STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ASOTIN COUNTY CORRECTIONS GUILD, Complainant,	)	CASE 19810-U-05-5021
vs.	)	DECISION 9549-A - PECB
ASOTIN COUNTY, Respondent.	)	ORDER FOR FURTHER PROCEEDINGS

Garrettson, Goldberg, Fenrich, and Makler, P.C., by *Steven Schuback*, Attorney at Law, for the union.

This case comes before the Commission on a timely appeal filed by the Asotin County Corrections Guild (union) seeking review and reversal of an order dismissing the union's unfair labor practice complaint issued by Unfair Labor Practice Manager Mark S. Downing.[1] Asotin County (employer) did not file a brief in this matter and no individual has filed a notice of appearance in this proceeding on behalf of the employer.

ISSUE PRESENTED

1. Did the Unfair Labor Practice Manager correctly conclude that the employer's one-time deviation from the "just cause" discipline standard that existed prior to the union assuming status as the exclusive bargaining representative of the employees failed to state a cause of action that could be redressed by this Commission?

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[1] *Asotin County*, Decision 9549 (PECB, 2007).

2. Did the Unfair Labor Practice Manager correctly conclude that the parties' arbitration provisions of the previous contract did not survive after the previous collective bargaining agreement expired?

We have reviewed the applicable statutes and case law and reverse the Unfair Labor Practice Manager's decision dismissing the case.[2] The union's complaint states a cause of action that the employer altered the status quo in violation of Chapter 41.56 RCW when it unilaterally changed the standard to be applied to employee discipline, a mandatory subject of bargaining. At this time, we also decline to adopt the Unfair Labor Practice Manager's analysis and conclusion that an employer's status quo obligation cannot be enforced through the arbitration clause of an expired collective bargaining agreement. We reserve judgment regarding the question of parties' rights to seek arbitration under an expired contract until a more fully developed record is before this Commission.

ANALYSIS

ISSUE 1 - Unilateral Change to "Just Cause" Standard

Under the Public Employees' Collective Bargaining Act, an employer is required to maintain the status quo regarding mandatory subjects of bargaining during the pendency of contract negotiations. RCW 41.56.030(4). This Commission has consistently held that grievance procedures are mandatory subjects for collective bargaining, and an employer's obligation to maintain the status quo

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[2] Because we are reviewing an order of dismissal issued at the preliminary ruling stage of case processing under WAC 391-45-110, we are confined to the assumption uniformly applied in that process: All of the facts alleged in the complaint are assumed to be true and provable. *Whatcom County*, Decision 8246-A (PECB, 2004).

with respect to all mandatory subjects of bargaining commences as soon as a union becomes the exclusive bargaining representative of the employees involved. *City of Pasco*, Decision 3368-A (PECB, 1990); *see also Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994). Where employees have chosen to be represented by a different exclusive bargaining representative than the one who negotiated the previously expired contract, maintenance of the status quo includes the terms and conditions of employment at the time the representation petition was filed, except where such changes are made in conformity with the employer's collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1988), *aff'd*, 117 Wn.2d 655 (1991). In such cases, the complainant is asking the agency to redress statutory violations of bargaining rights, and not a contract violation. *See City of Walla Walla*, Decision 104 (PECB, 1977).

Generally speaking, Commission precedent recognizes that an isolated instance where an employer fails to follow an established practice on a mandatory subject of bargaining does not rise to the level of an actual change in practice. For example, in *Kennewick School District*, the union claimed that the employer unilaterally changed employee working conditions when it announced that an employee "would be paid equal to the hours she previously made only if that was 'possible' and if she was 'available for work'." The Commission disagreed, and found the practice to be an isolated instance of violating existing policy. In *City of Yakima*, Decision 3564-A (PECB, 1991), the Commission found that an erroneous enforcement of a long-standing rule did not, by itself, constitute a unilateral change giving rise to a duty to bargain. In *Snohomish County*, Decision 4995-B (PECB, 1996), the Commission held that a reiteration of an existing policy does not give rise to a unilat-

eral change, and the union failed to prove that the employer used a specific release form in fitness for duty evaluations on a consistent basis in the past.

Here, the Unfair Labor Practice Manager dismissed the union's complaint on the basis that it alleged a factual situation where the employer failed to apply the "just cause" discipline standard in one isolated instance, and failed to have a neutral arbiter rule upon the validity of the employer's application of the termination under the just cause standard. We disagree.

During contract negotiations, substantial changes to the terms and working conditions of employees without first bargaining to a lawful impasse has a detrimental effect on the terms and conditions of employment. This is true even where isolated instances of change occur because alterations of the status quo tends to create confusion and uncertainty regarding the floor for bargaining. Furthermore, a unilateral change in the status quo that results in an employee's termination have a substantial impact on employees, and isolated instances will be closely scrutinized. *But cf. City of Kalama*, Decision 673-A (PECB, 2000)(changes from past practices must be meaningful, not just *de minimis*).

Here, we find that the allegation that the employer unilaterally changed a mandatory subject of bargaining when it failed to apply the grievance procedure and just cause standard when it terminated an employee, states a cause of action that, if sustained, could be redressed by this Commission. Article 2 of the parties' collective bargaining agreement sets forth management rights.[3] Included within those rights is the ability to discipline, suspend, or

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[3] Exhibit 1, filed with the union's complaint.

discharge employees for "just cause."[4] Thus, if the employer applies a different standard to employee discipline, this is a change in the status quo, and a unilateral change to a mandatory subject of bargaining. We emphasize that with respect to this allegation, we find a cause of action exists regarding a change to the "just cause" standard, and not to the failure to grieve the union's complaint through the arbitration clause of the pre-existing contract.

ISSUE 2 - Failure to Submit Grievance to Arbitration

Having found the union's complaint states a cause of action with respect to the application of the just cause standard, we next turn to the issue of whether the employer failed to apply the pre-existing grievance procedure, specifically the employer's failure to submit the matter to arbitration. Under National Labor Relations Act precedent, the parties' obligation to submit grievances to arbitration does not survive the expiration of the collective bargaining agreement. *Goss Golden West Sheet Metal, Inc. v. Sheet Metal Workers International Union, Local 104,* 933 F.2d 759 (9th Cir. 1991) *citing Teamsters, Local 230 v. Kennicott Bros.*, 771 F.2d 300 (7th Cir. 1985). Federal precedents, however, also hold that parties still have an obligation to submit to arbitration any grievances that arose while the collective bargaining agreement was in effect. *Goss Golden West Sheet Metal, Inc. v. Sheet Metal Workers International Union, Local 104,* 933 F.2d 759, 763.

While existing agency precedent states a similar premise, we are not convinced that the existing statements of law and policy

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[4] It is well settled that employee discipline is a mandatory subject of bargaining. *City of Yakima*, Decision 3503-A (PECB, 1990).

represent the current and best policy of the agency. In *Pierce County*, Decision 2693 (PECB, 1987), an examiner relied upon federal precedent to conclude that parties are not bound to arbitrate disputes in collective bargaining agreements negotiated under Chapter 41.56 RCW once the contact has expired. However, neither party appealed that decision.[5] In *City of Yakima*, Decision 3880 (PECB, 1991), the Commission commented, in passing, that an agreement to arbitrate survives the expiration of a collective bargaining agreement only with respect to causes of action which arose while the contract was in effect.[6] However, that decision only briefly relied upon much of the same federal precedent that the examiner relied upon in *Pierce County*, and did not explore any of the policy arguments for or against the premise that arbitration agreements do not survive expiration of the collective bargaining agreement.

In *Maple Valley Fire Professionals, Local 3062 v. King County Fire Protection District No. 43*, 135 Wn. App. 749 (2006), the Court of Appeals of the State of Washington held that a union could not enforce the arbitration provision of the parties' collective bargaining agreement. The court specifically relied upon *Pierce County*[7] and noted that the "court gives great deference to [the Commission's] expertise in interpreting labor relations law". *Maple Valley Fire Professionals, Local 3062 v. King County Fire*

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[5] Although *Pierce County* decision was never appealed, under the Administrative Procedure Act, that decision became the final order of the agency.

[6] Interestingly, it was the employer who attempted to enforce the arbitration agreement.

[7] The Court also cited *City of Enumclaw*, Decision 4897 (PECB, 1994). That decision was not appealed to the full Commission.

Protection District No. 43, 135 Wn. App. 749, 759.[8] The Court concluded by noting that it was unwilling to overturn established agency precedent. *Maple Valley Fire Professionals, Local 3062 v. King County Fire Protection District No. 43*, 135 Wn. App. 749, 760.[9]

Thus, while the *Maple Valley Fire Professionals* Court did rely upon federal precedent and the statute, much of its reasoning centered around agency precedent. Because we may not necessarily agree with the ultimate holdings in either *Pierce County*, Decision 2693, or *City of Yakima*, Decision 3880, we are reluctant to rely upon Washington State appellate court decisions commenting on this issue because of their reliance on those decisions.

However, we are also mindful that any determination regarding the survivability of arbitration clauses after the terms of a collective bargaining agreement expire should not be made without providing the parties the opportunity to fully brief the issue. Federal law is predicated upon the inherent ability of private sector employees to strike, a right that does not expressly exist for public sector employees in the State of Washington. *See* RCW 41.56.120. The parties to this case may present their arguments to a Commission examiner, and then to us should either choose to appeal.

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[8] The union in *Maple Valley Fire Professionals* sought enforcement of the arbitration clause in the courts. This Commission did not process any part of that complaint.

[9] The union in the *Maple Valley Fire Professionals* case appealed that decision to the Washington State Supreme Court. As of the date of this decision, the Supreme Court has not decided whether or not it will accept review.

NOW, THEREFORE, it is

ORDERED

The Order of Dismissal issued by Unfair Labor Practice Manager Mark S. Downing is VACATED. Processing of the above captioned case is REMANDED to the Executive Director for further expedited proceedings consistent with the following preliminary ruling.

1. Assuming all of the facts alleged to be true and provable, the refusal to bargain allegations of the complaint state a cause of action, summarized as follows:

> Employer interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4), by its unilateral change to employee discipline and discharge procedures without providing an opportunity for bargaining.

The interference and refusal to bargain allegations of the complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. Asotin County shall:

File and serve its answer to the allegations listed in paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

a. Specifically admit, deny, or explain each fact alleged in the complaint, except if a respondent states it is

without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the complaint, will be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

Issued at Olympia, Washington, the 9th day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner