City of Wenatchee, Decision 6517 (PECB 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WENATCHEE POLICE GUILD,	)	
	)	
Complainant,	)	CASE 13505-U-97-3298
	)	
vs.	)	DECISION 6517 - PECB
	)	
CITY OF WENATCHEE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

Cline & Emmal, by Sydney D. Vinnedge, Attorney at Law, appeared on behalf of the complainant.

Eileen M. Lawrence, Attorney at Law, appeared on behalf of the respondent.

On October 30, 1997, the Wenatchee Police Guild (union) filed a complaint with the Public Employment Relations Commission under Chapter 391-45 WAC, charging the City of Wenatchee had committed unfair labor practices in violation of RCW 41.56.140. A hearing was held July 15, 1998, in Wenatchee before Examiner Pamela G. Bradburn. The file closed on September 16, 1998, with receipt of both parties' briefs.

The preliminary ruling issued under WAC 391-45-110 found a cause of action to exist on allegations of:

> The employer's unilateral termination of a past practice of making light duty available for temporarily disabled officers, and its refusal to consider interim measures for handling light duty requests while negotiating a new policy.

Though the employer has raised legitimate concerns, I find it cannot lawfully change the light duty policy without giving prior

notice to, and bargaining to agreement with, the union representing these uniformed employees, whether through bilateral negotiations or interest arbitration. In addition, the two employees harmed by the unilateral change are made whole.

PROCEDURAL BACKGROUND

Six weeks before the thrice-rescheduled hearing in this case, the employer filed a request for deferral to arbitration.[1] The employer argued deferral was appropriate under City of Yakima, Decision 3564-A (PECB, 1991), because the management rights clause and language on light duty protected the employer's discretion. I denied the request for deferral the day after I received it, for reasons explained below, and assured the employer it could argue the collective bargaining agreement language as an affirmative defense.

BRIEF FACTUAL BACKGROUND

The union has represented the employer's police officers and sergeants since at least 1978. This bargaining unit is eligible for interest arbitration under RCW 41.56.030(7) because Wenatchee's population was 24,960 as of April 1, 1996 (Office of Financial Management report).

"Light duty" is shorthand for a situation where an employee who is temporarily incapable of performing full duties is permitted to come to work and perform duties within her or his temporarily reduced capabilities, whether they are a subset of normal duties or

---

[1] These documents can be filed at the Examiner's office, avoiding the week delay that occurred here. See, WAC 391-08-120(1)(c) and 391-45-130.

are different duties. The employee on light duty draws a salary rather than using sick leave; the employer benefits from the work rather than receiving nothing useful, as would be the case if the employee stayed home and drew sick leave.

The evidence established the parties have had a light duty policy since at least 1982, when a newly hired officer broke his arm during training at the police Academy, then worked four to six weeks of light duty in the jail after partially recovering.

The following contract language has appeared in at least the last three collective bargaining agreements covering 1993 to the present:

> ARTICLE 14. INDUSTRIAL INSURANCE COVERAGE
>
> ...
>
> 14.4 Officers on disability who are (1) released by their physician to perform light-duty assignments, and (2) able to perform a needed light-duty function in the Police Department are encouraged to do so.

The employer's concerns about the light duty practice arose when Officer Jill Shaw asked whether she would receive light duty if she and her husband decided to have another child. Captain Murray said she could work, or draw disability if a doctor deemed her unable to perform her patrol duties, but she wouldn't get light duty because a male officer's request for nine months light duty wouldn't be feasible. Murray told the union he would research the issue of light duty during pregnancy, and gave a draft policy to the union some six to eight months later (after this unfair labor practice complaint was filed).

The September 1997 denial of light duty work to Officer Guy Miner triggered this complaint. After surgery, Miner asked his immediate

superior about future light duty work. Sergeant Marty Bryan relayed the question in a meeting with the captains and Chief Ken Badgley; Captain Boles said it wouldn't be a problem. Bryan returned from vacation to discover Captain Murray had denied Miner's request.

Officer Kim Sherwood requested light duty in December 1997 and April 1998 while recovering from treatments to her vocal cords that temporarily affected her voice. Murray denied light duty both times. She didn't request light duty for her July 1998 treatment because of the earlier denials.

DECISION AND ANALYSIS

Jurisdictional Issues

The employer makes several challenges to the Commission's jurisdiction over this complaint. None of them succeed.

Contract Defense Doesn't Destroy Jurisdiction -
The employer reasons the dispute must fall outside the Commission's jurisdiction because three contract clauses are involved in this case and the statute doesn't make a breach of a collective bargaining agreement an unfair labor practice.

It is true the Commission declared the legislature had "not delegated to the Commission authority to determine violation of contract allegations as unfair labor practices under Chapter 41.56 RCW." City of Walla Walla, Decision 104 (PECB, 1976), at page PD-52 of the Public Employment Relations Reporter. But Walla Walla's language and facts don't stretch as far as the employer would like.

In Walla Walla, two bargaining unit members asked for paid leave to attend a union meeting out of town, as permitted by their collective bargaining agreement; the employer refused because it cost too much. The complaint recited the breach of contract but lacked any explanation of how this employer action violated employee rights granted by Chapter 41.56 RCW. It was dismissed because it was a bare claim of contract violation without any accompanying claim of statutory violation.

Here the respondent brings contract language into this case, not the complainant. The complaint alleges the employer refused to bargain by unilaterally halting a longstanding past practice of granting light duty during periods of temporary disability; the employer claimed, in its request for deferral, that the Miner denial was protected by collective bargaining agreement language. These facts simply do not fit the Walla Walla precedent.

The employer cites Olympia School District, Decision 1366 (PECB, 1982), to support its contention, but without success. The complaint in Olympia School District was dismissed, but not for lack of jurisdiction. The Examiner found the union had waived its rights by failing to request bargaining over a unilateral change to a mandatory subject of bargaining, and a midterm contract modification. Olympia School District shows that incidents allegedly violating Chapter 41.56 RCW may also seem to violate a collective bargaining agreement. During those first few days when the facts are still emerging, it may be wise for complainants to file both an unfair labor practice complaint and a grievance, then wait to see which forum is most appropriate. See, City of Yakima, Decision 3564 (PECB, 1991), at page 15.

Deferral Doesn't Destroy Jurisdiction -

The employer makes the following argument about deferral in its post-hearing brief:

> In the City's motion for deferral, the PERC decision in City of Yakima [Decision 3564-A (PECB, 1991)] was cited to support deferral of the case to an arbitrator. The opinion in Yakima deals with a different fundamental issue from this case. In Yakima it was unclear if the collective bargaining agreement address[ed] the issue in dispute. Interpreting the collective bargaining agreement was a prerequisite to the determination of the failure to bargain charge. When the meaning of the collective bargaining agreement is unclear, PERC has jurisdiction to interpret the contract only to the extent necessary to determine if the contract addressed the conduct complained of. . . . PERC would have jurisdiction over the matter only if the arbitrator found the activity was neither protected [n]or prohibited under the CBA.
>
> ...
> To summerize [sic], even if there is a dispute about whether the collective bargaining agreement addresses the action in dispute, PERC has declined to interpret the collective bargaining agreement in an effort to resolve the dispute. Once the contract language is determined central to the dispute, the PERC proceeding is subject to dismissal. PERC's authority is limited to situations where the arbitrator rules the conduct in question was neither protected [n]or prohibited under the CBA (citations omitted).

It seems to me the employer reads the Commission's deferral policy as establishing a lack of jurisdiction over all matters involving contract interpretation, somewhat akin to its reading of Walla Walla. This is inaccurate.

The Commission **chooses** to accommodate its statutory responsibilities over unfair labor practice complaints with the statutory deference to arbitration in RCW 41.58.020(4) by **voluntarily suspending** the processing of complaints alleging unilateral changes that are refusals to bargain. This permits arbitrators to decide the respondents' contract defenses **so long as** the resulting delay

assists the Commission in preventing and remedying unfair labor practices. City of Yakima, Decision 3564-A (PECB, 1991). This temporary suspension of processing doesn't deprive the Commission of continuing jurisdiction. Yakima states:

> The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to **assist** this Commission **in evaluating** a "waiver by contract" defense which has been or may be asserted in the unfair labor practice case.
>
> ...
> Rather than issuing an order of dismissal and later having to reopen the case [which the National Labor Relations Board does], our practice at least since Stevens County, supra, has been to **keep** "deferred" unfair labor practice cases **open on the agency's docket** while the related grievance is processed before an arbitrator.

Decision 3564-A at pages 11, 16 (emphasis by **bold** supplied).

If the existence of a contract language defense or the act of deferral deprived the Commission of continuing jurisdiction over a complaint, an arbitrator's award interpreting the language wouldn't assist the Commission at all. How, then, would the goal of the Commission's deferral policy be achieved? In addition, Yakima states deferral is "a discretionary, rather than mandatory, policy". Decision 3564-A at page 11.

Deferral Properly Denied

The employer hasn't persuaded me I should have granted the request for deferral it made six weeks before a hearing that had already been rescheduled three times. Based on two-score years of labor law experience, I estimate it takes a minimum of five months to get a grievance arbitration award, and much longer if the arbitrator or counsel have full calendars. If I had granted the deferral

request, the arbitration award would have been issued in November 1998, at the earliest. Awards don't always dispose of deferred cases, since some arbitrators decide the contracts neither prohibit nor protect the challenged actions (e.g., the discussion of the award in Seattle School District, Decision 5733-B (PECB, 1998), at pages 7, 16-17). If an unfair labor practice hearing were required, at least seven more months would be required before decision.

Granting the employer's request for deferral would have potentially delayed the decision on the complaint for two years or more after Miner's request was denied. The Commission's deferral policy asks whether the assistance it receives from an arbitrator's interpretation of the contract justifies the delay in processing the complaint. It's hard for me to understand how delaying this decision half a year or more would help me make it, given that the employer's contract defenses aren't novel.

Merits of the Case

Relevant Legal Standard -

The Commission recently affirmed its historical approach to unilateral change/refusal to bargain complaints filed by units ineligible for interest arbitration. If, on balance, a topic impacts wages, hours, or working conditions more deeply than it affects managerial prerogatives, it is a mandatory subject of bargaining. A public employer is bound to maintain the status quo on a mandatory subject of bargaining until it has given the union representing its employees advance notice and an opportunity to bargain. Notice and bargaining are excused if the union has clearly waived its bargaining rights in the contract; bargaining is excused if the union fails to request negotiations after receiving timely notice. However, a union presented with an implemented

change, a fait accompli, need not request bargaining. Seattle School District, supra, at pages 9-11, 15-19.

The only difference when the unit consists of uniformed personnel is that agreement has to be reached through negotiations or interest arbitration before the employer can lawfully implement a change. City of Seattle, Decision 3051-A (PECB, 1989)(affirming Examiner's order that city proceed to interest arbitration if it couldn't persuade the two interest arbitration eligible bargaining units to agree); City of Bremerton, Decision 2733-A (PECB, 1987)(Commission notes "the unilateral change actually implemented by the city only compounded its violation of its obligations under the law" to the police union).

Application of Law to Facts -
The evidence in this case establishes that changes to the parties' light duty policy are a mandatory subject of bargaining, that the union did not waive its rights by contract or by its handling of two incidents beyond the scope of the parties' policy, and that the employer presented the union with a fait accompli which mooted any request for bargaining. The employer has unlawfully refused to bargain.

Mandatory Subject - The union contends light duty is a mandatory subject of bargaining; the employer doesn't address the topic. Whether a light duty policy can be changed without bargaining is a question of first impression for this agency. I conclude changes to the light duty policy are a mandatory subject of bargaining.[2]

Wages, hours, and working conditions are included in the topics over which employers and unions must bargain collectively (mandato-

---

[2] The National Labor Relations Board has reached the same conclusion. Jones Dairy Farm, 925 NLRB No. 20, 131 LRRM 1497 (1989).

ry subjects). RCW 41.56.030(4). The Commission has interpreted these words broadly in accordance with the remedial nature of Chapter 41.56 RCW. IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978). Two prior decisions provide helpful guidance in deciding whether changes to the light duty policy is a mandatory subject of bargaining in this case.

- Seattle School District, Decision 5542-C (PECB, 1997), says that keeping employees away from their worksite by putting them on paid administrative leave clearly impacts their hours and working conditions.

- The Commission has also said "paid leaves ... are alternative forms of wages" and "the use of accumulated leave rights is closely related to the existence of those rights." City of Yakima, Decision 3564-A at pages 20-21.

Thus, precedent suggests that changes to a light duty policy could be a mandatory subject because the policy impacts whether employees can come to work rather than stay home, and affects their use of accumulated sick leave.

The Supreme Court has directed the Commission to engage in a case by case determination when asked to decide whether a particular topic is a mandatory subject of bargaining. The first step in the analysis is asking whether the topic closely impacts employees' wages, hours, or working conditions. IAFF, Local 1052 v. PERC, 113 Wn.2d 197 (1989). Employees permitted to work light duty were able to draw a salary, while the few employees who were denied light duty used sick leave to maintain their pay or lost employment. Being required to use sick leave has an additional impact on compensation because the parties have bargained a sick leave cashout on retirement or resignation in good standing. Thus, the scope of the light duty policy directly impacts the amount of these

bargaining unit members' sick leave accumulations while injured or temporarily unable to perform their full duties, their continued employment if sick leave is exhausted, and their compensation at retirement or resignation in good standing.

The next step in the analysis is to decide whether changes to a light duty policy are a managerial prerogative; if so, I must balance whether the employer's interests in maintaining its managerial prerogatives outweigh the employees' interest in maintaining their working conditions. Washington Public Power Supply System, Decision 6058-A (PECB, 1998), at pages 16-17. Examples of topics determined to be managerial prerogatives are: elimination of a non-bargaining unit nurse position (City of Tacoma, Decision 4740(PECB, 1994); whether kindergarten will be full or half-day (Wenatchee School District, Decision 3240-A (PECB, 1990); number of lieutenant positions budgeted (City of Bellevue, Decision 3343-A (PECB, 1990), and the decision to annex additional territory (City of Kelso, Decision 2633-A (PECB, 1988).

The employer's brief is silent on this issue. Employer witnesses described the following concerns as proof that light duty work wasn't "needed" in contract terms, but I am considering it here because it is the only evidence on the employer's need for total discretion on types of light duty work. The concerns include: complaints by non-bargaining unit department employees that they were impeded, rather than helped, by officers doing traditional light duty work; doubt that the traditional light duty work really needed to be done; constraints due to rising demands for services outstripping budget growth, and an observation that one employee on light duty wasn't kept busy. These types of concern don't go to core entrepreneurial issues and aren't sufficient to outweigh the employees' concerns for continued pay and employment.

Employer Changed Light Duty Policy - Concluding that changes to a light duty policy must be negotiated does not end the inquiry; a policy must exist and it must have been changed, not just reiterated or misapplied in one instance. King County, Decision 5810-A (PECB, 1997) at page 10. The union is correct when it argues the evidence establishes the existence of a light duty policy which the employer changed unilaterally.

Evidence of Policy - These parties have a clearly defined light duty policy, established both by the contract and by their actions in applying this language. Nineteen requests for light duty between 1982 and the denial of Miner's request were adequately supported to be considered evidence of the policy. Some of the other requests are excluded for the following reasons:

1. Incidents after the Miner denial are excluded for this purpose because they couldn't impact the parameters of the light duty policy in place when Miner made his request;
2. The evidence on the following injuries was too sketchy to help establish a pattern or practice: Greg Mills in 1995, Homer Ramirez in April-May 1995 and September-October, 1996, Shawndra Fulton in June 1997, and Tracy Gordon in August 1997; and
3. Incidents mentioned in the employer's list but not confirmed through documents or testimony are excluded because of defects in that list. It excludes incidents before 1995 although the practice began at least in 1982, it incorrectly lists two admitted light duty incidents, it may be incomplete since it is drawn from employer records although many light duty requests were made and granted verbally without any documentation, and its details about at least four incidents were contradicted by testimony.

The 19 clearly established and relevant requests for light duty[3] covered injuries occurring from early 1982 until Miner's request was denied in September 1997. Requests were granted for time periods ranging from one day to two months. Officers typically asked their sergeants about light duty. Sergeants always spoke to the appropriate captain in advance, except when Sergeant Ken Britt granted light duty to Officer Paul Hughes for one weekend day when the captain wasn't at work. Sergeants regarded their communication with superiors as giving information rather than requesting permission, because light duty had almost always been granted.

The employer argues that no binding past practice is created by bargaining unit sergeants granting light duty to fellow unit members. This defense could succeed only if the employer established the captains and chief were ignorant of, and weren't put on notice of, the practice. However, management witnesses testified about their long-term understanding of the practice and didn't offer evidence that sergeants had been instructed to handle requests in a different way.

The employer further argues the union waived its right to challenge the denial of Miner's request because it didn't oppose earlier denials. Only two light duty requests were denied before Miner's was; later denials aren't relevant. Because these two requests were made for significantly longer time periods than those described above, they fall into a different category which is irrelevant to this dispute.

In 1993, Officer Bruce Gerber was granted light duty after a back injury. When his physician warned Gerber he risked a fifty percent

---

[3] These are: Bryan 1982; Hughes 1987; Adcock 1990; Crown 1992; Gerber 1993; Adcock 1994; Crown 1995; Manke 1995; Adcock 1995; Ramirez 1995; Smith 1995; Huffer 1995; Mills 1996; McCormick 1996; Shaw 1997; Erhardt 1997; Hughes 1997; Perez 1997, and Miner 1997.

chance of paralysis if he reinjured his back, he asked for permanent light duty. Captain Murray testified the request was denied because no permanent light duty position existed in the department and there wasn't enough light duty work to keep an officer busy full time. Gerber is no longer employed by Wenatchee.

The second denial occurred a couple of months before Miner's request. While Officer Robert Perez was already off work, he and his doctor requested at least six months and up to two years of light duty. The request was denied, Perez rejected the union's help, and he is no longer employed by Wenatchee.

The situations of Gerber and Perez differ significantly from the pattern established by the 19 incidents discussed above: the time periods Gerber and Perez requested are much longer than the pattern, and their circumstances don't give the employer the assurance a fully recovered employee would soon return to regular duty.

