*City of Snohomish*, Decision 9569 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| TEAMSTERS LOCAL 763<br>Complainant,<br>vs.<br>CITY OF SNOHOMISH,<br>Respondent. | CASE 20656-U-06-5263<br>DECISION 9569 - PECB<br>AMENDED PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL |

On September 20, 2006, Teamsters Local 763 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Snohomish (employer) as respondent. The union is the exclusive bargaining representative for a unit of office technical employees. After a review of the complaint under WAC 391-45-110,[1] a preliminary ruling was issued on November 9. On November 15, the union filed a motion to amend the preliminary ruling. The employer filed an answer to the complaint on November 30. On January 3, 2007, a deficiency notice was issued in response to the motion to amend the preliminary ruling. The deficiency notice provided the union with a period of 21 days in which to file and serve an amended complaint, or face dismissal of certain defective allegations of the complaint.

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

On January 19, 2007, the union filed an amended complaint. The Unfair Labor Practice Manager dismisses defective allegations of the amended complaint for failure to state a cause of action, and finds a cause of action for interference and refusal to bargain allegations of the amended complaint. An amended preliminary ruling is issued for the allegations found to state a cause of action.

DISCUSSION

The preliminary ruling summarized the allegations of the complaint found to state a cause of action as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by skimming of bargaining unit work previously performed by assistant planners without providing an opportunity for bargaining, and by its refusal to provide relevant collective bargaining information requested by the union concerning the skimming of unit work.

The union's motion to amend the preliminary ruling requested two modifications to the preliminary ruling:

> 1) Add the phrase "and direct interference in violation of RCW 41.56.140(1)" after the reference to derivative interference in line 2; and
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> 2) Add the phrase "and by unilaterally implementing a change in the scope of the bargaining unit, a permissive subject of bargaining not agreed to be bargained by the Union" to the last line.

The deficiency notice denied the motion to amend the preliminary ruling, indicating that there were several defects with the motion.

One, in relation to the request to add a direct or independent interference violation under RCW 41.56.140(1), the union did not check the box entitled "Employer Interference with Employee Rights" on Form U-1, Complaint Charging Unfair Labor Practices. The union only checked the box entitled "Employer Refusal to Bargain." A derivative interference allegation was included in the preliminary ruling, as any violation of the discrimination provisions of RCW 41.56.140(1), domination or assistance of a union provisions of RCW 41.56.140(2), discrimination for filing an unfair labor practice charge provisions of RCW 41.56.140(3), or refusal to bargain provisions of RCW 41.56.140(4), is automatically a derivative interference with employee rights violation under RCW 41.56.140(1). The deficiency notice stated that this defect could be cured through the filing of an amended complaint alleging a direct or independent interference violation under RCW 41.56.140(1).

Two, the complaint's "scope of unit" allegations do not state a cause of action. The complaint contends that the employer unilaterally altered the scope of the bargaining unit by removing the assistant planner classification from the unit. The complaint alleges that the employer shifted work of the assistant planner to a senior planner position outside of the unit, and to lower-paid classifications within the unit. To remedy the alleged unfair labor practice violations, the complaint requests that the Commission issue an order "that the City return the scope of the bargaining unit to the status quo unless and until PERC grants a unit clarification petition in the City's favor with respect to the removal of the Assistant Planner classification."

The motion to amend the preliminary ruling lists several reasons for inclusion of a cause of action for the complaint's "scope of unit" allegations. The motion claims that the employer's conduct

is "unilaterally altering the scope of the recognition clause." Collective bargaining agreements often include a recognition clause describing the classifications or positions of the bargaining unit that are subject to the agreement. As indicated in the preliminary ruling, the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. The motion confuses appropriate bargaining unit concepts with transfer of unit work principles. The Commission has exclusive jurisdiction under RCW 41.56.060 to determine what classifications or positions will be grouped together to form an appropriate bargaining unit. Questions concerning the scope of a bargaining unit are determined by the Commission under representation rules in Chapter 391-25 WAC, or unit clarification rules in Chapter 391-35 WAC. Disputes concerning the transfer of unit work are determined by the Commission under unfair labor practice rules in Chapter 391-45 WAC.

Bargaining unit work is defined as work that has historically been performed by bargaining unit employees. Once an employer assigns unit employees to perform a certain body of work, that work attaches to the unit and becomes bargaining unit work. *City of Tacoma*, Decision 6601 (PECB, 1999). A public employer must bargain the transfer of bargaining unit work to employees outside of the unit. *South Kitsap School District*, Decision 472 (PECB, 1978). The Commission uses the term "skimming" where bargaining unit work is transferred to employees of the same employer who are outside of the existing bargaining unit. The term "subcontracting" or "contracting out" is used where unit work will be performed by employees of another employer. If an employer transfers unit work without fulfilling its bargaining obligations, it commits a refusal to bargain violation. The typical remedy for a transfer of unit work violation is restoration of the status quo that existed before the unlawful change.

The motion to amend the preliminary ruling argued that "changing the scope of the bargaining unit is a permissive subject of bargaining and . . . the Union has not agreed to bargain the issue." The creation of positions by a public employer is a permissive subject of bargaining. *Lakewood School District*, Decision 755-A (PECB, 1980); *City of Mercer Island*, Decision 1026-A (PECB, 1981); *City of Bellevue*, Decision 3343-A (PECB, 1990); *Evergreen School District*, Decision 3954 (PECB, 1991); *City of Tacoma*, Decision 6601 (PECB, 1999); *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001). Parties are only obligated to negotiate on mandatory subjects of bargaining. The employer had no obligation to negotiate with the union concerning the creation of a senior planner position.

In *Kitsap County Fire District 7*, the Commission stated as follows:

> The determination of appropriate bargaining units is a function delegated by the legislature to the Commission. RCW 41.56.060. Unit determination is not a subject for bargaining in the usual mandatory/permissive/illegal sense and, although parties may agree on units, their agreement does not guarantee that the unit agreed upon is or will continue to be appropriate. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

In *Lakewood School District*, Decision 755 (PECB, 1979), the union prosecuted its unfair labor practice complaint on two theories: unilateral alteration of the scope of the bargaining unit, and transfer of unit work. The Examiner rejected the "scope of unit" theory, holding that the employer did not commit an unfair labor practice violation by creating new positions outside of the bargaining unit. In relation to the union's transfer of unit work theory, the Examiner ruled that the employer committed an unfair

labor practice violation by skimming of unit work without fulfilling its duty to bargain.

## Review of Amended Complaint

The amended complaint added allegations concerning a direct or independent interference violation under RCW 41.56.140(1). The preliminary ruling is amended to include those allegations. The amended complaint provided the same statement of facts that was filed with the original complaint, and did not respond to the defects noted for the complaint's "scope of unit" allegations. Those allegations do not state a cause of action and are dismissed.

NOW, THEREFORE, it is

## ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference and refusal to bargain allegations of the amended complaint state a cause of action, summarized as follows:

   > Employer interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4), by skimming of bargaining unit work previously performed by assistant planners without providing an opportunity for bargaining, and by its refusal to provide relevant collective bargaining information requested by the union concerning the skimming of unit work.

   The interference and refusal to bargain allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. The "scope of unit" allegations of the amended complaint are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 24th day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK S. DOWNING, Unfair Labor Practice Manager

Paragraph 2 of this order will be the final order of the agency on any defective allegations, unless a notice of appeal is filed with the Commission under WAC 391-45-350.