STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PASCO POLICE OFFICERS' ASSOCIATION,	)	
Complainant,	)	CASES 9043-U-91-2001 9044-U-91-2002
vs.	)	DECISIONS 4197-A - PECB 4198-A - PECB
CITY OF PASCO,	)	
Respondent.	)	DECISION OF COMMISSION

Aitchison, Hoag, Vick and Tarantino appeared on behalf of the complainant, by Victor I. Smedstad, Attorney at Law, at the hearing, and by James M. Cline, Attorney at Law, on the petition for review.

Greg Rubstello, City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on both a petition for review filed by the Pasco Police Officers' Association (union) and a cross-petition for review filed by the City of Pasco (employer). Each party seeks partial reversal of a decision issued by Examiner J. Martin Smith.[1]

BACKGROUND

Most of the union's factual allegations in these cases were admitted by the employer in its answer. A thorough review of the record in this case is detailed in the Examiner's decision, and the background information given here is limited to the issues brought up in the petition for review and cross-petition for review.

---

[1] City of Pasco, Decisions 4197 and 4198 (PECB, 1992).

The union is the exclusive bargaining representative of certain of the employer's law enforcement personnel. The parties have had a series of collective bargaining agreements, covering periods of at least 1987-88, 1989-90, and 1991-92. Article II, Section 3, of each of those contracts contained a provision of the type sometimes referred to as a "zipper clause". Article III of each of those contracts contained a "Management Rights" provision. During September and October of 1990, the parties were engaged in collective bargaining negotiations for a successor contract.

The Board of Review / Point System -
Since an unspecified date, the employer had a procedure in effect under which police-related traffic accidents and discharges of firearms were submitted to a "board of review", and a system of point values was used to classify police vehicle accidents and recommend disciplinary outcomes. On September 19, 1990, the employer's police chief issued a memorandum abolishing the board of review and the point system. At the same time, he established a new "management review" procedure to deal with the same subject matters. The union sought to bargain over the board of review and point system during the negotiations on a successor agreement, but the employer refused to bargain on those issues.

The Training Expense Procedure -
Prior to August of 1988, it was the employer's practice to require job applicants to agree, as part of their acceptance of a job offer from the employer, to reimburse the employer for its training costs if they left employment within 24 months after they completed the training. Dan Reierson commenced his employment in the bargaining unit represented by the union on August 1, 1988. The employer did not obtain Reierson's signature on a training expense reimbursement contract prior to Reierson's first day of work, and instead had him sign such a contract on August 15, 1988.

During collective bargaining negotiations between the parties in 1989, the union sought to eliminate the practice under which new employees were required to enter into training expense reimbursement contracts. The employer did not accept the union's proposal, and it represented to the union that its practice was limited to pre-hire agreements signed with applicants for employment. The union then apparently ceased pursuing that issue.

When Reierson submitted a letter of resignation on October 2, 1990, to be effective October 20 of that year, the employer attempted to enforce the training expense reimbursement contract Reierson had signed on August 15, 1988. Reierson objected, and the employer then negotiated with Reierson concerning a reduction of the amount in dispute. Reierson accepted the employer's offer after his employment ended.

The Unfair Labor Practice Proceedings -
On February 25, 1991, the union filed a complaint charging unfair labor practices involving two counts, each alleging a refusal to engage in collective bargaining:[2]

1. The union complained that the change of the board of review and point system was not bargained by the employer prior to its unilateral implementation, that the union made a demand to bargain over the issue, and that the employer informed the union during collective bargaining negotiations that it declined to bargain over the issue.

2. The union complained that the employer's attempt to enforce a training expense reimbursement contract signed by a bargaining unit employee after he had commenced his employment in the bargaining unit was unlawful, that individual contracts for the repayment of training costs are a mandatory subject of collective bargaining affecting terms and conditions of employment, and that

---

[2] Two separate cases were docketed, but they were re-consolidated after initial processing.

the employer had unilaterally initiated a new practice by having employees sign post-hire contracts to reimburse training costs. The union also alleged that the unilateral change in practice violated RCW 41.56.140(2) and (4), in that it had interfered with the union's ability to represent its members.

While it admitted the basic facts of both counts alleged by the union,[3] the employer's answer raised several affirmative defenses. In particular, the employer asserted that **both** counts of the complaint were untimely under the applicable statute of limitations.

At the hearing held by Examiner Smith on February 25, 1992, the employer moved to dismiss the allegation regarding the training expense reimbursement contract, based on the six-month statute of limitations set forth in RCW 41.56.160. The employer noted that more than six months had elapsed from Reierson's signing of his training expense reimbursement contract on August 15, 1988, to the filing of the unfair labor practice complaint on February 25, 1991. The union argued that the complaint was timely as to the attempted **enforcement** of the training expense reimbursement contract.[4] The Examiner took the employer's motion under advisement, and the parties produced evidence and argument on the issue.

---

[3] As to the board of review and point system, the employer admitted the allegations of the complaint, except it alleged that the board of review "made recommendations only", and it denied that the point system either affected discipline of bargaining unit members or constituted a term or condition of employment. As to the training reimbursement issue, the employer asserted that Reierson's case was an "isolated one", where his failure to sign the pre-hire agreement was remedied within 48 hours of his employment "without protect [sic] or objection".

[4] The union had changed attorneys between the filing of the complaint and the hearing.

In his decision issued on October 23, 1992, the Examiner denied the employer's motion to dismiss on the basis that the complaint alleged a "unilateral" action in the **enforcement** of the agreement, and that the complaint was filed within the six-month period as to that event. The Examiner ruled that the training expense reimbursement policy enforced against Reierson was a pre-existing practice and

> ... not a change giving rise to a duty to bargain ... so that the employer had not committed ... any unfair labor practice under RCW 41.56.140 by enforcing that policy.

In regard to the board of review and point system, the Examiner ruled that the union could not demand to bargain new departmental instructions or the alteration of existing ones, due to the "management rights" provision of the parties' contract. The Examiner did hold that the employer failed to bargain the **effects** of abolishing the board of review and point system, and so ordered the employer to bargain the effects of the changes it had made.

POSITIONS OF THE PARTIES

The union takes the position that the Examiner erred in finding that the union waived its bargaining rights concerning the board of review and point system, by entering into the contracts containing a management rights clause. It also argues that the Examiner wrongly concluded that only the union's right to bargain "effects" was denied by the employer's actions. The union continues to argue that the employer committed a refusal to bargain violation, by unilaterally enforcing a post-hire training expense reimbursement contract. Finally, it argues that the Examiner should have considered and made a conclusion regarding interference under RCW 41.56.140(2), rather than limiting his decision to the unilateral change allegation, and that the Examiner should have found that the

employer interfered with the bargaining representative, both when it entered into and when it enforced an individual agreement with an employee.[5]

The main thrust of the employer's argument is that the Examiner should have granted its motion to dismiss the training expense reimbursement matter, by reason of the six-month statute of limitations provided in RCW 41.56.160. It further argues that the complaint fails to allege any violation based on the enforcement of the individual agreement, so that the Examiner erred in ruling that the complaint was within the statutory six-month period because the employer's enforcement of the agreement fell within that period.

DISCUSSION

The Board of Review and Point System

Before considering the "waiver by contract" defense advanced by the employer and adopted by the Examiner as to this count of the complaint, it should be noted that the Examiner correctly determined that the changes announced by the employer affected a mandatory subject of collective bargaining under Chapter 41.56 RCW. The board of review and point system clearly impacted the disciplinary response to police vehicle accidents. Discipline can affect tenure of employment, which is the ultimate "working condition" within the traditional scope of "wages, hours and working conditions". RCW 41.56.030(4). Therefore, unless there was a waiver, a bargaining obligation arose.[6]

---

[5] The union had changed attorneys again between the filing of its brief to the Examiner and its petition for review.

[6] The employer's cross-petition for review did not challenge the Examiner's determination on this issue.

Waiver by Contract -

The employer asserts that provisions in Articles II and III of the parties' contract constitute a waiver of the union's right to bargain. In Article III of their collective bargaining agreements covering 1987-1988, 1989-1990 and 1991-1992, these parties had set forth certain "management rights", as follows:

> ARTICLE III - MANAGEMENT RIGHTS
>
> Any and all rights concerned with the management and operation of the department are exclusively that of the Employer, unless otherwise specifically provided by the terms of this Agreement.
>
> The Association recognizes:
>
> 1. The prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities and powers; and
>
> 2. That the Employer reserves those rights concerning management in operation of the department which include, but are not limited to the following:
>
> a. To recruit, assign, transfer or promote members to positions within the department;
>
> b. To suspend, demote, discharge, or take other disciplinary action against employees for just cause;
>
> c. To control the department budget.
>
> 3. To take whatever actions are necessary at all times in order to insure the proper functioning of the department.

Article II of the contract contains what is commonly referred to as a "zipper" clause. In its opening statement at the hearing, and in its post-hearing brief to the Examiner, the employer relied on Article II, in conjunction with Article III.[7]

---

[7] The employer's post-hearing brief to the Examiner was incorporated, by reference, in its response to the union's petition for review.

The Examiner did not base his "waiver by contract" finding on Article II, and did not otherwise address the employer's argument founded on the "zipper" clause. Instead, the Examiner determined, based upon the "management rights" provision, that the union had acknowledged the right of the police chief "to establish and operate the department through reasonable rules, to accomplish the 'proper functioning' of the department". The Examiner then concluded that the union "cannot demand new [Department Instruction] rules or the alteration of existing rules".

In City of Yakima, Decision 3564-A (PECB, 1991), the Commission had occasion to review a management rights provision much more specific than the one advanced here. The contract in Yakima provided:

> The Union recognizes the prerogative of the City to operate and manage its affairs .... City affairs which are not included within negotiable matters pertaining to wages, hours and working conditions are inclusive of the following but not limited thereto:
>
> 4.1 The right to establish and institute **work rules** ...
>
> 4.2 The right to determine reasonable **schedules of work**, **overtime** and all methods and processes by which said work is to be performed in a manner most advantageous to the Employer ...
>
> 4.5 The right to **assign incidental duties** reasonably connected but not necessarily enumerated in job descriptions, shall nevertheless be performed by employees when requested to do so by the Employer.
>
> [Emphasis by **bold** supplied.][8]

---

[8] Prior to the negotiation of the most recent contract, the word "reasonable" had preceded the words "work rules" in paragraph 4.1 of the Yakima contract. Article XI of the Yakima labor agreement paralleled the statutory bargaining obligation, requiring that "all negotiable matters pertaining to wages, hours and working conditions shall be established through the negotiation procedures, as provided by RCW 41.56."

That case involved unilateral changes regarding leaves, vacation scheduling and "acting" assignments, all of which were deemed to be mandatory subjects of collective bargaining. In rejecting a waiver by contract defense asserted by the employer in Yakima, we said:

> Assuming that the employer may have envisioned the changes in [the management rights article] as conferring upon it the prerogative to unilaterally revise the disputed directives, it has not sustained the burden of proof necessary to establish a waiver by contract. **In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer. We find no evidence of such a meeting of the minds in this case.**
>
> Based upon the language of [the management rights article] alone, the Commission concurs with the Examiner's conclusion that the union did not waive its right to bargain over the disputed "number of employees on leave", "vacation scheduling", or "acting assignments".

[Emphasis by **bold** supplied.][9]

The Commission thus held the employer in Yakima to its statutory bargaining obligation.

The "management rights" provision before us in this case is written in more general language than the clause we interpreted in Yakima. Moreover, it makes no explicit reference to department rules. In comparison, the reference to the "just cause" standard for discipline in Article II.2.b., indicates that employee discipline was a subject of negotiations between these parties. There is no

---

[9] The Commission went on to note that the specific provisions of Article XI, requiring that "all negotiable matters pertaining to wages, hours and working conditions shall be established through the negotiation procedures, as provided by RCW 41.56", must prevail over the general statements made in Article IV of the contract.

bargaining history to suggest that the employer evidenced an intent to alter departmental instructions that impacted the discipline of bargaining unit employees.

Because the management rights language is so general, we cannot conclude that the union understood or could reasonably have presumed to have known that acceptance of the employer's general management rights language was intended by the employer as a waiver of the union's statutory right to bargain over departmental instructions which affect a core collective bargaining issue such as employee discipline. We find, instead, that the employer did not sustain the burden of proof necessary to establish a waiver by contract under the management rights provision. The Examiner's decision on this issue must be reversed.

In arriving at the foregoing conclusion, we have considered Article II, Section 3 of the parties' 1989-1990 contract, which contains language of the type often referred to as a "zipper" clause:

> The parties acknowledge that each has had the unlimited right and opportunity to make proposals with respect to any matter being the proper subject of collective bargaining. The results of the exercise of that right are set forth in this Agreement. Therefore, except as otherwise provided in this Agreement, each voluntarily and unqualifiedly agree to waive the right to oblige the other party to bargain with respect to any subject or matter not specifically referred to or covered by this Agreement.

That language remained the same during the parties' 1987-1988, 1989-1990 and 1991-1992 collective bargaining agreements.

This Commission has rarely, if ever, dealt with the application of zipper clauses. Although the National Labor Relations Board (NLRB) originally held that "such clauses, standing alone, did not constitute a sufficiently clear and unmistakable waiver as to a

specific bargaining item,[10] the NLRB has more recently given weight to such clauses in making contract interpretations "encompassing relevant provisions in the contract, the bargaining history and past practice".[11] We also believe that weight accorded a zipper clause must be judged in the context of the clarity of that provision, the bargaining history, and events surrounding the request for bargaining.

In the present case, we find the bargaining history to be significant. The employer abolished the board of review and point system on September 19, 1990, at a time when the 1989-90 labor contract was in effect. One could perhaps construe the "zipper" clause in that contract as allowing the unilateral change at issue during the term of the 1989-90 contract, but we are mindful that the parties were engaged in negotiations during the autumn of 1990 for what became their 1991-92 collective bargaining agreement. As a part of those negotiations, the union clearly retained the right to bargain a return to the prior practice or adoption of some other process in place of the board of review and point system that was being eliminated by the employer. The union did demand to bargain over that issue in connection with the negotiations then in progress, and the employer declined to do so.

The fact that Article II, Section 3 was continued unchanged in the successor 1991-92 contract does not validate the employer's refusal to bargain during the negotiations in 1990. In the zipper clause at issue, the union acknowledged having "... the unlimited right and opportunity to make proposals with respect to any matter being the proper subject of collective bargaining". Read as a whole, the clause implicitly contemplates that **both parties** had a full oppor-

---

[10] Morris, The Developing Labor Law, BNA Books (Second Edition, 1983) p. 642.

[11] Id., at p. 642. See, also, Radiowear Corp, 214 NLRB 362 (1974); Columbus and Southern Ohio Electrical Co., 233 NLRB 686 (1984).

tunity to explore and fully discuss all bargainable matters during contract negotiations. When the employer refused to bargain over its abolition of the board of review and point system in this case, it denied the union the condition precedent to the application of Article II. In foreclosing the entire subject, the employer lost any protection the zipper clause might otherwise have provided.

We have also considered the "past practice" argument advanced by the employer in connection with the modification of departmental instructions by the police chief, but are not persuaded by it. With one exception, the employer offered no specifics about which departmental instructions were changed, or whether they affected wages, hours, discipline or other working conditions. Chief Francis did testify that he had issued a modification to the departmental instruction in question on May 7, 1986, without negotiating with the union, but his testimony does not reveal the nature of that modification. Moreover, it is not even known whether this union was the employees' exclusive bargaining representative in 1986. Given the employer's failure to offer substantive evidence in support of its "past practice" defense, we are not persuaded that the record establishes a knowing waiver by the union that would absolve the employer of its bargaining obligations in 1990.

The Examiner's findings of fact, conclusions of law and order on the board of review and point system will be amended to reflect that the employer refused to bargain when it unilaterally implemented the new "management review" procedure in place of the board of review and point system.

The Training Expense Reimbursement Contract

Before considering the arguments on the "training expense" issue, we note that employee training affects employee working conditions, and that deductions from pay affect wages, so that the training

expense reimbursement contract between the employer and Reierson affected mandatory subjects of collective bargaining under Chapter 41.56 RCW.

In the count regarding the training reimbursement contract, the complaint alleged:

> Previous to ... October, 1989, the City implemented a pre-hire contract requiring new employees to reimburse the City for training costs incurred by the City to train them if they left employment within two years of their date of hire.
>
> The matter was discussed between the parties during negotiations for the 1989 collective bargaining agreement in the context of an Association proposal for contract language to prohibit the practice of pre-hire contracts. At all times the City represented that its practice was limited to individuals signing such contracts prior to their employment.
>
> **On or about October 19, 1990, the Association learned** that the City expected Officer Rierson [sic], who had given notice of his intention to leave employment, to repay the costs of his training. **On or about the same day, the Association learned** the contract signed by Rierson [sic] was actually signed several days after Rierson [sic] had been an employee and a member of the Association's bargaining unit. [reference to attachment omitted]
>
> The initiation of the practice of **having individuals sign a post-employment contract** for the reimbursement of training costs was done without bargaining between the City and the Pasco Police Officers Association.
>
> **Individual contracts for the repayment of training costs are mandatory subjects of bargaining** as they directly affect a term and condition of employment.
>
> The **unilateral implementation of post-hire individual contracts with bargaining unit members** to repay training costs was an unfair labor practice under RCW 41.56.140(2) and (4) as it interferes with the ability of the

> Association to represent its members and is a refusal to engage in collective bargaining.
>
> [Emphasis by **bold** supplied.]

Subsection (2) of RCW 41.56.140 provides that it shall be an unfair labor practice for a public employer:

> To control, dominate or interfere with a bargaining representative;

That provision parallels Section 8(a)(2) of the National Labor Relations Act, which was designed to protect employees from employer interference in the internal affairs of unions. See, Legislative History of the National Labor Relations Act, National Labor Relations Board, Volume I pages 15-26, 37-44, 46-57 and 89 ff; Washington State Patrol, Decision 2900 (PECB, 1988). The union's reliance on RCW 41.56.140(2) is misplaced in this case, because there is no assertion of interference in the union's internal affairs. There is no allegation, for example, that the employer has contributed financial support or other assistance to the union, or that it has interfered in any way with the internal workings of the employees' organization.

A "circumvention" violation can nevertheless be found under RCW 41.56.140(4), if an employer negotiates mandatory subjects of collective bargaining with anybody other than the authorized agents of the exclusive bargaining representative of its organized employees. Such a "circumvention" of the union inherently interferes with the rights of the bargaining unit employees, and is thus also an "interference" violation of RCW 41.56.140(1).

The Timeliness of the Complaint -

The wording of the complaint suggests that the union's allegations were limited to the employer's act of requiring Reierson to sign the training expense reimbursement contract on August 15, 1988. However, in response to a routine deferral inquiry by the Executive

Director, the union made clear that it was taking aim at the employer's enforcement of the individual contract, an act that occurred within six months prior to the filing of the complaint.

If the union had become aware of the signing of the training expense reimbursement contract by employee-Reierson prior to July of 1990, and had chosen to voice no objection, then the complaint could conceivably be dismissed as untimely despite subsequent enforcement of the contract within six months of the complaint. We need not resolve that issue in this case, however, because we are not persuaded that the union waited more than six months after obtaining knowledge of the contract's existence.

The Commission has uniformly held that the six-month period set forth in RCW 41.56.160 begins to run with the date of notice or constructive notice of the complained-of action. Port of Seattle, Decision 2796 (PECB, 1987); Emergency Dispatch Center, Decision 3255-B and 3255 (PECB, 1990). The complaint alleges that the union first learned of the August 15, 1988 contract on October 19, 1990, a date falling within the six months prior to the filing of the complaint. The burden of proving knowledge at an earlier date rested with the employer.

The employer seems to feel that its burden was met at the hearing, by the following exchange between Reierson and the employer's counsel:

> Q. [By Mr. Rubstello] And you spoke to other **officers in the Association** about this?
>
> A. [By Mr. Reierson] I assume, yeah.
>
> Tr. 44:8-10 [Emphasis by **bold** supplied].

In the employer's view, Reierson was acknowledging through the foregoing response that he had consulted with agents of the Pasco Police Officers' Association at the time he signed the training

expense reimbursement contract. The testimony is ambiguous, however. Reierson's response could be interpreted in the manner suggested by the employer. But Reierson did not seem to be referring to union officeholders when he stated in earlier testimony, at Tr. 41, that he "talked to other officers" about signing the training expense reimbursement contract. It therefore seems likely that Reierson's response to the employer's counsel at Tr. 44 was referring to fellow **police officers** who belonged to the union, but were not necessarily **officers of the union**. Because of this ambiguity, the record is certainly not clear that Reierson was acknowledging that he gave notice to the union.

The employer offered no other evidence that the union or its agents had knowledge of the contract on an earlier date than that asserted in the complaint, and other transactions between the parties belie the existence of notice. When the union raised the subject of training expense reimbursement contracts in collective bargaining in 1989, the employer responded with assurances that its practice was limited to "pre-hire" contracts. The union apparently did not contest the employer's response, or make any reference at that time to the situation of Reierson. The union's quiet dropping of its bargaining demand seems uncharacteristic of an organization having information directly contradicting the employer's response to its proposal. Had it known that Reierson was required to sign his reimbursement contract after commencing his employment, it seems likely the union would have brought up that situation at the time of the parties' bargaining table discussions. We therefore find that the employer has failed to satisfy the burden of proof on its "statute of limitations" defense.

The "Refusal to Bargain by Unilateral Change" Allegation -
The complaint alleged that the employer unilaterally implemented a **practice** of having bargaining unit members sign post-hire individual contracts to repay training costs, thus refusing to bargain in violation of RCW 41.56.140(4). The answer denied that the employer

initiated any **practice** of requiring individuals to sign post-employment training expense reimbursement contracts, alleging instead that the actual practice is to have individuals sign **pre-employment** contracts. The employer asserted that Reierson's case was an isolated one, in which the employer sought to rectify its failure to have Reierson sign a pre-employment contract.

The document actually signed by Reierson was worded as a contract for reimbursement of **hiring** and training expenses. It expressly referred to "the **applicant** identified below", and provided signature places for "**Attorney of Applicant**" and "**Applicant**". Exhibit 4. This evidence, and the record as a whole, falls short of showing that the employer implemented a **blanket practice** of requiring post-employment training expense reimbursement contracts, as alleged by the union. Instead, the record indicates that the employer implemented a blanket practice of requiring applicants to sign such contracts **prior** to their being hired.

In Reierson's case, the employer neglected to obtain a training expense reimbursement contract until after he became a bargaining unit employee. In the union's view, the employer was guilty of a unilateral change as to Reierson, because it deviated from its own training reimbursement procedure. In City of Yakima, Decision 3564-A (PECB, 1991), the Commission was asked to decide whether the erroneous enforcement of a long-standing rule, by itself, changed the rule or created a new status quo. In that case, we concluded that there was no material change giving rise to a duty to bargain on the subject. The present case is analogous. Had the employer actually adopted a new policy of requiring police officers to sign training expense reimbursement contracts after commencing their employment, we could find that a unilateral change had occurred. But in this case, the union is asking the Commission to find a "unilateral change" where the employer was merely seeking to assure consistency in application of an unchanged policy. We decline to do so.

The "Refusal to Bargain by Circumvention" Allegation -
Although the employer may not have breached any duty to bargain through a unilateral change in working conditions, it could nevertheless have committed a refusal to bargain if it negotiated a mandatory subject of collective bargaining directly with a bargaining unit member in circumvention of the exclusive bargaining representative. The Examiner concluded that the circumvention issue lurking in the facts was not before him. The Examiner appears to have reached that conclusion because of a belief that the claim needed to be filed within six months of the time the employer dealt directly with the employee.[12] We conclude that sufficient facts, arising from both undenied allegations in the complaint and from testimony at the hearing, were available for the Examiner to make a ruling.

Both the acts complained of (i.e., requiring Reierson to sign the training expense reimbursement contract and enforcing that contract) occurred while Reierson was a member of the bargaining unit. What the employer failed to recognize back in 1988 is that it should have dealt with Reierson's exclusive bargaining representative when it required him to sign the training expense reimbursement contract. Faced with the reality that it had neglected to obtain Reierson's signature on a training expense reimbursement contract while he was still an applicant for employment, the employer had only two lawful options open to it: First, it could have abandoned all effort to obtain such an agreement as to Reierson-the-employee, and hope for the best about his tenure of employment; or second, it could have taken up the issue with the union as the exclusive bargaining representative of Reierson-the-employee. The employer instead pursued a third, and unlawful, course of conduct, circumventing the union to deal directly with

---

[12] Examiner's decision at pp 14-15, fn 18. In fairness to the Examiner, both the focus of the union's argument and the timeframe that it was addressing were sometimes confusing.

Reierson on a mandatory subject of collective bargaining. The employer thus committed a violation of RCW 41.56.140(4) that was not made known to the union until late in 1990.

The employer compounded its error when it attempted to enforce its contract with Reierson in 1990. When Reierson objected to repaying his training costs, the city manager made a proposal of compromise directly to Reierson, offering to settle the matter by splitting the training costs with him. That offer was made while Reierson was still a member of the bargaining unit, but without involving the union. Thus, even though Reierson did not sign the settlement contract until October 20, 1990, when he was no longer a member of the bargaining unit, the offer of compromise amounted to another circumvention of the union, in violation of RCW 41.56.140(4).

Remedy for "Circumvention" Violation -
In addition to the customary remedies for a circumvention violation, an issue arises in this case as to the monies paid by Reierson for his training. Reierson did eventually agree to pay a portion of his training costs, but that settlement was made without the participation of, or any assistance from, his exclusive bargaining representative. In view of the foregoing circumstance, we find it inappropriate to recognize that settlement as binding on the employee. Our remedial order will, instead, include a requirement that Reierson be reimbursed for any monies he paid pursuant to such settlement.

AMENDED FINDINGS OF FACT

1. The City of Pasco is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1).

2. The Pasco Police Officers' Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclu-

sive bargaining representative of an appropriate bargaining unit of commissioned law enforcement officers employed by the City of Pasco.

3. The parties to these proceedings were parties to a series of collective bargaining agreements covering 1987 through 1990. Article II of each of those contracts contained a general "zipper" clause. Article III of each of those contracts contained a general "management rights" clause reserving to the employer a right to manage the department.

4. Since at least 1986, and continuing through September 19, 1990, the City of Pasco had a policy in effect under which an ad hoc "board of review" was established to review the circumstances of automobile accidents or property damage that involved police officers and vehicles, and a point system was used to assess disciplinary outcomes for employees in the bargaining unit represented by the union. That policy was reflected in the employer's "department instructions" book.

5. Prior to August 15, 1988, and at all times continuing through October of 1990, the City of Pasco had a policy in effect under which applicants for employment as a police officer were required to sign a training expense reimbursement contract providing that an employee who voluntarily left employment within 24 months after the completion of certain training was required to reimburse the employer for a pro-rata portion of the employer's costs for hiring and training of that employee.

6. Dan Reierson commenced employment with the City of Pasco on or about August 1, 1988, as a police officer within the bargaining unit represented by the Pasco Police Officers' Association. The employer neglected to obtain Reierson's signature on a training expense reimbursement contract prior to the commencement of his employment, and it sought to rectify that

error by having him sign such an agreement on August 15, 1988. The employer did not involve the Pasco Police Officers' Association in the transaction which led to Reierson's signing of the training expense reimbursement contract. The record fails to establish that the union knew, or reasonably should have known prior to August 25, 1990, of Reierson's post-hire signing of a training expense reimbursement contract.

7. During collective bargaining negotiations between the parties in 1989, the union proposed to eliminate the practice under which employees departing from the bargaining unit were sometimes required to reimburse the employer for its training expenses. The employer responded that its practice was limited to signing pre-hire training expense reimbursement contracts with applicants for employment. The union thereafter ceased to pursue its proposal in the negotiations.

8. By memo dated September 19, 1990, Police Chief Francis abolished the board of review procedure and point system, by amending department instructions known as D.I. 1.9 and D.I. 1.18.

9. Reierson resigned his employment with the City of Pasco less than 24 months after completing his training, and the City of Pasco demanded reimbursement from him for a pro-rata portion of the employer's hiring and training costs. While Reierson remained an employee within the bargaining unit represented by the union, the employer entered into direct negotiations with him concerning a compromise. The employer did not involve the Pasco Police Officers' Association in the transaction which led to Reierson's signing of a settlement agreement on the training expense reimbursement matter.

10. During the course of negotiations between the parties on a successor collective bargaining agreement, the union made a

demand on October 21, 1990, for bargaining concerning the board of review procedure formerly embodied in department instructions D.I. 1.9 and D.I. 1.18. The employer declined to negotiate any matters concerning those changes.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. In the absence of evidence that the Pasco Police Officers' Association knew, or reasonably should have known prior to August 25, 1990, of Reierson's post-hire signing of a training expense reimbursement contract, the complaint charging unfair labor practices filed in this matter on February 25, 1991 was not time-barred by RCW 41.56.160.

