Kitsap County, Decision 8292-A (PECB, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFF GUILD,	)	
Complainant,	)	CASE 17190-U-03-4448
vs.	)	DECISION 8292-A - PECB
KITSAP COUNTY,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Cline & Associates, by *George E. Merker,* Attorney at Law, for the union.

Russell D. Hauge, Kitsap County Prosecuting Attorney, by *John S. Dolese,* Senior Deputy Prosecuting Attorney, for the employer.

On February 10, 2003, the Kitsap County Deputy Sheriff Guild (guild) filed an unfair labor practice complaint against Kitsap County (employer) charging the employer with interference with employee rights, employer domination or assistance of the guild, and refusal to bargain. On October 17, 2003, the Commission issued a deficiency notice regarding the domination or assistance charge. On November 4, 2003, the guild filed an amended complaint. On November 19, 2003, the Commission dismissed the allegations of employer domination or assistance, but found a cause of action for the interference and refusal to bargain claims. The employer filed a timely answer. Examiner Katrina I. Boedecker conducted a hearing on October 26, 27, and November 23, 2004. The parties filed post hearing briefs.

Based upon the record, statutes, rules, and case law, the Examiner finds that Kitsap County did not commit the unfair labor practices alleged by the union. The guild's claims are DISMISSED on the merits.

ISSUES

Prior to 2002, did a past practice exist regarding release time for guild activities?

Prior to 2002, did a past practice exist regarding overtime for guild activities?

Did any activities involving release time or overtime violate Washington law?

Did the employer interfere with employee rights by comments allegedly made by the sheriff to the guild president concerning release time?

ANALYSIS

Did the parties have a past practice regarding release time?

Applicable Standards - Past Practice

A past practice is an action acknowledged by both parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *City of Pasco,* Decision 4197-A (PECB, 1994). In order to be an established past practice, the action must be consistent, and all parties must have knowledge of it. *Whatcom County,* Decision 7288 (PECB, 2002). To constitute an unfair labor practice, the change must be meaningful. *City of Kalama,* Decision 6733-A (PECB, 2000).

Application of Standards

The parties define "release time" as the period of time an on duty deputy is engaged in guild activities while in regular pay status and without using annual leave. The following uses of release time are at issue:

1. Guild members and officers participating in grievance and interest arbitrations, specifically as witnesses or guild representatives;

2. Guild members attending guild executive board meetings and general membership meetings on employer property;

3. Guild members preparing for collective bargaining;

4. Guild members consulting with legal counsel over union activities; and

5. Guild members attending law enforcement oriented political action committee meetings (WACOPS).

The guild witnesses testified that prior to autumn 2002, the employer routinely granted guild officers and general members release time for the activities noted above. The guild asserts that during contract negotiations in 2002 the employer proposed restricting release time. The guild claims that rather than bargaining over this alleged change, the employer unilaterally implemented it. The guild alleges the employer has now altered the release time practice allowing it only for joint contract negotiation sessions or labor/management meetings called by the employer, and disallowing all other uses. In addition, the guild claims that, under past practice, sergeants controlled the granting of release time, but under the new policy, a lieutenant or higher rank must approve release time.[1] Several former guild officers stated that in the 1990s it was routine for guild members to attend executive board and general guild meetings while on duty, and that the employer knew of this. The guild witnesses stated that the former sheriff allowed them to attend guild meetings in their patrol vehicles. Guild witnesses also testified that guild officers and members had attended grievance and interest arbitrations, consulted with attorneys and prepared for negotiations, and attended WACOPS meetings, all on release time and with the knowledge of their supervisors.

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[1] Sergeants are in the bargaining unit.

The employer produced evidence that in the 1990s and prior to 2002 there had been only one grievance arbitration and two interest arbitrations. Further, a current administrator and former guild officer stated that as a guild officer in the late 1990s, he never took release time for executive board or general guild meetings, but adjusted his work schedule to attend the meetings. Additionally, the record shows that some sergeants approved release time for guild activities and some denied it. The employer instituted a procedure in 2002 identifying lieutenants and above as the sheriff's designees for granting release time.

