as a factor in favor of the policy's categorization as a mandatory subject. The employer contends that the policy presents another area where its ability to ensure the safety of the jail environment affects its ability to fulfill its core mission.

Weighing both parties' stated interests, I find that the employer's inmate safety interest predominates and places the policy closer to a managerial prerogative than to a core issue of wages, hours, and working conditions. The policy is not a mandatory subject, and the employer was not obliged to bargain its decision before implementing the policy; however, it would be obligated to bargain any impacts on mandatory subjects.

Culinary Tools

The parties dispute whether this policy, imposing protocols for how corrections deputies distribute and account for knives and sporks used by inmates, is a mandatory subject of bargaining. The union again raises questions about the protocols' feasibility and states that its interest is in preventing discipline. The employer contends that its interest is in ensuring safeguards to prevent inmates from obtaining a likely source of weaponry and potentially causing harm.

Weighing all cited interests, I find that the employer's interest in setting appropriate safety standards predominates and places the policy closer to a managerial prerogative than to a core issue of wages, hours, and working conditions. The policy is not a mandatory subject, and the employer was not obliged to bargain its decision before implementing the policy; but again, the employer would be obligated to bargain any impacts on mandatory subjects.

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[9] The union appears to interpret the policy language, "notation at the beginning and end of each rec period shall be made on the activity log," to mandate logging of each time each general population inmate comes and goes from the recreation yard during a free recreation period.

Waiver by Inaction Defense

The party asserting an affirmative defense has the burden as to that defense, and the Commission has held that a party asserting waiver by inaction bears "a heavy burden." *City of Mountlake Terrace*, Decision 11702-A, *citing Clover Park Technical College*, Decision 8534-A. To find waiver by inaction, the evidence must show that the union's intent to abandon its right to negotiate is the "only reasonable inference" to be drawn from its conduct. *Id.* While the union's record of communication regarding its review of the Lexipol policies was not perfect, based on the record presented, I cannot find that its intent to abandon its bargaining right was the only reasonable inference to be drawn from its conduct. The union did not waive its right to bargain.

The record as to this defense is thorny. The union made a demand to bargain "Lexipol policies" upon first hearing of the employer's intent to create a Lexipol manual in 2016 and renewed that demand in July 2017 upon receiving formal notice from Aston that the employer would implement a Lexipol manual effective October 15, 2017. The union's July e-mail requested to bargain both the decision to implement a Lexipol manual and the impacts. Aston provided over 2,000 pages of material to the union, including draft policies, and asked the union to identify which subjects, if any, the union wished to bargain. The union did not ultimately identify any impacts to the employer.

Aston sent a second formal notice to the union on September 25, 2017, notifying the union that the employer would extend the date on which it intended to implement the Lexipol policies as it had not heard from the union regarding any impacts the union wished to bargain. There is no evidence that the union responded to Aston's e-mail.

In addition, it is undisputed that the employer attempted to give Carrell access to some version of the Lexipol policies via the Lexipol platform throughout this time.

If this was the extent of the record, the case for a waiver defense may have been clearer. However, the union offered unrebutted evidence of concurrent events that undermine the defense and suggest alternative explanations for the union's conduct.

Carrell testified that though he asked other union-involved individuals to begin reviewing the draft policies sent in July, he also sent an e-mail to the employer stating his understanding that the draft policies transmitted were not the employer's final versions and asking the employer to let the union know when the employer had final versions in bill draft format to review. Carrell also testified that into the fall of 2017 he had several face-to-face conversations with employer officials involved in the Lexipol manual project in which he followed up on these requests and was told that final versions of the policies were not ready for review. Carrell's testimony that he continued to pursue final, bill draft versions is corroborated by contemporaneous e-mails to Simonson and Young, which apparently went unanswered.[10]

Carrell also offered unrebutted, unimpeached testimony that though the employer had attempted to notify him of policies for review in Lexipol, he had difficulty accessing Lexipol using the log-in credentials he had been given. Carrell documented the problem in an e-mail to Aston on October 13, 2017. Carrell's testimony that he also informed Young of this problem (and was told by Young that it was an ongoing problem with the Lexipol system) was unrebutted.

Finally, after the employer sent its "all hands" e-mail to employees on December 5, 2017, announcing the rollout of Lexipol effective January 1, 2018, the union again asserted its demand to bargain. On December 8, 2017, the union sent a letter to Sprague, a designated labor negotiator for the employer, reiterating unequivocally that the union continued to demand to bargain over the Lexipol policies, pointing out that it was still awaiting final draft policies in bill draft format, and requesting that the employer maintain the status quo.

This series of actions is inconsistent with an intent to waive the right to bargain changes resulting from the implementation of Lexipol. Based on the record presented, the employer failed to meet its burden for this affirmative defense.

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[10] The employer's failure to respond to Carrell's requests for bill draft versions of the policies is further discussed below.

Refusal to Provide Information

The union contends that Carrell made repeated requests for bill draft versions of the employer's proposed policy changes and that his request went wholly unanswered. Carrell testified that he first made this request during the summer of 2017 in response to Aston's e-mail. The union contends that Carrell continued to request bill draft versions of the revised policies through fall 2017 and relies on written communications to employer representatives Simonson, Young, and Sprague that demonstrate Carrell's reiteration of his request. I find that the employer did not properly deal with the union's request.

It is apparent to the Examiner that communications between the parties during this time were not functioning optimally. This matter could have been resolved simply. The union made a request for a set of specific documents that did not exist, and the employer was entitled to rely on the union's specific request. *Kitsap County*, Decision 9326-B. The employer was also not obligated to create records that did not exist. *Id.* However, the employer was required to communicate the fact that no responsive documents existed. I find that it failed to do so.

First, I do not credit Kane's testimony that he informed the union that bill draft versions of the Lexipol policies did not exist. When asked directly at hearing whether he had informed the union between July 2017 and January 1, 2018, that no bill draft versions existed, Kane did not answer directly. Instead, he gave an overview of general speeches that he "would tell the [various] labor groups" representing the employer's employees about how the manual was "Frankensteined" together and no track changes resulted. The employer's counsel redirected him to the question of whether a specific conversation had occurred with this union, and while Kane ultimately answered in the affirmative, his recollection of how such a conversation happened was unreliably vague. For example, Kane could not identify the time period for the conversation with specificity beyond speculating that he believed he may have done so at a labor-management meeting or some other type of meeting before August 2017. However, the union offered credible testimony that there had been no other labor-management meetings in 2017 beyond the August 25, 2017, meeting. Kane could not name the union representative(s) with whom he had the alleged conversation or recall anything specific about the conversation.