3. The complaint charging unfair labor practices filed in this matter was timely under RCW 41.56.160 with respect to the abolition of the board of review on September 19, 1990, and with respect to the employer's attempts on and after October 2, 1990 to enforce the training expense reimbursement contract signed by Reierson on August 15, 1988.

4. The board of review and related point system affected the discipline and tenure of employees in the bargaining unit represented by the union, and were a mandatory subject of collective bargaining under RCW 41.56.030(4). The parties' collective bargaining agreement(s) do not constitute or contain a clear and unmistakable waiver of the union's statutory bargaining rights on such matters.

5. By unilaterally eliminating the board of review and related point system, without notice to the exclusive bargaining representative of its employees or providing an opportunity

for collective bargaining on the matter, the City of Pasco has failed and refused to bargain with the exclusive bargaining representative of its employees and has committed, and is committing, unfair labor practices under RCW 41.56.140(4).

6. By circumventing the exclusive bargaining representative of its employees in dealing directly with bargaining unit employee Reierson, both as to the original signing of the training expense reimbursement contract by Reierson on August 15, 1988 and as to the enforcement and compromise of that enforcement in October of 1990, the City of Pasco has failed and refused to bargain with the exclusive bargaining representative and has committed, and is committing, unfair labor practices under RCW 41.56.140(4).

AMENDED ORDER

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

1. CEASE AND DESIST from:

   a. Failing and refusing to bargain collectively, in good faith, with the Pasco Police Officers' Association, concerning the board of review procedure and the related point system formerly set forth in paragraphs 1.9 and 1.18 of the Departmental Instructions of the Pasco Police Department.

   b. Circumventing the Pasco Police Officers' Association, by direct dealings with employees in the bargaining unit represented by that organization concerning any matters of wages, hours or working conditions within the meaning of Chapter 41.56 RCW.

c. In any other manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

3. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Reinstate the board of review procedure and point system which was in effect prior to September 19, 1990.

b. Upon request of the Pasco Police Officers' Association or an affected employee, withdraw any discipline imposed upon bargaining unit employees under the "management review" procedure on and after September 19, 1990, and re-impose discipline upon such employees only in conformity with the board of review and point system which was in effect prior to September 19, 1990.

c. Give notice to the Pasco Police Officers' Association and, upon request, bargain collectively with that organization concerning any proposed alteration of the board of review procedure and point system referred to in this proceeding.

d. Reimburse Dan Reierson for any money paid by him under the training expense reimbursement contract signed on August 15, 1988 and/or any implementing settlement agreement concerning Reierson's liability for his hiring and training costs. Such reimbursement shall be with interest, computed as per WAC 391-45-410 at the interest rates used by the Superior Court for Franklin County during the period since October 20, 1990.

e. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

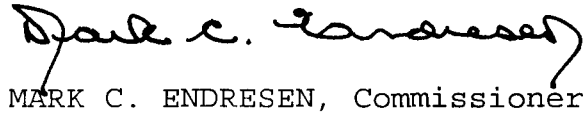
f. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice required by the preceding paragraph.

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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 Executive Director with a signed copy of the notice required by this order.

Entered at Olympia, Washington on the 20th day of January, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL reinstate the board of review procedure and point system that was in effect prior to September 19, 1990.

WE WILL, upon request of the Pasco Police Officers' Association or the affected employee, withdraw any discipline imposed upon bargaining unit employees under the "management review" procedure implemented by the police chief on and after September 19, 1990, and will re-impose discipline upon such employees only in conformity with the board of review procedure and point system in effect prior to September 19, 1990.

WE WILL give notice to the Pasco Police Officers' Association and, upon request, bargain collectively with that organization concerning any proposed alteration of the board of review procedure and point system.

WE WILL NOT circumvent the Pasco Police Officers' Association by direct dealings with bargaining unit employees on matters of wages, hours or working conditions.

WE WILL reimburse former employee Dan Reierson for all funds paid by or withheld from him under the training expense reimbursement contract he was unlawfully required to sign while he was a member of the bargaining unit represented by the Pasco Police Officers' Association, and/or any settlement agreement concerning Reierson's liability for his hiring and training costs. Such reimbursement shall be with interest, at the interest rates used by the Superior Court for Franklin County.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ CITY OF PASCO

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.