Arbitrations -
The evidence does not support a claim that attendance by guild members at grievance or interest arbitrations constituted a past practice. The number of these arbitrations was insufficient to establish a pattern, and there was no evidence that, even if the employer was aware of the guild members' presence, the employer knew their pay status.

Other Guild Activities -
There is evidence that some guild officers in the 1990s assumed they could use release time for guild activities and attained permission through their sergeants. However, not everyone assumed this, and release time for guild activities was not universally utilized. There was also no evidence that the administration was aware of this use of release time by some deputies. A past practice requires knowledge by both parties that it is occurring.

The sheriff's department apparently had no policy concerning release time for guild activities until the arrival of a new labor relations manager in 2002. At that time, the employer instituted several new standards: Sergeants would no longer dole out release time, only lieutenants and above could do so; uses of release time plainly prohibited by law would not be allowed; and any release time for guild activities must be "vitally connected to the employer's business." This was the first time a policy had been in

place regarding this issue. While the guild presented evidence that at least some of its members and officers took for granted a liberal release time policy for guild activities, the employer produced persuasive evidence that there was no meeting of the minds between it and the guild over this use of release time. The Examiner finds no past practice regarding release time for guild activities prior to 2002.

Did the parties have a past practice regarding overtime for guild activities?

The legal standard regarding past practices as stated above applies to this issue.

The following uses of overtime are in dispute:

1. Guild members participating in disciplinary investigations, Loudermill hearings, and grievances, including grievance arbitrations;

2. Guild members serving as guild representatives, *e.g*, to support fellow officers involved in a shooting;

3. Guild members attending guild executive board meetings.

Disciplinary Matters -
The guild asserts that while the employer grants release time for disciplinary investigations (Weingarten hearings), Loudermill hearings, and grievances, it does so only when an officer is on duty. If a guild member wishes to participate in one of those activities when not on duty, the employer refuses to pay call out or overtime. The guild claims the change in practice results from the employer's past policy of scheduling the above noted events when the appropriate guild members were on duty, that is, those guild members desired by the guild to serve as a guild functionary in one of the above noted situations. The guild claims that the employer now schedules these matters poorly. The guild states that if the employer refuses to schedule the matters when guild-desired

members are on duty, then the employer should pay those members overtime or call out time when they do respond.

The alleged change in position by the employer seems to involve a change in scheduling, not in payment of overtime. The guild offered no persuasive evidence that a past practice existed for scheduling guild-desired members for disciplinary matters.

Guild Representatives -
The guild representatives at issue here are guild members not acting within the disciplinary settings noted above, but serving as support to fellow guild members. Examples would include giving support to officers involved in shootings or other traumatic events in the course of official business. The guild provided one instance where a guild officer claimed overtime when serving as a guild representative, and one instance where overtime was approved by a lieutenant for a guild representative. In the first instance, no record of overtime was in evidence. In the second, the approval was based on a sergeant having granted the overtime request, with the stipulation by the administration that the sergeant had erred and that the approval was not precedent setting. The record does not support a past practice of guild representatives receiving overtime. Two incidents, even had they been validated and non-qualified, do not constitute a past practice.

Executive Board Meetings -
The guild maintains that overtime was granted for attendance at executive board meetings prior to the employer's apparent change of policy in the fall of 2002, when it denied such overtime requests submitted by two guild members. The employer relies on two arguments in opposing the guild's position. First, that Article I, Section B of the collective bargaining agreement, Guild Activities, prohibits overtime for guild activities. Second, that the employer had never paid overtime for a guild executive board meeting, and that until the summer of 2002 no guild member had even requested it.

The guild maintains that the prohibition against overtime applies only to contract negotiations and not to other guild activities. It is beyond the purview of the Examiner in an unfair labor practice case to interpret a collective bargaining agreement. *City of Walla Walla,* Decision 104 (PECB, 1976). However, the employer provided substantial evidence that it has consistently interpreted the collective bargaining agreement to mean it would not pay overtime for any guild activities. Further, the employer had uncontested evidence that no guild member had put in for overtime for an executive board meeting prior to 2002. The employer promptly denied the two requests. The guild, on the other hand, produced no evidence for the employer ever granting overtime for executive board meetings. No past practice ever existed for overtime for guild executive board meetings.

Did any activities involving release time or overtime violate washington law?

Applicable Standards - Illegal Activities

An employer may lawfully deny the use of public facilities and release time for union activities. *State Labor and Industries,* Decision 8261 (PSRA, 2003); *City of Pasco,* Decision 3582-A (PECB, 1991). RCW 41.56.140(2) prohibits a public employer from assisting or dominating a union. The Commission has found the unrestricted funding of union activities by an employer to violate the aforementioned statute. *Enumclaw School District,* Decision 222 (PECB, 1977).[2]

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[2] Illegal in this context does not, of course, imply criminal acts, but rather, those financial activities that might violate Washington law concerning the use of public funds and property under Sections II and VII, respectively, of the state constitution. The Commission has no jurisdiction to decide constituional violation issues. Further reference to illegal actions will refer only to alleged violations of RCW 41.56.140(2).

Application of Standards

An obvious irony in this case is that the guild's initial claim of employer domination or assistance of a union was dismissed, and that the employer relies as a defense on the prohibition against such activities. However, this defense is crucial to the analysis of this issue. The employer argues that providing the guild release time for union activities not vitally connected to the employer's business constitutes illegal funding. Such illegal funding not only is untenable for a public entity, but provides the direct assistance to a union prohibited by RCW 41.56.140(2)(the statute).

The guild admits that some activities funded by the employer might have been illegal, specifically, funding attendance at WACOPS. The guild's position seems to be that, other than activities related solely to guild business (*e.g.*, fund raisers), executive board meetings, general membership meetings, activities by guild representatives, and participation in arbitrations by guild members are all related to the employer's business.

The employer and guild have a fundamental difference in perception that needs to be addressed. The Examiner finds that the statute and controlling case law make clear that a public entity allowing free use of public property or release time for public employees to conduct union business violates the statute. Exceptions are explicit agreements in the collective bargaining agreement related to collective bargaining negotiation sessions, or joint labor/management meetings. In addition, guild members serving as representatives in Weingarten and Loudermill proceedings, or in grievance arbitrations may act on paid status.

The uses of release time at issue here constitute violations of the statute:

1. Executive board and general membership meetings;

2. Attendance at WACOPS or other political action conventions;

3. Negotiation planning, consultation over labor matters with attorneys or business representatives; and

4. Participation in mediations, arbitrations, and activities as guild representatives not involving formal disciplinary investigations and hearings.

Although no past practice was found regarding overtime for guild activities, specifically attendance at executive board meetings and service as guild representatives in non-disciplinary settings, the same principle applies. Not only does an employer have no obligation to authorize overtime for the foregoing guild activities, doing so would violate the statute.

The guild maintains in its closing brief that the relationship with the employer demonstrates it is not a company union, and that the employer's funding of the activities at issue does not make it one. However, the relationship of the parties in the instant case is not the sole issue at bar. Rather, the statute addresses all bargaining units and public employers in the state of Washington. Common logic and experience dictates that an employer who provides a free meeting place for unions, and pays union members to conduct union business, is assisting and dominating the union. The Commission is charged with enforcing this rule impartially throughout the state. The Commission does not find the guild an exception to the rule.

The guild also argues that by not allowing release time and overtime for guild officers, the employer places a burden on those officers that might prevent them from acting effectively for the guild. This argument only proves the statute's point: a union that can exist only at public expense is a company union, or has all the appearances of being one.

Arbitration Witnesses and Representatives -
As ancillary matters, the employer argues that the collective bargaining agreement, Article I, Section F(d), Cost of Arbitration,

provides that each party must pay for its own witnesses and representatives. The employer asserts that this provision applies to all arbitrations, including interest arbitrations. The employer states that the guild waived its right to have its witnesses and representatives attend interest arbitrations on paid status when it agreed to this provision of the contract.

The guild contends that this section refers only to grievance arbitrations, not interest arbitrations. Further, the guild proposes that the term "representative" applies to the person presenting the arbitration case, whether an attorney or union business agent, and not to employees who attend to represent the guild.

An alleged violation of the contract would be decided ultimately through the arbitration process. In any case, these issues are now moot under the analysis set forth above.[3]

Did the sheriff interfere with employee rights when he talked to the guild president about release time?

Applicable Legal Standards - Interference

Interference with employee collective bargaining rights is prohibited under RCW 41.56.040 and enforced through RCW 41.56.140(1). The test for interference violations is whether an employee could reasonably perceive employer actions as a threat of reprisal or force, or a promise of benefit, associated with the employee's pursuit of collective bargaining rights. The employee does not need to show that the employer intended to interfere.

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[3] The union alleged in its complaint of unfair labor practices that the employer implemented a unilateral change in use of union release time without providing an opportunity for bargaining. The Commission found this allegation to state a cause of action. Now this issue is moot under the above analysis, also.

City of Tacoma, Decision 6793-A (PECB, 2000); *City of Omak,* Decision 5579-B (PECB, 1997); WAC 391-45-270.

Application of Standards

In response to the guild president's question as to whether the employer was changing its position on release time, the guild states the sheriff purportedly asked, "What has the guild done for me?" The sheriff testified that he did not recall making that statement. There were no witnesses to the conversation other than the two principles. Therefore, the inquiry becomes one over credibility. The Examiner finds both individuals to be credible and includes their testimony on this point in that finding.

Even if the sheriff did make that comment, it would not rise to the level of an interference violation within the context in which it was allegedly made. If the comment were made, it was made to the guild president, not a novice. At worst the comment could be construed as an awkward attempt at informal *quid pro quo* bargaining. The guild president, as an experienced negotiator, had the option of ignoring the comment, rejecting it, or asking what the sheriff might be hinting at as a guild response.

Of course, the sheriff need not have intended interference to commit an interference violation. Interference may be proven from a reasonable perception by the offended employee. However, considering the context and the recipient, the guild president could not have reasonably perceived this alleged comment as interfering with his collective bargaining rights.

Finally, the sheriff's explanation for his perception of the conversation comports with the evidence concerning release time given throughout the hearing. While the guild president thought the sheriff was specifically authorizing release time, the sheriff thought he was giving the guild president the option of going to the guild meetings after making appropriate arrangements with his supervisor. This exemplifies the lack of any meeting of the minds

of the parties over release time between the 1990s and the arrival of the employer's new labor relations manager in 2002. The sheriff's department administration, and the guild officers and membership, operated in a hazy and ambiguous arena where no questions were asked and no demands made over release time. The sheriff had no knowledge of any agreements over release time. The guild had only a vague perception of a pattern of past practices involving release time. These perceptions, upon examination, were not borne out by the evidence. This analysis applies equally to overtime. The guild's perception was that the employer regularly paid overtime for guild activities. The evidence disproved that belief.

FINDINGS OF FACT

1. Kitsap County is a public employer within the meaning of RCW 41.56.030(1).

2. The Kitsap County Deputy Sheriff Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of uniformed deputy sheriffs employed by the Kitsap County Sheriff's Office.

3. Prior to 2002, the employer and the guild did not engage in a pattern of behavior establishing a past practice regarding the use of release time by guild members for guild activities.

4. Prior to 2002, the employer and the guild did not engage in a pattern of behavior establishing a past practice regarding the use of overtime by guild members for guild activities.

5. The employer properly identified and halted guild activities that violated RCW 41.56.140(2).

6. The guild president could not reasonably have perceived that the sheriff made a comment regarding release time that interfered with his collective bargaining rights.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. On the basis of Findings of Fact 3 through 5, the employer did not commit an unfair labor practice under RCW 41.56.030(4) by refusing to bargain with the guild concerning release time and overtime.

3. On the basis of Finding of Fact 6, the employer did not commit an unfair labor practice under RCW 41.56.040 through comments made by the sheriff to the guild president over release time, and so did not interfere with employee collective bargaining rights.

ORDER

The complaint charging unfair labor practices filed in case 17190-U-03-4448 against Kitsap County is DISMISSED on the merits.

Issued at Olympia, Washington, on the 10th day of May, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina Boedecker

KATRINA I. BOEDECKER, 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.