STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY DEPUTY SHERIFF'S ASSOCIATION,	)	CASE 17839-U-03-4610
Complainant,	)	DECISION 8852-A - PECB
vs.	)	
SNOHOMISH COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Aitchison & Vick, Inc., by *Jeffery Julius*, Attorney at Law, for the union.

Janice E. Ellis, Prosecuting Attorney, by *Steven J. Bladek*, Deputy Prosecuting Attorney, for the employer.

This case comes before the Commission on a timely appeal filed by Snohomish County (employer), and a timely cross-appeal filed by the Snohomish County Deputy Sheriff's Association (union) both seeking to overturn certain Findings of Fact, Conclusions of Law, and the Order issued by Examiner Lisa Hartrich in the above-captioned case.[1] The Examiner found that the employer had refused to bargain collectively with the union about how it was operating its provisional appointment process. The employer appealed the Examiner's findings and conclusions that it had committed an unfair labor practice. The union appealed the Examiner's findings and conclusions that the employer had not committed an independent interference violation and it appealed the remedy fashioned by the Examiner.

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[1] *Snohomish County*, Decision 8852 (PECB, 2005).

ISSUES PRESENTED

1. Did the union file a timely complaint?

2. If the union's complaint was timely, did the employer commit an unfair labor practice when it appointed a provisional lieutenant deputy who was not the first name on the civil service list of eligible sergeants?

3. Did the Examiner correctly dismiss the union's charge that the employer committed an independent interference with protected employee rights?

For the reasons set forth below, we reverse the Examiner's ruling that the complaint filed by the union was timely, and therefore overrule the Examiner's finding that the employer committed an unfair labor practice. We affirm the Examiner's decision dismissing the independent interference charge argued by the union in its post-hearing brief. Accordingly, we dismiss the complaint in its entirety.

ANALYSIS

ISSUES 1 AND 2 - STATUTE OF LIMITATIONS

Applicable Legal Standard

The employer appeals the Examiner's conclusion that the union filed the complaint within six months of the employer's action which the union alleged was an unfair labor practice. The employer argues that the union's complaint was untimely because the union had notice that the employer was not appointing the sergeant at the top of the list to a provisional lieutenant's position in January of 2003, more than six months prior to the filing of the complaint in the instant case.

RCW 41.56 160(1) governs the statute of limitations for unfair labor practice complaints, and provides that a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with this Commission. Commission precedents strictly enforce the time limitations contained within RCW 41.56.160. The only exception to strict enforcement occurs in cases where a complainant shows it had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Bremerton*, Decision 7739-A (PECB, 2003).

Alleged Violation of Past Practices

The union alleges the employer violated the parties' past practice when it failed to appoint the highest scoring eligible deputy to a provisional lieutenant appointment in June of 2003. The past practices of the parties are properly utilized to construe provisions of an agreement that may be rationally considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002), *citing City of Pasco*, Decision 4197-A (PECB, 1994).

For a past practice to exist, two basic elements are required: (1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *See, generally, Whatcom County*, Decision 7288-A (no unilateral change violation found where employer lacked knowledge of past practice). It must also be shown that the conduct was known and mutually accepted by the parties. To constitute an unfair labor

practice, a change in the status quo must be meaningful. *City of Kalama*, Decision 6773-A (PECB, 2000).

Application of Standards

Since at least 1983, the Snohomish County Civil Service Commission had in effect certain rules and regulations designed to create a process for employee promotions. Under these rules, the employer maintained eligibility lists for certain classes of employees. Successful applicants were ranked on the eligibility list based on examination scores. The employer was not bound by any contractual or civil service rules to appoint any specific candidate, and not bound to promote by seniority or by test score. However, the employer consistently appointed the highest scoring candidate on the promotional examination to provisional lieutenant appointments.

We agree with the Examiner that the parties at one time had an established past practice regarding provisional appointments. However, this record demonstrates that the practice was broken, and the union failed to file a timely complaint regarding the unilateral change.

In January of 2003 the employer placed Sergeant Arnold Aljets, who was number four on the lieutenant eligibility list, into a provisional appointment as lieutenant. At the time that decision was made, the sheriff's department command staff made a particular effort to explain to Sergeant Matt Bottin why he had not been selected even though he was at the top of the list.

The Examiner found, and the record supports, that in January 2003, the union knew that a short-term provisional appointment was being made. At this point, the employer unilaterally changed the past practice without bargaining, and the union could have filed a

complaint alleging unfair labor practices against the employer. Instead, the union filed its complaint on September 11, 2003, responding to a repeated appointment of Aljets over Bottin in June of 2003.

On appeal, the union refers to the January 2003 appointment as a "temporary suspension" of the past practice. However, close scrutiny of testimony related to this conversation found in the transcript reveals no mention of language related to waiver or temporary suspension or that Cothern or Bottin had been empowered in any way by the employer or the union to instigate any form of exception. Rather, the conversation, in Bottin's own words, is better characterized as Cothern "advising him" and "assuring him."

Not only does the transcript not reveal that either one believed that a waiver between an agent of the union and an agent of the employer had been enacted, neither was there any evidence presented that the parties had a practice of developing waivers in such a manner. As we said in *North Franklin School District*, Decision 5945-A (PECB, 1998):

> In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer.

See also City of Yakima, Decision 3464 (PECB, 1990). There was no showing in the instant case that either party knew that they were discussing a waiver or a temporary suspension of a past practice. In fact, Bottin makes no mention of past practice in his recounting of the conversation with Cothern at the hearing. The burden of proving the existence of a waiver or temporary suspension of past

practice is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). The union did not do so in this instance. The September 1, 2003, complaint was untimely filed more than eight months after the initial January 2003 appointment of Aljets that ended the parties' past practice. The Examiner erred in not dismissing the union's complaint.

ISSUE 3 - INDEPENDENT INTERFERENCE

It is an unfair labor practice of a public employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by the statute. RCW 41.56.140(1). An independent interference violation can be found against an employer if a complainant proves that the employer's conduct could reasonably be perceived by an employee as a threat of reprisal or force, or a promise of a benefit, deterring them from participating in lawful union activity. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). The burden of proving unlawful interference rests with the complaining party and must be established by a preponderance of the evidence. *King County*, Decision 6994-B (PECB, 2002).

Application of Standard

The Examiner held that there was no showing that Chief Cothern, who was alleged to have said that Bottin was not "management friendly," was aware of Bottin's involvement with the union or in his handling of an April 2003 grievance in which Bottin was the union representative. She did not credit the union's assertion that after participating in that grievance as a representative of another employee for the union, Bottin had become a management target. Finally, the Examiner did not give credence to the argument that Cothern had some problem with Bottin when he was acting in his role

as a liaison to the prosecutor's office because she held that such a liaison role had no connection with his union activity and, as such, could not be the basis of an interference charge.

We conclude that the Examiner correctly found that the union did not meet the necessary burden of proof to establish an independent interference charge. We further hold that the decision is supported by substantial evidence in the record as developed by the parties at the hearing and through briefs. The Examiner's decision dismissing the union charge of interference is affirmed.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

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

2. The Snohomish County Deputy Sheriff's Association is the exclusive bargaining representative within the meaning of RCW 41.56.030(3) of an appropriate bargaining unit of law enforcement officers of the employer through the rank of sergeant, excluding confidential employees. The union also represents a bargaining unit of lieutenants and captains employed by the employer.

3. The employer maintains a civil service eligibility list for the purpose of filling provisional and permanent vacancies as is required by RCW 41.14.130. The list is developed by the civil service commission from the administration of an examination as required by RCW 41.14.060(2). Candidates for promotions are ranked based on examination scores.

4. Neither the civil service rules nor provisions of the parties' collective bargaining agreement dictate how the employer must use the civil service eligibility list in making appointments for provisional lieutenant's positions.

5. In January of 2003 and again in June of 2003, Sergeant Matt Bottin placed ahead of Sergeant Arnold Aljets in the civil service list of qualified candidates for appointment as a provisional lieutenant.

6. In January of 2003, the employer appointed Aljets to a provisional lieutenant's position for less than 45 days.

7. In June of 2003, the employer again appointed Aljets to a provisional lieutenant's position.

AMENDED 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. The above-captioned unfair labor practice complaint filed by the Snohomish County Deputy Sheriff's Association in September of 2004 was untimely and in violation of RCW 41.56.160(1).

3. The Snohomish County Deputy Sheriff's Association did not prove that the employer had violated RCW 41.56.140(1) and committed an interference violation when it did not appoint Sergeant Matt Bottin to the position of provisional lieutenant in June of 2003 when he was the top candidate on the civil service list of qualified applicants.

AMENDED ORDER

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

Issued at Olympia, Washington, the 31st day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner