City of Cashmere, Decision 13429 (PECB, 2021)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 760, Complainant, vs. CITY OF CASHMERE, Respondent.	CASE 133004-U-20 DECISION 13429 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Teamsters Local 760 (union) represents a bargaining unit of employees within the water/wastewater department for the City of Cashmere (employer). The unit is currently comprised of three administrative staff positions and four to five field staff positions. The employer and the union are parties to a collective bargaining agreement (CBA) that expires on December 31, 2021.

On September 1, 2020, the union filed an unfair labor practice complaint against the employer alleging the employer refused to bargain the implementation of new timekeeping measures. On September 3, 2020, an unfair labor practice administrator for the Commission found a cause of action for refusal to bargain. I held a virtual hearing on June 15, 2021, and the parties submitted post-hearing briefs on August 6, 2021.

ISSUES

The preliminary ruling framed the following issue for hearing:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by unilaterally changing rules and/or procedures related to timekeeping measures without providing the union an opportunity for bargaining.

Having thoroughly reviewed the evidence, arguments, and law, I find the employer did not refuse to bargain. The decision to change timekeeping measures is not a mandatory subject of bargaining, which would require the employer to bargain. This decision is a permissive subject of bargaining where the interests of the employer's entrepreneurial control outweigh employee concerns of a change to working conditions.

BACKGROUND

In August 2020, the employer wanted to install a new timekeeping system that would use facial recognition technology as a means of more efficiently tracking employee time. Similar in concept to other electronic-based methods of tracking employee time, this system would record when an employee clocked in and out of work. The employees would use the system at the wastewater treatment plant. Currently, the employees who work in the field (field staff) do not use this timekeeping system. Field staff do not keep a log of exact hours worked, but they do record hours for specific projects on handwritten cards. Field staff are expected to work 40 hours per week. The three employees who work in the office have voluntarily agreed to use this new system for timekeeping. However, the employer has not actually implemented the facial recognition program for the bargaining unit. Office staff employees occasionally forget to log in or out of the new system and have encountered issues with tracking because of gaps in information.

When the union learned the employer was planning on installing the new system, it made a demand to bargain the decision to implement. Union representative Paul Parmley stated in an August 25, 2020, email: "We demand to bargain over the implementation of any new timekeeping measures . . . ." The employer responded in an email on August 28, 2020, stating that introducing automated methods of payroll timekeeping was a management right specified in the CBA and did not necessitate negotiating with the union. The union filed this unfair labor practice complaint soon afterward.

ANALYSIS

Applicable Legal Standards

Duty to Bargain

The Public Employees' Collective Bargaining Act, chapter 41.56 RCW, imposes a duty on public employers and unions to bargain over mandatory subjects of bargaining. RCW 41.56.030(4). The duty to bargain for public employers is enforced through RCW 41.56.140(4), and unfair labor practice complaints are processed by the Commission under RCW 41.56.160 and chapter 391-45 WAC. The complainant has the burden of proving an unfair labor practice allegation. WAC 391-45-270(1)(a).

Mandatory and Permissive Subjects of Bargaining

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 '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*.

While the balancing test calls upon the Commission and its Examiners to balance these two principal considerations, the test is more nuanced and is not a strict black-and-white application. Subjects of bargaining fall along a continuum. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours, and working conditions," also known as mandatory subjects of bargaining. RCW 41.56.030(4). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives. *City of Richland*, 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of the case. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. *Id.*

Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which parties may negotiate. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

The bargaining obligation applies to a decision on a mandatory subject of bargaining and the effects of that decision, but the obligation only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decision could be mandatory subjects of bargaining. *See Wenatchee School District*, Decision 3240-A (PECB, 1990).

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of formal notice, the employer must show that the union had actual, timely knowledge of the contemplated change. *Id*.

A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining on a mandatory subject of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of the employer and employees. *Yakima Valley Community College*, Decision 11326-A (PECB, 2013).

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.

Waiver

Waiver is an affirmative defense. *Lakewood School District*, Decision 755-A (PECB, 1980). A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991); *City of Yakima*, Decision 11352-A (PECB, 2013). When a knowing, specific, and intentional contract waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A.

A typical management rights clause claimed by employers to be a waiver of union bargaining rights will generally fail to meet the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

Application of Standards

Mandatory vs. Permissive Subject of Bargaining

The employer's decision to implement facial recognition technology for its timekeeping purposes is a permissive subject of bargaining and does not require the employer to bargain the decision with the union. In the present case, the balancing test, which determines employee interest in wages, hours, or working conditions against entrepreneurial control, tips more heavily toward the employer's interests. The employer is exercising its right to update its timekeeping system to more accurately track employee work schedules. There is no written policy in place regarding a more sophisticated timekeeping system, nor is there a status quo of possibly similar subjects relating to technology in the past. In general, there seems to be little accountability on the part of the field staff to track their work schedules throughout the day.

In *King County*, Decision 9495 (PECB, 2006), the employer installed additional stationary video cameras in booths because the public works refuse stations were being robbed. The Commission determined that the employer was not obligated to bargain the decision to install video cameras. Until a technological change impacts a working condition, the decision falls into the realm of

entrepreneurial control. Similarly, in the present case, no working condition has changed as a result of the decision to install a new timekeeping method.

Other jurisdictions agree that the employer can make a decision to change working conditions if the scale leans in favor of the employer's effectiveness in running its operations. The National Labor Relations Board (NLRB) allows private-sector employers to make changes in the workplace without bargaining with the union when the decision has more of an effect on the employer's efficiency and productivity than on employee working conditions. In *Rust Craft Broadcasting of New York.*, an employer installed an electronic time clock, to replace handwritten "in and out" cards, without first bargaining with the union. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976). The NLRB found no violation for installation of electronic time cards. *See also Metromedia, Inc. v National Labor Relations Board*, 586 F.2d 1182 (8th Cir. 1978) and *National Labor Relations Association v. Columbia Tribune Publishing Co.*, 495 F.2d 1384 (8th Cir. 1974). This is similar to the present case where the decision to implement a new timekeeping method would greatly increase the efficiency of the employer's operations. Currently, employees do not record when they arrive, take breaks, eat lunch, or leave. It is within reason to want a more accurate and updated method of timekeeping.

The union failed to carry its burden and provide evidence that the new facial recognition technology would negatively affect the employees' privacy enough to impact their working conditions. During the hearing, there was a lack of evidence presented about the facial recognition system. There was testimony that information would be saved on the employer's server, but there was no evidence provided on what specific kind of employee information would be saved and how this would link to the employees' facial images. It is unclear whether detailed employee information, like birthdate, social security number, or home address would be connected with each employee's image. Also uncertain was how long the information would be stored on the server,

who had access to the server, and what kind of protections the server encompassed. Without these details, determining the impact on employee working conditions is difficult.[1]

Waiver

General language in a management rights clause does not constitute a contractual waiver of the union's right to bargain over a specific employer decision. In *Griffin School District*, Decision 10489-A (PECB, 2010), the school district changed the number of work days from 260 to 240 for certain maintenance and custodian workers. The district argued that the management rights clause in the contract, permitting it to lay off employees due to "lack of work or other legitimate reasons," constituted a waiver. The Commission, however, disagreed, noting such a provision was broad and unspecific and did not represent the type of language demonstrating a conscious decision by the union to waive its bargaining rights on this specific subject.

In the present case, the employer argues that multiple sections of the contract, including 4.2.2, 4.2.15, 4.2.17, 4.2.18, and 4.3.26, provide language showing that the union waived their right to bargain over changes in technology. The language of these sections describes how the employer has the right to maintain order and efficiency, change methods and procedures of new equipment and facilities, and improve and automate methods of keeping track of time for payroll purposes. Like *Griffin School District*, the language in the union's contract is too broad and does not demonstrate a knowing and willing decision of the union to waive its bargaining rights about something as specific as a facial recognition method of timekeeping.

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[1] This analysis is restricted to the decision to implement a new timekeeping system. If/when the facial recognition timekeeping system is installed, any effects of the implementation that are mandatory subjects of bargaining will need to be negotiated. The bargaining obligation is applicable to a decision on a mandatory subject of bargaining and the effects of that decision, but the obligation will only be applicable to the effects of a managerial decision on a permissive subject of bargaining. *Skagit County*, Decision 6348 (PECB 1998); *City of Kelso*, Decision 2633 (PECB, 1988) (finding decision to merge operations with another employer is an entrepreneurial decision, and only the effects of that decision on wages, hours, and working conditions are mandatory subjects of bargaining).

CONCLUSION

The union failed to meet its burden proving that the employer's decision to use a facial timekeeping system is a mandatory subject of bargaining. The employer is obligated to bargain mandatory subjects of bargaining but not permissive subjects. In this case, because the decision to install this type of timekeeping method is not a mandatory subject of bargaining, the employer did not fail in its duty to bargain. Additionally, the union did not waive its right to bargain the decision of the installation of the new timekeeping system in its contract. The language the employer referred to in the contract is too broad and lacks the specificity necessary to show that the union intended to waive its right to bargain this particular subject.

FINDINGS OF FACT

1. The City of Cashmere is a public employer within the meaning of RCW 41.56.030(13).

2. Teamsters Local 760 is a bargaining representative within the meaning of RCW 41.56.030(2)

3. The employer and union are parties to a collective bargaining agreement effective from January 1, 2019, to December 31, 2021.

4. In August 2020, the employer wanted to install a new timekeeping system that would use facial recognition technology as a means of more efficiently tracking employee time. The employees would use the system at the wastewater treatment plant.

5. The employees who work in the field (field staff) do not use this timekeeping system. Field staff do not keep a log of exact hours worked, but they do record hours for specific projects on handwritten cards.

6. Field staff are expected to work 40 hours per week.

7. The three employees who work in the office have voluntarily agreed to use this new system for timekeeping. The employer has not implemented the facial recognition program for the bargaining unit.

8. The union made a demand to bargain the decision to implement. Union representative Paul Parmley stated in an August 25, 2020, email: "We demand to bargain over the implementation of any new timekeeping measures . . . ." The employer responded in an email on August 28, 2020, stating that introducing automated methods of payroll timekeeping was a management right specified in the CBA and did not necessitate negotiating with the union.

9. The union filed this unfair labor practice complaint soon after August 25, 2020.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 41.56 RCW and chapter 391-25 WAC.

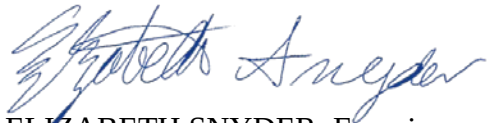
2. By the actions described in findings of fact 4 through 9, the union failed to prove that the decision to install new facial recognition technology was a mandatory subject of bargaining and that the employer refused to bargain that decision.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 4th day of November, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



ELIZABETH SNYDER, 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.

RECORD OF SERVICE

ISSUED ON 11/04/2021

DECISION 13429 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 133004-U-20

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