City of Fircrest, Decision 5669-A - PECB (1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

FIRCREST POLICE GUILD,	)	
	)	CASE 12344-U-96-2921
Complainant,	)	DECISION 5669-A - PECB
	)	
	)	CASE 12702-U-96-3040
vs.	)	DECISION 5905 - PECB
	)	
	)	CASE 12703-U-96-3041
CITY OF FIRCREST,	)	DECISION 5906 - PECB
	)	
Respondent,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
	)	AND ORDER
	)	

Cline and Emmal, by Roger C. Cartwright, Attorney at Law, appeared on behalf of the complainant.

McGavick Graves, by Edward R. Lindstrom, Attorney at Law, appeared on behalf of the respondent.

On February 22, September 16, and September 19, 1996, the Fircrest Police Guild (union) filed three separate unfair labor practice complaints with the Public Employment Relations Commission under Chapter 391-45 WAC. Three separate cases were docketed, as indicated above. In each of the cases, the underlying issue is hours of work. In Case 12344-U-96-2921, the union charged that the City of Fircrest (employer) had unilaterally implemented a new investigator position and changed the hours of work for that position. In Case 12702-U-96-3040, the union charged that the employer unilaterally changed the hours of work for a specific officer, which thus took that officer out of the general shift rotation plan in effect at the police department. In Case 12703-U-96-3041, the union charged that a newly-hired police officer was scheduled to work "five eight-hour days", in violation of the

parties' collective bargaining agreement. Walter M. Stuteville was assigned as Examiner in all three cases, and they were consolidated for further processing. A hearing was held on January 21, 1997. The parties filed post-hearing briefs.

BACKGROUND

The City of Fircrest (employer) is a largely-residential suburb of Tacoma, Washington, with a population of approximately 5,375.[1] Located on the southeastern shore of Puget Sound, Fircrest is bordered on the north and east by Tacoma, on the west by the suburb of University Place, and on the south by the suburbs of Steilacoom and Lakewood.

The employer's police force organized for purposes of collective bargaining in 1994, when the Fircrest Police Guild (union) was certified as exclusive bargaining representative.[2] and the parties signed their first collective bargaining agreement after 10 months of negotiations. The bargaining unit consists of six police officers and one employee holding the rank of sergeant.

For approximately the last 10 years, the bargaining unit employees have worked what is termed a "4-40" shift schedule on a rotating shift basis. That is, they are scheduled to work four consecutive

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[1] April 1, 1996 population per Office of Financial Management. This employer and its law enforcement personnel will not come under the coverage of the "interest arbitration" procedure of RCW 41.56.430 et seq., and related precedents such as City of Seattle, Decision 1667-A (PECB, 1984) until July 1, 1997, when chapter 273, laws of 1995, takes effect.

[2] Decision 4824 - PECB.

10-hour days followed by three consecutive days off. Every 56 days, the schedule is rotated: Employees who had been on the day shift move to the graveyard shift; employees who had been on the graveyard shift move to the swing shift; and employees who had been on the swing shift move to the day shift.

During negotiations, the parties agreed to the following collective bargaining agreement language to memorialize their agreement concerning management rights and hours of work:

> Section 4.1 Management Rights - Except as otherwise specifically provided in this Agreement, and without waiving its right to negotiate mandatory subjects of bargaining, the Guild agrees that the City has the sole and exclusive right to exercise all the rights and functions of management. Without limiting the generality of the foregoing, as used herein, the term "management rights" includes:
>
> (1) The determination of a Police Department policy, including the right to manage the affairs of the Police Department in all respects;
>
> (2) **The right to assign working hours,** including overtime;
>
> (3) **The right to establish, modify or change work schedules,** managing of facilities and equipment, including the amount of facilities and equipment;
>
> (4) The right to direct the employees of the Police Department, including the right to hire, evaluate qualifications, evaluate skill and ability, promote, demote, suspend, layoff and discipline or discharge for just cause;
>
> (5) The right to organize and reorganize the Police Department in any manner it chooses, including the size of the Police Department and the determination of job classifications and rank based upon duties assigned, except where such changes impact conditions of employment, wherein the City

> will notify the Guild of its intent and offer the opportunity to bargain prior to implementation by the City.
>
> ...
>
> (7) The selection, promotion or transfer of employees to supervisory or other managerial or technical position, except where otherwise subject to Civil Service procedures;
>
> ...
>
> (9) The determination of policy affecting selection or training of employees;
>
> (10) **The scheduling of operations and determination of the number and duration of hours of assigned duty per week**, except that the City will notify the Guild of its intent and offer the opportunity to bargain prior to implementation by the City;
>
> ...
>
> (16) The determination of the amount of supervision necessary.
>
> ...
>
> Section 9.1: Work Week and Overtime - The work week shall be defined as those hours of a scheduled shift that start between 12:01 a.m. Monday and 12:00 o'clock midnight Sunday. **The current schedule is four (4) ten (10) hour days** . ...

[Emphasis by **bold** supplied.]

The parties' contract contains a grievance procedure which culminates in final and binding arbitration.

The Investigator Assignment

On September 29, 1995, Chief of Police James Kenoyer advised President James Barrett of the Fircrest Police Guild that the employer wanted to bargain for a new "police investigator"

assignment within the police force.[3] Chief Kenoyer met with Barrett and Sergeant John Cheeseman on October 3, 1995, when he gave them the following proposal referred to by the parties as "draft one":

> In reviewing Departmental operations and evaluating the level of service we should be providing to the community, we are establishing the position of investigator. This position is anticipated to be part-time (probably one week out of the month) with addition [sic] investigative time being allotted if there is a special need. This is a position announcement and request for application for the position.
>
> Description
> This position will be responsible for conducting detailed follow-up investigations of complex cases based upon preliminary investigations. This will be a plain clothes position requiring appropriate attire provided by the successful applicant. The investigator will be issued a pager and may be called from an off-duty status, as determined by the Sergeant or the Chief, for serious crimes.
>
> Initially, the position will be assigned as a five day forty-hour week when in the investigative week. Hours and days may be flexible with the Chief's approval of an investigative tactic or plan. The position will be permanent probationary with an initial commitment by the officer of two years.
>
> ...
> Testing
> An oral board will be held for all applicants on Friday, October 20, 1995, beginning at 9 a.m. The Board will be comprised of investi-

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[3] Throughout their correspondence, the parties referred to the employer's proposal as a "position". In the Examiner's view, however, they were actually discussing a special assignment given to one officer. It is thus referred to as an "assignment" in this decision.

