City of Pasco, Decision 9181 (PECB, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PASCO POLICE OFFICERS' ASSOCIATION, Complainant, vs. CITY OF PASCO, Respondent.	CASE 18431-U-04-4696 DECISION 9181 - PECB FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Emmal Skalbania & Vinnedge, by *Patrick A. Emmal*, Attorney at Law, and *Patrick Bunch*, Rule 9 Intern, for the complainant.

Paine Hamblen Coffin Brooke & Miller LLP, by *James M. Kalamon*, attorney at Law, for the respondent.

The Pasco Police Officers' Association (union) is the representative of uniformed personnel employees of the City of Pasco (employer). On April 14, 2004, the union filed an unfair labor practice complaint against the employer, charging interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4). The Public Employment Relations Commission's Unfair Labor Practice Manager issued a preliminary ruling on April 30, 2004, and the employer filed an answer.

On November 17, 2004, the union filed an amended complaint and the examiner issued a deficiency notice on November 29, 2004. The union filed a second amended complaint on December 17, 2004. On January 3, 2005, the examiner issued a preliminary ruling on that complaint and the employer filed a timely answer.

A hearing was held before the examiner on May 27 and 28, 2005. The parties filed post-hearing briefs on September 16, 2005.

ISSUES PRESENTED

Issue 1: Did the employer's action of December 1, 2003, eliminating an existing procedure for use of compensatory leave, without notice to the union, without affording it an opportunity to bargain, and prior to utilization of statutory interest arbitration, violate RCW 41.56.140(1) and (4)?

Issue 2: Did the employer's action of July 30, 2004, eliminating the option of receiving compensatory time in lieu of overtime pay and cashing out accrued compensatory time, without notice to the union, without providing an opportunity to bargain, and prior to utilization of statutory interest arbitration, violate RCW 41.56.140(1) and (4)?

Issue 3: Did the employer's conduct set forth in Issue 2 violate RCW 41.56.140(1) and/or (3) because the employer was motivated to take the action, in whole or part, because bargaining unit employees exercised a right protected by statute and/or employees filed an unfair labor practice charge?

Based on the evidence and arguments submitted by the parties, the Examiner rules that the employer violated RCW 41.56.140(1) and (4) by its interference and refusal to bargain but did not discriminate in violation of RCW 41.56.140(1) and (3).

ANALYSIS

Issue 1: Did the employer's action of December 1, 2003, eliminating an existing procedure for use of compensatory leave, without notice to the union, without affording it an opportunity to bargain, and prior to utilization of statutory interest arbitration, violate RCW 41.56.140(1) and (4)?

Applicable Legal Provisions and Precedent

Chapter 41.56 RCW applies to the employer here. RCW 41.56.030 defines several terms applicable in this case:

> (1) "Public employer" means any officer, board, commission, council, or other person or body acting on behalf of any public body governed by this chapter, or any subdivision of such public body. . . .
>
> (2) "Public employee" means any employee of a public employer. . .
>
> (3) "Bargaining representative" means any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers.
>
> (4) "Collective bargaining" means the performance of the 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 . . .
>
> . . . .
>
> (7) "Uniformed personnel" means: (a) Law enforcement officers as defined in RCW 41.26.030 employed by the governing body of any city or town with a population of two thousand five hundred or more . . .

RCW 41.56.040 provides that no public employer shall interfere with, restrain, coerce, or discriminate against any public employees in the free exercise of their right to organize and designate representatives for the purpose of collective bargaining, or in the free exercises of any other right under that chapter.

That provision is enforced through RCW 41.56.140, which declares it shall be an unfair labor practice for a public employer:

> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
> . . . .
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

Chapter 41.56 RCW also contains several statutes related to labor disputes of uniformed personnel. RCW 41.56.430 declares it was the intent of the legislature to establish an effective and adequate means of settling disputes as an alternative to strikes among law enforcement personnel. RCW 41.56.450 directs that, following mediation, an interest arbitration panel be created to resolve the dispute. RCW 41.56.470 expressly states that "existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other."

An unlawful interference violation must be established by the complainant by a preponderance of the evidence. *Lyle School District*, Decision 2736-A (PECB, 1988); *City of Vancouver*, Decision 6732-A (PECB, 1999). To prove an "interference" violation under RCW 41.56.140(1), a complainant need only demonstrate that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with union activity. *City of Seattle*, Decision 3066 (PECB, 1989),

aff'd, Decision 3066-A (PECB, 1989); *Seattle School District*, Decision 7348 (PECB, 2001). The complainant need not prove the employer acted with unlawful intent or motivation. Nor is it necessary to show that the employees were actually interfered with or coerced. *Clallam County v. Public Employment Relations Commission*, 43 Wn.App. 589 (1986); *City of Omak*, Decision 5579-B (PECB, 1998); *King County*, Decision 7104 (PECB, 2001). Indeed an employer violation can be established where employee perceptions of the employer activity are inaccurate, or where the employer in fact intended to act lawfully. *King County*, Decision 7104-A (PECB, 2001); *King County*, Decision 7819 (PECB, 2001). As indicated in *City of Mill Creek*, Decision 5699 (PECB, 1996), and cases cited therein, the burden of proof WAC 391-45-270(1)(a) imposes upon the complainant is not substantial.

Where an employer discriminates against employees in violation of the statute or engages in an unlawful refusal to bargain it also commits a derivative interference violation of the statute. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *City of Pullman*, Decision 8086 (PECB, 2003); *City of Bremerton*, Decision 7873 (PECB, 2002); *City of Wenatchee*, Decision 6517-A (PECB, 1999); and *Battleground School District*, Decision 2449-A (PECB, 1986).

The examiner believes an extended discussion of the law concerning *refusal to bargain/unilateral change* violations may be useful here. Since the decision in *Borg-Warner Corp.*, 356 U.S. 342 (1958), a distinction has been drawn under the Labor Management Relations Act between:

- Mandatory subjects of bargaining (employee wages, hours and working conditions) on which employers and unions must bargain in good faith;

- Permissive subjects (primarily management and union rights which are not improper subjects) on which parties may bargain but are not obligated to do so; and
- Illegal subjects on which parties cannot lawfully agree or enforce a collective bargaining agreement.

In *First National Maintenance Corp*, 452 U.S. 666 (1981), the Supreme Court of the United States stated a balancing test should be applied where it is necessary to decide whether a management decision is a mandatory or permissive subject of bargaining. The employer's need to conduct a profitable business must be balanced against the impact of the decision upon employees.

Washington law has developed along the same lines, including the "mandatory/permissive/illegal" triad of potential subjects for bargaining. Moreover, the Supreme Court of the State of Washington stated a balancing approach is to be used when determining scope of bargaining issues. The court explained the balancing approach as follows:

> On one side of the balance is the relationship the subject bears to "wages, hours and working conditions". On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates.

International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission [City of Richland], 113 Wn.2d 197 (1989) (citing *Spokane Education Association v. Barnes*, 83 Wn.2d 366 at 376 (1974)).

Additionally, the Supreme Court noted:

> Scope-of-bargaining questions cannot be resolved . . . summarily. Every case presents unique circumstances, in which the relative strengths of the public employer's need for managerial control on the one hand, and the employees' concern with working conditions on the other, will vary.

City of Richland, 113 Wn.2d at 203. The Court thus adopted the Commission's practice of determining scope of bargaining questions on a case-by-case basis. In assessing whether a duty to bargain exists, the Commission considers the impact upon wages, hours or working conditions versus the extent to which the matter involves an essential management prerogative. Where it is found the personnel action involves a matter at the core of entrepreneurial prerogative or fundamental changes in the manner of conducting business rather than concerns over labor costs, the decision does not have to be bargained. Where the decision has a substantive impact on wages, hours or working conditions, however, those impacts must be bargained upon request. *Spokane County Fire Protection District 9*, Decision 3661-A (PECB, 1992). The Commission reiterated this concept in *City of Pullman*, Decision 8086 (PECB, 2003). The Commission has long held that absent a showing of compelling need an employer may not make a unilateral change in a mandatory subject of bargaining. *City of Chehalis*, Decision 2803 (PECB, 1987).

In ruling upon cases where changes in past practice are alleged to be unlawful, the Commission has incorporated at least the following concepts. The Commission defines past practice as a consistent course of conduct known by the parties over a protracted period of time which has become so well understood by them that its inclusion in a collective bargaining agreement is not necessary. *City of*

Pasco, Decision 4197-A (PECB, 1994); *Whatcom County*, Decision 7288 (PECB, 2001). The complainant must establish that a mandatory subject of bargaining is involved and a change or decision to change has been made. *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1989); *City of Tacoma*, Decision 4539-A (PECB, 1994).

The Commission addressed the effect of a management rights clause in *City of Seattle*, Decision 1667 (PECB, 1984). There the Commission held that a strong presumption exists that a management rights clause does not give an employer the right to take unilateral action unless the right is specifically expressed in the labor agreement. The Commission noted that such a provision does not permit the employer to take unilateral action on a matter not embodied in the contract or discussed in negotiations. In order to show a contractual waiver, the party must show the exact subject matter of the change was discussed in negotiations. Where the employer action involves a major change in policy, the employer is required to show an express written contractual waiver with respect to the changes at issue. The fact that prior minor changes in policy had not been objected to by the union does not foreclose the union from later contesting a major change in policy. Since the bargaining unit in that case was eligible for interest arbitration, the Commission gave that union access to the statutory remedy as part of the remedial order.

Waiver by contract, in order to be effective, must be specific and knowingly made. *Kennewick School District*, Decision 3330 (PECB, 1989). In *Lakewood School District*, Decision 755-A (PECB, 1980) and *City of Yakima*, Decision 3564-A (PECB, 1992), as in many other cases, the Commission held waiver to be an affirmative defense with the burden of proof upon the proponent.

An employer made a waiver argument in a case involving a change in compensatory time procedures. A Commission examiner found compensatory time to be a mandatory subject of bargaining in *Spokane County*, Decision 4973 (PECB, 1995). In *Spokane County* the labor agreement specifically referenced the subject of compensatory time providing for its use in lieu of overtime with prior approval of the employer. The employer for a number of years had permitted unlimited accrual of compensatory time and unlimited time in which to use it. The employer, without notice to the union, began to limit the accrual of compensatory time and the period of time in which it might be used. The employer's waiver by contract defense was rejected. The decision noted that the obligation to bargain extends to any change in a mandatory subject of bargaining, such as compensatory time. The examiner rejected the employer's waiver by contract defense, holding that waivers must be clear, specific, and unmistakable to excuse the duty to bargain.

City of Wenatchee, Decision 2194 (PECB, 1985), involved a unilateral change allegation with respect to employer overtime policies contained in the employer's organizational manual. In two different contract negotiations the union unsuccessfully attempted to incorporate terms of the policy manual into the collective bargaining agreement. In addition, the union had failed on at least one occasion to protest employer changes in its overtime policy. The union filed the complaint after the employer further unilaterally revised the overtime policy. The employer's defenses of waiver by contract (predicated upon the management rights clause) and waiver by conduct (predicated upon unsuccessful efforts to incorporate limitations in the contract and failure to object to prior unilateral changes) were rejected in holding the employer liable.

The failure to request negotiations relative to prior policy changes did not operate as an automatic waiver of right to bargain on the subject in the future, absent express agreement to the contrary. *See Kennewick School District*, Decision 3330 (PECB, 1989). Since there was no express contractual language authorizing the changes by the employer, there was no waiver by contract and the failure to obtain contract proposals on the subject did not furnish evidence of a contractual waiver. *See Clover Park School District*, Decision 6072-A (EDUC, 1998).

A similar result was reached in *City of Wenatchee*, Decision 6517-A (PECB, 1999), where the employer modified a 15 year light duty policy without notice to the union representing an interest arbitration eligible bargaining unit. The Commission rejected the employer's reliance upon the management rights clause in view of the fact the clause was negotiated in the context of the existing policy. Moreover, the Commission deemed it significant that another part of the contract referenced light duty, thus acknowledging the existence of the practice. The contract was not viewed as giving the employer license to modify or terminate the policy at will.

The Commission in *City of Yakima*, Decision 3564-A (PECB, 1991), held the employer violated its collective bargaining obligation where it revised portions of its operating policies and practices. The changes reduced the number of employees who might be on leave at one time, thus affecting employee selection of vacation periods. The evidence indicated there were other means available to the employer to attain necessary staffing, including the use of overtime or voluntary shift changes. The Commission stated paid leave directly affects the hours worked by an employee and are an alternative form of wages. Accordingly, any changes in paid leave must be bargained as a mandatory subject.

The Commission in *City of Yakima* rejected the employer's contentions that recently adopted contract language listing the right to determine work schedules or when overtime is worked as management prerogatives constituted a waiver by contract. The Commission noted the language relied upon did not specifically cover the employer's action and the record failed to show requisite evidence that the union could reasonably be presumed to have understood that the contract language was an unequivocal waiver of the right to bargain.

Factual Context of this Case

In 1985 the United States Supreme Court held that amendments to the Fair Labor Standards Act (FLSA) extending its overtime compensation requirements to all state and local government employees were constitutional. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US 528 (1985). In an effort to mitigate the financial impact of FLSA requirements, Congress in 1985 adopted further amendments to permit states and local governments to compensate employees for overtime by providing them with compensatory time off rather than overtime pay. The amendments required the government entities to adopt a detailed procedure in order to take advantage of this alternative to payment of overtime pay.

The FLSA directed that an employee of a public agency, who has accrued compensatory time off and who has requested the use of such compensatory time, shall be permitted to use such time within a reasonable period after making the request if the use of the compensatory time does not "unduly disrupt the operations of the public agency."

In response to those developments in the FLSA, the employer issued Administrative Order No. 43 in 1986. That order contained the following language:

> V. COMPENSATORY TIME: "Compensatory time" means time off from regularly scheduled work in lieu of overtime pay and used during a work period subsequent to the work period in which the overtime was earned. Compensatory time must be used in strict compliance with the following rules:
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> A) May be granted in lieu of overtime pay only if requested by the employee and approved by the department head . . .
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> . . . .
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> C) Compensatory time accrual shall not exceed 80 hours; . . .
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> . . . .
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> E) Use of accrued compensatory time, if properly requested, shall be granted by the respective department head, unless the department head finds the dates and/or times requested will unduly disrupt operations. . . .
>
> . . . .
>
> H) The City may payoff the accumulated compensatory time of any employee at any time, at the then prevailing rate.

