Yakima County, Decision 11621-A (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

YAKIMA COUNTY LAW ENFORCEMENT OFFICER'S GUILD, Complainant, vs. YAKIMA COUNTY, Respondent.	CASE 23986-U-11-6135 DECISION 11621-A - PECB DECISION OF COMMISSION

Cline and Associates by *James M. Cline*, Attorney at Law, for the union.

Menke Jackson Beyer, L.L.P., by *Rocky L. Jackson*, Attorney at Law, for the employer.

On May 17, 2011, the Yakima County Law Enforcement Officer's Guild (union) filed an unfair labor practice complaint alleging that Yakima County (employer) discriminated against the union when it lai off bargaining unit members and demoted bargaining unit members; refused to bargain the decision to layoff bargaining unit members; and failed to provide information. The Unfair Labor Practice Manager reviewed the complaint pursuant to WAC 391-45-110 and issued a preliminary ruling. Examiner Robin A. Romeo held a hearing and issued a decision.[1]

The Examiner concluded that the employer did not discriminate against the union; the union waived its right to bargain the decision to lay off employees and the effects of the decision; and the employer failed to provide information. On February 4, 2013, the union appealed the rulings that the employer did not discriminate and that the union waived its right to bargain the decision and effects of the decision to lay off. The union did not appeal any of the Findings of Fact. The employer cross-appealed the ruling that it failed to provide information.

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1 *Yakima County*, Decision 11621 (PECB, 2013).

ISSUES

1. Did the employer discriminate against the union when it laid off and reduced the rank of bargaining unit employees?
2. Did the employer interfere with employee rights when it laid off and reduced the rank of bargaining unit employees?
3. Did the union waive by contract the right to bargain the employer's decision to lay off and reduce the rank of bargaining unit employees?
4. Did the union waive by contract the right to bargain the effects of the employer's decision to lay off and reduce the rank of bargaining unit employees?
5. Did the employer refuse to provide information when it did not provide requested information and delayed providing requested information?

The employer did not discriminate against or interfere with the union. The union waived by contract the right to bargain the decision to lay off and reduce the rank of bargaining unit employees. The union did not waive by contract the right to bargain the effects of the employer's decision to layoff and reduce the rank of bargaining unit employees. The employer refused to bargain when it failed to provide requested information and delayed in providing requested information.

RELEVANT FACTS

The union represents commissioned sheriff's deputies through the rank of sergeant. Eric Wolfe was the union president.

In November 2010, Yakima County Sheriff Ken Irwin (Irwin) invited Wolfe to attend meetings with Irwin and bargaining unit employees. At the meeting, Irwin provided employees with notices of layoff or reductions in rank.

On November 30, 2010, after learning that the employer laid off and reduced the rank of bargaining unit employees, the union demanded to bargain the decisions to layoff and reduce

rank of bargaining unit employees, demanded to bargain the impacts of that decision, and requested information. On December 3, 2010, the union requested additional information.

On December 6, 2010, the employer responded to the union. While not disputing that layoffs were a mandatory subject of bargaining, the employer asserted that the union waived by contract its right to bargain the decision to lay off employees and the impacts of that decision. The employer asserted that it had no obligation to provide information if the requested information was for purposes of bargaining the layoffs. However, the employer was providing the information in anticipation of the parties' negotiations. The employer provided partial responses, objections, and requested clarification to some of the requests.

On December 15, 2010, the employer informed the union that information would be mailed and provided electronically on December 16, 2010. The employer informed the union that some information would not be available until January 31, 2011.

On December 16, 2010, the employer mailed the union information and sent information via e-mail. The employer did not provide information on January 31, 2011. There is no evidence that the employer communicated with the union that it would be unable to meet the January 31, 2011 timeline. The employer did not provide other information to the union until March 25, 2011.

ISSUES 1 AND 2:

Did the employer discriminate against the union when it laid off and reduced the rank of bargaining unit employees?

Did the employer interfere with employee rights when it laid off and reduced the rank of bargaining unit employees?

STANDARD OF REVIEW

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran,* Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains

evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College,* Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-Tran,* Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County,* Decision 7210-A (PECB, 2001).

Conclusion

The Examiner stated the correct legal standard. Substantial evidence supports the Examiner's findings of fact, which support the conclusions of law. We affirm the Examiner's conclusions that the employer neither discriminated against nor interfered with the union.

ISSUES 3 AND 4:

Did the union waive by contract the right to bargain the employer's decision to lay off and reduce the rank of bargaining unit employees?