> gators from Pierce County Sheriff's Office and Milton Police Department, and Sergeant Cheeseman. The questioning will include the applicant's analysis and discussion of the case that was submitted with the applicant.

At the close of that meeting, the union left the employer official with six questions concerning the proposed assignment.

Barrett sent a memo to Kenoyer on the same day, October 3, 1995, as follows:

> As I stated in our meeting on 9-29-95, I would need to bring your proposition up with the bargaining committee as it appears the addition of an investigative position (full or part-time) is a negotiable item. The By-Laws of the Guild require bargaining to fall under the jurisdiction of that committee.
>
> I have approached the other committee members with your proposition of adding an investigative position. They have requested to meet as a committee to discuss your proposal and to discuss whether or not any agreement made would need an approval vote of the whole membership. They have also expressed a desire to check with our legal counsel in regards to a couple of the issues involved.
>
> I have expressed my desire to them to work with you in good faith and to come up with a solution that is ultimately good for the community. I have also expressed to them my faith and trust in you in regards to your dealings with the Guild in this matter. I understand the time constraints with your proposal and vow to expedite the matter on our end, perhaps as early as the evening of 10-4-95. Perhaps a meeting that included you to present your proposition could be set up?
>
> I also have a couple questions about the position announcement/memorandum you presented to me today.

> a) What is your preference as to the time frame from which an officer can draw upon for submitting an example of his investigative work? One or two years? We briefly talked about this in today [sic] meeting but I can't recall the time frame we discussed.
>
> b) How will the choice be made for the position? Will the applicant with the best scores be chosen or will there be a "rule of three" type appointment where you will choose from the top two or top three applicants?
>
> c) Were you going to add a third year option to the commitment time period? Would this be a mutual agreement option?
>
> d) Were you going to add "written test" language to the testing procedure?
>
> e) Are those officers currently in a motor-cycle position eligible for this position too?

Within the next few days, Kenoyer gave Barrett another memorandum (referred to by the parties as "draft two") concerning the new assignment. Draft two was basically the same as draft one, with the following information added to the Testing paragraph:

> An additional component will be a mock case requiring an investigative plan including how to prove the elements of the case. Upon conclusion of the testing, the panel will forward the names of the top three qualifying officers to the Chief who will make the final selection.

Soon thereafter, Barrett sent Kenoyer a handwritten memo repeating his earlier questions concerning length of service needed to apply for the assignment and whether other assignments will need to be given up by the officer selected for this assignment.

On October 10, 1995, Chief Kenoyer sent a revised "third draft" memorandum to the union concerning the investigator assignment.

This memo was essentially the same as the previous memo, except for: Changing the application deadline from October 13, 1995 to October 16, 1995; removing the sentence under the Testing header which had read, "Testing will be on a pass/fail basis"; and adding the following language under the Application header:

> All officers may apply however, current specialty assignments and length of service will be considered in the selection process. Additional factors for consideration include self motivation, ability to work independently, ability to make good decisions, and a strong work ethic.

The additional language was responsive to one of the union's questions.

On December 6, 1995, newly-installed President Pete Joyce of the union sent the following letter to Chief Kenoyer:[4]

> It has come to our attention that you intend to go forward with your plan to implement the Investigative Position. It further appears that you intend to schedule the investigator five, eight hour days.
>
> As you know bargaining in this matter has not concluded in an agreement. Since officer duties and shifts are subjects of mandatory bargaining we welcome you to continue bargaining. We also expect, prior to implementation, that you will discharge your obligation under our collective bargaining agreement and R.C.W. 41. [sic]

Kenoyer provided a written reply to the union on December 7, 1995, which included the following:

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[4] Joyce had been vice-president of the union prior to taking office as its president in November 1995.

> Your memo indicates that bargaining in this matter has not concluded in an agreement. At this time I am not aware of any requirement that the assignment of an officer to investigate criminal activity is a subject of bargaining because it falls into the parameters of the current job description. Further, contrary to your assertion that bargaining was not concluded on the issue, I sat and bargained in good faith with former Guild president James Barrett and concluded with an agreement prior to distributing the memorandum dated October 10, 1995 (attached). Prior to distribution, I personally contacted you on October 10, regarding a vote to be taken of the entire Guild. You stated to me the vote was "Overwhelming" approval.
>
> My bargaining on this issue occurred with President Barrett and was confirmed by you as the Vice-President of the Guild. Notes and memoranda between President Barrett and myself reveal that the final document was reflective of Guild concerns, containing several modifications in response to Guild suggestions. I would suggest that a neutral arbiter would believe that in dealing with the President and vice-President of your organization, Management would be considered to have bargained in good faith and had fulfilled Management's obligations under the Collective Bargaining Agreement and Title 41 of the Revised Code of Washington.
>
> It is Management's desire to work cooperatively with its'[sic] employees for the betterment of the department and the employees. I am available to discuss the issues with you as I was with your predecessor.