Since the union was not certified as the bargaining representative for the employer's police officers until 1987, the employer unilaterally developed and implemented its compensatory time policy for police officers and other employees under that Administrative Order. Under that policy, the employer adopted the following consistent practice.

Whenever an employee requested he be credited with compensatory time in lieu of overtime pay, the request was granted if otherwise appropriate. For example, compensatory time in lieu of overtime could not be claimed where grant money or other outside reimbursements of wage costs were involved, such as work at evening school functions and where the employee would accrue over 80 hours.

Employees were also not permitted to use accrued compensatory time off during time frames when operational considerations required all manpower be available. Among such times were the Fourth of July, annual summer boat races, and New Year's Eve. Of profound significance is that the employer never approved compensatory time when it would require paying overtime to another employee in order to meet the employer's minimum shift staffing requirements.

This practice came into question in the early 1990s. Captain Michael Aldridge, called by the employer, testified that he became aware of an opinion letter from the administrator of the Wage and Hour Division of the United States Department of Labor (DOL). He discovered the opinion letter after receiving a complaint from a bargaining unit employee concerning being denied a request for compensatory time off. All parties agree the opinion letter was the catalyst for a change in city practice. The DOL issued that opinion letter in 1994, which indicates the city practice was not modified until that date.

The DOL administrator opined in the August 19, 1994, opinion letter that:

> . . . an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. *The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason* for an employer to claim that the compensatory time off request is unduly disruptive.

1994 WL 1004861 (DOL WAGE-HOUR)(Emphasis added.)

Aldridge, who was union president in the early to mid-1990's, brought the matter to the attention of the employer. The employer decided to change its practice to conform with the Opinion Letter, although it was not legally binding. There is no dispute that after this point, for a period of approximately eight to nine years, the employer denied no request for compensatory time off on the basis that the employee's absence would have to be covered by another employee on overtime.

This resulted in a pervasive practice called "comp. time trumping." The employer would deny vacation leave requests when granting them would require the payment of overtime to reach minimum staffing requirements, but compensatory time off requests would be granted without exception.

Employees would first submit a vacation request which the employer would deny if already scheduled time off would require the employer to fill an additional vacancy through overtime. Upon having the vacation request denied, the employee would then submit a compensatory time off request. That request would be honored without exception and the employer would then pay an employee overtime to cover the absence.

Later, employees began to shortcut the process. When an employee wished time off he would check the shift schedule. If he determined that a vacation request would be denied because of overtime, the employee would immediately submit his request for compensatory time off, which would be granted.

Initially, bargaining unit employees showed restraint in making such requests. Over the course of time, however, widespread utilization developed. The practice came to be regarded as essentially "comp. time on demand." Compensatory time off requests

began to be received during periods where the employer had required full staffing and, pursuant to the practice, the employer was honoring the requests. The employer viewed this to be a matter of definite concern but continued to conform to the policy predicated upon the Opinion Letter.

After consultation with the union, the employer issued a memorandum to bargaining unit employees further modifying the compensatory leave policy in September 1999. The modification adopted the union's suggestion that an employee be limited to accruing no more than eight hours of compensatory time per pay period in order to ease the impact upon the employer of major accruals of compensatory time in limited time frames. The employer's adoption of this policy modification tacitly acknowledged its long-standing abandonment of its discretion to approve or deny requests to accrue compensatory time as stated in Administrative Order No. 43.

The parties concluded negotiations for the 2000-2002 collective bargaining agreement by October 2001, wherein the union unsuccessfully sought contract language dealing with compensatory time off. Chief of Police Dennis Austin then issued an administrative order dealing with leave requests, developed after discussions on the subject during contract negotiations. This document reaffirmed that compensatory time off may be approved even where its approval results in requiring overtime staffing. It also provided that compensatory time off requests could be denied based upon operational or training considerations that would create undue hardships as determined by the Chief of Police.

Captain James Raymond scheduled bargaining unit employees in 2003. By the latter part of that year, he found himself in a position where, if the trend in compensatory time off usage continued, he

would have to cancel previously approved vacation requests over the Christmas holiday season because there was an insufficient number of employees who could be assigned to work on an overtime basis.

At the same time, the compensatory time off practice became increasingly onerous for the employer. Due to training requirements and more newly hired police officers, the employer found it increasingly difficult to meet its minimum staffing levels. Employees resorting to "comp. time trumping" compounded this problem. Further, overtime costs were becoming increasingly significant as on various occasions shifts were staffed by more employees on an overtime basis than on a straight time basis. This increased pressures overall upon employer financial resources.

An influx of new hires exacerbated the scheduling problems. Employees are not eligible to take vacation time until after completing 18 months of employment. Sick leave also can not be utilized prior to 12 months of employment. New employees could, however, take accrued compensatory time off during those time frames. New hires routinely availed themselves of the opportunity to elect to accrue compensatory time off rather than overtime pay in the first 18 months of employment.

Accepting at face value the evidence introduced by the employer, a total of 249 compensatory time off shifts were granted in 2002 and 2003. Of this number, 61 of those shifts required coverage to be provided on an overtime basis. The bargaining unit numbers approximately 24 individuals who provide police protection on a 24 hour 7 day per week basis.

Raymond discussed these concerns with Chief Austin. He also told Chief Austin of a posting on a departmental bulletin board which indicated that there had been recent court decisions holding the

1994 Opinion Letter to be erroneous.[1] Chief Austin, without notice to the union, then instructed Captain Raymond to issue a directive eliminating "comp. time trumping." Captain Raymond did so on December 11, 2003, precipitating the original complaint herein.

Analysis

The statute and Commission precedent preclude unilateral action on a mandatory subject of bargaining. By virtue of Captain Raymond's memorandum of December 11, 2003, the employer eliminated the practice of "comp. time trumping" as of that date. From that point on, the employer refused to permit an employee to take compensatory time off if this would result in paying another employee overtime to cover the absence.

The employer admittedly terminated "comp. time trumping" without prior notice to the union and providing it with an opportunity to bargain upon the subject. Moreover, the employer effected this unilateral change in practice in a bargaining unit eligible for interest arbitration under the statute. A quick analysis of the circumstances herein establishes a classic violation of the employer's good faith bargaining obligations.

The evidence shows:

- The practice eliminated by the employer had been in existence for approximately nine years and was clearly understood by the parties. This was shown by testimony of witnesses called by

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[1] *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004) and *Houston Police Officers Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003), *cert. denied*, 1245 Ct. 300 (2003) both held the Opinion Letter to be erroneous because its rationale would cause the very financial hardships upon governmental agencies that the amendments were designed to alleviate.

both parties, employer memoranda memorializing the practice, and reference to compensatory time off in the collective bargaining agreement.

- Compensatory time off affects hours of work, is an alternative form of wages and is a mandatory subject of bargaining.

- The employer's unilateral action cannot be excused on the basis of concluding its prerogative to direct its operations outweighs the employee's interests. The employer failed to establish a business necessity for taking the unilateral action. The evidence does not show the payment of overtime resulting from granting compensatory time off requests was bankrupting the employer. In addition to the alternative of working employees on a overtime basis, the employer could have cancelled vacations to meet its staffing requirements under the existing practice. Moreover, nothing in the employer policy as modified, the FLSA statute, or the Opinion Letter precluded the employer from denying a compensatory leave request if the employer could not meet minimum staffing requirements without denying previously approved vacation requests.

- The management rights provisions of the collective bargaining agreement did not specifically address compensatory time off. Therefore, under the overwhelming weight of precedent, the employer failed to establish an affirmative defense on the theory of contractual waiver. The same reasoning is applicable to the employer's waiver defense predicated upon Article VIII Overtime, which does not reference compensatory time.

- Precedent has long established that the mere failure to obtain contract proposals dealing with the subject matter at issue, such as occurred in this case, does not relieve the employer

of its obligation to bargain in good faith a desired change in practice.

- Because the employer presented the union with a *fait accompli*, the union was excused from making a request to bargain.

Conclusion

The employer violated RCW 41.56.140 (1) and (4) by its action on December 1, 2003. An appropriate remedy for the violation will require the employer to:

- refrain from unilaterally acting with respect to mandatory subjects of bargaining;
- restore the status quo ante;
- give notice to and upon request negotiate with the union relative to changes in compensatory time off practices, and, absent agreement by the union, implement any changes only in accord with statutory interest arbitration provisions,
- post notices and read the notice herein into the record at a regular public meeting of the employer City Council along with appropriate notices of compliance to the union and the Commission.

Issue 2: Did the employer's action of July 30, 2004, eliminating the option of receiving compensatory time in lieu of overtime pay and cashing out accrued compensatory time, without notice to the union, without providing an opportunity to bargain, and prior to utilization of statutory interest arbitration, violate RCW 41.56.140(1) and (4)?

After the employer action of December 11, 2003, the union filed the original complaint herein on April 14, 2004. On May 5, 2004, Chief Austin sent the union president an e-mail request to meet with him, the employer city manager, and the union's executive board on May 10, 2004. The purpose of the meeting was to discuss the complaint and the employer's position prior to responding to the complaint. Union president Jeffrey Harpster responded on May 10, 2004, indicating that date was unacceptable and requesting the meeting be rescheduled through union counsel. The meeting ultimately was held on June 2, 2004.

The parties discussed the need to have clear and complete guidelines developed with respect to compensatory time. The union representatives indicated that if a written procedure for compensatory time off accrual and usage were agreed upon the unfair labor practice complaint might not be pursued. During the meeting, City Manager Gary Crutchfield said the granting of compensatory time off where overtime would result was unacceptable. Crutchfield indicated that unless the parties agreed on a procedure that eliminated "comp. time trumping," he would revoke application of compensatory time to bargaining unit employees and cash out accrued compensatory time.

On June 4, 2004, Chief Austin sent a five page document to the union containing the employer's compensatory time use guidelines and noting the desire to reach an agreement with the union on language which would then be incorporated in a new department policy manual. On July 16, 2004, the union responded, in writing, that the question of compensatory time should be negotiated when the parties negotiated their next collective bargaining agreement. The union stated it would consider withdrawing its unfair labor practice complaint if the employer returned to the former practice

with respect to "comp. time trumping." The union said if this were done it would agree to discuss compensatory time off issues in the course of negotiations for a new labor agreement.

On July 30, 2004, the employer notified the union in writing that, since the union had not agreed to changes in the practice which would eliminate "comp. time trumping," the employer was eliminating the availability of compensatory time off for bargaining unit employees and would cash out previously approved compensatory time. The employer honored already approved requests for compensatory time off for time periods prior to August 16, 2004. With those exceptions, the employer thereafter has not allowed employees to receive compensatory time off in lieu of overtime pay. The employer paid the employees for their accrued compensatory time off at the next payroll cycle following August 2, 2004.

The Commission has no tolerance for repeated refusals to bargain the same subject. For the same reasons enumerated in connection with the analysis of Issue 1, the employer's action in this instance violates the statute. The magnitude is greater because the employer totally eliminated an employee benefit rather than just a significant part thereof.

The employer unilaterally adopted its administrative order establishing the policy with respect to compensatory time off prior to the union becoming the employee's bargaining representative in 1987. Indeed, it appears that neither the union nor bargaining unit employees were aware of the genesis of the policy until the hearing herein. The policy of compensatory time off created by the administration, however, was in existence for approximately 18 years and was well known and accepted as a binding past practice dealing with a mandatory subject of bargaining since at least 1987.

Although the benefit was the result of unilateral action by the employer, it may not be changed without first satisfying statutory bargaining obligations. That is, unless the employer demonstrates the union has waived its right to bargain upon the matter. The only reference to the issue of compensatory time in the labor agreement is in Article XIV, concerning compensation for being called back to work on holidays.

As noted earlier, no waiver by contract can be established by vague provisions of management rights clauses in collective bargaining agreements. If the employer can not show express language in the labor agreement conferring upon it the right to act unilaterally with respect to the matter at issue, it acts at its peril. No such express language is found in the parties' labor agreement. Further, the employer implicitly recognized its bargaining obligation. The employer at least twice modified the application of its policy only after consultation with the union and sought agreement of the union to further modifications before its unilateral action of July 30, 2004.

No employer case can be made even if changes had been made without prior consultation with or objection by the union. Commission decisions consistently have held that the failure to request negotiations in one instance does not constitute a waiver by inaction precluding bargaining with respect to future changes. Where, as here, the employer unilaterally changes an existing practice, the union need not request bargaining when confronted with a *fait accompli*.

Conclusion

As with the employer's change of practice in December 2003, its total elimination of the compensatory time off benefit in July

2004, constituted an unlawful refusal to bargain under RCW 41.56.140(4) and interfered with the exercise of employee rights and constituted an independent violation of RCW 41.56.140(1). An appropriate remedy will be directed in accord with that referenced in the analysis of Issue 1.

Issue 3: Did the employer's conduct set forth in Issue 2 violate RCW 41.56.140(1) and/or (3) because the employer was motivated to take the action, in whole or part, because bargaining unit employees exercised a right protected by statute and/or employees filed an unfair labor practice charge?

Legal Standards for Discrimination

The Commission and Supreme Court require a higher standard of proof to establish a discrimination violation. A violation occurs when: (1) the employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so; (2) the employer, with that knowledge, deprives the employee of some ascertainable right, benefit or status; and (3) there is a causal connection between the exercise of the legal right and the discriminatory action. *See Educational Service District 114*, Decision 4361-A (PECB, 1994) *Mansfield School District*, Decision 5238-A (EDUC, 1996), and *Brinnon School District*, Decision 7211-A (PECB, 2001).

The Commission utilizes a three-pronged shifting burden approach. To meet the initial burden, a complainant must establish a prima facie case of discrimination. The employer then must articulate nonretaliatory reasons for its actions by producing evidence sufficient to warrant a finding that its action was taken for a nondiscriminatory reason. This evidence need not meet the

preponderance of evidence standard because the burden of persuasion continues to remain with the complainant. If the employer does not produce such evidence, liability attaches as a matter of law. If such evidence is provided, the presumption of a violation of statute is rebutted.

The complainant must then show, by a preponderance of the evidence, that the stated reason for the disputed employer action was pretextual and in fact was in retaliation for the employee's exercise of statutory rights. This may be done by direct or circumstantial evidence showing: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action. If this third factor is not established, the case is dismissed. If it is, the complainant establishes a reasonable inference of discrimination. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *King County*, Decision 7506-A (PECB, 2003).

As noted in *Educational Service District 114*, an employer usually does not publicize a retaliatory motive. Therefore circumstantial, rather than direct evidence, is most often the basis for a finding of a discriminatory motive. In establishing the causal connection, Washington Supreme Court decisions indicate it is sufficient to show the employee engaged in protected activities, the employee had knowledge of such activities, and under the facts it can reasonably be inferred the employee was discharged or suffered other adverse consequences to his employment status as a result thereof. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 821 P.2d 18 (Wash.,1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (Wash.,1991. A recent reaffirmation of the Commission view on the elements of a discrimination case is found in *City of Tacoma*, Decision 8031-B (PECB, 2004).

Where direct evidence is absent of discriminatory motivation, the timing of adverse actions attendant upon protected activity by an employee or bargaining representative can provide circumstantial evidence of discriminatory motivation. *City of Omak*, Decision 5579-B (PECB, 1998); *Kennewick School District*, Decision 5632-A (PECB, 1996); and *King County*, Decision 7104-A (PECB, 2001).

Legal Standard for Establishing a Violation of RCW 41.56.140(3)

Although the statute literally defines the violation to be discriminating against a public employee for filing an unfair labor practice complaint, the Commission has repeatedly found violations for actions taken by the employer against employees where the unfair labor practice charge was filed by the employee's collective bargaining representative rather than by the employee. *Valley General Hospital*, Decision 1195-A (PECB, 1981); *Clallam County*, Decision 1405-A (PECB, 1984), *aff'd*, *WPERRCD* 319 (Division II, 1986); *City of Kelso*, Decision 2633-A (PECB, 1988); and *City of Pasco*, Decision 3804-A (PECB, 1992).

Analysis

The union has established the doing of an act protected by statue, *i.e.*, the filing of the complaint herein. It has also established that some three and one half months after the filing, bargaining unit employees continue to suffer a significant detriment in the form of the loss of access to compensatory time off.

While the union correctly notes that circumstantial evidence including timing may be considered in determining motivation of the employer, more than mere conjecture or speculation is required. In this instance, the employer did not take the action because the union filed the complaint. It did so because it wanted to end any possibility of again, in its view, wastefully expending public

funds by granting compensatory time off which would require overtime coverage. The employer acted under the mistaken belief that it was lawfully able to avoid the impact of an unfavorable result relative to the initial unfair labor practice by eliminating the condition giving rise to the practice. This motivation is not synonymous with retaliating against employees for filing the original unfair labor practice herein. Moreover, the employer was no doubt affected in some degree by the union's procrastination in responding to its proposed guidelines for compensatory time off and reluctance to begin prompt discussions on it. Accordingly, the allegations of the second amended complaint will be dismissed.

Conclusion

The examiner finds the employer violated RCW 41.56.140(4) by the unilateral actions it took on December 11, 2003, and July 30, 2004. These actions also were derivative violations of RCW 41.56.140(1) as such actions also interfered with, restrained or coerced employees. The employer action of July 30, 2004, was not motivated in whole or substantial part by discriminatory reasons and accordingly no violation of RCW 41.56.140(1) predicated upon discrimination is found. The evidence also fails to establish the July 30, 2004, unilateral action by the employer was in retaliation for the filing of the original complaint herein. In similar fashion no evidence was introduced to show a change in vacation scheduling.

The usual remedies for unlawful refusals to bargain involving a bargaining unit eligible for statutory interest arbitration will be imposed. The union's request for attorney fees is denied. The facts in this case do not indicate the employer's actions to be sufficiently flagrant or defenses so contrived as to warrant an imposition of this extraordinary remedy. Of significance to the

examiner is the failure of the evidence to establish discriminatory motivation on the part of the employer and the union's own reluctance to avail itself immediately of the opportunity to bargain in response to the employer's presentation of proposed compensatory time procedures for review in June 2004.

FINDINGS OF FACT

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

2. Pasco Police Officers' Association, a bargaining representative within the meaning of RCW 41.56.030(3) is the exclusive bargaining representative of an appropriate unit of police officers employed by the City of Pasco. These employees were uniformed personnel pursuant to RCW 41.56.030(7) at all relevant times in this matter.

3. At the time of events leading to the filing of the unfair labor practice herein and all relevant times thereafter the union and employer were parties to a collective bargaining agreement. That contract did not contain clear and unequivocal waivers of the union's right to bargain concerning changes in practice with respect to when an employee could utilize accrued compensatory time off and/or the elimination of compensatory time off or revocation of the policy establishing compensatory time off.

4. The manner in which compensatory time off is utilized as well as compensatory time relate to alternative forms of wages and are essential components of working conditions.

5. The employer on December 11, 2003, announced and implemented the rescission of the practice of "comp. time trumping" which had been in existence at least since 1994 and had been widely utilized by bargaining unit employees. Under this practice employees who could not receive vacation leave because the leave, if granted, would require their replacement by an employee on an overtime basis were granted the time off if they submitted a request for previously accrued compensatory time off. This practice came into being as the result of the employer electing to adhere to an Opinion Letter of the Wage and Hour Administration of the United States Department of Labor stating that a political subdivision of a state could not premise a rejection of a requested use of compensatory time off on the fact that the granting of the request would cause the employer to replace the individual with an employee working on overtime. The predicate for the employer's change in practice were recent federal court of appeals decision which held the Opinion Letter to be in conflict with the Federal Wage and Hour statute.

6. The employer took the action referenced in Finding of Fact 5 above without: notice to the union; providing an opportunity for the union to request bargaining upon the matter; or maintaining the status quo pending exhaustion of the procedure set forth in RCW 41.56.430, *et seq.*, for resolution of bargaining impasses.

7. On April 14, 2004, the union filed an unfair labor practice complaint relative to the action taken by the employer referenced in Finding of Fact 4 above.

8. On July 30, 2004, the employer rescinded the application to bargaining unit employees of the Administrative Order it issued in 1986 providing for compensatory time off and provided for the immediate cash out of accrued compensatory time off.

9. The employer took the action referenced in Finding of Fact 8 above without: notice to the union; providing an opportunity for the union to request bargaining upon the matter; or maintaining the status quo pending exhaustion of the procedure set forth in RCW 41.56.430, *et seq.*, for resolution of bargaining impasses.

10. The employer actions set forth in Findings of Fact 5 and 8 above were not required to enable it to carry out essential functions.

11. The employer took the action referenced in Finding of Fact 7 above because it was not willing to continue to provide compensatory time off if the union would not agree to the change in practice initiated by the employer in December 2003. The employer believed it had the right to unilaterally terminate the policy and thereby preclude the possibility of being bound to follow a practice it felt was uneconomical and no longer lawfully required.

12. The employer was not substantially motivated to take the action referenced in Finding of Fact 7 above to discriminate against employees for exercising rights protected by statute including the filing of the complaint herein.

13. No evidence was introduced relative to changes in vacation scheduling.

CONCLUSIONS OF LAW

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

2. On the basis of paragraphs 4 and 10 of the foregoing Findings of Fact, the unilateral employer actions set forth in paragraphs 5 and 8 of the foregoing Findings of Fact involved a mandatory subject of bargaining under RCW 41.56.030(4).

3. By the acts set forth in paragraphs 5 and 8 of the foregoing Findings of Fact under the circumstances set forth in paragraphs 4, 6, 9, and 10 of the foregoing Findings of Fact the City of Pasco failed and refused to bargain in violation of RCW 41.56.140(4) and thereby also interfered with employee rights in violation of RCW 41.56.140(1).

4. Under the circumstances set forth in paragraphs 11 and 12 of the foregoing Findings of Fact actions set forth in paragraph 8 of the foregoing Findings of Fact did not constitute discrimination in retaliation for exercising of employee rights or guaranteed by statue and/or for filing an unfair labor practice complaint.

5. The evidence does not establish the employer changed vacation scheduling in violation of the statute.

ORDER

The CITY OF PASCO, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing and refusing to bargain in good faith by unilaterally changing the wages, hours, and working conditions of employees in the bargaining unit represented by the Pasco Police Officers' Association, including eliminating existing practices with respect to compensatory time off policy with accompanying cash out of accrued compensatory time off and/or usage of compensatory time off thereunder.

   b. In any other manner, interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Restore the *status quo ante* by: giving bargaining unit employees the benefit of compensatory time off provided under employer's policy pursuant to Administrative Order No. 43 and by restoring practice of "comp. time trumping" as it existed immediately prior to December 11, 2003.

   b. Give notice to and, upon request, negotiate in good faith with the Pasco Police Officers' Association, concerning any future modification of compensatory time off policies and/or practices for employees represented by the union. In the event that any dispute is not achieved through negotiations submit the issue for mediation and, if necessary, for interest arbitration for determination as required by RCW 41.56.430, *et seq.*

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 "Notice." Such notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are 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 the Pasco City Council, 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 complainant, 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 complainant 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 signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 5th day of December, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Vincent M. Helm

VINCENT M. HELM, 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 cease and desist from unilaterally changing the wages, hours and working conditions of employees in the bargaining unit represented by the Pasco Police Officers' Association.

WE WILL restore the status quo ante by reinstituting the compensatory time off policy established by Administrative Order No. 43 and the practice of "comp. time trumping" developed thereunder.

WE WILL give notice to and, upon request, negotiate in good faith with the Pasco Police Officers' Association, concerning any future modification of compensatory time off for employees represented by the union, including utilization of the interest arbitration procedure set forth in RCW 41.56.430, *et seq.*, should an impasse occur.

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

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

DATED:_____

CITY OF PASCO

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 Henry Street N.E. PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's website: www.perc.wa.gov.