

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117,

Complainant,

vs.

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS,

Respondent.

CASE 137243-U-23

DECISION 14133 - PSRA

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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General Nicholas W. Brown, for the Washington State Department of Corrections.

On July 25, 2023, Teamsters Local 117 (union) filed an unfair labor practice complaint on behalf of its custody officer bargaining unit against the Washington State Department of Corrections (employer or DOC).¹ The undersigned examiner conducted a hearing via videoconference on January 14 and 15, 2025, and the parties filed post-hearing briefs on March 17, 2025, to complete the record.

ISSUES

As framed by the complaint and the cause of action statement, the issue is as follows:

Did the employer refuse to bargain in violation of RCW 41.80.110(1)(e) [and if so, interfere with employee rights in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed, by unilaterally changing how bargaining unit members conduct strip searches of transgender incarcerated individuals, without providing the union an opportunity for bargaining?

¹ An unfair labor practice administrator issued the cause of action statement certifying claims for further processing on August 7, 2023. The employer filed an answer on August 28, 2023.

The employer violated RCW 41.80.110(1)(e) by unilaterally eliminating the practice of soliciting volunteers and first assigning strip searches of transgender incarcerated individuals to corrections and custody officers (COs) on the volunteer list. The employer is ordered to reinstate the practice of maintaining a volunteer list at each facility and first assigning strip searches of transgender incarcerated individuals to COs on the volunteer list. The employer's decision to require that searches of transgender individuals be conducted by an officer of the gender formally requested in documentation by the individual was not a mandatory subject of bargaining. If there are no volunteers of the same gender available, the employer's policy change requiring that searches of transgender individuals be conducted by an officer of the gender formally requested in documentation by the individual needs to be followed to comply with the federal Prison Rape Elimination Act (PREA).

BACKGROUND

The union represents a bargaining unit of nonsupervisory classified employees that includes COs. COs are responsible for the safety and security of the incarcerated population, staff, and institution. COs job duties include conducting pat searches and strip searches of incarcerated individuals. COs conduct strip searches when an incarcerated individual initially enters a correctional facility due to the concern that an incarcerated individual may be smuggling contraband or for other security reasons.

Procedure for Strip Searches

There is a recognition that incarcerated individuals are in a vulnerable position during a strip search. Strip searches are conducted in private. There are always two COs present when a strip search is performed. One CO serves as the primary and is tasked with directing and visually inspecting the incarcerated individual. The second CO is present in the same room but is positioned in a way to only directly observe the other CO and not view the incarcerated individual. The CO serving in the secondary role is responsible for searching the clothing of the incarcerated individual. The observer's role also ensures that there is no physical contact or inappropriate communication between the incarcerated individual and the CO in the primary search role.

Strip searches involve multiple detailed steps including the following three steps:

If the individual has male genitals, expose the genitals by lifting penis and then scrotum[.]

If the individual has female genitals, assume a squatting position and cough, if the individual has a combination of both male and female genitals the individual will both squat and cough and lift male organs.

Expose bottoms of feet and between toes by turning away from the employee, and separate buttocks to expose anus.

Gender is an important factor in determining who will conduct a strip search. Unless there is an emergency, a male CO must be the primary when a male incarcerated individual is being strip searched. Likewise, absent an emergency, a female CO must be the primary when a female incarcerated individual is being strip searched. A person of any gender may serve as the secondary on a strip search because they are not directly viewing the individual being searched.

For this reason, it is extremely uncommon for a female officer working in a male-only corrections facility to serve as the primary person to conduct a strip search.

2019-2020 New Policy Adopted on Transgender Strip Searches

In 2019, DOC recognized a need to develop policies and practices that were more responsive to the needs of transgender, intersex, and gender non-conforming incarcerated individuals. On October 18, 2019, the employer notified the union that it had proposed creating a new DOC policy 490.700, titled “Transgender, Intersex, And/Or Gender Non-Conforming Housing and Supervision.” On October 22, 2019, the employer sent the union an updated version of that policy.

In part, policy 490.700 addressed strip searches of the transgender population by COs. That policy created a mechanism for transgender, intersex, and gender non-conforming individuals to document their preference for the gender identity of the staff conducting searches. Policy 490.700 would require that searches be conducted in accordance with the incarcerated individual’s preferred gender to conduct searches, as set out in the individual’s form 02-420. The policy also defined “gender” to encompass more than the incarcerated individual’s assigned sex at birth. It considered all relational aspects of social identity, psychological identity, and human behavior, including gender identity and gender expression. Under policy 490.700 both a transgender female and an assigned female at birth would be treated as female.

In 2019, the union and the employer negotiated over the implementation of the employer's proposed policy 490.700 and agreed that female CO staff at male correctional facilities would be permitted to volunteer to participate in searches of transgender incarcerated individuals identifying as female. Each facility created a list of staff who agreed to volunteer for those searches. It was important to the union that female staff be allowed to volunteer for those searches, rather than the searches being mandatory, because the union recognized that this was a "significant change within the agency."

At that time, management also recognized that, in implementing its new policy, one important consideration was that staff would have "varying personal perspectives and comfort levels in searching a person of a different gender." It also described the new policy as "a significant culture shift for female staff."

On January 16, 2020, DOC made a targeted request to only female corrections staff working in male corrections facilities asking for volunteers to search transgender women.

DOC policy 490.700 was released on February 13, 2020. The effect of policy 490.700 was that, going forward, transgender individuals would be strip searched by a staff member of the incarcerated individual's gender preference regardless of whether the individual and staff member had the same genitalia.

On February 25, 2020, the employer sent out an email to all staff with the subject line "Transgender Search Preference." The email was written in a question-and-answer format and explained in part,

Q: What is the strip search process for these individuals?

A: When they have a known Preference Request, or inform you they do prefer a Female Staff conduct the search, Staff will contact the Shift Commander for verification. If verified, the Shift Commander will determine if staff are available to accommodate the request. WA DOC is using a volunteer only approach to this process. Only staff that have volunteered in advance will be asked to conduct the search. If available, the female staff member will conduct the strip search as the search officer. If no female staff are available to conduct the strip search, a female staff will be used to 2nd the Search Officer and act as the Observer only.

Q: What happens if the Preference cannot be accommodated?

A: Only the Shift Commander can determine this. If no female volunteers are available, the Shift Commander will direct male staff to conduct the search. The Shift Commander will then complete an IMRS [Incident Management Reporting System] report documenting the inability to accommodate the preference request. The Incarcerated Individual cannot voluntarily decline our attempts to accommodate once the Preference is known to staff. The Shift Commander must be contacted and is solely responsible to make the decision to accommodate or not.

Q: What happens if staff volunteers no longer feel comfortable conducting the search?

A: Female staff will never be required or obligated to conduct strip searches. Even if they have volunteered previously, they can decline to conduct the search without providing any reason. The Shift Commanders will seek other volunteers or provide alternative direction. Furthermore, if concerns arise during the search, staff should stop the search immediately and notify the Shift Commander. There will be zero tolerance for the slightest attempts at sexual harassment/inappropriate behavior from the Incarcerated Individual during the search process.

This is a significant change in our practice and we expect some learning and adjustments. HQ [Head Quarters] is currently approving a sticker for preference identification that will go on the back of Identification Cards to assist with the preference identification during Pat/Strip searches. As additional questions and concerns are brought forward, I will send out updates. I will also send out an update later this week when we have an official list of approved Preference Requests.

Lack of Volunteers to Conduct Transgender Strip Searches

The employer ran into issues getting enough female staff volunteers, resulting in transgender incarcerated individuals identifying as female being strip searched by male corrections staff. Deborah Jo Wofford, Deputy Assistant Secretary for DOC's women's prison division, who is responsible for oversight of transgender services across all 11 DOC facilities, explained, "What we know is that when we tried the volunteer method, it was insufficient and we were not -- we were having many reported cross-gender searches because females did not volunteer or we did not have a sufficient number of volunteers to carry out the duty at all facilities."

Michelle Duncan, DOC's Director of PREA Services, testified that when she was an associate superintendent at a male correctional facility, she ran into challenges where female staff would not be available to conduct strip searches of transgender females.

They would be involved in another duty so they wouldn't be able to pull them from the duty. You wouldn't have any volunteers on the graveyard shift. It was very

difficult to find a female staff member who was able to or who had volunteered that was in a position to be able to come and do it.

The employer did not provide any data on how many cross-gender strip searches had occurred, or any percentages or information about the frequency of the problem, despite having a policy requiring that all cross-gender searches be documented.

Policy 490.700 allows cross-gender searches (transgender females searched by male corrections officers) if “circumstances do not allow for the preference to be implemented.” DOC’s practice at the time stated, “If no female volunteers are available, the Shift Commander will direct male staff to conduct the search. The Shift Commander will then complete an IMRS report documenting the inability to accommodate the preference request.”

There is no evidence of the employer notifying the union about the lack of female volunteers to conduct transgender strip searches in male correctional facilities.

Failure to Comply with PREA and Related Lawsuit Settlement

At some point after the implementation of policy 490.700 and the volunteer system, DOC administrators became aware that the practice of directing male staff to conduct strip searches of transgender females when a female volunteer was not available did not comport with the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2, 117 Stat. 972, 972–75 (codified at 42 U.S.C. § 15601 (2018)).

PREA standards prohibit strip searches by a member of the opposite gender, except in exigent circumstances. The PREA Resource Center, part of the Department of Justice, also published an FAQ² that states in part,

Agencies or facilities that conduct searches based solely on the gender designation of the facility without considering other factors such as the gender identity or expression of the individual inmate or the inmate’s preference regarding the gender

² National PREA Resource Center, Can You Please Clarify the Parameters for Conducting a Search of a Transgender or Intersex Individual?, PREA Resource Center, <https://www.prearesourcecenter.org/frequently-asked-questions/can-you-please-clarify-parameters-conducting-search-transgender-or> (last visited June 8, 2025).

of the person conducting the search, would not be compliant with Standards 115.15, 115.115, 115.215, and 115.315.

Concerns with PREA compliance were raised in a lawsuit against the employer. Unbeknownst to the union, on or about October 11, 2023, the employer entered into an agreement with the organization Disability Rights Washington to resolve a pending lawsuit over employer practices with respect to transgender incarcerated individuals. The portion of the settlement agreement regarding searches of transgender incarcerated individuals states,

20. Searches of transgender individuals will be conducted by an officer of the gender formally requested in documentation by the individual and in such circumstances will not be considered a cross-gender search. Strip searches will not be conducted for the purpose of examining an individual's genitals. The Superintendent, Community Corrections Supervisor, or Duty Officer will approve or deny a cross-gender search and consider appropriate alternatives. The Department's inability to make available women correctional officers who are trained to perform strip or pat-down searches of transgender people is not an exigent circumstance justifying a cross-gender search.

21. The Department will train all correctional officers, regardless of gender, on the strip and pat-down searching of transgender people as part of the CORE curriculum and semi-annual in-service training. Training will include issues related to searching people with gender-affirming clothing and property items covered in this Agreement.

22. The Department will staff any facility housing transgender people with a sufficient number of women correctional officers trained on the strip and pat-down searching of people to meet the requirements of this Agreement.

The employer did not contact the union to discuss its intent to make changes to employer practices and policies with respect to strip searches of transgender incarcerated individuals prior to entering into the above settlement agreement.

2023 Changes to Policy on Transgender Strip Searches and Union Demand to Bargain

On February 27, 2023, DOC provided a draft of changes to policy DOC 490.700, "Transgender, Intersex, and/or Non-Binary Individuals," to the union. The employer invited the union to "bargain the impacts" of the changes. This draft was provided in a track changes format and showed that the employer was deleting language that had appeared in section X about searches, regarding both pat and strip searches. The deleted language stated, "Searches will be conducted in accordance

with the stated preference unless circumstances do not allow for the preference to be implemented during a pat or strip search.”

On March 21, 2023, DOC provided a draft of changes to policy 420.310, “Searches of Incarcerated Individuals” to the union. DOC added the following new language to section IV.D.3: “Searches of an individual who is transgender, non-binary, and/or intersex will be conducted by the gender requested on the individual’s DOC 02-420 Preferences Request and will not be considered a cross-gender search.” The employer invited the union to “bargain the impacts” of the changes.

On March 22, 2023, the union filed a demand to bargain over the employer’s proposed changes to policy DOC 420.310. The union requested to bargain “both the decision and the impacts” of the employer’s decision to change policy DOC 420.310. The union also demanded that the employer “maintain the status quo” until bargaining was complete.

The parties met to bargain over changes to policy DOC 420.310 on May 22, 2023, and June 16, 2023. Notes from these meetings were emailed to all parties on June 28, 2023. At the hearing, employer and union witnesses concurred that the notes were accurate.³ At the May 22 and June 16 meetings, the union and the employer disagreed about whether this policy change required only impacts bargaining, also known as effects bargaining.

During the May 22, 2023, meeting, the employer stated, “Relying on volunteers is discriminatory on the basis of gender and violates state and federal law, including PREA. . . . [M]anagement confirmed that the intent of the revision is to remove the voluntary option for employees for these searches.” Representative Davis expressed that this change was a “significant change in working conditions.” The employer explained, “[T]he State’s position is that this is a required policy revision due to PREA, and state and federal non-discrimination laws on the basis of gender, so that the revisions are not a mandatory subject of bargaining. . . .” The notes from the meeting also

³ Sarena Davis, union representative and DOC Director of Corrections and Law Enforcement, testified that this email “did a pretty good job capturing” the discussions. Alicia Dack, Senior Employee Relations Manager for Statewide Prisons, also testified that the summary was an accurate reflection of the discussions.

observed, “Davis reiterated several times that this is a significant change in working conditions and asked for mediation.”

The union attempted to bargain over the implementation of the policy and did not make any proposals specifically regarding the impacts or effects of the policy. The parties did not reach an agreement on the revised policy.

On July 17, 2023, the employer implemented revisions to policy DOC 420.310. On July 21, 2023, DOC Superintendent Dan White sent an email to managers at the Monroe Correctional Complex, a male correctional facility. The email informed managers that female CO staff were no longer allowed to refuse to strip search a transgender individual if they were directed to do so. The email further directed management to treat any refusal by a female CO as an act of insubordination and report it via incident report.

On August 1, 2023, the employer began distributing training documents for the new transgender search policy to all the superintendents at DOC institutions. The training documents acknowledged that “[s]trip searches are customarily completed by male staff in facilities that are generally designated to incarcerate males.” The new policy required training for “staff who have not conducted strip searches to include shadowing staff who conduct searches by observing them as they do searches to increase their confidence and comfort level.” The document acknowledged that “[m]any female officers working in male prisons have never conducted a strip search.”

Other Legal Concerns Identified by the Employer

The employer also argues that both state and federal laws prohibit the state from engaging in discrimination based on sex and gender expression or identity. The employer asks that PERC take official notice of WAC 10-08-200(10) and RCW 34.05.455(5).⁴

⁴ The employer also identified in its brief, “The Washington Law Against Discrimination (WLAD) prohibits employment discrimination on the basis of sex and gender expression or identity. RCW 49.60.030(a); RCW 49.60.040(29). Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. 42 USC 2000e-2. The Equal Protection Clause of the 14th Amendment to the United States Constitution

There is no evidence that the employer notified the union that it had concerns that its policies with respect to strip searches of transgender incarcerated individuals were out of compliance with these laws prior to announcing the policy change described below.

ANALYSIS

Applicable Legal Standards

Burden of Proof

In unfair labor practice proceedings, the ultimate burdens of pleading, prosecution, and proof all lie with the complainant. WAC 391-45-270(1)(a); *City of Seattle*, Decision 8313-B (PECB, 2004). This burden of proof requires the complainant to show, by a preponderance of the evidence, that the respondent has committed the complained-of unfair labor practice. *Whatcom County*, Decision 8512-A (PECB, 2005).

Duty to Bargain

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.80.110(1)(e). 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. *University of Washington*, Decision 11414-A (PSRA, 2013).

Refusal to Bargain

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.80.110(1)(e), (a).

and article I, section 12 of the Washington State Constitution prohibits the State from subjecting similarly situated people to disparate treatment. U.S. Const. amend. XIV; Const. art. 1, § 12.”

Mandatory Subjects of Bargaining

Whether a particular subject is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. The courts have instructed the Commission to apply a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989); *Kitsap County v. Kitsap County Corrections Officers Guild, Inc.*, 179 Wn. App. 987 (2014). To decide if a particular issue is a mandatory subject of bargaining, 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.” *City of Richland*, 113 Wn.2d at 203. When performing the *City of Richland* balancing test, the parties’ history of bargaining or not bargaining the subject does not come into play. *King County*, Decision 13961 (PECB, 2024), *aff’d*, *King County*, Decision 13961-A (PECB, 2025). The type of bargaining or discussions that occurred to establish the previous policy and past practice cannot convert a non-mandatory subject into a mandatory subject or vice-versa. WAC 391-45-550; *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A.

While the balancing test calls upon the Commission and its examiners to balance these two principal considerations, the actual application of this test is more nuanced and is not strictly black and white. 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,” which are permissive subjects of bargaining. *City of Richland*, 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of each case. One case may result in finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. The decision focuses on which characteristic predominates. *Id.*

Unilateral Changes

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)).

The parties' collective bargaining obligation requires 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 a term of a collective bargaining agreement. *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).

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 a duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007) (citing *Municipality of Metropolitan Seattle (METRO) (ATU Local 587)*, Decision 2746-B (PECB, 1990)). A complainant alleging a unilateral change must establish both 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). 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)).

Past Practice

The past practices of parties are used to construe provisions of an agreement that may rationally be considered ambiguous or where the contract is silent as to a material issue. *Kitsap County*, Decision 8402-B (PECB, 2007). A past practice is a course of dealing acknowledged by the parties over a period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (citing *City of Pasco*, Decision 4197-A (PECB, 1994)).

For a past practice to exist, two elements are required: (1) an existing prior course of conduct and (2) an understanding by the parties that the conduct was known and mutually accepted by the

parties as the proper response to the circumstances. *See generally Whatcom County*, Decision 7288-A.

Application of Standard(s)

Mandatory Subjects of Bargaining

The gateway question is whether the changes to policies regarding strip searches of transgender incarcerated individuals were mandatory subjects of bargaining.

The union argues that policy changes regarding strip searches of transgender incarcerated individuals constituted a substantial change to working conditions for female corrections officers working at male corrections facilities and are a mandatory subject of bargaining. The employer argues that it did not have an obligation to bargain because the policy changes were either legally required or non-mandatory subjects of bargaining.

Union's Interests

The union argues that the change to the search policy created a material and substantial change to working conditions for female corrections officers working at male correctional facilities. During the hearing, Davis testified that the union recognized that some of its female staff members have histories of sexual abuse or other trauma as well as staff whose religious beliefs conflict with being required to view the genitals of someone of a different biological sex. The union points out that female employees were told they could be disciplined or terminated if they refused to conduct strip searches of transgender incarcerated individuals housed in male facilities after being ordered to do so. The union argues that this policy change puts employees' job security at risk and is a significant change to their working conditions in male prisons.

The union agrees that the employer can assign that work to COs on a voluntary basis, can train COs on how to perform those searches, can incentivize COs to perform that work, and can even assign those searches to other classifications on a voluntary basis. Specifically, the union argues that PREA, 28 C.F.R § 115.15 (2024) and the settlement agreement require that the employer achieve a specific result: that the employer provide adequate staffing and training to ensure that transgender incarcerated individuals can be searched by an officer of the gender that they have formally requested. But neither specifies how the employer is to achieve that result. The union

points out that, during negotiations, the union suggested alternative approaches to achieving the employer's desired result, including allowing other classifications to volunteer to conduct strip searches and/or establishing bonafide occupational qualification positions that would allow DOC to assign designated female corrections officers to be available for strip searches of incarcerated transgender women. The union argues that neither 28 C.F.R § 115.15 nor the settlement agreement mandated that the employer take the specific action it did. The employer, therefore, retained discretion, under the law, to consider multiple approaches to achieving the result required by federal regulations and its settlement agreement.

Employer's Interests

The employer argues it has a compelling interest in controlling contraband to maintain safety within its prisons. The primary purpose of strip searching is to control contraband. To maintain that safety, DOC must ensure that all its corrections officers are required, trained, and prepared to conduct a strip search when needed. The employer argues that if fails to have adequate female staff to conduct strip searches of transgender incarcerated individuals simply because available female staff are unwilling to carry out the duty, DOC would be forced to forgo strip searches that should otherwise be conducted, jeopardizing the safety and welfare of both incarcerated individuals and corrections staff.

The employer cites part 115.15(a) of the PREA National Standards, which states, "The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners." 28 C.F.R §115.15. Only temporary and unforeseen situations constitute exigent circumstances under PREA. According to employer witnesses, foreseeable events, like routine staff shortages or a lack of volunteers, do not constitute exigent circumstances under PREA. The employer argues that, on balance, DOC's interest in maintaining the safety of staff and incarcerated individuals as well as its obligation to comply with legal requirements under PREA and state and federal anti-discrimination laws outweigh the union's interests in this circumstance and should be found to be a permissive or illegal subject of bargaining.

In This Case, Requiring Female COs to Conduct Strip Searches of Transgender Females If No Volunteer Is Available Is a Non-Mandatory Subject

It is important to recognize that the employer made two interrelated, yet distinct, changes to its policy on strip searches of transgender incarcerated individuals. I will analyze these elements separately.

The portion of the employer's existing policy and practice that was not in compliance with PREA was the portion of policy 490.700 that allowed cross-gender searches (transgender females searched by male corrections officers) if "circumstances do not allow for the preference to be implemented." DOC's practice at the time stated, "If no female volunteers are available, the Shift Commander will direct male staff to conduct the search. The Shift Commander will then complete an IMRS report documenting the inability to accommodate the preference request."

The *City of Richland* test calls on me to weigh the evidence supplied by the parties. Based on the record here, the balance favors the evidence of the employer's interests. The employer demonstrated that its previous policy and practice of having a male CO conduct a strip search of a transgender female incarcerated individual when a female CO on the volunteer list was not available was not compliant with PREA. I find that the employer's interest in complying with PREA outweighs the impact on employee working conditions.

Additionally, as the Commission explained in *University of Washington*, Decision 13865-A (PECB, 2025),

An otherwise mandatory subject of bargaining can be preempted by statute. *Id.* at 25.⁵ Such preemption occurs when "neither the employer nor the union have the authority to negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes or court decisions." *Id.* at 5 (finding firefighter pensions to be preempted by statute and that the employer was not obligated to negotiate over a proposal for statutorily provided retirement benefits). . . . [C]omplying with a legal requirement, often referred to as legal necessity, is an affirmative defense to a failure to bargain change. *Kitsap Transit*, Decision

⁵ "Id." here refers to *City of Seattle*, Decision 4687-B (PECB, 1997) at 14, *aff'd*, *International Association of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235 (1998), *rev. denied*, 137 Wn.2d 1035 (1999).

11098-B (PECB, 2013) (citing *Cowlitz County*, Decision 7007-A (PECB, 2000)) (holding an employer can raise a necessity defense when compelling legal circumstances necessitate a unilateral change of employee wages, hours, or working conditions).

Under PREA, both transgender females and an assigned female at birth must be treated as female. Requiring female COs to conduct strip searches of transgender females if no volunteer is available is a non-mandatory subject of bargaining.

In This Case, Eliminating the Process of First Using a Volunteer List Was a Mandatory Subject

The union puts forward persuasive arguments that PREA does not prescribe how the employer should accomplish ensuring that incarcerated individuals are strip searched by someone of the same gender identity. PREA only requires that the result be achieved.

The union argues that elements of this case are analogous to *City of Spokane*, Decision 13353 (PECB, 2021). In that case, a change in Washington State Department of Labor and Industries (L&I) rules governing overtime exemptions from Washington State's Minimum Wage Act resulted in some employees represented by the Spokane Managerial & Professional Association no longer qualifying as overtime exempt. Due to that change, the employer asserted that those employees would lose access to a contractual "partial leave benefit" that was available to "salaried" employees. The employer raised a legal necessity defense and argued that the new L&I salary threshold required it to reclassify employees and, as a result of that reclassification, they lost access to the partial leave benefit. The examiner in *City of Spokane* found,

[E]ven if the employer was legally required to respond to the rule change by reclassifying bargaining unit employees, it does not follow that these employees should automatically be restricted from use of their partial leave benefit. The effect of the classification change was the revocation of the partial leave benefit, and as discussed above, this was not bargained by the parties prior to implementation.

In this case, DOC is legally required to "not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances." 28 C.F.R. §115.15. How the employer accomplishes staffing and work assignments to assure that transgender females housed in male facilities are strip searched by female COs is not specified by the law. There is nothing in PREA that prohibits the employer from

utilizing a volunteer list to distribute these work assignments or allowing the parties to come up with other solutions. The method by which the legal requirement to “not conduct cross-gender strip searches or cross-gender visual body cavity searches” is accomplished should have been bargained by the parties.

The *City of Richland* test calls on me to weigh the evidence supplied by the parties. Based on the record here, the balance favors the evidence of the union’s interests. In applying the balancing test, I find that use of or elimination of the volunteer list to assign employees to conduct strip searches of transgender incarcerated individuals is a mandatory subject of bargaining. The process of determining these work assignments has a significant impact on employees’ working conditions. The employer did not provide a compelling explanation as to why it should not have to bargain with the union about how work assignments for strip searches of transgender incarcerated individuals are assigned.

The union points out various options that the employer was unwilling to discuss because of its position that it didn’t have an obligation to bargain. The employer’s explanation for eliminating the volunteer list in its entirety seems to center on the argument that it is easier or more convenient to assign any female CO to conduct a search rather than attempting to locate an employee on the volunteer list. The employer also argued that in some instances it was not able to locate a volunteer. The employer’s policy required the shift commander to “complete an IMRS report documenting the inability to accommodate the preference request.” This should ensure that all cross-gender strip searches are reported. However, the employer failed to provide any evidence as to how often it was unable to have an employee on the volunteer list perform a strip search of an incarcerated transgender female. The decision to eliminate the process of first using a volunteer list to assign strip searches of incarcerated transgender individuals was a mandatory subject of bargaining. The process of determining how to ensure transgender females housed in male facilities are strip searched by females was a mandatory subject of bargaining.

Eliminating the Use of a Volunteer List Was a Unilateral Change

In 2020 the parties mutually agreed upon and established a practice of creating a volunteer list of female COs working at each male correctional facility to conduct strip searches of transgender

incarcerated individuals identifying as female. The parties agreed that the employer would assign these searches to female employees on their institution's volunteer list before requiring other staff members to perform strip searches of transgender inmates identifying as female. The parties maintained this practice until the summer of 2023.

Although the employer gave the union notice of the change, the employer did not agree to bargain with the union over its decision. On May 22, 2023, the employer informed the union that its intention was to make transgender strip searches an essential job function for every corrections and custody officer. "[M]anagement confirmed that the intent of the revision is to remove the voluntary option for employees for these searches." The employer explained that it believed "[r]elying on volunteers is discriminatory on the basis of gender and violates state and federal law, including PREA." Davis expressed that this change was a "significant change in working conditions." The union objected to eliminating the practice of using volunteer lists to make these work assignments.

The employer took the position that "this [was] a required policy revision due to PREA, and state and federal non-discrimination laws on the basis of gender, so that the revisions are not a mandatory subject of bargaining." On June 16, 2023, the employer reiterated its position that "the State does not believe this [was] decision bargaining but impact bargaining." Davis explained that "the union believe[d] [it] need[ed] to bargain the decision to change the policy."

The employer's decision to eliminate the practice of soliciting volunteers and maintaining a list of female volunteers to conduct strip searches of transgender females housed at each male correctional facility was a material and substantial change to COs' working conditions. The employer's decision to eliminate the previously bargained practice of first assigning strip searches of transgender incarcerated individuals to COs on the volunteer list was a mandatory subject of bargaining. The employer refused to bargain by unilaterally eliminating the process of using a volunteer list to make these work assignments without giving the union an opportunity to bargain.

Remedy

Washington State law grants the Commission and its examiners the authority to issue appropriate orders to remedy unfair labor practices. RCW 41.80.120. The standard remedy for an unfair labor

practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the status quo; post notice of the violation; publicly read the notice; and order the parties to bargain from the status quo. *State – Department of Corrections*, Decision 11060-A (PSRA, 2012); *City of Anacortes*, Decision 6863-B (PECB, 2001).

In the instant case, much like in *City of Spokane*, Decision 13353, a return to the status quo is frustrated by a portion of the employer's previous policy that was not in compliance with PREA. I am not ordering a full restoration of the status quo because the employer's previous policies had elements that were not in compliance with PREA. An order to fully return to the status quo would have male COs strip searching transgender females when a female volunteer is not available. This portion of the policy would directly contravene the requirements of PREA prohibiting cross-gender strip searches. But there is no impediment to reinstating the practice of maintaining and using a volunteer list at each facility. My order restores the use of the volunteer list to select female staff to conduct strip searches of transgender incarcerated individuals identifying as female housed in male correctional facilities and assign the work to available volunteers before mandating that other staff perform these strip searches. Any change to this portion of the status quo is subject to bargaining. In this way, the remedy of a return to the status quo is effectuated to the extent possible without conflicting with other statutory requirements.

Lastly, the employer's position that the entirety of the policy changes it made were non-mandatory subjects precluded any meaningful bargaining about implementation at the May 22, 2023, and June 16, 2023, bargaining sessions. At the union's request, the employer is ordered to meet and bargain with the union about ways to ensure transgender females housed in male facilities are strip searched by persons of the same gender as required by PREA.

CONCLUSION

The employer's decision to require searches of transgender individuals be conducted by an officer of the gender formally requested in documentation by the individual was necessary to comply with PREA and is not a mandatory subject of bargaining. This means that female COs can be directed to conduct strip searches of transgender incarcerated individuals identifying as female who are housed in male correctional facilities when no female COs on the volunteer list are available.

The union has proven by a preponderance of the evidence that the employer violated RCW 41.80.110(1)(e) by unilaterally eliminating the practice of soliciting volunteers and first assigning strip searches of transgender incarcerated individuals to COs on the volunteer list.

FINDINGS OF FACT

1. The Washington State Department of Corrections (employer or DOC) is a public employer as defined by RCW 41.80.005(8).
2. Teamsters Local 117 (union) is a bargaining representative within the meaning of RCW 41.80.005(7) and (9).
3. The union represents a bargaining unit of nonsupervisory classified employees that includes corrections and custody officers (COs).
4. COs' job duties include conducting pat searches and strip searches of incarcerated individuals.
5. Gender is an important factor in determining who will conduct a strip search. Unless there is an emergency, a male CO must be the primary when a male incarcerated individual is being strip searched. Likewise, absent an emergency, a female CO must be the primary when a female incarcerated individual is being strip searched. A person of any gender may serve as the secondary on a strip search because they are not directly viewing the individual being searched.
6. In 2019, the union and the employer negotiated over the implementation of the employer's proposed policy 490.700 and agreed that female CO staff at male correctional facilities would be permitted to volunteer to participate in searches of transgender incarcerated individuals identifying as female.
7. On January 16, 2020, DOC made a targeted request to only female corrections staff working in male corrections facilities asking for volunteers to search transgender women.

8. DOC policy 490.700 titled “Transgender, Intersex, And/Or Gender Non-Conforming Housing and Supervision” was released on February 13, 2020. Policy 490.700 allowed cross-gender searches (transgender females searched by male corrections officers) if “circumstances [did] not allow for the preference to be implemented.”
9. On February 25, 2020, the employer sent out an email to all staff with the subject line “Transgender Search Preference.” The email provided clarification on policy 490.700 and explained in part,

Q: What is the strip search process for these individuals?

A: When they have a known Preference Request, or inform you they do prefer a Female Staff conduct the search, Staff will contact the Shift Commander for verification. If verified, the Shift Commander will determine if staff are available to accommodate the request. WA DOC is using a volunteer only approach to this process. Only staff that have volunteered in advance will be asked to conduct the search. If available, the female staff member will conduct the strip search as the search officer. If no female staff are available to conduct the strip search, a female staff will be used to 2nd the Search Officer and act as the Observer only.

Q: What happens if the Preference cannot be accommodated?

A: Only the Shift Commander can determine this. If no female volunteers are available, the Shift Commander will direct male staff to conduct the search. The Shift Commander will then complete an IMRS [Incident Management Reporting System] report documenting the inability to accommodate the preference request. The Incarcerated Individual cannot voluntarily decline our attempts to accommodate once the Preference is known to staff. The Shift Commander must be contacted and is solely responsible to make the decision to accommodate or not.

10. The employer ran into issues getting enough female staff volunteers to conduct transgender strip searches in male correctional facilities, resulting in transgender incarcerated individuals identifying as female being strip searched by male corrections staff. The

employer did not provide any data on how many cross-gender strip searches had occurred, or any percentages or information about the frequency of the problem, despite having a policy requiring that all cross-gender searches be documented. There is no evidence of the employer notifying the union about the lack of female volunteers to conduct transgender strip searches in male correctional facilities.

11. At some point after the implementation of policy 490.700 and the volunteer system, DOC administrators became aware that the practice of directing male staff to conduct strip searches of transgender females when a female volunteer was not available did not comport with the Prison Rape Elimination Act of 2003 (PREA). Part 115.15(a) of the PREA National Standards states, “The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.” 28 C.F.R §115.15.
12. On February 27, 2023, DOC provided a draft of changes to policy DOC 490.700, “Transgender, Intersex, and/or Non-Binary Individuals” to the union. The employer invited the union to “bargain the impacts” of the changes. This draft was provided in a track changes format and showed that the employer was deleting language that had appeared in section X about searches, regarding both pat and strip searches. The deleted language stated, “Searches will be conducted in accordance with the stated preference unless circumstances do not allow for the preference to be implemented during a pat or strip search.”
13. On March 21, 2023, DOC provided a draft of changes to policy 420.310 “Searches of Incarcerated Individuals” to the union. DOC added the following new language to section IV.D.3: “Searches of an individual who is transgender, non-binary, and/or intersex will be conducted by the gender requested on the individual’s DOC 02-420 Preferences Request and will not be considered a cross-gender search.” The employer invited the union to “bargain the impacts” of the changes.
14. On March 22, 2023, the union filed a demand to bargain over the employer’s proposed changes to policy DOC 420.310. The union requested to bargain “both the decision and the

impacts” of the employer’s decision to change policy DOC 420.310. The union also demanded that the employer “maintain the status quo” until bargaining was complete.

15. The parties met to bargain over changes to policy DOC 420.310 on May 22, 2023, and June 16, 2023. The union and the employer disagreed about whether this policy change required only impacts bargaining, also known as effects bargaining. The union attempted to bargain over the implementation of the policy and did not make any proposals specifically regarding the impacts or effects of the policy. The parties did not reach an agreement on the revised policy.
16. During the May 22, 2023, meeting, the employer stated, “Relying on volunteers is discriminatory on the basis of gender and violates state and federal law, including PREA. . . . [M]anagement confirmed that the intent of the revision is to remove the voluntary option for employees for these searches.” The union expressed that this change was a “significant change in working conditions.” The employer explained, “[T]he State’s position is that this is a required policy revision due to PREA, and state and federal non-discrimination laws on the basis of gender, so that the revisions are not a mandatory subject of bargaining. . . .” The union reiterated several times that this was a significant change in working conditions and asked for mediation.
17. On July 17, 2023, the employer implemented revisions to policy DOC 420.310.
18. On July 21, 2023, DOC Superintendent Dan White sent an email to managers at the Monroe Correctional Complex, a male correctional facility. The email informed managers that female CO staff were no longer allowed to refuse to strip search a transgender individual if they were directed to do so. The email further directed management to treat any refusal by a female CO as an act of insubordination and report it via incident report.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has statutory jurisdiction in this matter pursuant to chapter 41.80 RCW and chapter 391-45 WAC.

2. Requiring female COs to conduct strip searches of transgender females if no volunteer is available is a non-mandatory subject of bargaining. By the actions described in findings of fact 4, 5, 8, 9, 11, 12, 13, 15, 16, 17, and 18, the employer did not refuse to bargain in violation of RCW 41.80.110(1)(e), nor did it derivatively interfere in violation of RCW 41.80.110(1)(a).
3. The employer's decision to eliminate the previously bargained practice of first assigning strip searches of transgender female incarcerated individuals in male facilities to female COs on the volunteer list was a mandatory subject of bargaining. By the actions described in findings of fact 6, 7, 9, 10, 12, 13, 14, 15, 16, and 17, the employer refused to bargain in violation of RCW 41.80.110(1)(e) and derivatively interfered in violation of RCW 41.80.110(1)(a).

ORDER

Washington State Department of Corrections, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from
 - a. Unilaterally changing the practice of first using a volunteer list to select and assign female COs to conduct strip searches of transgender incarcerated individuals identifying as female who are housed in male correctional facilities.
 - b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.80 RCW:
 - a. Restore the *status quo ante* working conditions that existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this


order by reinstating the practice of maintaining and using a volunteer list at each facility to select female staff to conduct strip searches of transgender incarcerated individuals identifying as female who are housed in male correctional facilities and assign the work to available volunteers before mandating that other staff perform these strip searches.

- b. Give notice to and, upon request, negotiate in good faith with Teamsters Local 117 before changing the practice of maintaining and using a volunteer list at each facility to select female staff to conduct strip searches of transgender incarcerated individuals identifying as female who are housed in male correctional facilities and assign the work to available volunteers before mandating that other staff perform these strip searches.
- c. Upon request, negotiate in good faith with Teamsters Local 117 over ways to ensure strip searches of transgender incarcerated individuals are performed by persons of the same gender, regardless of the gender designation of the correctional facility.
- d. Contact the 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.
- e. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

- f. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 11th day of June, 2025.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, 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.