Traditional Light Duty Tasks - Sergeants on light duty spent their time on the administrative aspects of their jobs; no one presented evidence on what proportion those duties are of their regular responsibilities.

Officers on light duty have done a variety of tasks (traditional light duty), including:

1. Helping non-bargaining unit clerical employees with paperwork and filing;
2. Taking phone calls for dispatchers and sending officers to incidents;
3. Handling complaints and inquiries from people who phoned or visited the department;
4. Updating addresses and seeking identifying information on persons for whom there were outstanding warrants;

5. Preparing fingerprint cards for mailing to the state and the FBI;

6. Helping patrol officers by taking statements from multiple victims or suspects;

7. Attending training sessions;

8. Helping in the property room, and

9. Doing shrub patrol in an unmarked car.[4]

The employer argues past behavior should be ignored and only the contract should define the light duty policy. It asserts the present situation doesn't fit the two circumstances in which it believes past practices are relevant: to establish a fundamental condition of employment not mentioned in the contract, and to determine the post-expiration working conditions an employer must maintain. Essentially, the employer asserts the contract reference to light duty precludes consideration of the parties' actual behavior while applying the policy. This is incorrect.

The Commission has long adhered to the Supreme Court's adoption of the "objective manifestation" theory of contracts, which "imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts." WPPSS, supra, at page 23. What better objective manifestation of parties' understanding of their contract language than their actual use of it? The evidence describing the granting and denying of light duty provides a gloss that adds to a correct understanding of the contract language.[5]

---

[4] No one explained this bit of police jargon.

[5] The employer cites cases involving grievance arbitration; the past practice concept may be applied differently by arbitrators than in unfair labor practice cases. See, City of Burlington, Decision 5840 (PECB, 1997) at page 8. The employer also cites Washington State Ferry System, Decision 1324 (MRNE, 1982), which is an arbitration award by a Commission staff member under a statute that has since been removed from the Commission's jurisdiction.

Light Duty Policy Changed - The union is correct when it argues the employer changed the parties' light duty practice. The evidence discussed above establishes that officers temporarily unable to perform all their duties, but expected to return to full duty within two months, have been permitted to help out in the office by doing traditional light duty tasks. Officer Miner requested light duty from the time his doctor partially released him until he was fully released. His request clearly fell within the parameters of the parties' light duty practice. Miner had been cleared by his doctor for light duty. There is no evidence indicating how long Miner's doctor expected him to stay on light duty, so I infer Miner's projected light duty fell within the period (one day but no more than two months) established by the practice. Union witnesses testified traditional light duty tasks were always available.

The employer denied Miner's request because there was no light duty work of the type it wanted done: researching and gathering data to support a grant proposal, doing a statistical review on an issue, or participating in an instructor-training course (new light duty tasks). Because the employer offered no evidence on how often the new light duty tasks occurred, and because no new light duty tasks were available for Miner though traditional light duty tasks were, I infer the new light duty tasks arise less frequently than the traditional tasks. This is a significant change in both the type and frequency of light duty tasks that necessarily impacts how often employees would qualify to work light duty.

At hearing, the union raised the denials of Officer Kim Sherwood's requests for light duty. There was no surprise although the complaint predated Sherwood's requests. The union's opening statement included a request that Sherwood be made whole, the employer's opening mentioned evidence about Sherwood's medical condition, and Sherwood testified about both requests without

objection. In these circumstances, the Commission has accepted the implied amendment, Kennewick School District, Decision 5632-A (PECB, 1996). To make the situation even clearer, a party could file an amended complaint adding the events occurring after the first filing, or move at the close of the case to conform the original complaint to the evidence.

The union persuasively argues the denial of Officer Kim Sherwood's requests for light duty show the employer changed the light duty policy. After the quality/condition of Sherwood's voice had been mentioned in performance evaluations, she saw a doctor and was diagnosed with a vocal cord condition (spasmodic dysphonia). When she requested light duty in December 1997, she explained she might need five to ten days off because the botulin injections could affect the volume of her voice if the doctor had difficulty finding the correct dosage level. The second request, made in April 1998, was for a fixed period of five days.

Both Sherwood requests were denied by her sergeant, who relayed Captain Murray's statement there was no light duty whatsoever. Murray denied he made that statement, but his denial is worth little because he just answered a leading question. See, Lyle School District, Decision 2736-A (PECB, 1988). Murray testified he was concerned the effect on Sherwood's voice would preclude her from doing traditional light duty work, but he didn't share his concerns about Sherwood's voice with anyone at the time, or ask her to get a doctor's release as he'd done with Miner. These two incidents don't help the employer. The fact that Murray thought Sherwood unable to perform traditional light duty tasks contradicts his claim that new types of light duty work were appropriate now.

If traditional light duty would have been good enough for Sherwood, why wasn't it good enough for Miner? And, since Murray asked Miner to produce a doctor's certificate, though Murray didn't claim any

concern about Miner's physical ability to do light duty, why didn't he ask Sherwood for a similar certificate if he actually had concerns?

The incidents involving Sherwood suggest to me the employer had, indeed, stopped granting all light duty requests. They also establish there was a genuine change in policy (King County, Decision 5810-A (PECB, 1997)) rather than an isolated variance affecting a single employee (King County, Decision 4258-A (PECB, 1994)).

Change Presented as Fait Accompli - The union contends the changed light duty policy was a fait accompli since it was presented without notice or bargaining to agreement. The evidence establishes the employer presented the union with a fait accompli, thus mooting the usual obligation to request bargaining. Seattle School District, Decision 5733-B at page 19-21.

The employer has not claimed it gave the union advance notice of its desire to change the light duty policy, and an opportunity to bargain to agreement or initiate interest arbitration. Murray did contact union officers about a pregnancy policy in response to Shaw's inquiry, but these are totally different fact situations.

Affirmative Defenses Fail -
The employer asserts several affirmative defenses, none of which prevail.

No Contractual Waiver - The employer argues the management rights clause of the contract waives the union's right to bargain over changes to the light duty policy. Again, the employer seeks to ignore the parties' behavior over the past 15 years.

The current contract and its two immediate predecessors include an identical management rights clause, section 4.1:

> Any and all rights concerned with the management and operation of the City are exclusively that of the City unless otherwise provided by the terms of this Agreement. The City has the authority to adopt rules for the operation of the City and conduct of its officers, provided such rules are not in conflict with the provisions of this Agreement or with applicable law. **The City has the right to** (among other actions) temporarily lay off officers; discipline or discharge officers for just cause; to **assign work and determine duties of officers;** to schedule hours of work, consistent with this agreement and collective bargaining obligations; to determine the number of personnel to be assigned duty at any time, and to perform all other functions not otherwise expressly limited by this Agreement (emphasis by **bold** indicates the phrase on which the employer relies).

Neither party offered bargaining history for this language. The party asserting a waiver has the burden of proving a contractual waiver of bargaining over changes to a particular subject was made knowingly and intentionally. WPPSS, supra, at pages 23-24. See, City of Anacortes, Decision 5668 (PECB, 1996), cited with approval in WPPSS, supra, at n. 19, for a demonstration of how stringently these requirements are applied.

There are two reasons the language this employer cites is not a waiver of bargaining rights over changes to the light duty policy. First, the words "assign work and determine duties of officers" encompass much more than changing a longstanding light duty policy. The lack of evidence the employer explained during negotiations that it understood these words as covering changes to the light duty policy is crucial, because the clause is too broad for the language to send the union clear and unmistakable signals of the employer's present interpretation.

Second, these management rights are retained "unless otherwise provided by the terms of this Agreement." Article 22.1 does provide otherwise, in relevant part:

> All terms and conditions of employment constituting mandatory subjects of bargaining not specifically reserved to management by Article 4 of this Agreement shall be continued at not less than the level in effect as of December 31, 1996.

Changing the long-standing light duty policy is a mandatory subject of bargaining which is not specifically reserved to management in Article 4. Therefore, the contract itself prohibits unilateral changes to the light duty policy during its 1997 - 1999 term. The employer fails to sustain its burden of proof on waiver.

The employer also argues the contractual light duty clause itself gives it the discretion to grant or deny light duty in particular situations. Section 14.4, in the Industrial Insurance article, provides:

> Officers on disability who are (1) released by their physician to perform light-duty assignments, and (2) able to perform a needed light-duty function in the Police Department are encouraged to do so.

The employer asserts this clause gives it discretion to decide whether light duty work is "needed", and that it has no obligation to create work for officers unable to perform their regular assigned duties. This contention disavows the whole concept of light duty, and begs the question. The issue here isn't whether the employer must have a light duty policy, but whether the employer can unilaterally change a policy it has agreed on and applied consistently for at least 15 years. Besides, the employer has admitted the traditional types of light duty work still exist;

it would prefer to use non-commissioned and lower paid employees to do the work. The type of work to be performed on light duty is so intricately tied to the availability of light duty that employer discretion to significantly change the type of work must be bargained.

No Agreement to Substitute Sick Leave Bank - The employer suggested it was less open-handed with light duty after agreeing to grant new employees 24 days of sick leave when they passed probation. The evidence doesn't bear out this claim.

The sick leave bank was triggered by Bryan's 1982 injury at the Police Academy and was added to the 1984-1986 contract. The employer offered no evidence it said during the negotiations that the bank would reduce the availability of light duty. In fact, 15 of the 19 adequately supported light duty requests were granted after 1984 and they fit within the pattern rather than changing it.

No Waiver by Inaction - The employer asserts the union's failure to grieve the Gerber and Perez denials waived its right to bargain over future changes to the light duty policy. As discussed above, Gerber and Perez are factually distinguishable from, and presented completely different issues than, the requests for light duty fitting within the policy.

Alternatively, the employer contends the Gerber and Perez denials gave the union notice that the light duty policy had been changed. Again, the employer incorrectly lumps Gerber and Perez with the incidents falling within the light duty policy. The employer also ignores the fact that its collective bargaining obligation to this interest arbitration eligible unit is to give advance notice of its desire to make a change.

Employer Refused to Bargain Changes - The employer contends it can't have refused to bargain over light duty because the results of the parties' bargaining on the subject appear in the collective bargaining agreement light duty clause. The employer misunderstands the refusal to bargain concept.

In unilateral change/refusal to bargain cases, the refusal to bargain arises from the employer's failure to fulfill its collective bargaining obligations to the union before acting on its own; thus, the unilateral act is the refusal to bargain. In the present case, the employer refused to bargain with the union when the employer changed the type of tasks it considered appropriate for light duty work without telling the union it wanted a change and without reaching agreement on the topic, through bargaining or arbitrating, before instituting any change.

Practice under the National Labor Relations Act is consistent and persuasive when the two statutes agree, as they do in establishing the employer unfair labor practice of refusing to bargain.[6] Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984).

Roberts' Dictionary of Industrial Relations (1971 ed.) defines "refusal to bargain" as:

> Findings made by the National Labor Relations Board under Sections 8(a)(5) or 8(b)(3) finding that either the employer or the union has not fulfilled collective bargaining requirements of the statute. What constitutes a refusal to bargain may depend upon specific circumstances or the total behavior of the union or the company.
>
> With more sophisticated behavior on the part of both labor and management, instances of refusal to bargain such as failure to sign an

---

[6] Compare RCW 41.56.140(4) to Section 8(a)(5) of the National Labor Relations Act.

> agreement to which both parties have agreed or where the employer has refused to meet for the purpose of discussing the terms of the contract after a union has been certified, very rarely occur at the present time. The Board is concerned about the relationships between the parties which are conducive to reaching a settlement and the establishment of a collective bargaining agreement. Behavior seeking to thwart such an accomplishment, whether by obvious or devious means, would be considered by the Board as indicative of a refusal to bargain.

Thus, the refusal to bargain lies in the employer's behavior in the present dispute over changes to the light duty policy, not in whether the employer negotiated language on light duty.

Conclusion on the Merits -

The evidence demonstrates the parties had established a practice of permitting employees to do light duty work after they were able to come to the office but had not yet been fully released for their customary duties. This light duty work consisted of assisting other department employees in the office with their own work and doing officers' tasks that weren't getting done in the normal course of affairs. The employer unilaterally changed this practice by denying light duty to two employees, although their circumstances qualified them for light duty under the parties' practice. It took this action without giving the union advance notice and bargaining with the union to agreement on revised light duty tasks. The union didn't waive its bargaining rights, either in the collective bargaining agreement or by its actions. By changing the established light duty policy, the employer has violated RCW 41.56.140(1) and (4).

Remedy

The union asks for reinstatement of the status quo ante, the usual order to cease and desist, and restoration of sick leave to all

bargaining unit members who had to use it because light duty was denied. The union has established a unilateral change/refusal to bargain case and the employer has failed to establish a defense. The union is entitled to a finding that the employer has unlawfully failed to bargain and to the customary order to post a notice and read it into the record.

Employees who have been harmed by the employer's violation are entitled to be made whole therefor. Miner's September 1997 request was flatly denied, and he should be made whole by restoration of the sick leave he used after the denial until returning to full duty. Because the employer premised its denials on Sherwood's inability to perform traditional light duty work, and has failed to prove that inability, I must conclude she could have performed. She should be made whole by restoration of the sick leave she took following her December 1997 and April 1998 treatments.

The union's brief lacks any reference to the complaint's request for an attorney fee award. In Seattle School District, supra, the Commission discusses at length the grounds upon which the extraordinary remedy of attorney fees is granted. Generally, respondents must demonstrate such resistance to their legal obligations by past history or frivolous arguments that an award of attorney fees is required to bring about compliance with the law and prevent additional violations. The present case is only the second in which this employer has violated the law by making a unilateral change and refusing to bargain. City of Wenatchee, Decision 2194 (PECB, 1985). There are no grounds to conclude this respondent violated its statutory obligations and advanced previously-rejected arguments through malice or stubborn resistance to its statutory duty. This case doesn't warrant an extraordinary remedy.

FINDINGS OF FACT

1. The City of Wenatchee is a public employer within the meaning of 41.56.030(1) and had a population of 24,960 in April 1996.

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

3. Deferral of this unfair labor practice case six weeks before the third amended hearing date was not justified, considering the delay it would likely cause and the lack of contract-based defenses novel to the Commission.

4. The City of Wenatchee and Wenatchee Police Guild have had a light duty policy since at least 1982. This policy permits officers or sergeants to return to work before they are able to perform their normal duties. Light duty for periods of one day to two months have been granted. Permanent light duty requests and requests for light duty lasting from six months up to two years present a different fact situation and do not affect the light duty policy.

5. Traditional light duty tasks include administrative aspects of their normal duties for sergeants, and for officers include helping non-bargaining unit employees with their duties, assisting officers by taking in-person and phone complaints or statements at the station, updating information to find persons with outstanding warrants, preparing fingerprint cards for submission to other law enforcement agencies, attending training, and doing shrub patrol in an unmarked car.

6. The light duty policy described in Findings of Fact 4 and 5 reduces employees' use of sick leave by permitting them to return to work before being fully ready for normal duties, allows them to stay employed if sick leave is exhausted, and preserves their accumulated sick leave for cashout at resignation or retirement. The light duty policy deeply impacts employees' pay and continued employment.

7. The City of Wenatchee changed the light duty policy to avoid complaints from non-bargaining unit employees, to have lower-paid employees do the work, and because it wasn't convinced the traditional light duty tasks needed to be done. These concerns do not impinge on core entrepreneurial issues and managerial prerogatives.

8. Because of the factors described in Findings of Fact 6 and 7, changes to the light duty policy described in Findings of Fact 4 and 5 are mandatory subjects of bargaining.

9. Without prior notice to Wenatchee Police Guild of a desire to change the light duty policy, and without achieving agreement through bargaining or interest arbitration, the City of Wenatchee denied Officer Guy Miner's September 1997 request for light duty and Officer Kim Sherwood's December 1997 and April 1998 requests for light duty. Each of these requests fell within the parameters of the light duty policy described in Findings of Fact 4 and 5.

10. The Wenatchee Police Guild had not waived its rights to bargain changes to the light duty policy through language in the collective bargaining agreement or by its actions or inaction.

11. Officers Guy Miner and Kim Sherwood had to use sick leave to maintain their salaries because their light duty requests were denied. They would not have used this sick leave if their light duty requests had been reviewed and granted under the unchanged traditional light duty policy.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The City of Wenatchee has committed unfair labor practices within the meaning of RCW 41.56.140(4) by changing the traditional light duty policy without first obtaining the agreement of Wenatchee Police Guild through bargaining or interest arbitration.

Based upon the foregoing findings of fact and conclusions of law, I make the following:

ORDER

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

1. CEASE AND DESIST from: changing the traditional light duty policy without first obtaining the agreement of Wenatchee Police Guild through bargaining or interest arbitration, and in any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

a. Rescind the changes it made to the traditional light duty policy.

b. Give Wenatchee Police Guild advance notice of any proposed changes to the traditional light duty policy and obtain the agreement of Wenatchee Police Guild through bargaining or interest arbitration to any changes to that policy.

c. Make Officer Guy Miner whole for any sick leave used as a result of the denial of his September 1997 request for light duty, and make Officer Kim Sherwood whole for any sick leave used as a result of the denial of her December 1997 and April 1998 requests for light duty.

d. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Read the notice attached hereto and marked "Appendix" aloud at the next public meeting of the City Council of the City of Wenatchee and append a copy thereof to the official minutes of said meeting.

f. Notify Wenatchee Police Guild, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide Wenatchee Police Guild with a signed copy of the notice required by the preceding paragraph.

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

Dated at Olympia, Washington on the 16th day of December, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Pamela G. Bradburn

PAMELA G. BRADBURN, 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.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL restore the status quo ante by reinstating the traditional light duty policy for the bargaining unit represented by Wenatchee Police Guild.

WE WILL NOT refuse to bargain with Wenatchee Police Guild by changing the traditional light duty policy without first obtaining agreement of Wenatchee Police Guild through bargaining or interest arbitration, or in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL restore sick leave used by Officer Guy Miner when his September 1997 request for light duty was denied.

WE WILL restore sick leave used by Officer Kim Sherwood when her December 1997 and April 1998 requests for light duty were denied.

WE WILL read this notice into the record of the next public meeting of the City Council, and append a copy thereof to the official minutes of such meeting.

DATED: _____

CITY OF WENATCHEE

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.