*City of Yakima*, Decision 9062-A (PECB, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| YAKIMA POLICE PATROLMEN'S ASSOCIATION,<br><br>Complainant,<br><br>vs.<br><br>CITY OF YAKIMA,<br><br>Respondent. | CASE 19206-U-05-4882<br><br>DECISION 9062-A - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

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

Summit Law Group, by *Bruce L. Schroeder*, Attorney at Law, for the employer.

On February 16, 2005, the Yakima Police Patrolmen's Association (union) filed an unfair labor practice complaint against the City of Yakima (employer) charging employer interference and refusal to bargain in violation of RCW 41.56.140(1) and (4). A preliminary ruling was issued on April 7, 2005, and a timely answer was received April 28, 2005. The union filed a motion to amend the complaint on July 18, 2005. The employer's answer to the motion was received on August 19, 2005. Subsequently, Examiner Christy L. Yoshitomi denied the amendment on grounds that the amendment was not germane to the original complaint. On October 25, 2005, a hearing was held before Examiner Yoshitomi. Simultaneous briefs were submitted on January 11, 2006.

Issues Presented

1. Did the employer circumvent the union through its communications with employee, Brian Dahl, or by engaging in a return to work order with him in violation of RCW 41.56.140(1)?

2. Did the employer unilaterally change the drug testing procedure in Dahl's return to work order without providing the opportunity to bargain in violation of RCW 41.56.140(1)?

3. Did the employer refuse to bargain a drug testing procedure for bargaining unit employees in violation of RCW 41.56.140(4) and (1)?

Based on the arguments and evidence submitted by the parties, the Examiner rules that the employer did not commit an independent interference violation under RCW 41.56.140(1) by circumventing the union nor by unilaterally changing the drug testing procedure for bargaining unit employees. However, the employer did commit a refusal to bargain violation under RCW 41.56.140(4), together with a derivative interference violation under RCW 41.56.140(1) by refusing to bargain the issue of drug testing.

Issue 1: Did the employer circumvent the union?

The legal standard on circumvention holds that an employer that bypasses the exclusive bargaining representative of its employees and deals directly with the employees themselves on mandatory subjects of bargaining commits an unfair labor practice. *City of Pasco*, Decision 4197-A (PECB, 1994); *Whatcom County*, Decision 7244-A (PECB, 2003).

The employer's communication with Dahl and the union began on March 31, 2004, when Brian Dahl, an officer of the Yakima Police Department and a bargaining unit member at that time,[1] approached Lieutenant Steve Finch, and explained that he was addicted to prescription medication. Chief of Police Sam Granato was contacted

[1] Dahl is no longer an employee of the employer.

immediately and proceeded to speak with Finch about his conversation with Dahl. While Granato and Finch were conferencing, Dahl waited to speak directly with Granato. After Granato met with Finch, he allowed Dahl to speak with him. In Granato's office, Dahl explained he was addicted to prescription medication but that he had not been using this medication for a couple days. Granato subsequently placed Dahl on administrative leave and required him to see the police psychologist, Dr. Schneider. Subsequently, Dahl did see Schneider and the results from this visit were delivered to the police department on June 15, 2004.

On July 9, 2004, a meeting occurred between Dahl, a union representative, and employer representatives to discuss Dahl's fitness for duty and Schneider's results. His results included findings and recommendations that Dahl undergo random urinalyses testing upon his return to work. During the discussion about the results, the union raised a concern about Schneider's qualifications for making such recommendation, as he is as a psychologist and not a medical doctor. Therefore, the employer directed Dahl to be examined by a medical doctor, Dr. Decker.

On August 9, 2004, the police department received a copy of Decker's diagnostic assessment from Dahl's visit. Based on the recommendation in Decker's assessment, the chief drafted a return to work order which included both recommendations that Dahl submit to random urinalyses upon his return. The employer provided the union and Dahl a copy of the drafted order to review prior to a meeting scheduled for August 18, 2004, to discuss the order.

The meeting on August 18, 2004, included Dahl, union secretary Shawn Boyle, union president Eric Walls, Chief Granato, Captain Greg Copeland, and Lieutenant Finch. During this meeting, Walls and Boyle asked clarifying questions about aspects of the order and discussed details about Dahl's random testing. At the end of the

conversation, Dahl, Granato, and Boyle signed the order. When the order was passed to Walls for a signature, he refused to sign and asked Dahl to leave the room. Further discussion continued without the presence of Dahl.

The employer did not circumvent the union in the handling of Dahl's discipline. The evidence shows the union was involved at all the meetings with Dahl and the employer. Boyle further testified that he was in meetings every month or couple of weeks with the Lieutenant or the Captain regarding Dahl. There was no evidence that the employer directly dealt with Dahl and circumvented the union.

The return to work order signed by Dahl and Granato is not inherently a circumvention violation. Although the return to work order became an agreement between Dahl and the City, the union was involved throughout the process leading up to and actually witnessing Dahl, Granato, and Boyle signing the document. The union's refusal to sign a return to work order after its involvement in the discussions and witnessing signatures to the order, does not rise to a circumvention violation. The circumvention allegation is dismissed.

Issue 2: Did the employer unilaterally change the drug testing procedure in Dahl's return to work order?

Past Practice

There is no dispute between the parties that drug testing is a mandatory subject of bargaining.[2] As the Executive Director stated in *King County*, Decision 4258 (PECB, 1992), none of the statutes

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[2] The Commission has found drug testing as part of a disciplinary action to be a mandatory subject of bargaining. *City of Tacoma*, 4539-A (PECB, 1994)

governing the Commission's jurisdiction "make the Commission the . . . enforcer of an employer's unilaterally adopted personnel policies." However, personnel policies do provide a basis for establishing a practice to become the status quo.

Here, the policy for drug testing is not written in the parties' collective bargaining agreement, but rather it is in the employer's personnel policies. The employer has maintained the same substance abuse policy for its employees since 1996 which was a continuation of a 1998 policy. This policy was adopted to "ensure the health, welfare, and safety of its employees, and the citizens whom they serve . . ." The policy provides guidance as to when and how testing is conducted for detecting employees use of drugs and alcohol. Although it is stated that "nothing in [the] Policy . . . is intended to require random testing of employees", the employer has, in fact, required random testing of an employee in a different bargaining unit. In this bargaining unit, however, there is no evidence showing such past practice of random testing. Because no past practice of random drug testing exists in this bargaining unit, imposing random testing on an employee could be found as a unilateral change.

Waiver by inaction

In order for there to be a unilateral change giving rise to a duty to bargain, there must be a material change in the status quo of a mandatory subject of bargaining. *City of Tacoma,* Decision 4539-A (PECB, 1992). The duty to bargain includes a duty to give notice and to provide for an opportunity to bargain prior to implementing changes. *City of Anacortes*, Decision 6863-B (PECB, 2001). A waiver by inaction exists when an employer proposes a change in a mandatory subject of bargaining and the union does not make a request to bargain, or fails to advance meaningful proposals in a timely manner. *Whatcom County*, Decision 7643 (PECB, 2002); *Port of Moses Lake*, Decision 7238 (PECB, 2000).

Here, the employer placed the union on notice that it would be requiring Dahl to submit to random testing through a return to work order. As mentioned above, the employer provided the union and Dahl a copy of this drafted order to review prior to the August 18, 2004, meeting scheduled to discuss the order. The union argues that it subsequently made its request to bargain Dahl's return to work order in an e-mail from its attorney to the employer's attorney after having received a copy of the drafted order. In an e-mail from Jim Cline (the union's attorney) to Sofia Mabee (the employer's attorney) on August 17, 2004, Cline stated that he believed there were legal issues with the drafted order and if they were to be implemented, the union would file a grievance. In response to this e-mail, Mabee requested he provide her with specific areas of concern with the order. Cline did not provide any specific areas of concern, but did indicate he was available to discuss his concerns over the next couple of days.

The following day, August 18, 2004, the union, employer, and Dahl met to discuss Dahl's return to work order. Neither Cline nor Mabee were involved in this discussion. During this part of the meeting, the union did not raise issue with the employer imposing disciplinary conditions on Dahl and Boyle testified that there was no objection to the contents of the return to work order, which required Dahl to submit to random testing. The union did raise concerns about the details of Dahl's random testing process[3] and the employer agreed to certain details surrounding Dahl's continuing medical review.[4] Thus, the union had the opportunity to raise issue with the testing being random, but it did not.

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[3] Discussion ensued about the possibility of Dahl changing out of uniform for the testing.

[4] The employer agreed to allow Dahl the ability to take a city car for appointments and be accompanied by his wife for these trips.

The union argues that the return to work order was presented as an order that Dahl must obey without the ability for the union to negotiate over the contents. However, the union discussed elements and agreed to certain details of Dahl's testing during the course of the August 18, 2004, meeting. There is no indication here that the union believed it did not have the ability to negotiate, when in fact, it did negotiate certain details of Dahl's return to work. The union was afforded the opportunity to engage in discussion, explore possibilities and offer alternatives addressing the specific issue of random testing, but did not do so. Therefore, the union waived its right to bargain over random testing in Dahl's return to work order, however, it did not waive its right to bargain over a drug testing procedure affecting the bargaining unit.

Issue 3: Did the employer refuse to bargain a drug testing procedure?

The duty to bargain not only rises in times when the parties are negotiating contracts, but also during the term of an existing agreement. A duty to bargain continues during the term of the agreement as to matters which are mandatory subjects of bargaining that are not covered by the specific terms and conditions set forth in the collective bargaining agreement. *City of Seattle*, Decision 1667-A (1984). *See also NLRB v. Jacobs Manufacturing Co.*, 196 F. 2d 680, (1952).

The parties here do not have an article in their contract which addresses drug testing, nor has drug testing been discussed at the bargaining table in contract negotiations. Therefore, upon request by the union, the employer has the duty to bargain the issue of drug testing. *See City of Jacobs Manufacturing Co.*.

Refusal to bargain upon request

In the August 18 meeting, the union provided the employer with a copy of the City of Kirkland's substance abuse policy as a starting point for their proposal and they discussed specifics pertaining to drug testing. The union clearly indicated it wanted to negotiate the issue of drug testing at the August 18 meeting, at further labor-management meetings through out the year, and again in January 2005. The union filed this unfair labor practice in February 2005, after receiving no response to their proposal from the employer. The employer did not engage in bargaining upon the union's request, and admittedly delayed the bargain of this issue until negotiations began for a successor contract.

Remedy

While the circumvention and unilateral change allegations advanced by the union in this case are being dismissed, an appropriate remedy must be fashioned to address the employer's refusal to bargain. The union's requested remedies that align with the findings and conclusions are:

1. An order directing the City to negotiate with the Association.

2. An order requiring a reading in a public session of the Yakima City Council and an appropriate posting within the workplace.

3. Any other relief the Commission deems equitable and just.

At the time of this hearing, the issue of drug testing had been raised in bargaining for a successor contract. Therefore, it is

recognized that the employer has begun its compliance with the Order set forth below.

## FINDINGS OF FACT

1. Yakima Police Department is a public employer within the meaning of 41.56 RCW.

2. Yakima Police Patrolmen's Association, a bargaining representative within the meaning of 41.56 RCW, is the exclusive bargaining representative of uniformed law enforcement officers employed by the Yakima Police Department.

3. The employer and union were parties to a collective bargaining agreement extending from January 1, 2004, to December 31, 2005. That agreement did not contain any reference to employee drug testing, nor had the parties bargained over the issue of drug testing during previous contract negotiations.

4. Brian Dahl was a member of the union's bargaining unit and employed as a uniformed law enforcement officer at the Yakima Police Department through September 2004.

5. On March 31, 2004, Dahl informed management that he was addicted to prescribed medication. As a result of this information, the employer placed Dahl on leave with pay.

6. Between August 9, 2004, and August 18, 2004, the employer drafted a return to work order and provided it to Dahl and the union. A meeting was then scheduled to discuss the drafted order.

7. On August 18, 2004, union representatives, Dahl, and employer representatives participated in a meeting to discuss the

return to work order. After discussion, which included clarification and negotiation to details of the order, Dahl, the employer and the union's secretary signed Dahl's return to work order. This order required Dahl to submit to random urinalysis testing.

8. Also on August 18, 2004, the union made a request to bargain a drug testing procedure for the bargaining unit. The union provided a copy of the City of Kirkland's substance abuse policy as a proposal to the employer.

9. The union repeatedly requested to bargain the issue of drug testing for at least five months prior to filing this unfair labor practice in February 2005. The employer did not bargain the issue of drug testing with the union after being requested.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in the matter pursuant to Chapter 41.56 RCW.

2. The employer did not interfere with the union rights in violation of RCW 41.56.140(1) by its conduct as described in findings of fact five through seven.

3. The employer refused to bargain with the union in violation of RCW 41.56.140(4) and RCW 41.56.140(1) by its conduct as described in findings of fact eight and nine.

## ORDER

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

1. CEASE AND DESIST from:

   a. Refusing to bargain a drug testing procedure and any other mandatory subjects of bargaining with the Yakima Police Patrolmen's Association.

   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 41.56 RCW:

   a. Upon request, negotiate in good faith with the Yakima Police Patrolmen's Association concerning a drug testing procedure and any other mandatory subjects of bargaining that have not been addressed in the contract or brought to prior negotiations.

   b. Post copies of the notice attached to this order 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.

   c. Read the notice attached to this order into the record at a regular public meeting of the Yakima City Council of the City of Yakima, and permanently append a copy of the

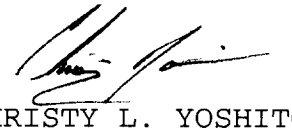
notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. 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 attached to this order.

e. Notify the Compliance Officer of the Public Employment Relations Commission, 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 attached to this order.

ISSUED at Olympia, Washington, this 28th day of June, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHRISTY L. YOSHITOMI, 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.

# PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY failed to bargain in good faith with the Yakima Police Patrolmen's Association concerning a drug testing procedure, which is a mandatory subject of bargaining.

WE UNLAWFULLY interfered with members of the Yakima Police Patrolmen's Association in the exercise of their collective bargaining rights under state law.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL meet and bargain collectively in good faith with the Yakima Police Patrolmen's Association concerning a drug testing procedure.

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 YAKIMA

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.

# PUBLIC EMPLOYMENT RELATIONS COMMISSION

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## RECORD OF SERVICE - ISSUED 06/28/2006

The attached document identified as: DECISION 9062-A - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

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|---|---|---|---|---|---|
| CASE NUMBER: | 19206-U-05-04882 | FILED: | 02/16/2005 | FILED BY: | PARTY 2 |
| DISPUTE: | - | | | | |
| BAR UNIT: | LAW ENFORCE | | | | |
| DETAILS: | - | | | | |
| COMMENTS: | | | | | |

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