Did the union waive by contract the right to bargain the effects of the employer's decision to lay off and reduce the rank of bargaining unit employees?

LEGAL PRINCIPLES

Refusal to Bargain

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *International Association of Fire Fighters, Local 1052 v. PERC* (*City of Richland*), 113 Wn.2d 197, 200 (1989); *Federal Way School District,* Decision 232-A (EDUC), *citing NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958). Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate. *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) "the relationship the subject bears to the wages, hours, and working conditions" of employees, and (2) "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. The inquiry focuses on which characteristic predominates. *Id.* "The scope of mandatory bargaining is limited to matters of direct concern to employees" and "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects. *City of Richland,* 113 Wn.2d at 200, *citing Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341 (1986).

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University,* Decision 10413-A (PSRA, 2011), *citing Skagit County,* Decision 6348 (PECB, 1998); *City of Kelso (Kelso I),* Decision 2120-A (PECB, 1985); *City of Kelso (Kelso II)*, Decision 2633-A (PECB, 1988). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decisions could constitute mandatory subjects of bargaining. *See Wenatchee School District,* Decision 3240-A (PECB, 1990). The decision to lay off employees has been found to be a mandatory subject of bargaining. *City of Kelso*, Decision 2633-A (PECB, 1988); *City of Centralia*, Decision 1534-A (PECB, 1982); and *South Kitsap School District*, Decision 472 (PECB, 1978).

Waiver

A party may waive its right to bargain through the language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999).

Waiver is an affirmative defense. *Lakewood School District,* Decision 755-A (PECB, 1980). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Id.*

Analysis

On appeal, the union argues that it did not waive, by contract, the right to bargain the decision to layoff and reduce the rank of employees or the effects of that decision. The decision to lay off employees has a direct impact on employees' wages, hours, and working conditions. Thus, the decision to lay off is a mandatory subject of bargaining. We affirm the Examiner's conclusion that the union did waive, by contract, the right to bargain the employer's decision to lay off and reduce the rank of bargaining unit employees. Substantial evidence supports the Examiner's Findings of Fact, which support the Conclusion of Law.

We reverse the Examiner's conclusion that the union waived, by contract, its right to bargain the effects of the decision to lay off and reduce the rank of bargaining unit employees.

The union requested to bargain the effects of the decision to lay off and reduce the rank of bargaining unit employees. The employer declined to bargain with the union, asserting the union waived its right to bargain the effects.

The parties' collective bargaining agreement addressed layoffs in two places: Article 4 – Management Rights Clause, and Article 21 – Layoff, Recall and Transfers.

ARTICLE 4 – MANAGEMENT RIGHTS

4.1 The Guild recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities, lawful powers and legal authority. The Guild agrees that the Employer has core management rights which are exclusively within the Employer's control. The core management rights are:

. . .

C. The right to hire, transfer, suspend, discharge, lay off, recall, promote, or discipline employees as deemed necessary by the Employer as provided by this Agreement and/or as provided by the General Rules and Regulations of the Yakima County Civil Service Commission.

4.3 If the Employer makes a change which affects wages, hours or working conditions, and if the contract or existing policies, procedures, or past practices, authorize the Employer to make such a change, then the Guild has the right to request to bargain the effects of the change, but not the decision, if the effects are not already addressed in the contract, existing policies, procedures or past practices. The Guild must provide written notice to the Employer of the request to bargain the effects within twenty calendar days of the Employer's written notice to the Guild of the change. The employer may implement the change, even if bargaining has been requested.

4.4 If the Employer wishes to make a change which would affect wages, hours, or working conditions, and if the change is not authorized by the contract or existing policies, procedures, or past practices then the Guild has the right to request to bargain the decision, its implementation, and its effects. The Guild must provide written notice to the Employer of the request to bargain within twenty calendar days of the Employer's written notice to the Guild of the proposed change. The Employer may not implement the change until negotiations have been resolved.

ARTICLE 21 – LAYOFF, RECALL AND TRANSFERS

21.1 The Sheriff and/or the Board of County Commissioners shall be the sole determiner of when layoffs are necessary. The Board may lay off employees when such action is determined to be necessary by reason of lack of work; lack of funds, and/or reorganization of the department. Each employee affected by a reduction in force/lay-off shall be notified in writing of the layoff and the reasons therefore at least fifteen days prior to the effective date of the layoff.

21.2 When it is necessary to implement layoffs, the Sheriff shall determine the number of employees by classification in which reductions will take place. The Guild attorney or President will be notified of the number of employees and classifications designated for reduction as soon as practicable. When reducing the work force, the Sheriff will layoff employees in the reverse order of their seniority within the affected classification of line deputy, deputy sergeant, or lieutenant.

21.3 Employees laid off will be eligible for reinstatement for a period of one year. In the event of a vacancy in the effected classification, an employee who has been laid off will have the first opportunity to fill said vacancy or vacancies in the order of their seniority in that position, provided the employee can perform the work needed in a satisfactory manner and provided the layoff period does not exceed one year and that the employees keep the Employer advised of their current address. An offer of re-employment shall be in writing and sent by registered or certified mail, return receipt requested, to the employee. The employee shall be presumed to have received notice within three days after the Employer mailed said notice. An employee so notified must indicate his/her acceptance of said re-employment within ten days of receipt of notice and shall be back on the job within twenty days of acceptance of said offer or forfeit all call-back rights under this article.

21.4 All permanent interdepartmental transfers shall be preceded by a five day written notice to the affected employee, except in the event of emergency.

21.5 Persons laid off within each classification shall revert to the next lowest rank or classification in which they have previously served. In the event that such entry requires or results in a reduction in force in the lower rank, such reduction shall be accomplished by a demotion of lay-off of the person or persons in said lower classification or rank having the least seniority. Time spent in all higher classifications or rank shall count towards seniority for purposes of lay-off within an affected classification, provided that such service has been continuous since the last date of hire. In the event of a subsequent vacancy in a higher classification or rank, employees demoted by lay-off shall have the first right to be reassigned to a higher classification or rank.

Article 21 addresses layoff procedures. The article identifies who may make the determination to lay off employees, the criteria for when a lay off may occur, how employees are selected for lay off, and procedures for layoffs. The article also addresses recall from lay off, reductions in rank, and interdepartmental transfers.

The parties anticipated and negotiated about, and included in the collective bargaining agreement, some of the potential effects of a decision to lay off. The collective bargaining agreement does not address all possible effects of such decisions. The union maintained the right to raise and request to bargain other potential effects not addressed in the collective bargaining agreement. *See also State – Social and Health Services*, Decision 9690-A (PSRA, 2008).

The union's failure to request to bargain the decision or effects of prior layoffs did not waive the union's right to bargain in this case. A union may choose not to demand bargaining over an issue it is otherwise entitled to bargain over. A union may choose not to request bargaining on an issue because, among other factors, that it does not disagree with the change or that it would rather not expend the resources on that issue. The union's failure to exercise its statutory rights in one circumstance does not waive the union's future bargaining rights. *See King County*, Decision 11319-A (PECB, 2014); *City of Wenatchee*, Decision 2194 (PECB, 1985).

Conclusion

The union demanded to bargain both the decision and effects of the decision to lay off and reduce the rank of bargaining unit employees. While the union waived by contract its right to

bargain the decision to lay off, the employer remained obligated to bargain, upon request, with the union over the effects of the decision to lay off employees. The union did not waive, by contract, the right to bargain the effects of the employer's decision to lay off employees. The employer refused to bargain when it did not engage in effects bargaining with the union.

ISSUE 5:

Did the employer refuse to provide information when it did not provide requested information and delayed providing requested information?

Duty to Provide Information

The duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information necessary to the administration of the parties' collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999). Failure to provide relevant information upon request constitutes a refusal to bargain unfair labor practice. *University of Washington*, Decision 11414-A (PSRA, 2013).

Upon receiving a relevant information request, the receiving party must provide the requested information or notify the other party if it does not believe the information is relevant to collective bargaining activities. *Seattle School District*, Decision 9628-A (PECB, 2008). If a party perceives that a particular request is irrelevant or unclear, the party is obligated to communicate its concerns to the other party in a timely manner. *Pasco School District*, Decision 5384-A (PECB, 1996). If the requesting party does not believe the provided information sufficiently responds to the intent and purpose of the original request, the requesting party has a duty to contact the responding party and engage in meaningful discussions about what type of information the requestor is seeking. *Kitsap County*, Decision 9326-B (PECB, 2010). The parties are expected to negotiate any difficulties they encounter with information requests. *Port of Seattle*, Decision 7000-A (PECB, 2000); *City of Yakima*, Decision 10270-B (PECB, 2011).

Parties must be prompt in providing relevant information. Unreasonable delay in providing necessary information may constitute an unfair labor practice. *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988).

The standard is not whether the union was prejudiced or harmed as a result of the employer's failure to provide information. The standard is whether the union made a request relevant to the performance of its duties in administering the collective bargaining agreement and the employer responded to the request. *University of Washington*, Decision 11499-A.

Analysis

The employer argues that it did not refuse to bargain by failing to provide the budget director's periodic budget update and delayed in providing information. The employer asserts that it should not be found in violation of the law because the union was not harmed by not having the information and not receiving information until March 25, 2011.

Employer arguments that the failure to provide information was inadvertent and harmless have not been found to be a defense to the failure to provide information. *University of Washington*, Decision 11499-A (PSRA, 2013); *City of Bremerton*, Decision 5079 (PECB, 1995). In *City of Bremerton*, the union requested "all police reports, witness statements, and all other documents prepared by, or in the possession of" the employer related to an incident. The police chief had made notes about the incident and pre-disciplinary meeting. The employer withheld documents that were responsive to the union's information request, including the police chief's notes. The union did not receive the police chief's notes until they were offered as exhibits in the grievance arbitration hearing. The employer argued that withholding an employer official's investigatory notes did not harm the union because those notes duplicated information contained in information provided to the union. The Examiner rejected the employer's argument that the union was not harmed. The Examiner held that the union was entitled to the information and the employer violated the statute when it failed to provide the requested information.

Whether the union was prejudiced by the employer's failure to comply with the law is not a factor in determining that the employer violated the law. *University of Washington*, Decision

11499-A. The obligation to provide information, upon request, requires the responding party to timely provide the requested information. If an employer commits to providing information by a certain date, it should notify the union if it is unable to meet that timeline. The parties should then discuss when the employer will be able to provide the information.

There is no exception to failing to provide information on the grounds that the other party is not prejudiced by the failure to provide information.

Conclusion

The employer refused to bargain when it failed to provide requested information and delayed providing requested information.

CONCLUSION

The employer did not discriminate against or interfere with the union. The union waived by contract the right to bargain the employer's decision to lay off and reduce the rank of bargaining unit employees. The union did not waive the right to bargain the effects of the employer's decision to lay off and reduce the rank of bargaining unit employees. The employer did not provide requested information and was untimely in producing requested information.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Robin A. Romeo are AFFIRMED and adopted as the Findings of Fact of the Commission. The Commission makes the following additional Findings of Fact:

13. On December 15, 2010, the employer informed the union that certain documents would not be available until January 31, 2011.

14. The employer did not provide information on January 31, 2011 and did not notify the union that the information would not be available at that time.

Conclusion of Law 1 is AFFIRMED. The Conclusions of Law are modified:

2. As described in Findings of Fact 5 through 9, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) the decision to lay off deputy sheriffs and demote sergeants.

3. As described in Findings of Fact 5 through 9, the employer refused to bargain in violation of RCW 41.56.140(4) and (1) the effects of the decision to lay off deputy sheriffs and demote sergeants.

4. As described in Findings of Fact 10, 11, 13, and 14, the employer refused to bargain in violation of RCW 41.56.140(4) and (1) when it failed to provide information requested by the union and providing information in an untimely manner without any discussion with the union.

5. The employer did not discriminate or interfere with employee rights in violation of RCW 41.56.140(1) when it laid off deputy sheriffs and demoted sergeants.

The Order is modified:

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

1. CEASE AND DESIST from:

   a. Failing to bargain, upon request, the effects of the 2010 decision to lay off and reduce the rank of bargaining unit employees.

b. Failing to provide relevant information requested by the union, including providing information in an untimely manner without discussing the delay with the union.

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

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

a. Within sixty (60) days of receipt of this decision, offer the Yakima County Law Enforcement Officer's Guild the opportunity to bargain the effects of the employer's 2010 decision to lay off and reduce the rank of bargaining unit employees. If the union requests bargaining, negotiate in good faith.

b. In the future, give notice to, and upon request, negotiate with the Yakima County Law Enforcement Officer's Guild over the effects of decisions to lay off and reduce the rank of bargaining unit employees.

c. Provide the union with the County Budget Director's periodic budget update reports, as requested on November 30, 2010.

d. In the future, provide relevant information requested by the union and provide it in a timely manner, or discuss with the union any reasons for omission or delay.

e. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission 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.

f. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Yakima County Board of Commissioners and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

g. 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.

h. 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 10th day of December, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	23986-U-11-06135	FILED:	05/17/2011	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	LAW ENFORCE				
DETAILS:	See 24228-S-11-00238				
COMMENTS:					

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