Energy Northwest (PACE, Local 8-369), Decision 9424 (PECB, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ENERGY NORTHWEST,	)	
	)	
Complainant,	)	CASE 19483-U-05-4944
	)	
vs.	)	DECISION 9424 - PECB
	)	
PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS, LOCAL 8-369,	)	SUMMARY JUDGMENT
	)	
Respondent.	)	
	)	

Summit Law Group, by *Otto G. Klein, III*, Attorney at Law, for the employer.

Reid, Pedersen, McCarthy & Ballew, by *Kenneth J. Pedersen*, Attorney at Law, for the union.

On May 18, 2005, Energy Northwest (employer) filed a complaint charging unfair labor practices with the Public Employment Relations Commission naming the Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 8-369, AFL-CIO (union) as the respondent. The employer and union were in negotiations in 2004 for a successor collective bargaining agreement when they reached impasse under RCW 41.56.450. The Executive Director certified issues for interest arbitration. The employer perceived three of the union's proposals to be permissive subjects of bargaining under Chapter 391-45 WAC. A preliminary ruling was issued on June 3, 2005, finding a cause of action to exist.

On June 3, 2005, the Commission suspended from the pending interest arbitration three proposals the employer alleged to be unlawful in its complaint.

The union filed a timely answer to the complaint on June 24, 2005. A hearing on the matter was scheduled for November 9, 2005, before Examiner Terry Wilson. On November 3, 2005, the employer sent a letter to the Examiner requesting a continuance. The Examiner granted the motion for continuance. The employer and the union then filed motions for summary judgment and briefs arguing their legal positions.

ISSUES PRESENTED

1. Should the cross-motions for summary judgment be granted in the present case?

2. Did the union commit an unfair labor practice by seeking interest arbitration on provisions which allow workers to transfer to positions in another the bargaining unit?

The Examiner grants the cross-motions for summary judgment. The Examiner finds that provisions that allow workers to transfer to positions in another bargaining unit are permissive subjects of bargaining. Based on the record as a whole, the Examiner holds that the union committed an unfair labor practice in violation of RCW 41.56.150 by seeking interest arbitration on a permissive subject of bargaining.

DISCUSSION

Issue One: Summary Judgment

The section of the Washington Administrative Code which provides the authority to issue a summary judgment is as follows:

> WAC 10-08-135 SUMMARY JUDGMENT. A motion for summary judgment may be granted and an order issued if the

> written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In the present case, the parties are in agreement about the factual scenario which led to the filing of the unfair labor practice, and the Examiner has determined that no material facts are in dispute. The underlying issue is strictly a legal issue. Therefore, the cross-motions for summary judgment are granted.

Issue Two: Contract Provisions

Applicable Law

Under RCW 41.56.030(4), this employer and union have a mutual obligation to negotiate personnel matters, including wages, hours, and working conditions of employees in the bargaining unit represented by the union. While neither party is compelled to agree to a proposal or make a concession, both parties have a duty to bargain in good faith. The potential subjects for negotiation have been traditionally divided into three categories: mandatory, permissive, and illegal. *City of Richland*, Decision 2448-B (PECB, 1987), remanded, 113 Wn.2d 197 (1989). The Commission decides whether a particular proposal falls into one of the categories. *Richland*, Wn.2d at 203.

Mandatory subjects of negotiation include employee wages, hours, and working conditions as described in RCW 41.56.030(4). Permissive subjects are matters which the Commission considers remote from wages, hours, and working conditions and includes matters regarded as the prerogatives of employers or unions. *Federal Way School District*, Decision 232-A (EDUC, 1977). Illegal subjects are matters where an agreement between an employer and union would contravene applicable statutes or court decisions. *City of Seattle*, Decision 4668-A (PECB, 1996), *aff'd*, *International*

Association of Fire Fighters, Local 27 v. City of Seattle, 93 Wn. App. 235 (1998), *review denied*, 137 Wn.2d (1999). Parties may only insist to impasse on subjects which are deemed to be mandatory subjects of bargaining under the appropriate statute. They may not go to impasse (or seek interest arbitration) on subjects which are deemed to be "permissive" or "illegal" subjects. *Klauder vs. San Juan County*, 107 Wn.2d 338 (1986). A party that takes a non-mandatory subject to impasse violates its good faith obligation, and commits an unfair labor practice under RCW 41.56.140(4) or RCW 41.56.150(4). *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989).

When determining whether a subject is mandatory or permissive, the impact on wages, hours, and working conditions of the employee is weighed against the extent of which the subject is a managerial prerogative. *Skagit County*, Decision 8746-A (PECB, 2006). Scope of bargaining is a question of law and fact for the Commission to determine on a case-by-case basis. Every case presents unique circumstances. *City of Richland*, 113 Wn.2d at 203.

Analysis

In the present case, the union, as the representative of nuclear security officers (NSO's), entered into a collective bargaining agreement with the employer in 1999. Under this agreement, NSO's who became disabled and unable to carry a firearm were eligible to bump less senior communications center officers who, along with watchpersons and resource protection officers, comprise a bargaining unit that is separate from NSO's.[1] It is noted that the union represents both bargaining units. Specifically, section 8.2.1(b) of the labor agreement between the NSO's and the employer stated:

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[1] Communications center officers are unarmed personnel who provide coverage for the communications center.

> Permanently disabled nuclear security officers, who are capable of performing the communication center officer duties, will have first preference for the communication center officer positions. Energy Northwest will not fill communication center officer positions with anyone other than regular disabled nuclear security officers. Permanently disabled nuclear officers will have preference over employees on short term disability.

Similarly, the agreement also provided for NSO access to RPO and watchperson positions through sections labeled "NSO Salary Continuance" and "Letter of Agreement." The latter section also stated that communications center officers, resource protection officers, and watchpersons will work under the same contract terms as NSO's. During current contract negotiations with the employer, the union insisted on maintaining these three provisions which would have the following cumulative effects:

- A permanently disabled nuclear security officer would be able to bump a less senior communications center operator.

- A permanently disabled nuclear security officer would be allowed to transfer to vacant positions of communications center operators, resource protection officers, or watchpersons.

By allowing NSO's to bump into positions in another bargaining unit, the Examiner finds that the proposed provisions set conditions for and adversely impact employees in another bargaining unit. The proposed language significantly impacts and potentially controls who is eligible for non-bargaining unit positions, and it impacts the assignment of personnel in positions outside the union. As explained in *City of Yakima*, Decision 2387-B (PECB, 1986), the duty to bargain cannot be construed as all inclusive and does not

include other persons, facilities, accommodations, or conveniences which, while they may co-exist in the work environment, are not assigned to or directly relevant to the contractual obligations covered by the bargaining unit. In short, a proposed provision which has some impact on the working conditions of unit members may not necessarily create a duty to bargain when that provision substantially affects the working conditions and obligations of parties not privy to the bargaining agreement.

Where a proposed provision also affects a bargaining unit not privy to the collective bargaining agreement, the employer may evaluate the totality of the effects of a proposal. Here, the employer has an entrepreneurial interest in eliminating the proposed provisions: avoiding the costs associated with litigation. By vesting with nuclear security officers the right to bump less-senior employees in another bargaining unit and transfer to vacant positions, the employer exposes itself to an array of unfair labor practice charges including skimming and refusal to bargain. It is well-settled law that an employer may not unilaterally take work from one bargaining unit and give it to other employees. *South Kitsap School District*, Decision 472 (PECB, 1978). It is also well-settled law that a union is not allowed to meddle in the employer's selection of persons to fill positions outside the bargaining unit. *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001).

The union argues that the proposed language is a partial implementation of the union's and the employer's obligation under the Americans with Disabilities Act (ADA) to provide accommodations to disabled persons and allow them to work through their period of disability. The union asserts that the ADA contemplates transfers between jobs at a single location and between different geographical locations. Therefore, negotiations seeking rules governing

such accommodations cannot be labeled permissive. Furthermore, the union contends that its proposal represents an attempt to eliminate discriminatory practices, and, as such, is a mandatory subject of bargaining.

Granted, the employer is obligated to adhere to the ADA. This obligation, however, does not magically transform the provisions at issue into mandatory subjects of bargaining. Adherence to a specific law does not automatically make the subject matter of that law a mandatory subject of bargaining. In the context of bargaining, what is of concern is whether the subject matter is an actual condition of employment and who is more impacted by the condition. Is the matter of more magnitude to employees in the bargaining unit or to the employer's exercise of entrepreneurial control? Controlling the staffing of positions outside of the bargaining unit impacts managerial prerogative far more than the bargaining unit composed of NSO's. The employer potentially exposes itself to unfair labor practice allegations by the bargaining unit not privy to the collective bargaining agreement. The outside bargaining unit could also try to force the employer to re-open negotiations. In addition, although the union contends its proposals represent an attempt to eliminate discriminatory practices, the evidence presented does not reflect that actual discrimination has occurred.

The Examiner finds that setting the conditions for and controlling an outside bargaining unit impacts managerial prerogative more than bargaining unit employees. In addition, as these provisions essentially control the staffing of non-bargaining unit positions, there is significant precedent that staffing is generally a permissive subject of bargaining. *See International Association of Firefighters Local 453 v. City of Wenatchee*, Decision 8802-A (PECB, 2006). Therefore, the Examiner finds that proposed provisions

labeled Section 8.2.1(b), NSO Salary Continuance, and Letter of Agreement are permissive subjects of bargaining. By insisting on the these provisions to impasse, the union committed an unfair labor practice.

FINDINGS OF FACT

1. Energy Northwest is a public employer within the meaning of RCW 41.56.030(1).

2. Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 8-369, AFL-CIO, is an exclusive bargaining representative within the meaning of RCW 41.56.030(3).

3. The union represents nuclear security officers who are uniformed employees within the meaning of RCW 41.56.030(7), and, therefore, their collective bargaining relationship is subject to interest arbitration.

4. The union also represents another bargaining unit, which is comprised of communications center officers, watchpersons, and resource protection officers. This bargaining unit is separate from the nuclear security officers.

5. The employer and the union are signatories to a collective bargaining agreement concerning the nuclear security officers dated October 30, 1999, through November 2, 2002.

6. In bargaining for a successor agreement, the union insisted on maintaining the three provisions which would have the effects that a permanently disabled nuclear security officer would be able to bump a less senior communications center operator.

7. In bargaining for a successor agreement, the union insisted on maintaining the three provisions which would have the effects that a permanently disabled nuclear security officer would be allowed to transfer to vacant positions of communications center operators, resource protection officers, or watch-persons.

8. The three provisions were certified to interest arbitration. Thereafter, Energy Northwest filed an unfair labor practice charge asserting that the three provisions should not be certified for interest arbitration as they represent permissive subjects of bargaining.

9. The Public Employment Relations Commission suspended the three provisions from interest arbitration.

10. The employer and the union filed motions for summary judgment and briefs arguing their legal positions. The Examiner determined that there were no genuine issues of fact and the motions for summary judgment were therefore granted.

11. The Examiner finds that the proposed provisions set conditions for and could significantly impact communications center officers, watchpersons, and resource employees. The proposed provisions also expose the employer to unfair labor practice allegations. Thus, the impact of the three provisions on managerial prerogative is substantial.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW.

2. A summary judgment issued under WAC 10-08-135 is based upon the statement of facts contained in the complainant's complaint and agreed upon by the respondent in its answer.

3. The union's proposal for provisions allowing nuclear security officers to transfer to positions outside the bargaining unit is a permissive subject of bargaining under RCW 41.56.030(4).

4. By bargaining to impasse on its proposals, the union did not bargain in good faith in accordance to RCW 41.56.030, and committed an unfair labor practice in violation of RCW 41.56.150(4).

ORDER

The Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 8-369, AFL-CIO, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

> Submitting to interest arbitration any proposal which permits nuclear security officers to automatically transfer to positions outside their bargaining unit.

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

   a. Remove from interest arbitration its proposals which permit nuclear security officers to automatically transfer to positions outside their bargaining unit.

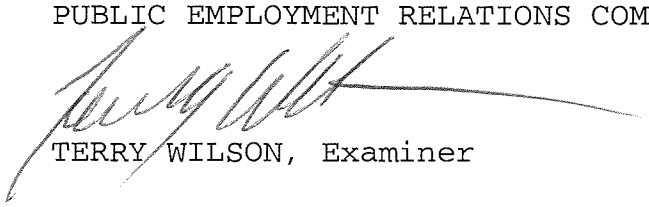
b. Post copies of the notice attached to this order in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from 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. 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.

d. 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 18th day of September, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



TERRY WILSON, 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 submitted proposals to interest arbitration concerning Section 8.2.1(b), Letter of Agreement CCO's, RPO's, and Watchpersons, and NSO Salary Continuance, which would have the following effects:

1. A permanently disabled nuclear security officer would be able to bump a less senior communication center operator.

2. A permanently disabled nuclear security officer would be allowed to transfer to vacant positions of communications center operators, resource protection officers, or watch persons.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL remove these proposals from interest arbitration.

WE WILL NOT, in any 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: _____

THE PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-369, AFL-CIO

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.