STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PASCO POLICE OFFICER'S ASSOCIATION,	)	
Complainant,	)	CASE 18431-U-04-4696
vs.	)	DECISION 9181-A - PECB
CITY OF PASCO,	)	
Respondent.	)	DECISION OF COMMISSION

Emmal Skalbania & Vinnedge, by *Patrick A. Emmal* and *Mark L. Bunch*, Attorneys at Law, for the union.

Paine, Hamblen, Coffin, Brooke & Miller, by *James Kalamon*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Pasco (employer) seeking to overturn certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Vincent M. Helm.[1] The Pasco Police Officer's Association (union) supports the Examiner's decision.

ISSUE PRESENTED

Did the Employer commit an unfair labor practice when it unilaterally changed the compensatory time off policy, thereby interfering with employee rights in violation of RCW 41.56.140(4) and (1)?

We affirm the Examiner's decision that the employer committed an unfair labor practice when it unilaterally ended the compensatory

[1] *City of Pasco*, Decision 9181 (PECB, 2005)

time off system. The compensatory time off system allowed leave time as compensation in lieu of monetary payment for overtime work. Compensation for overtime work is related to wages and terms and conditions of employment; as such, it is a mandatory subject of bargaining. The parties have concerned themselves with Fair Labor Standards Act (FLSA) law and labor arbitration decisions, neither of which are binding on this Commission, nor does this Commission have jurisdiction to make legal determinations in such cases.

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 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). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001). This Commission relies only on facts in evidence before the Examiner and will not entertain facts presented for the first time on appeal. *Snohomish County Fire District 4*, Decision 8816-A (PECB, 2005).

COMPENSATORY TIME AS A MANDATORY SUBJECT OF BARGAINING

Applicable Legal Standards

The Public Employee's Collective Bargaining Act (PECB or Chapter 41.56 RCW) imposes a duty to bargain on mandatory subjects of bargaining. RCW 41.56.140(4). The duty to bargain is enforced

through RCW 41.56.140(4), and unfair labor practices are processed under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270.

The potential subjects for bargaining between an employer and union are commonly divided into "mandatory," "permissive," and "illegal" categories:

- Subjects affecting employee "wages, hours, and working conditions" mentioned in RCW 41.56.030(4) are the mandatory subjects of bargaining. *See NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958), cited in *Federal Way School District*, Decision 232-A (EDUC, 1977).

- Permissive subjects are matters considered to be remote from employee wages, hours, and working conditions, including matters which are regarded as prerogatives of employers or of unions. *See Federal Way School District*, Decision 232-A; *Renton School District,* Decision 706 (EDUC, 1979).

- Illegal subjects are matters in which an agreement between a union and employer would contravene other statutes or court decisions. *See King County Fire District 11*, Decision 4538-A (PECB, 1994); *City of Richland*, Decision 2486-A (PECB, 1986).

It is well established that the duty to bargain imposes a duty to give notice and provide opportunity for good faith bargaining prior to implementing any change of practice concerning the wages, hours, or working conditions of bargaining unit employees. RCW 41.56.030(4); *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1990). However, the determination as to whether a duty to

bargain exists is a question of law and fact for the Commission to decide. WAC 391-45-550.

Refusal to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); RCW 41.56.150(1) and (4).

The bargaining obligation is applicable to a decision on a mandatory subject of bargaining and the effects of that decision, but will only be applicable to the effects of a managerial decision on a permissive subject of bargaining. *Skagit County*, Decision 6348 (PECB, 1998); *City of Kelso*, Decision 2120 (PECB, 1985) (both the decision to contract out bargaining unit work and the decision's effects on the terms and conditions of the employees' employment are mandatory subjects of bargaining); *City of Kelso*, Decision 2633 (PECB, 1988) (decision to merge operation with another employer is an entrepreneurial decision, and only the effects of that decision on wages, hours, and working conditions are mandatory subjects of bargaining). Similarly, while an employer has no duty to bargain concerning a decision to reduce its budget, the "effects" of such decisions could be mandatory subjects of bargaining. *Wenatchee School District*, Decision 3240-A (PECB, 1990); *Federal Way School District*, Decision 232-A (EDUC, 1977).

Past Practices

The past practices of the parties are properly utilized to construe provisions of an agreement that may rationally be considered ambiguous or where the contract is silent as to a material issue. *Kitsap County,* Decision 8402-B (PECB, 2007). A past practice is a course of dealing 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) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as 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).

Where a unilateral change is alleged, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1990). To constitute an unfair labor practice, a change in the status quo must be meaningful. *City of Kalama*, Decision 6773-A (PECB, 2000). No duty to bargain arises from a reiteration of established policy. *Clark County Fire District 6*, Decision 3428 (PECB 1990); *City of Yakima*, Decision 3564-A (PECB, 1991).

Legal Necessity

Necessity, either business or legal, is an affirmative defense which the proponent bears the burden of establishing. *Cowlitz County*, Decision 7007-A (PECB, 2000). A party claiming a defense of legal necessity to a unilateral change must prove that: (1) a legal necessity existed; (2) the respondent provided adequate notice of the proposed change; and (3) bargaining over the effects of the change did, in fact, occur or the complainant waived bargaining over the effects of the change. *Wenatchee School District*, Decision 3240-A. An employer relies on its erroneous interpretation of law to its detriment.

Application of Legal Standard

The Examiner found that the accrual of compensatory time and the manner in which compensatory time off was utilized related to an alternative form of wages and was an essential component of working conditions. We agree with the Examiner's determination.

It is well settled that wages, including overtime compensation, and hours of work are mandatory subjects of bargaining. *City of Kalama*, Decision 6733-A. Compensatory time is an alternate form of overtime compensation. We find support for our conclusion in the precedents developed under the National Labor Relations Act and other state labor relations agencies.[2] In the federal scheme, the hours and days employees work are "within the realm of 'wage, hours, and other terms and conditions of employment.'" *Meat Cutters Local v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). In *Jewel Tea*, the union negotiated the hours of meat counter operations with an employer's association. The Court held that hours of operation are closely related to hours of work. In *Fall River Savings Bank*, 260 NLRB 125 (1982), bank employees who worked Saturday chose between overtime pay at time and one-half or taking a day off during the week. The employer eliminated the practice of granting a day off mid-week for Saturday work, effectively mandating a six-day work week. The NLRB found the number of hours an employee works is a mandatory subject of bargaining. "Some mandatory subjects falling under the headings of 'wages' are so obvious that little discussion is required . . . . Overtime pay, shift differentials . . . are all wages." *Developing Labor Law*, Fifth Edition Vol. 1, p 1264-5.

---

[2] It is well settled that decisions construing the National Labor Relations Act may be used as persuasive authority in interpreting similar provisions of this state's collective bargaining laws. *IAFF Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978).

Other state labor relations boards have more specifically addressed the issue of whether compensatory time off is a mandatory subject of bargaining. The Supreme Judicial Court of Maine held that compensatory time off relates to both hours and working conditions. *Maine Bureau of Alcoholic Beverages v. Maine Labor Relations Board,* 413 A.2d 510 (1980). The Oklahoma Public Employees Relations Board held that "overtime and compensatory time proposals are mandatory subjects of bargaining." *Local 2562 International Association of Firefighters v. Cushing,* State of Oklahoma Public Employees Relations Board, Case 00115 (1987).

In the case before us, the employees received compensatory time off in lieu of overtime pay. Overtime pay is a form of wages, a mandatory subject of bargaining. Thus, we agree with the Examiner's conclusion that alternative compensation for overtime work is a mandatory subject of bargaining. We next turn to whether or not the employer did in fact bargain the change in the compensatory time off policy.

Did the employer bargain the change?

An employer has a duty to notify the exclusive bargaining representative of its employees of a proposed change and, upon request, to bargain mandatory subjects prior to implementing that change. The Examiner found that the employer changed the procedure for using compensatory time off, by an email dated December 11, 2003, without providing the union prior notice of the change. Captain James Raymond testified that the decision was made by Chief Denis Austin and himself to eliminate the system of "comp time trumping."[3] Raymond testified that he sent the December 11, 2003 email. Then-union president Jose Nunez testified that he had no knowledge of the change prior to its implementation other than hearing some

---

[3] Tr 221, line 15-21.

rumors.[4] The evidence in the record supports the finding that prior to the December 11, 2003, change the employer did not notify the union. On April 14, 2004, the union filed an unfair labor practice complaint against the employer.

On June 2, 2004, the employer and the union met to discuss the unfair labor practice charge and the compensatory time off policy. On June 4, 2004, the employer sent the union proposed changes to the compensatory time off system. On July 16, 2004, the union responded to the employer's proposal and requested to negotiate the changes. On July 30, 2004, the employer sent a letter to Officer Jeffrey Harpster, the subsequent union president, notifying the union that the employer had eliminated the compensatory time off system and would cash out employees' accrued compensatory time.

The employer disagrees with the Examiner's conclusion that the employer failed and refused to bargain in violation of RCW 41.56.140(4) and interfered with employee rights in violation of RCW 41.56.140(1). On appeal, the employer did not address the Examiner's conclusion that the employer failed and refused to bargain, but argued that the employer did not abandon Administrative Order 43 and that a past practice may be unilaterally changed when the underlying basis for the practice changes. We disagree, and find that by implementing a change, the employer's conduct shows a refusal to bargain the December 11, 2003 change.

Was a Past Practice in Existence?

The Examiner found the past practice of "compensatory time trumping" existed since at least 1994. The evidence supports this finding. In 1986, the employer implemented a compensatory time off policy by Administrative Order 43. The initial practice under

---

[4] Tr 185, line 16.

Administrative Order 43 did not grant compensatory time off when doing so would create an overtime situation. Sometime in 1994, the union brought to the employer's attention a letter by the Secretary of Labor stating that "[t]he fact that overtime might be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for the employer to claim that the compensatory time off request is unduly disruptive." After some research, the employer determined the Secretary's letter was good law and, in 1994, changed the policy to comply with the Secretary's letter. Following the change, the practice of compensatory time trumping, in which the employer granted compensatory time off even if it created an overtime situation, began.

The collective bargaining agreement does not address the compensatory time off policy. However, both newer and more senior employees, including members of management, were familiar with the system for accrual and use of compensatory time. Captain Michael Aldridge testified that during the time he was president of the union, there was no attempt to include compensatory time off in the collective bargaining agreement; however, there were later, unsuccessful, attempts for inclusion. Officer Harpster, an employee for less than five years, testified that, as a new hire, he was not allowed to take vacation for the first 16 months. Harpster testified that Captain Aldridge suggested he accrue compensatory time because he would not be able to get time off in the first months of employment. The fact that compensatory time off is not included in the collective bargaining agreement is not determinative as to whether a past practice existed. The evidence supports a determination that both parties understood the process for accruing and using compensatory time off so well that the inclusion of compensatory time off in the collective bargaining agreement was not necessary.

The Examiner also found the employer abandoned Administrative Order 43. The employer argues that the evidence does not support the finding of waiver or abandonment of Administrative Order 43. The employer instituted Administrative Order 43 to comply with the FLSA. Administrative Order 43 reserved the employer's right to terminate or alter the compensatory time off system at any time. Around 1994, the employer altered the compensatory time off policy. Regardless of whether the employer unilaterally instituted the policy and reserved the right to change the policy, absent a contractual waiver permitting the employer to do so, proposed changes to mandatory subjects must be bargained.

Did the Employer Establish a Legal Necessity Defense?

The employer also argues that a past practice may be eliminated when the basis for the practice has changed. The employer asserts that a change in the case law surrounding the FLSA necessitated the employer's change in policy. The union asserts that there has been no adjudication against the employer forcing a change in policy. We begin by noting that this Commission does not have jurisdiction over the FLSA and that this Commission is bound by its own decisions and Washington court decisions. This Commission cannot make determinations as to whether a policy is legal or illegal under the FLSA. This Commission can provide its best interpretation of cases construing the FLSA when those cases affect collective bargaining.

The employer defends the change with two United States Court of Appeals decisions. At the time the employer changed the compensatory time off policy, the employer relied on the Fifth Circuit case, *Houston Police Officers' Union v. Houston*, 330 F.3d 298 (5th Cir. 2003). The Fifth Circuit held that the FLSA does not require a public employer to permit an employee to use compensatory time off for the specific time requested, but requires that compensatory

time off be granted within a reasonable period of time. The court stated it is "not obligated to defer to" the Secretary of Labor's interpretation of the FLSA. *Houston Police Officer's Union* addresses the requirement of the FLSA, but not whether or not compensatory time is a mandatory subject of bargaining.

The second case the employer relies upon is *Mortenson v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004), which was decided after the employer implemented the December 11, 2003 change. The Ninth Circuit joined the Fifth Circuit holding "the employer has a reasonable period of time to grant the request." The holding means an employee cannot force an employer to grant the specific time off requested. The implementation of a policy, which may result in denial of compensatory time off if no leave openings exist, complies with the FLSA. It is important to note that neither decision specifically precludes an employer from granting compensatory time off when doing so would create overtime.

Under *Mortenson*, if an employer implemented a policy that denied a compensatory time off request when all leave slots available for the day requested were full, the policy would comply with the FLSA. The employee cannot mandate an employer grant him or her a specific day to use compensatory time. As with *Houston Police Officers' Union*, the *Mortenson* decision does not consider whether compensatory time is a mandatory subject of bargaining under a collective bargaining law. However, although neither decision clearly comments upon the bargaining obligation with respect to the decision to change compensatory time, an employer would still be required to bargain the effects that the change has on a mandatory subject if effects bargaining is requested.

A defense of legal necessity requires the proponent of the defense to show that a law, regulation, or other binding decision mandates

the change. Cases exist where the Legislature drafts a law that requires a change in the employer's policy to comply with the law, or in which a court rules a policy illegal. There are also cases, such as this one, in which it is arguable whether a change in the employer's policy is mandated by the court's ruling.

For example, in *Skagit County*, Decision 8886-A (PECB, 2007), the employer unilaterally implemented a payroll deduction for industrial insurance premiums. The Legislature statutorily allowed the employer to deduct the premium. The employer had, and raised, a legal necessity defense. The union did not request to bargain the effects of the required change. If the union had requested bargaining, the employer would have been obligated to bargain the effects of the change. Thus, even when the employer is legally required to make the change, it must bargain the effects of the change upon request.

In *Skagit County*, Decision 8746-A (PECB, 2006), a United States Coast Guard regulation prohibited employees from working more than 12 hours in a 24-hour period. The Coast Guard permitted the employer to exclude lunch hours and breaks in the computation of the 12-hour period. However, later the Coast Guard issued a clear ruling that strictly enforced the 12 hour work regulation and, as a result, the employer was required to change the employees' working hours. Although the employer was not required to bargain the decision, the employer was required to bargain, upon request, the effects of the change to employee shifts resulting from the Coast Guard enforcing the regulation.

Unlike the two *Skagit County* cases, in which this Commission was asked to interpret a statute or regulation, this case asks us to interpret a judicial decision construing a federal statute. This agency is not charged with determining whether or not the em-

ployer's compensatory time off policy complied with the FLSA. Our understanding of *Mortenson* and *Houston Police Officers' Association* is that neither court held that granting compensatory time off is illegal under the FLSA when it would result in granting overtime to another employee. In fact, neither court addressed the issue.

Conclusion

For the foregoing reasons, we affirm the Examiner's decision. The employer is obligated to bargain changes to the compensatory time off system because compensatory time is an alternative form of overtime, which is a mandatory subject of bargaining.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Vincent M. Helm are AFFIRMED and ADOPTED as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 13th day of February, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner