City of Kirkland, Decision 6949 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRKLAND POLICE OFFICERS' GUILD, Complainant, vs. CITY OF KIRKLAND, Respondent.	)	CASE 14677-U-99-3682 DECISION 6949 - PECB ORDER OF DISMISSAL

On June 30, 1999, the Kirkland Police Officers' Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Kirkland (employer) as respondent. The union alleged that the employer committed a refusal to bargain, in violation of RCW 41.56.140(4), by unilaterally modifying its practices regarding the rehiring of former employees who sought to return to work in the bargaining unit represented by the union.

The complaint was reviewed under WAC 391-45-110, and a deficiency notice was issued on January 4, 2000. The union was given a period of 14 days in which to file and serve a complaint which stated a cause of action, or face dismissal of the complaint. An amended complaint filed on January 14, 2000, has been reviewed under WAC 391-45-110.

The Executive Director concludes that the complaint, as amended, fails to state a claim for relief through unfair labor practice proceedings before the Public Employment Relations Commission. The complaint is DISMISSED.

DISCUSSION

The fundamental flaw with the union's claim in this case lies in the fact that the union is seeking to assert rights on behalf of an individual who is not currently an employee within the bargaining unit represented by the union. The duty to bargain imposed by Chapter 41.56 RCW relates to the wages, hours and working conditions of employees within the particular bargaining unit represented by an exclusive bargaining representative. RCW 41.56.080. While civil service rules affecting the wages, hours or working conditions of bargaining unit employees are a mandatory subject of collective bargaining under City of Yakima, Decision 3503-A (PECB, 1990), affirmed 117 Wn.2d 655 (1991), both civil service rules, and employer personnel policies generally, can affect matters outside of the sphere of mandatory collective bargaining.

Aside from pointing out that the original complaint contained confusing dates,[1] and was untimely as to many of the events,[2] the deficiency notice questioned the basis for the union's claim that

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[1] The original complaint alleged the individual sought to return in the spring of 1997 to a position he left in the summer of 1997. The amended complaint alleged he resigned in 1997, and sought to return in the spring of 1998.

[2] This complaint filed on June 30, 1999, can only be considered timely, under RCW 41.56.160, as to acts or events occurring on or after December 30, 1998. Thus, the circumstances surrounding the resignation, alleged actions by the employer or its civil service board during or about July of 1998, when the individual was placed on a civil service "reinstatement register", and the alleged absence of any openings at that time can only be considered as background material. The earliest allegation for which this complaint is timely concerns notice of a physical agility test which was received, according to the amended complaint, "in the spring of 1999 (in March and/or April)".

either civil service rules or employer policies about hiring and rehiring are a mandatory subject of bargaining. The amended complaint offers three theories, none of which is persuasive.

Union Acknowledges Lack of Past Practice or Agreement - The union acknowledges that it "is unaware of any prior reinstatement appointment for a police officer, ...". While the duty to bargain imposes a duty to give notice and provide opportunity for good faith bargaining prior to implementing any change of past practices concerning the wages, hours or working conditions of bargaining unit employees, the union's statement contradicts the existence of any past practice affecting the bargaining unit of police officers that it represents. The deficiency notice had pointed out, and the amended complaint did not alter, an absence of any allegation that the re-hiring procedure has actually been negotiated by these parties in the past.

Practices in Different Bargaining Unit Not Controlling - The union next asserts: "... the reinstatement process has been utilized for firefighters under the same [civil service] rules." The "peculiar" language contained within the definition of collective bargaining, RCW 41.56.040(4),[3] has been interpreted as

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[3] RCW 41.56.030(4) includes:

> "Collective bargaining" means ... to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, **which may be peculiar to an appropriate bargaining unit of such public employer**, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ... [emphasis by **bold** supplied]."

meaning that the bargaining in each unit stands alone. City of Wenatchee, Decision 2216 (PECB, 1985);[4] City of Pasco v. PERC, Decision 3368-A (PECB, 1990), affirmed 119 Wn.2d 504 (1992). The fact that a past practice may arguably exist for reinstatements of former employees to another bargaining unit without need for further examination, testing, or background checks is not a basis for a claim of past practice or bargaining rights affecting the bargaining unit represented by this union.

Precedent Discredits "Deferred Rights" Theory -

The union's amended complaint continues: "Such a right allows employees to terminate their employment secure in the knowledge that they may return to their position." The possibility that current employees might desire to leave and return at some time in the future does not alter the reality that they, too, would be outside of the bargaining unit when seeking such a reinstatement. They would certainly stand in no better shoes than retirees, whose post-retirement benefits are excluded from the mandatory subjects of bargaining. Allied Chemical & Alkali Workers, Local 1 vs. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). Even though applicants for employment are protected from anti-union discrimination, under decisions dating back to Phelps Dodge Corp. V. NLRB, 313 U.S. 177 (1941), that does not generally extend a union's bargaining rights to persons who are not yet employees within the bargaining unit represented by the union. Even where a "circumvention" violation was found on an agreement negotiated by an employer with a new employee shortly after he started work, the Commission

[4] In Wenatchee, the dispute concerned promotions to positions within the bargaining unit represented by the union involved. The Commission's decision in City of Bellevue, Decision 3156-A (PECB, 1990) mentions, as a routine and foregone conclusion, the previous dismissal of allegations concerning promotions to positions outside of the bargaining unit represented by that union.

did not impose a duty to bargain upon that employer with regard to pre-hire conditions. City of Pasco, Decision 4197-A (PECB, 1994).[5]

In assessing applications, checking the references of applicants, and applying other pre-employment screening techniques, an employer has a legitimate interest in identifying the most promising prospects to enhance its workforce and limit its liability to its clients and the general public. In applying "merit" principles to the hiring process, an employer's civil service board advances similar employer interests. In this case, the complaint alleges that the employer's civil service examiner stated that the former employee was expected to pass a physical agility test, and that the police chief stated the former employee would have to pass a physical fitness test, an oral board, a psychological screening, and a background investigation before being reinstated. Even if individual applicants (including the individual involved in this case) acquire some right to procedural fairness and due process in the application of civil service rules, all of the alleged impediments to the individual's reinstatement appear to be typical pre-hire screening.

The amended complaint suggests, but does not sufficiently detail, a claim that the former employee was being subjected to stricter standards than those encountered by first time applicants. There is, however, no surrounding circumstances which would suggest any anti-union animus on the part of the employer. Importantly, the union did not mark the box on its amended complaint to allege either an "interference" or "discrimination" claim.

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[5] While the Commission's decision was challenged in court on "timeliness" principles, that does not affect the point for which it is cited here.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-captioned matter is hereby DISMISSED for failure to state a claim upon which relief can be granted through unfair labor practice proceedings before the Public Employment Relations Commission.

DATED at Olympia, Washington this 31st day of January, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

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

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RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6949 - PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, 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/ BETTY PASSMORE

CASE NUMBER: 14677-U-99-03682 FILED: 06/30/1999 ISSUED: 01/31/2000

FILED BY: PARTY 2 DISPUTE: ER UNILATERAL DETAILS: Unilateral change in promotions & filling vacancies

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