Moreover, the employer was given other opportunities in the fall of 2017 to inform the union that its requested documents did not exist—when Carrell reiterated his request to Simonson, Young, and Sprague. Yet there is no evidence that any employer representatives ever responded to those communications.

Direct Dealing regarding Lexipol Policies

The union also argues that the employer engaged in unlawful direct dealing with employees over the Lexipol policies. I find that the employer's conduct does not amount to direct dealing.

The key piece of evidence is Kane's December 5, 2017, e-mail to employees announcing the implementation of the new Lexipol policies. In his e-mail, Kane first described the work-in-progress nature of the Lexipol manual. He stated that the manual lacked procedures and post orders, "which many [employees had] been asking for," and informed employees that his team would be issuing updates to the manual in the future. Kane then stated that the team had incorporated into the manual existing directives they could locate but added that "there will still be other e-mails and directives floating out there that we didn't find or address." Kane asked employees to bring those items to his team's attention. Kane also asked employees to notify him of typos or formatting errors in the manual. He concluded by saying that he "look[ed] forward to getting it out there and hearing [employees'] feedback."

Additionally, there is evidence that at least one employee offered substantive feedback to an employer representative on the Lexipol policies following Kane's e-mail. However, that employee testified without hesitation that his communications were a "one-way street," in which the representative thanked him for the feedback but did not negotiate potential changes with him or make changes in response to his feedback. Overall, it does not appear that the employer made many substantive changes to the Lexipol manual between July 2017, when it sent draft contents to the union, and January 1, 2018, when it implemented a final manual.

There can be a fine line between lawful and unlawful communications. Here, the employer's conduct treads close to the line, but I find that it does not cross it. Several Commission decisions are instructive. In both *Central Washington University*, Decision 12305-A and *Skagit Regional*

Health, Decision 12616-A (PECB, 2016), unlawful circumvention was found based on employers' solicitation of employees for feedback on a mandatory subject, receipt of feedback, and use of the feedback to make a decision regarding the mandatory subject, while cutting out the employees' union. An employer's conduct does not necessarily have to take the form of bargaining to be circumvention. *Central Washington University*, Decision 12305-A. However, the Commission has also instructed that an employer's announcement of its own unilateral changes to employees may not suffice. *Kitsap Transit*, Decision 11098-A.

The main point of Kane's December 5, 2017, e-mail was to announce its decision to implement new Lexipol policies that the employer had unilaterally crafted. The employer then solicited feedback on basic document formatting problems like typos, which does not amount to substantive discussion of any mandatory subject.

The employer also encouraged employees to be forthcoming with any of the employer's existing directives that the employer had failed to incorporate or address in the manual. This presents a closer question, particularly whereas the employer was seeking information from employees while concurrently avoiding its duty to bargain with the union. Ultimately, however, I do not conclude that this statement was an improper offer to directly negotiate changes to mandatory subjects with employees. Instead, I conclude from the sentence and its context that the employer was trying to marshal all of its own policies into one location.

Finally, the record shows that when substantive feedback on the Lexipol policies was offered by an employee, it did not generate inappropriate back-and-forth negotiations or change the employer's plans with respect to its rollout of the policies as announced. This distinguishes the employer's conduct from the employers in *Central Washington University*, Decision 12305-A and *Skagit Regional Health*, Decision 12616-A.

Unilateral Change Allegation Regarding Social Media Policy

The first step to proving a unilateral change violation is to prove that the alleged change regarded a mandatory subject of bargaining. Utilizing the two-part *City of Richland* analysis, I conclude that the decision to limit social media, online shopping, and personal e-mail websites within the

secure portion of the employer's facility was not a mandatory subject of bargaining. The employer was not obligated to bargain its decision to limit on-duty access to the websites.

The Extent to Which the Action Relates to Employee Wages, Hours, or Working Conditions

The union contends that limiting employee access to social media, shopping websites, and e-mail websites on work devices while inside the secure portion of the facility impacts corrections deputies' working conditions because it impairs corrections deputies' ability to reach the outside world during their shifts. Because employees are also not allowed to bring their cell phones into the secure portion of the jail, employees relied upon these online forms of communication to communicate with family members during their shifts; for example, to be notified of a family emergency during a shift.

However, the record shows that there are additional ways for employees to be reached in event of emergency. The employer maintains landline phones in each module of the jail, and employees carry portable radios for communication. The jail has staff available to route calls or messages from family members to corrections deputies. In some circumstances, the employer has also issued employer-owned flip phones to employees to carry when they are experiencing ongoing but temporary family emergencies, such as when a baby is due. Employees are also free to use their personal cell phones and other devices during rest and meal breaks outside the secure portion of the facility.

The union likens this case to *Seattle Community College*, Decision 12014 (CCOL, 2014) and argues that both generally dealt with "changes in technology affect[ing] the working conditions." In *Seattle Community College*, a union alleged an unlawful unilateral change when an employer changed the learning management system through which it offered online courses to students. There, the examiner found that the decision to change learning management systems was not a mandatory subject necessitating decision bargaining.

The Extent to Which the Action Is an Essential Management Prerogative

On the other hand, the employer articulated several management interests in limiting employee access to social media, online shopping, and personal e-mail websites within the secure portion of the facility. First, the employer has a strong interest in ensuring inmate safety by minimizing workplace distraction while employees in the secure portion of the facility are intended to be supervising inmates. Aston testified that ensuring inmate safety was a "core dut[y]" of the Corrections Bureau and that, particularly, the employer was under pressure to curb a history of in-custody deaths. For example, the change was enacted in the immediate wake of an in-custody death investigation in which it was revealed that a corrections deputy was watching YouTube videos rather than performing required inmate welfare checks during his shift.

Employer witnesses identified additional inmate and public safety concerns underlying the decision. The jail is a secure facility, and the employer has an interest in ensuring that inmates do not inappropriately locate and contact codefendants, victims, or others. Employer witness Kane testified that there were rare occasions on which staff were manipulated by inmates to use their social media and Internet access for the inmates' benefit, and the employer saw this as a safety risk.

Other interests identified by the employer included its public image, accountability to the public for its use of resources such as Internet bandwidth, and lost productivity stemming from excessive distraction.

Decision Bargaining Conclusion

I conclude that the employer's interest in ensuring the safety of those in its custody, as well as the public, is compelling and that, overall, its interests predominate over the union's identified interest here. The employer was not obligated to bargain its decision to restrict the websites, but it was obligated to bargain any effects on mandatory subjects upon request.

Effects Bargaining

The evidence is insufficient to show that the employer refused to engage in effects bargaining regarding the Internet-access policy. The union demanded bargaining on February 1, 2018, over

both the decision and effects of the employer's Internet-access change. However, based on the record presented, it appears that the union did little thereafter to pursue effects bargaining. Kane attempted to schedule meetings with the union during February 2018, and union representatives were not available. Kane invited the union to meet again in the near future but indicated that the employer had its own availability challenges during the coming weeks. The evidence does not show that the union followed up in an attempt to set meetings thereafter or that the union was rebuffed.

The employer was not obligated to wait until effects bargaining had occurred to implement its decision. *City of Bellevue*, Decision 3343-A. The parties could have bargained regarding the effects afterward. The record after the employer's implementation shows that the employer continued its efforts to schedule meetings with the union.

If there was a deficiency in the employer's conduct, it has not been proven.

Direct Dealing Regarding Internet Access

The employer did not unlawfully circumvent the union when implementing the Internet-access change, as the change did not involve a mandatory subject. *King County*, Decision 9979 (PECB, 2008), *citing City of Pasco*, Decision 4197-B (PECB, 1999).

Refusal to Meet and Bargain

The preliminary ruling also identified a claim for refusal to meet and bargain based upon the union's assertion that in early 2018 "the County intentionally offered [bargaining] dates on which it knew President Carrell would be on vacation or otherwise unavailable." The union has not proven that the employer officials involved in bargaining knew of Carrell's vacation and intentionally offered certain dates in order to thwart meeting, or again, that the employer otherwise refused to meet with the union. This claim is dismissed.

Refusal to Provide Information Regarding Internet Access

The union has also failed to prove that the employer failed or refused to provide information to the union regarding its Internet access change in February 2018, as alleged in the complaint and

certified by the preliminary ruling. In February, when Aston notified the union of its "interest in reducing access of non-work related social media within Corrections," Carrell asked, "What are you specifically referring to . . . [?] What specific policy\or policies are you intending to change, and what specific language is being proposed to change the policy\policies?"

The record shows that Aston responded to both of Carrell's questions on February 14, stating that the employer was referring to eliminating "contact with certain websites on county issued computers" and that no policy language would change. There is no indication that the union asked for further information or documents that went ignored by the employer. This claim is dismissed.

Remedy

The standard remedy for a unilateral change violation includes ordering the offending party to cease and desist and, if necessary, to restore the *status quo*; make employees whole; post notice of the violation; and order the parties to bargain from the *status quo*. *City of Anacortes*, Decision 6863-B (PECB, 2001). The union asks that the employer be ordered to rescind the Lexipol manual in its entirety as a return to the *status quo*. However, as the employer never changed the *status quo* as to certain subjects of bargaining within the 900-page Lexipol manual, rescission of the entire manual is unwarranted. The appropriate remedial order is one requiring that the employer return to the *status quo* only on those subjects on which there has been a unilateral change, including fitness for duty testing, drug testing, the early identification and intervention system, and administrative searches.

The employer also failed to properly respond to the union's information requests related to the Lexipol manual. The standard remedial order in information request cases includes requiring the respondent to cease and desist from its unlawful conduct and to post and read notices to communicate that it has disavowed the unlawful actions.

The union also seeks certain extraordinary remedies, including the appointment of a mediator empowered to direct the parties' compliance efforts and bargaining, as well as an award of attorneys' fees. While the Commission has the discretion to fashion remedies to prevent and

remedy unfair labor practices, based on the facts and circumstances presented in this matter, I decline to order the extraordinary remedies requested by the union.

FINDINGS OF FACT

1. Snohomish County is a public employer as defined by RCW 41.56.030(12).

2. The Snohomish County Corrections Guild is the exclusive bargaining representative as defined by RCW 41.56.030(2) for a bargaining unit of all full-time and part-time corrections deputies below the rank of sergeant employed by the Snohomish County Sheriff's Office Corrections Bureau.

3. The parties' most recent collective bargaining agreement was effective from January 1, 2015, through December 31, 2017.

4. Prior to 2018, there was no one place where employees could find all of the workplace policies and procedures utilized by the employer's Corrections Bureau. There were two policy manuals dating from different eras of employer governance, one from around 2006–07 and one from 2009. Each contained some policies and standard operating procedures that remained in effect until 2018. The employer had a Microsoft SharePoint platform and a software program called PolicyTech, that contained additional effective policies and directives.

5. Because the employer's policies were so decentralized, at times, employees had to rely on searches of their e-mail to figure out which authority on a given subject should prevail based on which they had been directed to follow most recently.

6. Prior to 2018, the employer was obligated by the Snohomish County Code to have an annual facilities inspection conducted by a qualified third party. However, before 2018, the employer had no formal written policy providing expectations and procedures for the

inspection. There is no evidence that the employer's annual inspections before 2018 involved reviews of records and policies.

7. The employer had a written policy entitled "Affirmatively Promoting a Positive Public Image," which set certain standards of conduct for corrections deputies to help maintain the reputation of the employer in the community. The policy applied to both off-duty and on-duty conduct. Specifically, there was evidence presented at hearing of discipline issued for violations of the policy before 2018 in which the conduct in question had occurred wholly inside the employer's facility for incidents involving mental health counselors and inmates.

8. The employer had a detailed written policy against insubordination. The policy generally stated that employees must observe and obey lawful employer directives, whether verbal or in writing. No language in the policy stated that an employee had to engage in a continuing pattern of defiance to be found insubordinate. The policy also contained examples of violations and non-violations. Examples of violations included "[r]efusing to report to a place of duty at the designated time and location," "[r]efusing to perform assigned work duties or tasks for the position being held," "[r]efusing to turn in a report as specifically directed to do so," and "[h]abitually challenging written directives." Union president Charles Carrell testified that his understanding of the practice under the employer's policy was that an employee was typically warned when at risk of being found insubordinate for failing to obey, and only disciplined if the course of conduct continued.

9. Prior to 2018, the employer maintained a written sick leave usage policy that stated that corrections deputies could be disciplined if their sick leave balances consistently dropped below 16 hours. Carrell testified that at some point before 2018, he had discussions with employer representatives about forthcoming changes in state law that would render the 16-hour rule within the employer policy unlawful, but there is no evidence that the employer changed its policy or practice before 2018.

10. Language from the parties' last collective bargaining agreement and an employer policy set the parties' expectations regarding fitness for duty examinations prior to 2018. The employer could require employees to undergo physical and psychological fitness for duty examinations when there was "reasonable cause" to believe they were unfit. Employees were only required to provide their medical information to the examining medical professional. In turn, the examining professional's report to the employer was limited to stating whether the employee was fit or unfit for duty, and if unfit, to stating any prognosis, recovery period, and workplace accommodations that could assist the employee.

11. The employer maintained a five-page written drug testing policy. The policy contained different standards for screenings before and during employment. Current employees were only subject to screenings upon "reasonable suspicion" of their violation of the employer's drug and alcohol policy, unless otherwise agreed to by contract. Employees ordered to undergo testing had the right to affirmative notice that they could have union representation present for such testing.

12. The urinalysis and sample processing procedures the employer would follow for drug testing were spelled out in detail in the drug testing policy. For example, the policy dictated that a supervisor would transport the employee to the collection site and contained rules for when during the testing the supervisor and union representative should be present. The policy dictated which clinic would process the urine sample and gave the employee the right to a second, independent sample analysis upon request.

13. The parties' respective rights related to Breathalyzer testing for alcohol use were also dictated in the drug testing policy. For example, the policy required that such tests be performed in the presence of a supervisor by a "state certified BAC operator using a BAC verifier datamaster machine following protocols established by the State Toxicologist."

14. Prior to 2018, the employer maintained a written policy that required employees to "report any criminal action including arrest that they are subject to [sic] their immediate supervisor within 24 hours." At hearing, Major Jamie Kane testified that this policy set the employer's

expectations. Carrell testified that the employer's practice prior to 2018 was more lenient than written. He stated that employees were only expected to report arrests occurring in the immediate vicinity of Snohomish County and arrests that could impair employees' ability to perform their work (e.g., if a deputy lost firearms rights as the result of arrest).

15. Prior to 2018, there was no "early identification and intervention system" in place to flag potential employee performance problems on the Corrections Bureau side of the Sheriff's Office. The Sheriff's Office of Professional Accountability had a handbook that laid out such a system, but there is no evidence that it was ever used to monitor or coach deputies within the Corrections Bureau before 2018.

16. The employer maintains a locker system outside the secure portion of the facility but in an area not accessible to the public. It is used by employees to store items that they are prohibited from carrying on the job, such as cell phones. The union also has use of two lockers, with its own keys to the lockers. Union officials use the lockers to store documents, laptop computers, and other items that they may need for meetings inside the facility. These can, at times, include the union's attorney-client communications.

17. At all relevant time periods, the Snohomish County Code has dictated that "[a]ny item or person entering or leaving a department facility shall be subject to search." In practice at the Corrections Bureau, however, Carrell testified that employees, including union officials, have historically enjoyed some expectation of privacy as to items placed in the lockers. Carrell stated that he believed the standard previously employed for a search was "probable cause." At least, if the employer was going to search the lockers for routine purposes, it provided some notice in advance. In the limited instances in which the employer had invaded the privacy of the lockers, the union had objected and "filed complaints." I find that the union produced credible testimony that the employer lacked an acknowledged right to search lockers for routine purposes with no prior notice to employees or the union.

18. Before 2018, the Sheriff's Office had issued several written policies regarding social media use and online speech. The policies contained content related both to the operation of official employer social media accounts and employees' posts on social media from their own accounts. The policies prohibited certain types of speech, including speech that "impair[s] working relationships of this Office for which loyalty and confidentiality are important, impede[s] the performance of duties, . . . or negatively affect[s] the public perception of the Office," speech that could undermine an officer's credibility as a witness, and other types of online disclosures that could compromise the safety and security of the employer's employees. The policies contained carve-outs if the employer's policies conflicted with "state law or binding employment contracts to the contrary." Carrell testified that the only online speech policy he was aware of was one prohibiting employees from endorsing products online in their official capacity.

19. Since at least 2014, the Sheriff's Office had a Prison Rape Elimination Act (PREA) policy that contained a section on background checks. The policy called for background checks for employees at least every five years. The policy also called for candidates for promotion to agree to a background check. Carrell lacked knowledge of the policy.

20. The employer utilizes disciplinary segregation as a punishment for some inmates who violate facility rules. When inmates are in disciplinary segregation, they are confined individually, have less recreation time than the general population, and are only allowed out of their cells one at a time. They are allowed to be confined up to 23 hours per day.

21. Prior to 2018, the employer did not have a written policy that required the specific logging of the inmates in disciplinary segregation and their activities. Instead, corrections deputies assigned to a disciplinary segregation module of the facility would receive a disciplinary segregation letter that contained only basic information about the inmate.

22. Prior to 2018, the practice at the employer's facility was for inmates to be provided showers during recreation time. Inmates did not necessarily get immediate access to a shower upon assignment to a housing unit absent exceptional circumstances.

23. Before 2018, there was no written or enforced requirement that employees log the beginning and end of each recreation period or inspect recreation areas when inmates came and went from the recreation area. Under existing practice, on warm days, inmates in the general population were allowed to come and go from the recreation space freely.

24. Before 2018, there was no effective written policy regarding the storage or utilization of culinary tools within the employer's facility. The practices regarding knives used by inmates working in the facility's kitchen included the knives being chained to the wall. They were not logged when used by inmates.

25. At one point in time there was a policy that called for employees to count the sporks provided to inmates before meals. Thereafter, however, the practice of how inmate meals were packaged changed, and by the time that employees received meal trays to serve inmates, the sporks were already placed on the meal trays, with the meal trays stacked atop one another. Corrections deputies did try to count the sporks when they received the empty trays back from inmates.

26. The employer set a goal of creating one universal policy manual, and particularly, became interested in creating one with Lexipol. Lexipol is a private company that leases a web-based policy manual product to law enforcement and corrections agencies. Lexipol provides purchasers a generic policy manual filled with recommended policies and procedures on topics ranging from general employment matters to industry-specific practices. Purchasers can customize the Lexipol manual's content by editing the generic policies and/or adding their own policies to Lexipol's template. Both are done within Lexipol's online system.

27. Once a manual is created, Lexipol hosts the manual in an online portal. Licensed end users are provided log-in credentials to the system. Lexipol provides e-mail notifications to end users when policies are updated and when new policies are added to their employer's manual.

28. The employer began leasing Lexipol as early as 2011 and assigned an employee to create a Lexipol manual for the Corrections Bureau. The project was slow-going and eventually reassigned to Kane in 2014 or 2015. Kane's process of creating the Lexipol manual content involved reviewing the generic policies provided by Lexipol, seeking out existing policies and practices on a given topic, comparing the two, line by line, on two computer screens, and editing the Lexipol policy as desired to reflect certain existing related practices and procedures. Kane conferred with other employer officials as needed.

29. The union became aware of the employer's interest in creating a Lexipol policy manual in 2016. Carrell sent a letter to Sheriff Ty Trenary at that time demanding to bargain regarding "Lexipol policies." The employer responded, indicating that it would be premature for the parties to bargain any prospective Lexipol policy changes at that time, as policies were still in the process of being developed. No further substantive discussion was had between the parties about Lexipol for some months.

30. In July 2017, the union received a notice from Bureau Chief Aston announcing the upcoming rollout of the new Sheriff's Office Lexipol Policy Manual. Aston stated that he anticipated the implementation on October 15th, 2017. Aston stated that the reformatted policy manual would contain the "overall principles, rules, and guidelines for the Corrections Bureau," and that the employer was still developing standard operating procedures to address the step-by-step processes for daily operations of the Bureau. Aston told the union to, "Please consider this letter a request for information to identify any effects or impacts of the protocol the Guild wishes to bargain."

31. Carrell responded on July 21, acknowledging receipt of Aston's notice. He also wrote that the union "hasn't been provided a copy of these new policies, nor [had it] been included in any discussions of what is being changed, so [it doesn't] know what these impacts will be at this time." Carrell renewed the union's "demand to bargain over the Lexipol policies" and requested that the employer negotiate the "change as well as the effects and impacts of this change." Carrell requested "that a copy of these new policies be provided to [the union] as soon as possible . . . to allow [the union] to review them and identify any potential

impacts to [its] members prior to any face to face meetings" and help both parties "negotiate this matter more efficiently." Carrell further stated that he was requesting that "until our negotiations are completed that the status quo on this issue be maintained."

32. On July 28, Aston responded, attaching a series of documents that he called "the complete Lexipol policy manual in draft form." Aston called the policy manual "a work that will require edits as they come in throughout many chapters." He invited the union's "suggestions to this project" and stated that "[a]ny and all suggestions / edits/ or corrections should be sent to Major Kane directly at this time." Aston further stated that, "It is anticipated that we will have to resend updated versions to be discussed as we move forward," and that the employer "look[ed] forward to working with [the union's] membership on this project."

33. The documents attached to Aston's e-mail totaled over 2,000 pages and included draft chapters of the Lexipol manual along with two generic policy manuals provided by Lexipol that the employer had used as a starting point for its work but did not intend to implement as employer policies. While the generic policy manuals were watermarked with the word "SAMPLE," Aston's e-mail did not identify that the documents were not policies that the employer was proposing to implement.

34. Carrell reviewed Aston's e-mail and drew the conclusion that the documents transmitted did not amount to final draft policies demonstrating which policies the employer proposed to implement. He recalled sending an e-mail back to the employer stating something to the effect that there appeared to be some errors and problems in the documents, that the documents sent clearly were not the final Lexipol policies, and that the employer should let the Guild know when the employer had final versions for the Guild to review. Carrell also asked for the policies in "bill draft" format so that the Guild could clearly identify what the employer was proposing to change from existing policy.

35. That said, Carrell also instructed union officials to set to work reviewing the versions of the policies provided by the employer.

36. At hearing, Kane testified that it was not possible for the employer to provide bill draft versions of the new Lexipol policies, given how the manual had been drafted. However, the employer did not respond to Carrell's e-mail to tell him so. Kane testified that he had a speech that he "would tell the labor groups" about that, and that he had informed some union representatives this during a meeting in 2017, but he could not recall the specific setting, date, or name of the union representative he believed he had informed. Kane's testimony that he gave the speech, detailed above, to the union is not credible. The union offered credible testimony that there had been no other labor-management meetings in 2017 beyond the August 25, 2017, meeting.

37. On August 25, 2017, the parties had a labor-management meeting. The parties discussed a long list of items at the meeting; among them, the union sought clarification of a draft Lexipol policy regarding taser use within the facility and whether it was intended to be a change of policy. The employer indicated that it would be a change of policy, and the employer agreed to review the draft Lexipol policy to ensure that change was clearly stated.

38. On September 25, 2017, Aston sent an e-mail to Carrell. Aston stated that "The Lexipol manual ha[d] been reviewed by the division heads and supervisors to ascertain any changes that needed addressing," and that, "[t]o date it would appear that the vast majority of corrections are grammatical in nature." Aston noted that, "Since sending the [union] a copy of the manual in July [the employer had] yet to receive any concerns, recommendations, or changes involving content." Aston announced that "In the interest of collaboration we agree to push out the implementation date for Lexipol to Jan. 1st 2018." He stated that "This will give us more time to discuss any substantive changes you may consider needing to bargain."

39. Aston's e-mail also reminded the union that, "[T]his document is a living product and will experience updates and corrections as time moves on. This may be dependent from everything to change of laws and policies to culture." Aston informed Carrell that, "The [employer] will continue to send the [union] dates to meet for whichever venue (Demand

to Bargain, or Labor Management) you choose" and "are committed to resolving all labor issues and look forward to your response."

40. There is no evidence that the union responded directly to Aston's e-mail.

41. Carrell testified that between July and December, he received intermittent e-mail notifications from the online Lexipol system informing him that he had new policies. However, he was repeatedly unable to log into the system with the credentials he had been given. Carrell informed Aston of this problem by e-mail on October 13 and testified that he let Captain Kevin Young know as well.

42. Carrell also testified that he had a series of conversations with employer representatives during the fall of 2017, including Lieutenant Mark Simonson, continuing to try to obtain final draft policies in bill draft format. He memorialized such a conversation in an e-mail to Simonson on October 13, 2017. There is no evidence of any employer response to the e-mail. Carrell testified that Simonson had stated verbally during their conversation that the employer's final draft versions of the policies were not yet ready.

43. In November 2017, Young sent an e-mail to employees informing them that a prior policy tool, PolicyTech, was being phased out to make room for a Lexipol manual "[i]n early 2018." Carrell responded to Young and stated that he continued to await a "finished copy" of the Lexipol policies in bill draft form. Carrell testified that he had a similar conversation with Young in person around that time, and the purpose of his e-mail was to memorialize the discussion. Carrell testified that Young also acknowledged that the employer did not have final versions of the Lexipol policies ready for review yet.

44. On December 5, 2017, Kane sent an e-mail to an "all hands" employee e-mail distribution list. Kane announced to employees that the employer would be moving forward with an online Lexipol policy manual, which was "set to go into effect on January 1st, 2018." He stated that staff would soon receive log-in credentials so that employees could begin to review the new policies.

45. In the same e-mail, Kane also remarked on the state of the Lexipol manual, telling employees that the manual "at this point has few procedures, and lacks post orders in relevant part (which many of you have been asking for)." He stated that "once the initial version is released, [the employer's] team will immediately begin work on adding everything that is not and should be in there." Kane further stated, "[T]here will still be other e-mails and directives floating out there that we didn't find or address. Please bring these to our attention through the process we define in future correspondence on this topic . . ."

46. In the same e-mail, Kane also asked that employees "Please be nice to us and kindly point out typos or formatting errors..." He informed employees that "We will be setting up a SCR-Lexipol e-mail address for you to send these to when you run across them. . ." Kane stated that he "look[ed] forward to getting [the manual] out there and hearing your feedback."

47. On December 8, 2017, Carrell sent a letter to the employer's labor negotiator Rob Sprague. Carrell indicated that he was sending the letter at Sprague's request on November 27, 2017, that all items the union was demanding to bargain be routed through him. Carrell identified a list of 22 items comprising the union's "current list of [its] demand to bargains [sic] with the Sheriff's office" and asserted that all of the items constituted mandatory subjects of bargaining over which the union wished to bargain the decision and effects. The Lexipol policy manual implementation was the first item on Carrell's list. Carrell told Sprague that "the Guild [had] requested a copy of the policy changes in bill draft form" and "still [hadn't] received them."

48. Carrell informed Sprague of Kane's e-mail stating that the policies would go into effect in January 2018. He reiterated his request that the employer maintain the status quo until negotiations could be completed. Carrell offered to either fold some of the union's open demands to bargain into the parties' ongoing contract negotiations or set up a series of separate meetings to discuss them. Carrell did not recall receiving any response from Sprague.

49. Carrell's letter to Sprague did not cause the employer to delay its planned implementation of the Lexipol manual effective January 1, 2018.

50. Carrell continued to have issues accessing Lexipol through December 2017 and into January 2018. He recalled bringing this up again to Simonson, who acknowledged that the employer was having issues with the Lexipol system. Carrell was first able to access the online Lexipol system in mid-January 2018, after the employer policies went into effect.

51. At that point, by the text of the Lexipol manual and the employer's December 5, 2017, e-mail, the Lexipol policies that follow in these findings of fact were in effect.

52. The Lexipol manual includes a new policy (policy 201) calling for an annual inspection of the employer's facilities, records, and policies, to be overseen by the bureau chief. The policy is generally written and does not specify in writing who is to perform the inspection beyond the bureau chief, "key program staff and service providers," and "program managers." The policy does not specify the standards that would apply during the inspection or the specific consequences to employees of any deficiencies found. It did, however, require that "discrepancies" and "correction" found during the inspection be noted and that a report of some kind ultimately be compiled.

53. The employer imported the existing "Affirmatively Promoting a Positive Public Image" policy into the Lexipol manual nearly word for word (as policy 403.3). Carrell testified at hearing that he believed the employer's application of the policy broadened after the implementation of Lexipol, resulting in more examples of discipline issued for incidents occurring inside the employer's facility, rather than out in the community. Carrell gave one example that involved discipline issued under the policy when a deputy made "a smart-aleck comment" to a superior officer's wife inside the facility.

54. When the employer adopted Lexipol, it imported its pre-existing insubordination policy without change (policy 403.9). Carrell testified that at some point before the Lexipol manual implementation, around October 2016, the employer began expanding its practice

of disciplining for insubordination. He testified that "a lot of things were now being considered insubordination that previously wouldn't have been considered insubordination," including failing to complete trainings on time. According to Carrell, the expansion of the practice continued when the employer adopted Lexipol. More disciplines for insubordination were issued in 2018 than in the five preceding years.

55. The employer imported its pre-existing sick leave policy word for word into the Lexipol manual (policy 403.15), including the rule that allows for discipline if an employee's sick leave balance consistently remains below 16 hours. Since the implementation of the Lexipol manual, and at the request of the union in grievance meetings, the employer has agreed to rescind discipline for violations of the 16-hour portion of the policy and not to enforce that portion of the policy until it can seek legal advice regarding the change in law.

56. The Lexipol manual contains a new policy regarding fitness for duty examinations that goes into significantly greater detail than the employer's preceding policy (policy 408.6). This policy calls for fitness for duty examinations "[w]henever circumstances reasonably indicate that the employee may be unfit for duty." The policy states that if an employee's condition was put into question in an administrative proceeding or grievance following the examination, the examining physician "may be required to disclose any information that is relevant to such proceedings." The policy additionally permits the employer to keep the employee's medical information on file, though treated as confidential and kept in a separate medical file. It also states that employees can be disciplined for failing to sign releases of their medical information.

57. The drug testing policy in the new Lexipol manual (policy 409) is three pages in length. It allows for testing in three circumstances: if a supervisor "reasonably believes, based upon objective facts" that the employee is violating the drug and alcohol policy, if an employee discharges a firearm except if on accident, and in certain circumstances in which the employee has an on-duty motor vehicle crash. The policy contains no mention of an employer obligation to notify the employee of a right to union representation during the

testing and contains no written protocols for the taking and testing of urine samples or Breathalyzer tests.

58. The employer's Lexipol policy on reporting arrests (policy 411.5) requires employees to immediately notify their supervisors of "any criminal detention, arrest, charge or conviction" regardless of the jurisdiction in which the matter is pending. The policy also requires employees to report proceedings or court orders that would prevent them from possessing firearms.

59. New Lexipol policy 413.3, a subset of the "personnel complaints" section of Lexipol, imported an "early identification and intervention system" that was previously used on the patrol side of the Sheriff's Office to the Corrections Bureau. Policy language describes the system as a way for the employer to track and intervene in "problematic behavior" by employees. A need for intervention is flagged when an employee has three "indicators" in one quarter-year or four per year.

60. Under policy 413.3, indicators can include such things as citizen complaints against employees (including those that are found to be "non-sustained") and use-of-force reports involving the employee. Once flagged, the policy calls for the employee to be counseled and trained, which the policy says is "not discipline." However, the counseling and/or training should be reported on a performance incident report (PIR).

61. An addendum to the Lexipol manual describes performance incident reports and their uses by the employer. The addendum indicates that performance incident reports are meant to document performance "that is substantially above or below what is expected of a trained and experienced employee." One negative PIR appears to result in "an action plan to remedy the matter" and repeated negative PIRs on a similar topic "may be considered misconduct" by the employer.

62. Lexipol policy 413.8 permits the employer to search the employer's lockers, among other workspaces, "upon a reasonable suspicion of misconduct." The policy also permits the

employer to search lockers at "any time" for "non-investigative purposes" and provides the example of when the employer is looking for needed documents or equipment.

63. Following the employer's implementation of policy 413.8, there have been several instances in which the union has discovered employer officials searching the lockers with no prior notice.

64. The employer adopted a new policy entitled "Employee Speech, Expression and Social Networking" when it implemented Lexipol (policy 415). The policy has several parts. First, the policy provides certain cautions regarding the dangers of social media to employees. The policy prohibits certain types of speech, in some instances whether from employer social media accounts or personal accounts. Examples of prohibited speech include "[s]peech or expression that . . . is significantly linked to, or related to, the Office and tends to compromise or damage the mission, function, reputation or professionalism of the Office or its employees." Speech that could compromise the employee's ability to be a credible witness and statements that could be reasonably foreseen to harm the safety of employees of the jail are other examples.

65. Policy 415 prohibits employee endorsements that could be reasonably be perceived as endorsements by the employer. It also contains rules for the use of official employer social media accounts. The policy carves out exceptions for "speech [that] is otherwise protected" by law.

66. The employer imported the background check language from its 2014 PREA policy directly into the Lexipol manual (at policy 501.18).

67. The Lexipol manual contains a new policy governing certain procedures related to keeping inmates in disciplinary segregation (policy 701). Particularly, the policy requires that employees document certain information related to inmates in disciplinary segregation and their activities, such as inmate identifying information, the date admitted to disciplinary

segregation and reason(s) for admission, the dates and times the inmate entered and exited their cell, and any counseling given for the inmate's behavior.

68. Lexipol policy 707.7 contains a statement that "[i]nmates shall be permitted to shower upon assignment to a housing unit, at least every other day thereafter and more often if practicable."

69. New employer policy 1103 requires employees to log the beginning and start of the recreation times for inmates in the general population and the employee's offer of recreation time to each inmate in more restrictive housing settings. The policy also calls for employees to inspect recreation equipment and to prevent inmates from utilizing broken items in an unsafe condition.

70. The employer's new Lexipol policy 1401 contains several new requirements regarding culinary tools. First, the policy calls for kitchen tools such as knives to be stored in a locked cabinet between uses. Employees are instructed to individually assign such tools to inmates and to log which inmate has which tool. The policy contains procedures for the return of the tools and what should happen if a tool is missing. The policy also calls for employees to count the sporks provided to inmates for meals prior to and at the completion of each meal. The policy contains instructions for what should happen if any sporks are missing.

71. Kane testified that where the employer's written policy language changed via the Lexipol manual, the employer did not intend to enforce the new language or change its practices. However, the Lexipol manual declares its import and effect in numerous places. The manual states, "Your job, your future, and in many instances your family's future and security depends upon your . . . compliance with these policies, rules, and procedures;" "All members are to conform to the provisions of this manual. All prior and existing manuals, orders and regulations which are in conflict with this manual are revoked, except to the extent that [an outside document covers subject(s) not covered by or in conflict with] this manual;" and "Employees of the Office shall be subject to disciplinary action in

accordance with the provisions of this manual and for violations of the rules and regulations set forth herein."

72. Corrections deputies are provided access to employer-owned computers while on duty. The key work purposes of the computers are to run the employer's electronic jail management system and to provide employees access to the employer's e-mail and online training systems. Over the last several decades, the employer has had a series of policies regarding computer use. Generally speaking, the policies called for employees to use employer-provided computers for work purposes with some *de minimis* personal use allowed.

73. In the Corrections Bureau, until 2009, there was a firewall system that limited Internet access from workplace computers. The employer then decided to eliminate its firewall restrictions and give employees access to the Internet, subject to employer policies.

74. Some years later, the employer began to notice that employees' use of workplace computers for non-work purposes had escalated to the point that employees were openly and frequently engaging in personal business while on duty. This gave employer officials concern. Because the practice was so widespread, the employer decided not to initiate disciplinary investigations and instead began looking into the idea of blocking employees' access to non-work-related websites again.

75. Aston testified that ensuring inmate safety was a "core dut[y]" of the Corrections Bureau and that the employer was under pressure to curb a history of in-custody deaths. Kane testified that there were rare occasions on which staff were manipulated by inmates to use their social media and Internet access for the inmates' benefit, and the employer saw this as a safety risk.

76. On February 1, 2018, Aston sent an e-mail to the union "to advise of the county's interest in reducing access of non-work related social media within Corrections." Aston stated that the employer "anticipate[d] this to take place in the beginning of April 2018." Aston stated

that "It is our belief that such a protocol is within the core of the Sheriff Office's entrepreneurial control over corrections operations. We therefore do not consider the decision to implement such a protocol a mandatory subject of bargaining."

77. In the same e-mail, Aston stated that the employer, "believe[d] the protocol does not have any significant impact or effect on the wages, hours, or working conditions of Custody Deputies." Aston concluded, "Please consider this letter a request for information to identify any effects or impacts of the protocol the Guild wishes to bargain."

78. Carrell responded that day. He informed the employer, "This doesn't give us enough information for us to determine if this is a mandatory subject of bargain, or impact bargaining." Carrell asked, "What are you specifically referring to when you state "reducing access of non-work related social media within Corrections ". [sic] What specific policy\or policies are you intending to change, and what specific language is being proposed to change the policy\policies?" Carrell also stated that the union considered the change to involve a mandatory subject and demanded to bargain the decision and impacts of the change.

79. Aston replied by e-mail on February 14, 2018. He stated that, "The reduction of non-work related social media access within Corrections refers to the elimination of contact with certain websites on county issued computers. It is not our intent to block access to the county owned public Wi-Fi, therefore allowing employees to acquire web browsing from their personal devices while on break outside of the secure areas of the jail. There is no change in policy or said language therein. We hope this information clarifies our position, we are committed to resolving all labor issues and look forward to your response."

80. There is no indication that the union responded to Aston's e-mail.

81. Around the same time period, the union and employer were trying to find dates to bargain other open demands by the union, and apparently, sought to discuss the Internet-access change at such meetings. For example, on February 9, Kane sent an e-mail to union

representatives including Carrell offering some dates and times to address "a variety of demand to bargain items" raised by the union. Another union representative informed Kane that Carrell was on vacation. Kane responded in part, "Either way, the offer is extended to your board."

82. When Carrell returned, he sent a lengthy e-mail back to Kane. He complained that Kane had sent his e-mail offering bargaining dates while Carrell was on vacation, and that of the dates offered, two were during his vacation and another was the date of a prescheduled joint labor-management training. Carrell informed Kane that only the president and 2nd vice president had the authority to negotiate on behalf of the union, and that the 2nd vice president's graveyard schedule made meetings during the employer's suggested meeting times difficult.

83. On March 1, Kane e-mailed Carrell. He stated that he thought the dates offered had accommodated the majority of the union's executive board and that with members on all three shifts, scheduling was a challenge. Kane thanked Carrell for his clarification of who was empowered to bargain for the union and stated that, given past approaches by a variety of different union representatives, "Quite frankly, we are never completely sure who can do what and when on behalf of the Guild." Kane further stated that the employer also had some items it would like to discuss with the union but that "upcoming vacations for multiple members of command . . . [would] put it out a little bit."

84. There was no further communication between the parties about scheduling bargaining sessions. The parties may have briefly discussed the Internet access subject "during a grievance meeting or something," but did not engage in formal bargaining.

85. Meanwhile, it took the employer some time to determine the scope of the websites it wished to ban. The employer gathered data from the county's Department of Information Services to help determine how much data Corrections Bureau staff was using on certain social media platforms.

86. For example, in March 2018, the Department of Information Services ran a report comparing the Corrections Bureau's data usage on Facebook and YouTube to other county departments. The report showed that the Corrections Bureau was using vastly more data on each than other departments. The Corrections Bureau had used 43 gigabytes of data on Facebook during the same time period in which other departments were using 5–630 megabytes, and the Corrections Bureau staff had used 54 gigabytes on YouTube, compared to 10 megabytes–8 gigabytes by other departments. There are 1,024 megabytes in 1 gigabyte.

87. Eventually, an incident occurred that prompted the employer to action. The employer became aware of certain circumstances surrounding an in-custody death and came to believe that a corrections deputy had been watching YouTube videos on the computer in his module throughout his shift, instead of doing required inmate-welfare checks. The employee had not checked on an inmate who was very ill. During the next shift, the inmate's condition was discovered, and he was transported to the hospital, where he died. The employer decided that it needed to address excessive Internet use urgently.

88. Soon thereafter, on May 16, Aston sent an "all hands" e-mail. Aston stated, "This is to remind us all of the reduction of Non-work related Social Media access within the secure area of the jail. This will eliminate contact with certain websites from county issued computers. Please understand we will not be blocking the access to the county controlled public Wi-Fi, therefore allowing employees to acquire web browsing from their personal devices while outside of the secure area. This will take effective [sic] May 21st 2018."

89. In the same e-mail, Aston informed employees, "If you believe that access to a website has been discontinued that is essential to performing work related functions please send the information forward via your chain of command."

90. Later that day, Aston sent the union a list of the sites the employer intended to block. It is not clear whether the union responded, though some informal discussions were eventually

had about some blocked websites that employees used for work purposes (to which the employer ultimately restored some access).

91. The employer enacted its Internet restrictions as planned on May 21, 2018. The employer continued to offer dates to meet with the union. For example, on June 28, 2018, Aston sent an e-mail to the union offering bargaining dates for later that summer. There is no indication whether the union responded.

92. The employer maintains landline phones in each module of the jail, and employees carry portable radios for communication. The jail has staff available to route calls or messages from family members to corrections deputies. In some circumstances, the employer has also issued employer-owned flip phones to employees to carry when they are experiencing ongoing but temporary family emergencies, such as when a baby is due. Employees are also free to use their personal cell phones and other devices during rest and meal breaks outside the secure portion of the facility.

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. As described in findings of fact 4-71, the employer refused to bargain in violation of RCW 41.56.140(4) and (1) by unilaterally implementing changes to mandatory subjects including fitness for duty testing, drug testing, the early identification and intervention system, and administrative searches.

3. As described in findings of fact 4-71, the employer refused to bargain in violation of RCW 41.56.140(4) and (1) by failing to properly respond to an information request for relevant information.

4. As described in findings of fact 4-71, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by circumventing the union through direct dealing with bargaining unit members regarding the Lexipol policy manual.

5. As described in findings of fact 72-92, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by unilaterally implementing a new social media policy without providing the union an opportunity for bargaining.

6. As described in findings of fact 72-92, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by refusing to meet and negotiate a new social media policy.

7. As described in findings of fact 72-92, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by refusing to provide relevant information requested by the union related to the social media policy.

8. As described in findings of fact 72-92, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by circumventing the union through direct dealing with bargaining unit members regarding the social media policy.

ORDER

Snohomish County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Unlawfully implementing changes to fitness for duty testing policies for employees represented by the Snohomish County Corrections Guild without providing the union notice and opportunity to bargain.

b. Unlawfully implementing changes to drug testing policies for employees represented by the Snohomish County Corrections Guild without providing the union notice and opportunity to bargain.

c. Unlawfully implementing changes to early identification and intervention system policies for employees represented by the Snohomish County Corrections Guild without providing the union notice and opportunity to bargain.

d. Unlawfully implementing changes to administrative search policies for employees represented by the Snohomish County Corrections Guild without providing the union notice and opportunity to bargain.

e. Refusing to provide relevant information related to the Lexipol manual or otherwise failing to appropriately respond to information requests by the Snohomish County Corrections Guild.

f. 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 reinstating the fitness for duty testing policies that existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this order.

b. Restore the status quo ante by reinstating the drug testing policies that existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this order.

c. Restore the status quo ante by reinstating the early identification and intervention system policies that existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this order.

d. Restore the status quo ante by reinstating the administrative search policies that existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this order.

e. Give notice to and, upon request, negotiate in good faith with the Snohomish County Corrections Guild before changing fitness for duty policies.

f. Give notice to and, upon request, negotiate in good faith with the Snohomish County Corrections Guild before changing drug testing policies.

g. Give notice to and, upon request, negotiate in good faith with the Snohomish County Corrections Guild before changing early identification and intervention system policies.

h. Give notice to and, upon request, negotiate in good faith with the Snohomish County Corrections Guild before changing administrative search policies.

i. Upon request, provide relevant information related to the Lexipol manual to the Snohomish County Corrections Guild or otherwise appropriately respond to information requests.

j. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for 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.

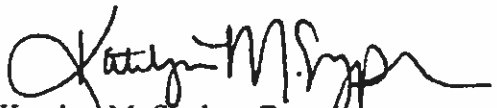
k. Read the notice provided by the compliance officer into the record at a regular public meeting of the County Council of Snohomish County and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

l. 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.

m. 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 15th day of November, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



Katelyn M. Sypher, 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 11/15/2019

DECISION 13098 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 130652-U-18

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