STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 453, Complainant,	)	CASE 17413-U-03-4513
vs.	)	DECISION 8802-A - PECB
CITY OF WENATCHEE, Respondent.	)	DECISION OF COMMISSION

Summit Law Group PLLC, by *Bruce Schroeder*, Attorney at Law, and *Shannon Phillips*, Attorney at Law, for the employer.

Emmal Skalbania & Vinnedge, by *Alex J. Skalbania*, Attorney at Law, for the union.

This case comes before the Commission on a timely appeal filed by the City of Wenatchee (employer) and a timely cross-appeal filed by the International Association of Fire Fighters, Local 453 (union), each seeking to overturn findings of fact, conclusions of law, and remedial order issued by Examiner Karl Nagel.[1] We affirm in part, reverse in part, and dismiss the union's complaint in its entirety.

PROCEDURAL HISTORY

On April 7, 2003, the union filed a complaint alleging the employer committed an unfair labor practice when it refused to bargain a change in minimum staffing level for its fire services. The union

[1] *City of Wenatchee*, Decision 8802 (PECB, 2005).

also alleged that the employer's conduct at a negotiating session on November 4, 2002, interfered with protected employee rights.

The Examiner conducted a hearing on June 22, 2004, and both parties filed post-hearing briefs. On December 10, 2004, the Examiner issued his decision finding the employer refused to bargain its change in employee staffing, but dismissing the union's interference allegation. The employer's appeal seeks reversal of the findings and conclusions that it refused to bargain with the union; the union's cross-appeal seeks reversal of findings and conclusions dismissing its interference complaint.

ISSUES

1. Did the employer's comments and actions at the meeting on November 4, 2002, interfere with protected employee rights?

2. Did the parties' collective bargaining agreement contain a contractual waiver granting the employer a unilateral right to determine the number of personnel to be assigned to duty?

3. If issue 2 is resolved in favor of the union, did the employer unlawfully change a mandatory subject of bargaining when it reduced the minimum staffing level of a ladder truck from three fire fighters to two fire fighters?

For the reasons set forth below, we affirm the Examiner's ruling dismissing the independent interference allegation under RCW 41.56.140(1) because the comments made at the November 4, 2002, were lawfully within the context of the collective bargaining process. We find that the parties' collective bargaining agreement contained a contractual waiver and so reverse the Examiner's ruling that the employer committed unfair labor practices when it

unilaterally changed the minimum staffing level without bargaining with the union to impasse, and find it unnecessary to rule on whether the employer unilaterally changed a mandatory subject of bargaining when it reduced the minimum staffing level of the ladder truck.[2]

DISCUSSION

Standard of Review

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Executive Director or Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002); *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991). The Commission attaches considerable weight to the factual findings and inferences made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ISSUE 1 - Independent Interference Allegation

The union urges reversal of the Examiner's decision that it failed to prove its interference allegations. RCW 41.56.040 provides that no public employer shall interfere with, restrain, coerce, or discriminate against public employees in the free exercise of their

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[2] Because we are reversing the Examiner's findings and conclusions that the employer violated RCW 41.56.140(4) when it changed the minimum shift staffing without bargaining, we need not address the Examiner's failure to find a derivative interference violation under RCW 41.56.140(1).

collective bargaining rights. The enforcement clause for this right is in RCW 41.56.140(1) which provides that an employer who interferes with the collective bargaining right of its employees is guilty of an unfair labor practice. *King County*, Decision 8630-A (PECB, 2005).

The test for interference is whether a typical employee could, in the same circumstances, reasonably perceive the employer's action as discouraging with his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant is not required to show intent or motive for interference that the employee involved was actually coerced, or that the respondent had an union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights.

In *Grant County Public Hospital District 1*, Decision 8378-A, the Commission outlined seven questions to ask when determining whether an employer's statements could constitute interference with protected employee rights:

1. Is the communication, in tone, coercive as a whole?
2. Are the employer's comments substantially factual or materially misleading?
3. Has the employer offered new "benefits" to employees outside of the bargaining process?
4. Are there direct dealings or attempts to bargain with the employees?
5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?

6. Did the union object to such communication during prior negotiations?

7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

Analysis of Interference Issue

Examining this record, we find that none of the seven concerns outlined in *Grant County Public Hospital District 1* appear to be present in this case.

These allegations center around the employer's conduct at a November 4, 2002, meeting between union and employer representatives. This meeting occurred before the employer implemented the unilateral change regarding the minimum level of staffing. The employer requested the November 4 meeting because it wanted to discuss ways to handle the budgetary overruns of fire fighter overtime. By October, the fire department had overspent its overtime budget for the year, and the employer desired to save money because it was facing tight economic times. In previous years when the employer overspent its fire fighter overtime budget, the employer would allocate more funds to cover the shortfall. In 2002, the employer wanted to discuss different options with the union.

The employer proposed options to control costs at the meeting. Some of the proposed options reduced the flexibility that fire fighters had in scheduling vacation and sick leave or required contractual concessions to alter the flexibility protected in the parties' collective bargaining agreement. Another option reduced the minimum staffing levels from seven to six. The employer couched its proposals in language that implied changes would need to be made so the employer could stay within its budget.

The employer's comments may have been bad news, but were not reasonably perceived as threats rising to the level of unlawful interference. The message communicated by the employer to the union was that the employer would reduce staffing levels unless the union agreed to contractual concessions. The union's response was to suggest that the employer should hire more fire fighters and it refused to make contractual concessions. The employer then decided to reduce the minimum staffing levels. We see the November 4 meeting as an appropriate discussion between labor and management. An employer faced with a budget problem appropriately asked the union to discuss the issue. Budget problems can be difficult to manage, and employers must be able to have frank discussions with unions to seek possible courses of action.

There is no indication that the communication was misleading, disrespectful or attempted to evade the legitimate bargaining process. Although the employer's actions could be characterized as an ultimatum of action if the parties do not agree to changes, this alone does not constitute interference. To do so would impose a gag rule on the parties which would hamper the parties' ability to have appropriate communications.

The most telling evidence that shows that the employer's behavior at the November 4 meeting was appropriate was the letter from the union which memorialized the discussion and thanked the employer for meeting. The tone and content of this letter were consistent with a meeting that was a respectful and appropriate discussion of a dispute. It did not mention any perceived threats or disruptive, rude or coercive behavior. In sum, we have examined the record and find that the Examiner's findings of facts regarding interference are supported by substantive evidence. The union and employer representatives appeared to have a civil exchange of information about budget overruns and possible ways to deal with these

overruns. We agree with the Examiner that as part of the collective bargaining process, employers and unions must be able to have full and frank discussions about issues and to explore options, including contractual concessions versus unilateral actions.

ISSUE 2: Contractual Waiver of Bargaining Rights

Contractual Waiver Regarding Minimal Staffing of Ladder Truck

The employer argues that the Examiner should have found a contractual waiver regarding the staffing change. The union argues that no contractual waiver exists in this case because this Commission has previously rejected the employer's arguments that the clause in question constitutes a contractual waiver.

When a knowing, specific and intentional contractual waiver exists, an employer may lawfully make unilateral changes as long as those changes conform with the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). A waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564 (PECB, 1990). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). We have long held the general management rights clauses often asserted by employers as waivers of union bargaining rights are generally found inadequate under the high standards for finding a waiver. *See Chelan County,* Decision 5469-A (PECB, 1996).

The Washington courts have adhered to an objective manifestation theory in construing words and acts of contractual parties, and impute to a person an intention corresponding to the reasonable meaning of the words and acts. *Plumbing Shop, Inc. v. Pitts*, 67

Wn.2d 514 (1965)(cited in *Chelan County*, Decision 5469-A (PECB, 1996)). Emphasizing the outward manifestation of assent by each party to the other, courts have found the subjective intention of the parties irrelevant. *Everett v. Estate of Sumstad*, 95 Wn.2d 853 (1981).

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) per L. Hand, J. (*quoted in Everett v. Estate of Sumstad*). Contract provisions are not ambiguous merely because the parties disagree about their particular meaning. When the contract terms themselves evidence a meeting of the minds, we need go no further to determine what was intended.

Analysis of Contractual Waiver Issue

The parties' collective bargaining agreement contains explicit language in its management rights clause. That clause states in part:

> Any and all rights concerned with the management and operation of the Department are exclusively that of the City unless otherwise provided for by the terms of the agreement. The City has the authority to adopt rules for the operation of the Department and the conduct of its employees, provided such rules are not in conflict with the provision of this Agreement or applicable law. The City has the right, among other actions, to discipline and discharge for just cause; to lay employees off; to assign work and determine the duties of employees; to schedule hours of work; *to determine the number of*

> *personnel assigned to duty at any time*; and to perform all other functions not expressly limited by this agreement.

(emphasis added). The Examiner found that this language was not a contractual waiver regarding a change to the minimum staffing levels of the ladder truck. The Examiner based his conclusion on the above-referenced Commission precedent, and found that this clause was part of a laundry list of waived rights and not clearly stated.[3]

The employer argues against such an interpretation of the management right clause, saying that such an interpretation would nullify the effect of management rights clauses in other collective bargaining agreements. We agree.

Management rights clauses can contain a list of clear and unmistakable waivers, can contain a list of unclear and confusing non-waivers or could have a mix of both. Here, we have specific waivers of certain subjects of bargaining and a more general waiver existing within the same contract. The language used demonstrates that the parties intended those specifically itemized subjects to be within the employer prerogative to change without bargaining. Had the employer been relying upon the more general "and all other functions not expressly limited" language found at the end of the

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[3] Had it been included in a separate clause which specifically referred to shift changing or overtime scheduling, this would, according to the Examiner, have signified the parties' intent to grant the employer the authority to make these changes on its own without bargaining.

provision, our conclusion would be different.[4] In this case, we find that language in the contract unequivocally grants the employer the right "to determine the number of personnel assigned to duty at any time" and in this case, a contractual waiver exists regarding shift staffing.

The union argues that previous rulings in *City of Wenatchee,* Decision 6517-A and *City of Wenatchee*, Decision 2194 (PECB, 1984) have already found the exact same clause not to be a waiver by contract. We disagree with the union that those decisions bind the Commission because they are factually different from this case.

- Decision 6517-A, involving the employer's police officers, was ruling on the application of a "light duty" provision as that provision related to the managements rights clause. Additionally, that case was commenting on the "to assign work and determine duties of [employees]" provision of the contract, and not the staffing level provision.

- Decision 2194, involving the fire fighters, was ruling on the employer's unilateral change of an overtime policy that was not covered by the parties' agreement, and the employer's assertion that the management rights clause operated as a contractual waiver. The examiner in that case found that the management rights clause did not conflict with a prevailing rights provision that limited the number of hours worked, and therefore the employer was obligated to bargain a change in overtime policy.

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[4] *See, e.g., City of Kelso*, 2633-A (PECB, 1988), where the management rights clause stating "all powers, authorities, functions and rights not specifically and expressly restricted by this agreement are subject to exclusive management control" was found too broad to constitute a contractual waiver.

Both of these rulings are inapplicable to the present case, and application of those holdings to this factual situation would countermand the Commission's previous directive to examine each case on its individual merits.

NOW, THEREFORE, the Commission makes the following

AMENDED FINDINGS OF FACT

1. The City of Wenatchee is a "public employer" within the meaning of RCW 41.56.030(1).

2. The International Association of Fire Fighters, Local 453, is a "bargaining representative" within the meaning of RCW 41.56.030(3) and is the exclusive bargaining representative of certain employees of the employer.

3. At a meeting on November 4, 2002, representatives of the employer and the union discussed problems associated with unbudgeted overtime costs for 2002 and how to reduce the demand for overtime in 2003.

4. After that meeting, the employer unilaterally changed its practice of having the minimum shift staffing level set at seven, when it reduced that minimum shift staffing to six in order to reduce overtime costs.

5. The management rights clause, Article 7 of the collective bargaining agreement, represents a waiver by the union of the right to bargain that issue.

AMENDED CONCLUSIONS OF LAW

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

2. The employer did not interfere with employee rights in violation of RCW 41.56.140(1) by its conduct referenced in the foregoing findings of fact.

3. The parties collective bargaining agreement contains a contractual waiver relieving the employer of its statutory requirement to bargain over the subject of minimum shift staffing under RCW 41.56.100.

AMENDED ORDER

The complaint charging unfair labor practices in the above-referenced matter is DISMISSED.

Issued at Olympia, Washington, the 13th day of February, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner