

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFF'S	)	
GUILD,	)	
	)	CASE 17583-U-03-04547
Complainant,	)	
	)	DECISION 8402-A - PECB
vs.	)	
	)	
KITSAP COUNTY,	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

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Cline & Associates, by *Christopher J. Casillas*, Attorney at Law, for the union.

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

On June 10, 2003, the Kitsap County Deputy Sheriff's Guild (union) filed a complaint with the Public Employment Relations Commission charging Kitsap County (employer) with unfair labor practices under RCW 41.56.140(1) and (4) alleging discrimination, interference with employee rights and the refusal to bargain. The changes arise out of the unilateral implementation of a sick leave monitoring system. The union is the exclusive bargaining representative of a unit of all regular full-time and regular part-time commissioned uniformed deputy sheriffs employed by the employer.

The complaint was reviewed under WAC 391-45-110. On January 9, 2004, a Deficiency Notice was issued regarding the discrimination allegation giving the union an opportunity to amend the complaint. Receiving no response from the union, a decision was issued on February 13, 2004, dismissing the discrimination allegation and ordering further proceedings on the claims of interference and the refusal to bargain. *Kitsap County*, Decision 8402 (PECB, 2004).

Following receipt of the employer's answer, the case was heard before Examiner Robin A. Romeo on July 27, 2004. Prior to the receipt of post-hearing briefs, the union filed a motion to reopen the hearing to allow for the admission of an arbitration award. Following consideration of the parties' written arguments, the award was admitted into evidence. Following submission of post-hearing briefs, the record was closed.

#### ISSUES PRESENTED

1. Did the employer fail to bargain over the implementation of the Absence Control Tracking System (ACTS)?
2. Did the employer fail to bargain over the effects of the implementation of ACTS?
3. Did the employer fail to bargain over the requirement to provide medical certification for each use of sick leave?
4. Does a claim of interference exist?

Based upon the record presented as a whole, the Examiner finds that the employer violated RCW 41.56.140(1) and (4) when it failed to bargain over the effects of the implementation of ACTS.

#### ANALYSIS

Pursuant to the current collective bargaining agreement between the parties, employees are entitled to accrue and use sick leave. It states in relevant part in Article 2, Section C:

1. Sick leave shall accumulate at the rate of ten(10)hours for each full month of employment,

*provided* that no more than twelve hundred (1200) hours of sick leave may be carried from one calendar year to the next.

3. Sick leave must be approved by the immediate supervisor. Sick leave taken in excess of three (3) consecutive working days must be supported by a certificate of a physician or other licensed medical practitioner, or if requested by the Sheriff or his designee. Any sickness or injury for which an employee desires to take sick leave shall be immediately reported to the sheriff or his designee.

On or about March of 2002, Sergeant Steve Sipple (Sipple) attended a seminar where he learned about the use of ACTS. He described ACTS as a system of tracking employees' sick leave by using an excel spreadsheet. The spreadsheet keeps track of sick leave usage, attaches a code to the absence based on the type of absence and whether the absence was taken in tandem with another type of leave. The system tallies the total leave taken by all employees, calculates an average and then adds a percentage to the average to come up with a number to indicate the level at which an employee will be identified as a possible abuser. Previously, sick leave use was tracked manually.

In July 2002, Sipple issued a counseling memo to an employee under his supervision, Deputy Sheriff Pam Fleming (Fleming), regarding her sick leave use. He had determined that her sick leave use was excessive by using ACTS. As a result, she was required to produce medical certification documenting the reason for the sick leave each time she used sick leave. This led to the filing of a grievance. Previously, in January 2002, Sipple had given Fleming a written evaluation that included comments regarding her sick leave.

In the union's written grievance submission, it referred to Sipple's use of the ACTS system. The employer's December 11, 2002,

written response to the grievance, acknowledged use of ACTS and that it was being used by all three patrol shifts. The response also included the employer's belief that use of ACTS was not subject to bargaining. As a result, the complaint herein was filed.

Issue 1: Did the employer fail to bargain over the implementation of ACTS?

The obligation between the parties to bargain changes in a mandatory subject is defined in the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, specifically RCW 41.56.030(4):

"Collective Bargaining" means the performance of mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, 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 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.

The topics included within "wages, hours and working conditions" have come to be known as mandatory subjects of bargaining. An employer that refuses to bargain over or takes unilateral action concerning such mandatory subject of bargaining, commits an unfair labor practice. *City of Pasco v. PERC*, 119 Wn.2d 504 (1992).

Unilateral action arises when a change in existing wages, hours of work or working conditions takes place. The change must be meaningful, substantial and significant to give rise to the obligation to bargain. *King County*, Decision 4893-A (PECB, 1995) (citing NLRB precedent); *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Pullman*, Decision 8086-A (PECB, 2003). The mere

restatement of an existing policy is not a meaningful change. *City of Kalama*, Decision 6773-A (PECB, 2000).

- In *Whatcom County*, Decision 7288-A, the employer discontinued the practice of allowing some police officers to call in while traveling which qualified them for on duty pay. The change did not rise to the level of a meaningful change in working conditions or compensation because the union could not prove a consistent past practice of making such allowances.
- In *City of Pullman*, Decision 8086-A, a unilateral change prohibiting the use of a recording device in investigatory interviews was found to be a meaningful change. The employer had argued that there was no consistent past practice of allowing such recordings. Moreover, the Commission affirmed the Examiner's finding that there had been a ten year practice of allowing the recordings such that the prohibition was judged to be a change in practice.
- In *City of Kalama*, Decision 6773-A, a directive given to the police chief to work vacant patrol shifts did not give rise to a meaningful change because it did not represent a change in the status quo. The evidence showed that the Chief, on occasion, had previously worked patrol shifts.

I find that the change to ACTS for the purpose of tracking sick leave is not a meaningful change in a condition of employment. The change merely involves the input of data to a computer spreadsheet. The union admits that sick leave use has always been tracked. It is just the manner which has changed. This represents an update in technology and the storage and presentation of data. It is not a substantive change. Also, the tracking of sick leave in connection with other leave used is not a new practice. Sipple examined Fleming's leave use in January as compared to, or in conjunction

with, her other leave use, prior to the time ACTS was used. Accordingly, the decision to use ACTS is not a mandatory subject of bargaining.

Issue 2: Did the employer fail to bargain over the effects of the Absentee Control Tracking System?

It is well established by Commission precedent that the bargaining obligation is applicable as to both a decision on a mandatory subject of bargaining and the effects of that decision. So, while an employer may have no duty to bargain concerning a decision, the "effects" of such decisions could be mandatory subjects of bargaining. *Grays Harbor County*, Decision 8044-A (PECB, 2004).

ACTS is a new system used to monitor sick leave. Previously, supervisors would keep track of how much leave an employee used to determine possible abuse. The determination of possible abuse would be up to the supervisor. Now, ACTS automatically flags employees as possible leave abusers. It keeps track of how much leave an employee uses. It calculates an average of sick leave taken by all employees. It automatically identifies when an employee's leave reaches above a pre-determined amount.

From the testimony presented, as a result of being identified or flagged by ACTS, action may be taken against an employee. A request for sick leave could be denied, resulting in leave without pay. Also, despite the employer's assertion to the contrary, employees could be disciplined as a result of the use of ACTS. The July 2002 counseling memo from Sipple to Fleming states that her failure to provide a health care provider's documentation for each instance of sick leave will result in the denial of the leave or further disciplinary action.

The Commission has found that a change in policy that affects the use of sick leave must be bargained. In *City of Wenatchee*,

Decision 6517-A (PECB 1998), the Commission affirmed the hearing Examiner's decision that the employer's unilateral discontinuance of a light-duty program for police officers was a violation of the obligation to bargain because such program affected whether or not employees had to use sick leave.

The decision to use ACTS is not a mandatory subject of bargaining but its effect on mandatory subjects of bargaining must be negotiated. ACTS has an impact on sick leave and discipline. Accordingly, the effects must be bargained.

The union states that it objected to the use of ACTS. The employer's response was that ACTS was not subject to bargaining. The employer did not dispute that the union asked to bargain. The employer has thus, refused to bargain. Based on the evidence and testimony, the employer committed an unfair labor practice when it refused to bargain over the effects of using ACTS.

Issue 3: Did the employer fail to bargain over the requirement to provide medical certification for each use of sick leave?

At the hearing, much of the union's evidence, testimony and argument focused on the requirement imposed on Fleming, in July 2002, to produce medical certification for each use of sick leave. This issue was also the subject of a contract violation grievance. That grievance resulted in an arbitration award. The union has argued that it is also an unfair labor practice.

The Commission has not asserted the jurisdiction to remedy contract violations. *City of Walla Walla*, Decision 104 (PECB, 1976). It has consistently refused to assert jurisdiction of contract violations with unfair labor practice remedies. Although, the requirement to produce medical certification is a mandatory subject of bargaining, the remedy for contract violations must be pursued

through the contract grievance procedure. *Clark County Public Benefit Area*, Decision 8489-A (PECB, 2004).

The parties had already bargained over the issue of when Fleming was required to produce medical documentation. The contract covered this issue. The arbitrator made that determination. He found that the requirement to provide medical certification for each use of sick leave violated the contract. Specifically, he found that a violation occurred of Article 2, section C(3) which requires documentation after three consecutive days of illness.

The argument that the change in the requirement to produce medical certification must therefore, be dismissed. It was clearly considered by the union and the arbitrator as a contract violation. The Commission asserts no jurisdiction over this issue.

Issue 4: Does a claim of interference exist?

Pursuant to RCW 41.56.140(1) an employer is prohibited from interfering, restraining or coercing public employees in the exercise of their rights guaranteed by that chapter. An independent interference claim will be found if it is shown that an employer's conduct could reasonable be perceived by an employee as a threat of reprisal or force, or a promise of a benefit designed to deter them from participating in lawful union activity. *City of Seattle*, Decision 3066 (PECB, 1988); *Grant County Public Hospital 1*, Decision 8378-A (PECB, 2004). The burden of proof in establishing a violation lies with the complaining party. *King County*, Decision 6994-A (PECB, 2002)

The claim of interference is unsubstantiated. The union offered no evidence on this point. No testimony was presented in support of an allegation that any employee perceived any threat of reprisal or promise of benefit concerning union activity. Neither party



offered any argument in their post-hearing briefs on this point. This charge is therefore, dismissed.

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's Guild is a "bargaining representative" within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of a unit of all regular full-time and regular part-time commissioned deputy sheriffs employed by Kitsap County.
3. The current collective bargaining agreement between the parties provides for the accrual and use of sick leave by employees.
4. The Absence Control Tracking System monitors sick leave use on an excel spreadsheet, computes an average of all employee use, and identifies employees as possible abusers when their use rises above a certain level.
5. Prior to the implementation of the Absence Control Tracking System, sick leave was monitored and examined in conjunction with other leave use.
6. An employee who is identified under ACTS as a possible abuser could face the denial of sick leave or discipline.
7. In July 2002, Deputy Sheriff Pam Fleming was given a written counseling memo by her supervisor, Sergeant Steve Sipple regarding her sick leave use. The memo stated that her sick leave was excessive. That determination was made by using the

Absence Control Monitoring System. She was then required to submit medical documentation for each time she used sick leave. The union filed a grievance concerning that requirement.

8. The grievance resulted in an arbitration award that found the employer violated the contract when it required Fleming to produce medical certification for each day of sick leave use.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 and RCW Chapter 391-45 WAC.
2. The implementation of the Absence Control Tracking System is not a violation of the employer's obligation to bargain under RCW 41.56.140(4).
3. The failure to bargain the effect of ACTS is a violation of the employer's obligation to bargain under RCW 41.56.140(4).
4. The claim of interference by the employer under RCW 41.56.140(1) was not sustained.

#### ORDER

KITSAP COUNTY, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. SUSPEND:
  - a. Taking any action against any employee represented by the Kitsap County Deputy Sheriff's Guild, as a result of

using the Absence Control Tracking System until effects bargaining is completed.

- b. Failing to bargain over the effects of using ACTS.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:
- a. Restore the status quo.
  - b. Give notice to and, upon request negotiate in good faith with the union on the effects of using ACTS.
  - c. Post in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notice shall be duly signed by an authorized representative of the employer and shall remain posted for 60 days. Reasonable steps shall be taken by the employer to ensure that such notice is not removed, altered, defaced or covered by other material.
  - d. Read the notice attached to this order into the record at a regular public meeting of Kitsap County 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.
  - e. Notify the union, 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 union with a signed copy of the notice attached to this order.

- f. Notify the Executive Director 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 Executive Director with a copy of a signed copy of the notice attached to this order.

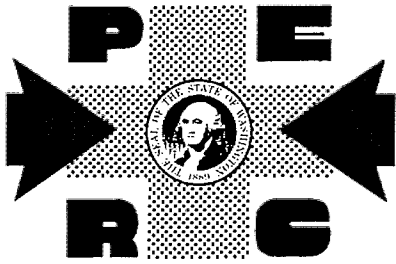
ISSUED at Olympia, Washington, this 28th day of March, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



ROBIN A. ROMEO, 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 PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE WILL suspend taking any action against any employee represented by the Kitsap County Deputy Sheriff's Guild as a result of implementing the Absence Control Tracking System until effects bargaining is complete.

WE WILL restore the status quo by rescinding the July 2002 counseling memo issued to Deputy Sheriff Pam Fleming by Sergeant Steve Sipple.

WE WILL give notice to and, upon request, negotiate in good faith with the Kitsap County Deputy Sheriff's Guild, concerning the effects of implementing the Absence Control Tracking System.

WE WILL NOT, in any manner, interfere with, restrain, or coerce our employees in the exercise of their bargaining rights under the laws of the State of Washington.

WE WILL read this notice into the record at a regular public meeting of Kitsap County, and permanently append a copy of this notice to the official minutes of the meeting where the notice is read.

DATED: \_\_\_\_\_

KITSAP COUNTY

By: \_\_\_\_\_  
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 112 NE Henry Street, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360)570-7300.