

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MERCER ISLAND POLICE ASSOCIATION,)	
Complainant,)	CASE NO. 2458-U-79-355
vs.)	DECISION NO. 1026-B PECB
CITY OF MERCER ISLAND,)	
Respondent.)	DECISION AND ORDER OF COMMISSION REGARDING COMPLIANCE

Schweppe, Doolittle, Krug, Tausend and Beezer, by Lee M. Burkey, Attorney at Law, appeared on behalf of the union.

Bogle and Gates, by George E. Greer, Attorney at Law, appeared on behalf of the employer.

On May 5, 1982, the Public Employment Relations Commission (PERC) issued its Decision and Order,^{1/} in which the employer, City of Mercer Island, was found to have committed certain unfair labor practices in violation of RCW 41.56.140(1) and (4). The employer thereafter tendered purported compliance with the remedial order issued by the Commission. The employer and the union, Mercer Island Police Association, disagree as to whether the employer has complied with the Commission's order. A hearing on the compliance dispute was held before Alan R. Krebs, Hearing Officer, on January 22, 1982.

THE REMEDIAL ORDER

The Commission adopted the remedial order issued by Examiner Katrina I. Boedecker.^{2/} The facts underlying that order are set forth in detail in the Examiner's decision. That order required, in pertinent part, that the employer take the following affirmative actions to remedy certain unfair labor practices:

- "(a) Bargain collectively in good faith with the Mercer Island Police Association as the exclusive bargaining representative of the city's employees in the appropriate bargaining unit with respect to working

^{1/} Decision 1026-A (PECB, 1981)

^{2/} Decision 1026 (PECB, 1980)

conditions and specifically with respect to any decision to transfer unit work from bargaining unit employees to other employees.

- (b) Reinstate the employment practices in effect prior to November 13, 1979, by reestablishing the position of "Police Lieutenant" in the bargaining unit.
- (c) Make whole employees Wallace Lee and Ed Reed by: offering them immediate and full reinstatement to the positions of police lieutenant without prejudice to their seniority rights or other privileges; eliminating any reference to their demotion from any and all personnel files; reimbursing them for any loss in pay and benefits they might have suffered because of their demotions by paying to each the sum of money equal to that which he would normally have earned or received as a lieutenant from date of his actual demotion to the effective date of his unconditional offer of reinstatement made pursuant to this order, less any earnings he may have received during said period. Such remedy shall be subject to computation and payment of interest as provided by WAC 391-30-556."

The union contends that the employer has not complied with these portions of the Commission's order. It concedes that the employer has complied with all other aspects of the order.^{3/} We are called upon in this proceeding to explain what we meant by our earlier order.

THE TENDER OF COMPLIANCE

Reed formerly supervised the Police Operations Division of the Department of Public Safety, while Lee had been in charge of the Administration and Services Division of that department. Following Reed's unlawful demotion, his duties were assigned to Ronald Green, who was given the newly created job title of "Deputy Chief/Assistant Director - Police Operations Division". Similarly, Lee's duties had been assigned to Phillip Parsons, who has given the newly created job title of "Deputy Chief/Assistant Director - Administrative Services Division". Green and Parsons were given two additional duties which had not been previously assigned to either Reed or

^{3/} At the hearing, the union first argued that the employer had failed to comply with the portion of the order which required it to eliminate references in its personnel files to the demotions. The parties indicated on the record that they would be able to negotiate a solution to that controversy, and that it would be the obligation of the union to notify the Hearing Officer, by the time the transcript of the compliance hearing was available, if there was not settlement of that issue. Nothing further was heard from the union. It is therefore assumed that the employer has complied to the satisfaction of the union with the requirements of the order concerning personnel files.

Lee. The job descriptions for the newly created positions list the additional duties as follows:

- "1. Participate in the development and implementation of labor relations policy.
2. May participate in labor negotiations on behalf of the city."

Effective August 15, 1981, the employer restored both Edward Reed and Wallace Lee to the rank of lieutenant, and made them whole as required by section 2(c) of the order. However, the lieutenant positions to which they were restored were considerably different from the positions they held prior to their unlawful demotions. Reed and Lee did not regain their former duties, and the deputy chiefs continued to perform those responsibilities. Instead, Reed and Lee were assigned to other duties, which the employer alleges are similar to their former duties and are commensurate with the rank of lieutenant.

Reed's pre-demotion duties as lieutenant in charge of the administration and services division encompassed both the police and fire arms of the department. He was in charge of the communications center, building management, the compilation, storage and retrieval of records including personnel records, and the storage and retrieval of evidence and found property. He supervised nine employees and was responsible for the preparation of the budget for his division. Upon his reinstatement to the rank of lieutenant, Reed was assigned, on an ad hoc basis, to research projects and problems within the department. He has since conducted studies on marine patrol services, a model harbor code, a bail schedule booklet and on fatalities among young people in the city. Reed testified that between the time of his reinstatement and December, 1981, he had spent less than fifty hours on these studies and generally had little to do. Reed continued to prepare bulletins for the police officers on legal developments, as he had done for years dating back to the time he had been a patrol officer in the department. Between February and November of 1981, Reed prepared the work schedules for patrolmen, a task previously performed by sergeants in the department. With the exception of those shift assignment responsibilities, Reed no longer had any direct supervisory responsibilities following his reinstatement as a lieutenant. He now reports to deputy chief Green.

Lee's pre-demotion duties as lieutenant in charge of the police operations division gave him budgetary and supervisory responsibilities for 21 or 22 employees involved in police patrol and detective activities. While working under the unlawful demotion, Lee was assigned as the sergeant in charge of the detective section and carried a small investigation case load. Upon his reinstatement to the rank of lieutenant, Lee continued with the same duties in the detective section. In addition, he was given responsibility for the

supervision of a sergeant whose principal responsibilities were in the areas of crime prevention, criminal intelligence and the conduct of an explorer scout program. Lee's budgetary responsibilities are now limited to the areas within his supervisory responsibility. Lee also reports to deputy chief Green.

DISCUSSION:

We conclude that the employer has not complied with our order. While the employer has re-established the position of "police lieutenant" in the bargaining unit and has complied with various other aspects of our order, it has not reinstated "the employment practices in effect prior to November 13, 1979". We explained the intention of our order in the accompanying decision, where we said:

"It was entirely inappropriate for the Respondent, having stipulated to inclusion of the lieutenant positions in a bargaining unit, to summarily restructure its organization to effectively skim off this same work without so much as a tip of the hat to the complainant union."

In order to rectify this unlawful evasion of the employer's bargaining responsibility, we explained the intent of our remedial order as follows:

"A return to the status quo ante accompanied by the obligation to negotiate about the decision to abolish the positions at issue properly recreated the situation as it existed when the city abolished the bargaining unit positions, and allows the affected employees' bargaining representative to fulfill its obligation to bargaining unit members."

A return to the status quo ante was required as a condition precedent to any bargaining regarding the employer's desire to assign bargaining unit work to personnel outside of the bargaining unit. "Status quo" is defined in Black's Law Dictionary (Revised Fourth Edition, West, 1968) as: "The existing state of things at any given date." As defined in the same dictionary, "ante" is Latin for "before". A return to the status quo ante in this situation means a return to the state of things as they existed before the employer committed the unfair labor practices.

The employer must restore to lieutenants Reed and Lee, or to their successors in function, the duties which Reed and Lee performed prior to their unlawful demotion. This will require that the employer reassign that work, taking it away from the deputy chiefs. The nature of the unfair labor practice was the failure of the employer to bargain with the union prior to transferring unit work to persons outside of the unit. We did not require that the employer make Reed and Lee lieutenants regardless of what their duties actually would be. We required more than a change of labels. Indeed, a mere change of rank

could not have remedied the unlawful skimming of the unit work. Lee's "reinstated" duties as lieutenant in charge of the detective division were in large part the same as the duties he had as a sergeant, and therefore had little or no effect on the scope of work of the bargaining unit. Reed's "reinstated" duties were very limited, and often insufficient to fully occupy his time. Additionally, the function of making such ad hoc studies had previously been performed by the employees of various ranks, and so added little or nothing to the scope of work of the bargaining unit. The work assignments made to Reed and Lee following their reinstatement as lieutenants do not satisfy the requirement of the order that the scope of bargaining unit work be restored to the status quo ante.

As the employer observes in its brief in this compliance proceeding, the order did not require that Reed and Lee be elevated to the rank of deputy chief. That would not be a return to the status quo ante regarding the employer's employment practices. The deputy chief positions were not a part of the state of things as they existed prior to the unfair labor practice violation.

The employer cites Michigan LMB v. Marr, 1 PBC para. 10, 205 (Mich. Ct. Appeals, 1970). In that case, an illegally discharged deputy sheriff had been reinstated to a job of jail "turnkey" even though the deputy had been a patrol officer prior to his unlawful discharge. The Michigan Court of Appeals overturned a decision of the Labor Mediation Board which held that the employer's offer of reinstatement was not to a substantially equivalent position. That case is distinguishable on multiple grounds. First, the deputy involved there was reinstated to a position which had pre-existed his discharge and which had traditionally been performed by deputy sheriffs. The second and crucial difference is there was no issue in that case concerning the transfer of bargaining unit work.

The employer asserts that it should not be precluded from assigning new duties to Reed and Lee upon their reinstatement to the rank of lieutenant, since they would still be performing lieutenant duties and since there have been a number of occasions over the years when duties have been added to or removed from the scope of responsibilities of the lieutenant positions. While certain of the duties assigned to Reed and Lee after their reinstatement are related in some manner to certain of their pre-demotion lieutenant positions, we conclude that the new positions are entirely separate positions. The duties of the pre-demotion lieutenant positions have, by and large, been transferred to and remain with the deputy chiefs. The employer's tender of compliance has done nothing to remedy that unlawful transfer of bargaining unit work.

In Interurban Gas Corp., 149 NLRB 576 (1964), the NLRB held that an employer's offer of reinstatement to do odd jobs at the same rate of pay earned by a dischargee as a driver-salesman prior to discharge was not

sufficient to satisfy a Board order requiring reinstatement of the employee to his former job or to a substantially equivalent job. The situation at hand is similar, particularly with respect to Reed, who was in effect given odd jobs to perform following his reinstatement as a lieutenant.

An alternative argument made by the city suggests that it earlier had the concurrence of the union for the compliance which has been tendered. As support for its position, the employer relies on a conversation between Director Deveny and the president of the union, Sergeant Elsoe. Deveny testified that, in July, 1981, he informed Sergeant Elsoe of his tentative plans for the creation of new lieutenant positions with new duties. Elsoe responded that he had no authority to approve on behalf of the union. Elsoe's failure to formally object to the proposed assignment of duties does not relieve the city from its obligation to comply with the order of this Commission. Elsoe did not have any real or apparent authority to waive or set aside that order.

Any inconvenience to or burden on the City of Mercer Island resulting from the removal from the job duties of the deputy chiefs of the duties unlawfully transferred to the deputy chiefs on and after November 13, 1979 has been caused by its own actions in violation of RCW 41.56.140(1) and (4), and neither the bargaining unit represented by the Mercer Island Police Association nor the two individuals involved should be adversely affected.

The union urges that the employer's failure to comply with the order should result in an award of attorneys fees to the union. We do not agree. An award of attorney's fees may be appropriate as part of a remedial order made pursuant to RCW 41.56.160, where it is necessary to make the order effective and where the defenses to the unfair labor practice complaint are frivolous or without any merit. Lewis County v. PERC, 31 Wa.App. 853 (Division II, 1982). In view of the withdrawal by the employer of its petition for judicial review in this matter, and in view of the measure of compliance already made by the employer and accepted by the union, and considering the substantial arguments made in this compliance proceeding, we do not find it appropriate or necessary to award attorney's fees.

SUPPLEMENTAL FINDINGS OF FACT

1. The City of Mercer Island is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1).
2. Mercer Island Police Association is a bargaining representative within the meaning of RCW 41.56.030(3).
3. On May 5, 1981, the Public Employment Relations Commission issued its Decision No. 1026-A in the captioned matter, wherein it was concluded

that the City of Mercer Island had engaged in certain unfair labor practices. Said decision contained a remedial order which required, inter alia, that the City of Mercer Island "bargain collectively" with Mercer Island Police Association, pursuant to RCW 41.56.030(4) and RCW 41.56.140(4) "with respect to any decision to transfer unit work from bargaining unit employees to other employees" and also required that the City of Mercer Island reinstate "the employment practices in effect prior to November 13, 1979", by re-establishing the position of Police Lieutenant in the bargaining unit. The order made provision for the reinstatement of Wallace Lee and Ed Reed to the position of police lieutenant.

4. Effective August 15, 1981, the City of Mercer Island created two new positions at the rank of police lieutenant, and assigned Wallace Lee and Ed Reed to those positions. The positions so created and filled are separate and distinct from the lieutenant positions held by Lee and Reed prior to November 13, 1979. In particular, the duties performed by Lee and Reed as police lieutenants prior to November 13, 1979 have been, and continue to be, incorporated into two deputy chief positions created on or after November 13, 1979. The duties assigned to Lee and Reed in the newly created positions of police lieutenant were performed prior to November 13, 1979 by employees holding various ranks within the police department.
5. The tender of compliance made by the City of Mercer Island does not reinstate to the bargaining unit represented by Mercer Island Police Association the full scope of bargaining unit work in effect prior to November 13, 1979.

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.
2. The City of Mercer Island has failed to comply in all respects with the order of the Public Employment Relations Commission contained in its Decision No. 1026-A, dated May 5, 1981.

SUPPLEMENTAL ORDER


1. The City of Mercer Island, in order to fully comply with the order of the Public Employment Relations Commission contained in its Decision No. 1026-A, shall immediately delete from the duties of positions entitled deputy chief and simultaneously restore to the police lieutenant

positions held by Wallace Lee and Ed Reed or their successors, all of the duties assigned to Lee and Reed prior to November 13, 1979.

2. The City of Mercer Island shall notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith.

Issued at Olympia, Washington, this 13th day of December, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANE R. WILKINSON, Chairman



MARK C. ENDRESEN, Commissioner