Later that day, the union filed a grievance concerning the hours of work of the investigator assignment. The grievance made reference to Officer Eric Norling, who had been given the assignment:

> Pursuant to Article 9.1 of our collective bargaining agreement officers are to be scheduled four ten hour days per week. It is also

> agreed that an officer shall not be sent home prior to the end of his/her shift for the purpose of avoiding overtime.
>
> It has come to our attention that on November 28th 1995 the department published the December work schedule directing officer Eric Norling to be sent home after eight hours of work on the eleventh, twelfth, thirteenth and fourteenth of this month. He is also scheduled to work eight hours on the fifteenth, out of his normal work sequence. This eight hours we expect will be paid at the overtime rate. As for the four shortened shifts, this unilateral change in the agreed upon four ten hour day schedule should not be implemented prior to negotiations which lead to an agreement to change.
>
> Article 4.1 of our collective bargaining agreement excludes agreement to any unilateral changes in contract areas otherwise specifically provided i.e. Article 9.1 - specifically "The current schedule is four (4) ten (10) Hour days." As you know (Hours of work) [sic] is a mandatory subject of bargaining according to RCW 41. [sic]
>
> By scheduling Eric Norling four eight hour days the department departs from our "specifically provided" agreement to schedule four ten hour shifts per week. We therefore respectively submit that the schedule be amended to direct officer Norling to work ten hours on the days in question.
>
> In conclusion we welcome negotiations in the matter of scheduling and any other area in which our mutual agreement to serve the citizens of Fircrest may be improved.

The grievance was rejected by the employer at each step of the grievance procedure. For reasons which are not at issue in this proceeding, the union did not advance the grievance concerning the investigator assignment to arbitration under the contractual grievance and arbitration procedure.

Disciplinary Change of Shift Rotation

On April 10, 1996, Fircrest police officer and union official Pete Joyce received a document titled "Performance Plan" from his immediate supervisor, Sergeant John Cheeseman. The document dated April 5, 1996, was given to Cheeseman April 10, 1996:

> During the past year you have had repeated instances of inefficiency and poor time management. Instances such as excessive amounts of time spent on routine duties, excessive time spent on processing prisoners and completing related reports, and claiming overtime compensation for activities that could easily be completed during normal duty hours have been brought to your attention.
>
> In the past two weeks you have been counseled; 1. regarding an additional 18 minutes break taken during your shift and; 2. Working a shift totaling 4-1/2 hours and taking a 1-1/4 hour break during that time. Such repeated abuse of sound time management is not acceptable and will not be tolerated.
>
> The duties of a law enforcement officer require the ability to act independently and manage one's on duty time with reasonable efficiency. At this time you are not demonstrating that ability.
>
> In attempting to assist you to correct these deficiencies I have spoken with you, suggesting methods of operation, and offering training.
>
> Because of your continuing inability to respond appropriately to management's concerns in this area of your performance the following course of action will be followed:
>
> 1. You are to closely monitor your time and activities on a daily basis, identify economies of time and efficiencies of operation and implement them.
>
> 2. You are to remain on the beat during your shift. Reports are to be completed in

the vehicle. Reports may be completed in the office only if permission is granted by the Sergeant or the Chief or if you are dealing with an in custody prisoner.

3. Warrant confirmations will be conducted quickly and efficiently. Then you are to report back to the beat.

4. You are to allocate your time to address departmental priorities including detection and prevention of criminal activity, traffic enforcement, assistance to the public and prompt courteous performance of all other duties related to your job.

5. Reports are to be completed and turned in prior to the end of your shift. Any exceptions must be approved by the Sergeant or the Chief.

6. Court duties will be conducted as per established departmental memoranda.

7. You will sign out for your rest periods by radio and account for them in your log book entries.

8. You are to be in your car on the beat within 15 minutes of the start of your shift. This may be extended to 30 minutes on the first day of your work week or if there is an unusually detailed briefing. This briefing will be documented with appropriate notes.

9. On a weekly basis you are to prepare a memorandum to the Sergeant outlining your progress for the week.

10. Any time you travel outside the city limits of Fircrest by more than two blocks you are to notify radio and the Sergeant or the Chief. If it is an emergency call, notification may be made as soon as possible after the emergency allows.

11. You are to make yourself aware of any training or other assistance that may be available to assist you and communicate that information to the Sergeant for his action.

12. You will be placed on a shift when supervision is most immediately available.

> 13. None of the forgoing directions relieve you of the duty to respond appropriately to emergencies, calls for service, or self initiated contacts.
>
> 14. This work plan will be in effect for three months during which time you will meet periodically with me to assess your progress. This plan may be extended or other action initiated if satisfactory progress is not attained.
>
> 15. Any questions or requests for clarification may be directed to me.

In connection with this plan, on May 27, 1996, when Joyce was originally scheduled to move from the swing shift to the grave yard shift, he was instead moved to the day shift. He began working the day shift on the next day, May 28, 1996.

On April 18, 1996, after receipt of the plan but prior to its implementation, Joyce filed a grievance concerning the performance plan, as follows:

> I feel the performance plan I am being required to follow is discipline, and is not for just cause, as article #21 requires.
>
> No other employee in the police department is required to follow this plan. I have had discussions with you over the allegations of inefficiency and poor time management. I was led to believe that I had satisfactorily explained myself regarding the allegations at the time. In fact, I even showed you written documentation supporting my defense.
>
> This discipline comes as a surprise to me. In early March, you told me verbally that my work was good. You said my stats were high and that my reports were looking good.
>
> I request that the performance plan assigned to me on April 10, 1996 be rescinded.

Sergeant Cheeseman replied to that grievance on April 24, 1996:

> After reviewing the content of your grievance, the response is similar to our previous conversations regarding inefficiency and poor time management.
>
> 1. During the past year I have spoken with you on various occasions about your inefficiency and poor time management. Your annual performance review reflected marginal to poor performance in dependability, quality of work, and quantity of work.
>
> 2. Most recently I have had to again counsel you about your time management. I met with you in regards to your taking 1 hour 48 minutes in breaks during your ten hour shift on March 8, 1996. That conduct was in violation of Article 9.2, Lunch and Breaks. When speaking with you in regards to this incident you were at a loss to explain your actions.
>
> 3. On April 1, 1996, you took 1 hour 15 minute break while your total time on shift was only 4 ½ hours. When I brought this to your attention, you explained that you thought you should get a one hour break after working only four hours. I informed you that it was unreasonable to be allowed to trade part of your shift and expect the department to allow two officers a one hour lunch during the original one hour shift. As explained to you this was not a use of sound time management.
>
> Given our prior conversations and your apparent inability to cope with reasonable expectations of performance in this critical area, it should not be a surprise that I would present guidelines to assist you in developing a level of understanding regarding these expectations.
>
> In reference to our conversation on March 1, 1996 when I informed you that your overall activity seemed to have picked up and that I appreciated your efforts, this was part of my duties as your supervisor to provide positive as well as negative feedback. Just because you have been recognized for performing at a certain level does not mean your performance

> should not be corrected when it fails to meet reasonable expectations.
>
> Article 21 addresses discipline. This action is corrective and not discipline. This plan is to help you manage your time in a more efficient and productive manner. Therefore, it is believed that Article 21 does not apply. Given the information as present. [sic] Your grievance is denied at step 1.

Joyce's grievance was denied at each step of the grievance procedure. In his denial at the third level of the grievance procedure, City Manager Dennis Richards stated, in part:

> It is my feeling that your request that this matter be dropped due to lack of just cause cannot happen. The Chief has proven that there is cause for some type of action regarding your work performance, and the schedule that has been provided is an attempt to assist you in performing your duties at a higher level. This matter will not become part of your permanent work file, and is viewed by myself as less than an oral or written reprimand.

As with the investigator issue, the union did not choose to take the performance plan grievance to arbitration.

Change of Work Schedule for New Hire

On July 17, 1996, union official Doug Peterson sent the following letter to Chief Kenoyer:

> In reference to our conversation of 7-21-96. You pointed out that our contract requires that all officers work 10 hour shifts. You also requested the guild grant an exemption from this requirement. The purpose of which would be to orient the new officer to LESA

> RECORDS and office procedure. You assured me that you had no intention of having him work shifts while with other officers. I discussed this matter with our President Pete Joyce as I said I would. It was agreed that the contract is clear that all officers are to work 10 hr. shifts. We, therefore, will expect the new officer to have the full benefit of the four forty scheduling and work ten hour shifts.

On August 1, 1996, Chief Kenoyer sent the following letter to President Joyce of the union:

> This letter is in response to our telephone conversation on July 30, and Officer Doug Peterson's letter dated July 17, 1996, both regarding a training schedule for a newly hired officer. On July 21, 1996, I had a conversation with Officer Peterson which I believed was positive and open. Officer Peterson voiced understanding that some flexibility from the 4-40 shift would be agreeable and even necessary. Given the tone of that dialogue, I was surprised and disappointed in the immediate negative written response from Officer Peterson without suggested alternatives or counter-proposals.
>
> I was further disappointed with the statement in Officer Peterson's letter that I "pointed out that our contract requires that all officers work 10 hour shifts." I do not agree with that statement. The contract, as negotiated, only acknowledges that the officers' current schedule is four 10 hour shifts, not that all officers are "required" to work 10 hour shifts. The purpose of my discussions with Officer Peterson was not to seek an "exemption." Rather, I was attempting to avoid controversy by educating the Guild about the necessity of flexibility in the scheduling for training and/or to give the Guild the opportunity to provide alternative suggestions. After receiving Officer Peterson's letter, I spoke with him again. He directed me to you, indicating that it was your express desire not to allow some flexibility in scheduling for training purposes.

In our conversation on July 30, you indicated some personal displeasure with administration of the contract relating to your loss of holiday hours at the end of calendar year 1995, and stated that, "Until the Department shows some flexibility in administration of the contract, the Guild is not going to give anything." If you recall, we indicated there was some flexibility in the way annual leave time could be extended, but there was no flexibility in extensions of holiday time and holiday time was administered on a city-wide standard. You used a portion of your holiday hours in lieu of sick leave, thereby allowing you to preserve the time in another "bank". Additionally, you were allowed to use as much time as minimum staffing would allow, including Friday of New Year's Day weekend (a normally very busy time for police operations). You lost no time. I believe that Sergeant Cheeseman suggested some alternate ways of managing your holiday and annual leave time to avoid this problem in the future. This digression is only to refresh your memory and to memorialize the issue concerning flexibility of administration of the contract. While the administration of the time may have been driven by the contract language and city policy, the Department approached it from the viewpoint of not wanting an employee to lose accrued time and worked with you to preserve your time in some form. This, I believe was accomplished.

...

Returning to the merits of this matter, if, as the letter and your conversation suggests, you believe that there was only going to be a minimal orientation in office procedures and LESA Records, you are ill informed. This is to be a comprehensive training program designed to assist the new officer's transition into the Department and to bring him up to speed on various aspects of law and procedure with which he is not familiar. It will include training at the State Patrol Academy and Criminal Justice Training Commission Academy, other agencies and with our staff. When the officer is being trained by other organiza-

tions, it is not realistic to believe they would change their shifts to accommodate a ten-hour shift. This new officer cannot receive all of this necessary training on a 4-40 shift. As I indicated to Officer Peterson, when the officer is in ride-along field training status (which will be the bulk of the time) his shift would conform to that of the officer to whom he is assigned (4-40). When he is finally assigned to full duties he would, of course, work the standard shift.

The issue of officer training falls within the scope of Article 4, Management Rights. The scheduling of operation, the determination of the number and duration of hours of assigned duty per week, and the assigning of hours are all management rights, subject only to the City's obligation to bargain prior to implementation. Further, your suggestion that the City is absolutely required to schedule this officer to work 4-10 hour days in every circumstance is contrary to past practice within the Department. Past practice has allowed flexibility on training days so that officers could take advantage of training that does not conform to the 4-10 hour week, i.e., academy training. The Guild did not ask for the issue to be bargained when the original contract was being negotiated. This issue has not been grieved by the Guild even though officers have worked other than the 4-40 shift during training since the signing of the Collective Bargaining Agreement. The eight hour training day is the industry standard and to attempt to force an artificial ten-hour standard would not be appropriate.

I believe that by providing the new officer with a comprehensive training program we can have a well-qualified officer on the street earlier and with a higher level of competency than by saddling him with the tradition "ride-along until the Academy" program. This would benefit the Guild members as well as the Department.

On July 30 you indicated there was no other reason to discuss the issue and agreed when I asked if we were at an impasse. Having de-

> clared an impasse, it is management's intention to go forward with the comprehensive training program. If you wish to discuss the issue further, I will be available.

[Emphasis by underlining in original.]

The record in this proceeding does not include information about a grievance on the "new hires" issue.

POSITIONS OF THE PARTIES

The union characterizes all three of these controversies as changes of past practice involving mandatory subjects of collective bargaining, or at least as requiring bargaining over effects of the change. It asserts that the employer unlawfully made a unilateral change of working conditions when it implemented the investigator assignment while negotiations were still in progress. It asserts that the "performance plan" implemented for one police officer was a unilateral implementation of new performance standards without notice to the exclusive bargaining representative. Finally, it argues that it did not waive recourse to the Public Employment Relations Commission when it signed a collective bargaining agreement, and that the charge relating to the change of work hours for a newly-hired police officer is a violation of contract over which the Commission should assert jurisdiction.

Concerning the investigator assignment, the employer argues that the parties were at impasse before the employer implemented its proposal. In reference to the "performance plan" it implemented for one police officer, the employer asserts that the union never made a request to bargain and never protested any impact on the rotating shift schedule. Finally, concerning the training plan for

the newly-hired employee, the employer argues that implementation of a new training program is not a mandatory subject of bargaining, and that it had no obligation to withhold implementation of the position until completion of bargaining over the effects of its decision.

DISCUSSION

General Legal Principles

The duty to bargain is defined in RCW 41.56.030(4). After an exclusive bargaining representative is recognized or certified for an appropriate bargaining unit, it is conventional for the employer and union to commence negotiations toward the goal of a written and signed collective bargaining agreement which will regulate affairs between the parties for the term of the agreement. The Commission administers the "refusal to bargain" unfair labor practices set forth in RCW 41.56.140(4) and RCW 41.56.150(4), to protect the collective bargaining process within which unions and employers are to negotiate contracts. The Public Employment Relations Commission does not, however, assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

During the term of a collective bargaining agreement, the duty to bargain continues to exist between the employer and union as to matters which are mandatory subjects of bargaining but are not covered by the specific terms and conditions of the collective bargaining agreement. City of Seattle, Decision 1667-A (1984). The Commission and its Examiners have frequently cited NLRB v Katz,

369 U.S. 736 (1962), for the proposition that an employer commits an unfair labor practice if it effects a "unilateral change" of an existing term or condition of employment of its represented employees, without having exhausted its obligations under the collective bargaining statute. See, also, Litton Financial Printing v NLRB, 949 F.2d 249 (8th Cir. 1991) cert. den 503 U.S. 985 (1992). If mandatory subjects of bargaining have not. been raised by either party during bargaining, or if such issues are entirely new, they may not be acted upon unilaterally by either party.

Situations frequently arise where one of the parties to a collective bargaining relationship finds it necessary, desirable or convenient to make changes during the term of a collective bargaining agreement. If those changes affect terms or conditions of employment of represented employees, the moving party will need to give notice of the contemplated changes to the other party sufficiently in advance of making the decision to allow time for bargaining prior to making a decision on the change of practice. If the other party makes a timely request for bargaining,[5] the moving party must bargain in good faith concerning the proposed change. City of Pasco, Decisions 4197 and 4198 (PECB, 1992). It is possible for parties to negotiate to an impasse in such situations. Where that occurs in negotiations for bargaining units that are not eligible for interest arbitration, the employer may be entitled to implement its proposed change(s) without the consent or agreement of the union. Pierce County, Decision 1710 (PECB, 1983). Where one party does not believe that the other party has fulfilled its statutory obligation, it may file unfair labor practice charges.

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[5] A party which fails to request bargaining when presented with an opportunity to do so will be found to have waived its bargaining rights by inaction. See, for example, City of Yakima, Decision 1124-A (PECB, 1981).

It is typically an employer who wants to change the status quo, and it is typically a union that is filing unfair labor practice charges alleging a unilateral change. Among the defenses typically encountered by the Commission in such situations are the following examples itemized in City of Pasco, supra:

(1) Absence of Change - the disputed action does not constitute any change of practice.

(2) Not a bargainable Subject - the disputed decision is not a mandatory subject of collective bargaining, even if the effects of the decision may be bargainable.

(3) Violation of Contract - the dispute involves only a claimed violation of a collective bargaining agreement already in existence between the parties.

(4) Waiver by Contract - the employer cites some explicit contract provisions which allow it to take the disputed actions.

(5) Waiver by Conduct - the union fails to request bargaining, or fails to advance meaningful proposals in bargaining, after being given notice by the employer of the contemplated change.

(6) Emergency - the employer was faced with a situation of such import that bargaining was not required.

Implementation of the Investigator Position

The union acknowledges that the parties had substantial negotiations concerning the chief's proposal concerning the implementation of a new investigator assignment within the functions of the commissioned police officers. The union alleges, however, that "the parties were nowhere near impasse".

In City Of Brier, Decision 5089-A (1995), the Commission discussed the impact of reaching an impasse:

> The occurrence of an "impasse" in collective bargaining provides a limited exception to the prohibition against unilateral changes. Impasse may permit an employer that has given notice, and that has bargained in good faith upon request, to make changes without the agreement of the exclusive bargaining representative, so long as those changes have previously been proposed to that organization. Pierce County, Decision 1710 (PECB, 1983). It is fundamental that impasse does not permanently relieve either party of the duty to bargain. At most, the duty to bargain becomes dormant on one or more issues when a deadlock is reached between the parties as to them, until changed circumstances indicate an agreement on those issues may again be possible. In short, impasse does not eliminate the obligation of either party to negotiate in a sincere desire to reach agreement.

The Commission discussed the impact of one party declaring an impasse in Mason County, Decision 3706-A (PECB, 1991):

> The unilateral change of a term or condition of employment without agreement of the union representing affected employees will ordinarily constitute a "refusal to bargain" in violation of RCW 41.56.140(4). An employer can make a unilateral change, however, after bargaining in good faith to an impasse. [footnote citing Spokane County, Decision 2167-A (PECB, 1985) and City of Seattle, Decision 1667-A, supra] An impasse exists "where there are irreconcilable differences in the positions of the parties after good faith negotiations". [footnote citing Federal Way School District, Decision 232-A (EDUC, 1977)] The focus of inquiry is whether the party declaring an impasse could reasonably conclude there was no realistic prospect that continued discussion would be fruitful. [footnote citing Pierce County, Decision 1710 (PECB, 1983]
>
> > The proper test for determining ... good faith is not whether judged on a basis of hindsight, an impasse has been

> reached as a matter of fact. What matters is whether the [employer] had reasonable cause to believe and did believe that an impasse had been reached. Cheney Lumber Co. v NLRB, 319 F.2d 375 (9th Cir., 1963).
>
> The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interest of both the employer and the employees. [footnote citing South Kitsap School District, Decision 472 (PECB, 1978)] The statutory obligation to bargain in good faith does not require a party to always grant a concession or agree to a specific proposal, but neither is a party entitled to reduce collective bargaining to an exercise in futility. [footnote citing RCW 41.56.030(4) and City of Snohomish, Decision 1661-A (PECB, 1984)]. Entering negotiations with a take-it-or-leave-it attitude on items of importance is risky for a party, but a party may maintain its firm position on a particular issue throughout bargaining, if the insistence is genuinely and sincerely held, and if the totality of its conduct does not reflect a rejection of the principle of collective bargaining. [footnote citing City of Snohomish, supra, and Pierce County, supra]

The union asserts that the parties could not be at impasse, because they had only two conversations concerning the implementation of the new assignment. It also argues that the negotiations actually began only 24 hours prior to the employer's implementation of the proposal, and that the employer's first proposal was also its last. While the union appears to be making the unprecedented argument here that the existence of an impasse is a quantifiable decision determined by the number of discussions had on the subject, that analysis does not even square with the facts of this case. From

the testimony at the hearing, the chronology of the negotiations on this issue was as follows:

1. September 29, 1995 - employer gave union notice of opportunity to bargain contemplated change.

2. October 3, 1995 - parties met regarding "draft one".

3. October 3, 1995 - union's written reply to "draft one".

4. October 3, 1995 - employer sent union "draft two", responding to one of the union's written questions.

5. October 5, 1995 - union submitted two written questions concerning "draft two".

6. October 10, 1995 - employer sent union "draft three" responding to the union's October 5 questions.

7. November 28, 1995 - investigative duties assigned in the December work schedule.

Thus, the union's assertions that "the City's original proposal also appears to be their 'last and final' offer" and about "the City's failure to budge an inch off of its original proposal" are not factually accurate. In fact, the employer did change its proposal based upon input from the union's representatives.

The union's arguments fail to persuade that the employer has committed an unfair labor practice in this instance. The union appears to be laboring under a mistaken belief that the employer is obligated to agree to all or most of its proposals. Bargaining in good faith means the serious consideration of the other party's position, but does not require either acceptance or a change in position on the part of either party. As the Commission wrote in Mansfield School District, Decision 4552-B (EDUC, 1995):

> Differentiating between lawful "hard bargaining" and unlawful "surface bargaining" can be difficult in close cases. This fine line reflects a natural tension between the obliga-

> tion to bargain in good faith and the statutory mandate that there is no requirement that concessions be made or an agreement be reached. Walla Walla County, Decision 2932-A (PECB, 1988). A party is entitled to stand firm on a position, and an adamant insistence on a bargaining position is not, by itself, a refusal to bargain. The obligation to bargain in good faith, however, encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. A party is not entitled to reduce collective bargaining to an exercise in futility. See, Mason County, Decision 3706-A (PECB, 1991), and cases cited therein.

As set forth above, the chronology of negotiations certainly does not indicate a "take it or leave it" approach by the employer. From the modified proposals which it developed and issued to the union, it is clear that this employer took the union's arguments seriously, and responded to the union's concerns.

The Examiner finds no merit in the union's argument that the time period for bargaining on this matter was too short. Although the time period during which the parties discussed this issue was not long, the issues themselves were not particularly complicated. Indeed, most of the union's questions on the new assignment related to how the selection process would work, and did not concern the substance of the job description or the details of how the responsibilities of how the assignment would be carried out. It was only at the end of the process, or even after the fact, that the union raised concerns about the work schedule of the employee assigned to the investigator role.

The Examiner also rejects the union's effort to find fault with the employer's procedure for declaring impasse. Impasse is inherently a unilateral action. The employer made its impasse decision in this case after consulting with the union, and after duly taking the union's positions and questions into consideration. The employer did not commit an unfair labor practice when it then implemented the new investigator assignment. Any pursuit by the union of its claim that the work schedule prescribed by the employer for the investigator violates the parties' collective bargaining agreement would have to be through the grievance and arbitration machinery of that contract.

Disciplinary Change in Hours of Work

The union's complaint concerning the change of shift rotation for Pete Joyce is neither based on an "discrimination" theory (as might be expected where the employee is a past and current union officer), nor based on a "just cause" theory (which would predictably be excluded from unfair labor practice proceedings as a contractual matter under City of Walla Walla, supra). Instead, the union attempts to fit this controversy into a "unilateral change" theory, based on the fact that the disciplinary action changed Joyce's hours of work.[6] Further, the union claims the change had a ripple effect on the schedules of other bargaining unit members. The union cites Spokane Fire Protection District 9, Decision 3661 (PECB, 1990), where an Examiner noted:

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[6] In a June 4, 1996 letter to Joyce, City Manager Dennis Richards stated that the employer-imposed performance plan "... is not discipline". The Examiner is not bound by the employer's description of its action, and considers the employer action to have been a disciplinary measure undertaken to change employee behavior.

> As a rule, any change in working conditions, particularly if it has a continuing effect on organized employees and is not some- how required by "business necessity", must be negotiated. The implementation of new performance standards would clearly have an impact on the working conditions of **members** of the bargaining unit.

[Emphasis by **bold** supplied]

The Examiner finds that decision inapposite, however, to the case at hand.

Both hours of work and discipline are mandatory subjects of collective bargaining that have been, in fact, addressed by these parties in their collective bargaining agreement. If the union desired to protest the work schedule assigned to Joyce or any other bargaining unit employee, its remedy lies in the collective bargaining agreement; if the union desired to protest the work schedule imposed on Joyce as discipline, its remedy lies in the collective bargaining agreement. In addition to dismissing "violation of contract" claims under Walla Walla, supra, the Executive Director and the Commission have consistently rejected attempts by unions to convert the unfair labor practice procedures of the statute into a forum for addressing violations of unchanged employer policies not addressed by the collective bargaining agreement. King County, Decision 4893-A (PECB, 1995); City of Enumclaw, Decision 4897(PECB, 1995). In contrast, the Spokane Fire District 9, supra, decision discussed an announced change of working conditions which was not covered by the contract negotiated by the parties to that case, and which **directly** affected more than one member of the bargaining unit involved. The Examiner rejects the union's claim that the performance plan implemented for Joyce had a "direct and continuing impact" on other members of the

bargaining unit,[7] as any effect on other employees was clearly indirect and did not alter their rights under the parties' contract.

The complainant has the burden of proof in an unfair labor practice case. Bellingham Housing Authority, Decision 2335 (PECB, 1985). In this case, the burden was on the union to set forth facts sufficient to support its allegation that the employer refused to bargain concerning a mandatory subject of bargaining. Auburn School District, Decision 3406 (PECB, 1990); City of Seattle, Decision 3199-B (1991). The union has failed to carry its burden of proof on this issue, and the unfair labor practice charge involving the performance plan developed for Officer Joyce must be dismissed.

Scheduling a New Hire

The union's third unfair labor practice charge involves the scheduling of a newly-hired officer for eight-hour shifts matching the work schedules of senior department officials, rather than the ten-hour shifts described as the "current" schedule in the parties' collective bargaining agreement. The employer asserts that all of the "unilateral change" violations alleged by the union in these cases are really just alleged contract violations "disguised" as unfair labor practice charges, and that the Commission should not exercise its jurisdiction in such situations. The union responds

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[7] The union reasons that, by keeping Joyce on the day shift to be more closely supervised, other officers would have to stay on the graveyard shift. This assertion was not, however, supported by any evidence or testimony brought forth by the union. There was no foundation evidence presented concerning how the rotation of shifts was administered, or how Joyce's performance plan changed that rotation.

that it has not waived the Commission's unfair labor practice jurisdiction by agreeing to a grievance procedure in the collective bargaining agreement.

The object of the collective bargaining process defined by the Legislature is for an employer and exclusive bargaining representative of its employees "to execute a written contract with respect to grievance procedures and collective negotiations on personnel matters". RCW 41.56.030(4). Collective bargaining agreements are enforceable in the courts, like any other contract. The Legislature has, however, endorsed the enforcement of collective bargaining agreements through non-judicial processes. A strong endorsement of the grievance arbitration process found in the statute which created the Commission:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. ...
>
> RCW 41.58.020(4).[8]

The Legislature specifically authorized the inclusion of procedures in collective bargaining agreements for "binding arbitration of a labor dispute arising from the application or the interpretation of the matters contained in a collective bargaining agreement". RCW 41.56.122(2). The Legislature has even made the Commission's staff available to arbitrate grievances without fees or charges to the parties. RCW 41.56.125. Importantly, what the Legislature has not

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[8] RCW 41.56.020(4) closely parallels Section 203(d) of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), which is part of the statute which creates the Federal Mediation and Conciliation Service.

done is to make "violation of a collective bargaining agreement" an unfair labor practice.[9] As noted above, the Commission and the Executive Director have often stated and reiterated the principle that the Washington Public Employment Relations Commission does not assert jurisdiction to remedy contract violations through the unfair labor practice provisions of Chapter 41.56 RCW. City of Walla Walla, supra.[10] The union's remedy, if any, for its contractually-based "hours of work" claims in this case was through the contract itself.

The Commission occasionally considers and interprets collective bargaining agreements, but only as part of the decisionmaking process on claims which independently state a cause of action for unfair labor practice proceedings. Thus:

> 1. Where "waiver by contract" defenses are asserted in unfair labor practice cases where a unilateral change is evident, the Commission will interpret the

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[9] In this, the Washington Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is distinctly different from the counterpart statutes in some other states. Oregon law makes it an unfair labor practice to:

> Violate the provisions of any written contract with respect to employment relations, ...

ORS 243.672(1)(g) and (2)(d).

Similarly, the Wisconsin Municipal Employment Relations Act makes it an unfair labor practice to:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. ...

Sections 111.70(3)(a)(5) and (b)(4), WIS.STATS.

[10] Snohomish County Public Utility District 1, Decision 4962 (PECB, 1995); Chelan County, Decision 5469 (PECB, 1996).

contract in the absence of viable grievance arbitration machinery. Under City of Yakima, Decision 3564-A (PECB, 1990), such contract interpretations will be deferred to arbitration if the parties' contract contains provisions for final and binding arbitration of grievances and there are no procedural impediments to arbitration.

2. Where contractual provisions are at issue in unfair labor practice cases where a union is alleged to have breached its duty of fair representation by aligning itself in interest against one or more bargaining unit members, the Commission will interpret the contract. City of Redmond, Decision 886 (PECB, 1980); Elma School District, Decision 1349 (EDUC, 1982).

The issue concerning the work schedule of the newly-hired police officer in Fircrest does not fall within of those categories. These parties have clearly negotiated contract language concerning hours of work. Whether exceptions to the 10-hour work day were agreed upon, and whether the negotiated management rights clause preserved for the employer a right to change the work day in the manner at issue here, are issues of contract enforcement and interpretation. The complainant's charge concerning this issue must be dismissed.

FINDINGS OF FACT

1. The City of Fircrest is a public employer within the meaning of RCW 41.56.030(1). The employer's Chief of Police is James Kenoyer.

2. The Fircrest Police Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of approximately seven commissioned law enforcement officers holding the ranks of police officer and sergeant. The presidents of the union during the period applicable to these cases have been James Barrett and Pete Joyce.

3. The parties' bargaining relationship has existed since 1994, and the parties signed their first collective bargaining agreement on October 12, 1995. That agreement specified that the "current" work schedule for police officers consisted of 10-hour work days, and rotation of shifts every 56 days. The management rights article of the collective bargaining agreement includes mention of assignment of work hours and changes of work schedules.

4. On September 29, 1995, the employer gave notice to the union that it desired to bargain concerning assignment of a police investigator role to one of the bargaining unit members. Between October 3 and October 10, 1995, Kenoyer sent the union three drafts outlining the duties and selection process of the new assignment. The second and third drafts produced by the employer responded to questions and concerns raised by the union in meetings and correspondence on the issue. The parties did not reach agreement on the matter, and the employer proceeded to implement the investigator assignment in accordance with its last proposal to the union.

5. On December 6, 1995, the union sent the employer written objections to the implementation of the investigator assignment. The union particularly alleged that the hours of work established by the employer violated the parties' collective

bargaining agreement. So far as it appears from this record, the union pursued a grievance on this matter, but did not invoke the arbitration machinery of the parties' contract.

6. On April 10, 1996, the employer imposed a "performance plan" on bargaining unit employee Pete Joyce, listing incidents of inefficiency and poor time management. Among other corrective actions, Joyce was "placed on a shift when supervision is most immediately available" for a period of three months. As a result, Joyce was taken out of the shift rotation sequence and remained on the day shift for an additional period of 56 days. The union again alleged that the hours of work established by the employer violated the parties' collective bargaining agreement. So far as it appears from this record, the union pursued a grievance on this matter, but did not invoke the arbitration machinery of the parties' contract.

7. On July 17, 1996, the union sent the employer written objections referencing a conversation of July 21, 1996, and indicating that the union did not agree to an exemption of a newly-hired employee from the work schedule of 10-hour days during training and orientation. The union again alleged that the hours of work established by the employer violated the parties' collective bargaining agreement.

8. On August 10, 1996, the chief of police rejected the union's objections, stated that the parties were at impasse on the issue, and stated that the training schedule for a newly hired police officer would consist of five 8-hour days per week. So far as it appears from this record, the union has not pursued a grievance on this matter through the grievance and arbitration machinery of the parties' contract.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters under Chapter 41.56 RCW.

2. By implementing the "investigator" assignment only after giving notice to the union, meeting with the union to discuss the proposal, and then modifying its proposal several times in response to comments provided by the union, the employer has bargained in good faith in conformity with RCW 41.56.030(4), and has not committed an unfair labor practice under RCW 41.56.140(4).

3. Issues raised by the union in these proceedings concerning the employer's temporary change of the work schedule of bargaining unit employee Peter Joyce are matters controlled by the collective bargaining agreement between the parties, and are not a basis for finding an unfair labor practice under RCW 41.56.140.

4. Issues raised by the union in these proceedings concerning the employer's temporary change of the work schedule for a newly-hired bargaining unit employee for the purpose of training and orientation are matters controlled by the collective bargaining agreement between the parties, and are not a basis for finding an unfair labor practice under RCW 41.56.140.

ORDER

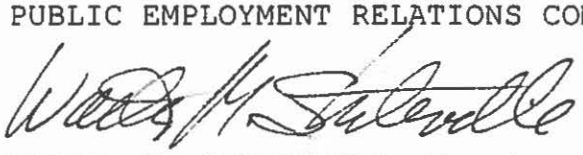
1. [Case 12344-U-96-2921] The complaint charging unfair labor practices filed by the Fircrest Police Guild is DISMISSED.

2. [Case 12702-U-96-3040] The complaint charging unfair labor practices filed by the Fircrest Police Guild is DISMISSED.

3. [Case 12703-U-96-3041] The complaint charging unfair labor practices filed by the Fircrest Police Guild is DISMISSED.

ISSUED at Olympia, Washington, this 3rd day of June, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.