City of Mountlake Terrace, Decision 11605 (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF MOUNTLAKE TERRACE, Complainant, vs. MOUNTLAKE TERRACE POLICE GUILD, Respondent.	CASE 24640-U-12-6296 DECISION 11605 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Summit Law Group, by *Michael Bolasina,* Attorney at Law, for the employer.

Cline and Associates, by *Christopher Casillas* and *Kelly Turner*, Attorneys at Law, for the union.

On March 5, 2012, the City of Mountlake Terrace (employer) filed an unfair labor practice complaint against the Mountlake Terrace Police Guild (union). The employer alleged the union refused to bargain in violation of RCW 41.56.150(4) and (1), by its unilateral change and breach of its good faith bargaining obligations regarding consolidation of grievance arbitrations. A preliminary ruling was issued on March 12, 2012. On March 19, 2012, the union requested to defer the matter to arbitration. On March 26, 2012, Unfair Labor Practice Manager David Gedrose denied the union's deferral request. On April 2, 2012, the union filed an answer. On May 29, 2012, the union filed a motion for summary judgment. On June 12, 2012, the employer filed a response and cross motion for summary judgment. On June 20, 2012, the union filed a reply. On June 22, 2012, the Examiner denied summary judgment finding that there were material issues in dispute. Examiner Emily Whitney held a hearing on July 30 and 31, 2012. The parties submitted post hearing briefs to complete the record.

ISSUE

1. Does the Public Employment Relations Commission have jurisdiction over the matter?

2. Did the union make a unilateral change regarding the consolidation of grievance arbitrations?

3. Did the union breach its good faith bargaining obligation in its dealings with the employer over the consolidation of grievance arbitrations?

The Examiner finds the Public Employment Relations Commission has jurisdiction over the matter. Based on the facts of the case, the union did not make a unilateral change or breach its good faith bargaining obligation in its dealings with the employer over the consolidation of grievance arbitrations.

BACKGROUND

The employer and the union are parties to a collective bargaining agreement effective January 1, 2011, through December 31, 2012. Article 17 of the collective bargaining agreement describes the grievance and arbitration procedure. When there is an allegation that the contract has been violated, a grievance can be filed through Article 17 of the collective bargaining contract. There are three steps to the grievance procedure for the parties to process the grievance internally. If the grievance is not resolved during those three internal steps, the employer or union may submit a demand for arbitration.

Prior to July 2011, the union was handling a wage progression grievance which was not resolved at step three. As set forth in the contract, on July 12, 2011, the union demanded arbitration and requested a list of arbitrators from the Public Employment Relations Commission. The union received the list from the Public Employment Relations Commission on July 14, 2011.

Additionally, prior to July 2011, the union was handling two disciplinary grievances involving two different union members which were not resolved at step three. The union again pursued these grievances to arbitration, the next step in the grievance process according to article 17. On July 14, 2011, the union filed a request for a list of arbitrators from the Public Employment Relations Commission for the two separate discipline grievances. The union received two lists from the Public Employment Relations Commission on July 19, 2011.

On October 18, 2011, the union e-mailed the employer and asked if the employer would be willing to consolidate the three July grievances under one arbitrator. The employer would not agree to the consolidation.

On October 30, 2011, the union e-mailed the employer and requested a time to meet and strike names from the lists of arbitrators for the three grievances. It again offered to consolidate the three grievances under one arbitrator. The employer refused to consolidate the three grievances, but was willing to meet and strike names. The union later made a third request to consolidate the three grievances, but the employer continued to refuse to consolidate the grievances.

In early January 2012, the parties met and struck names from the lists of arbitrators for three separate grievances. One arbitrator was selected to hear the wage progression grievance. A different arbitrator was selected to hear the two other discipline grievances separately.

On January 9, 2012, the union e-mailed the employer and stated it was still willing to consolidate all three grievances, but that it was also willing to consolidate the two discipline grievances because the same arbitrator was chosen for those two grievances. The employer continued to refuse to consolidate any of the grievances.

On February 10, 2012, the union wrote a letter to the arbitrator, regarding the two discipline grievances, notifying the arbitrator that he had been selected. The arbitrator later accepted the appointment. The union also wrote a letter to the arbitrator, regarding the wage progression grievance, notifying the arbitrator that she had been selected. The arbitrator later accepted the appointment.

On February 29, 2012, the union e-mailed the employer stating it believed the one wage progression grievance incorporated the other two discipline grievances. Because it believed the three grievances incorporated each other, the union explained to the employer that it would ask the arbitrator, assigned to the wage progression grievance, to determine the scope of the arbitration to see if the grievances could be consolidated. The union offered that if the parties could agree, no letter would be necessary.

One hour later on February 29, 2012, the employer responded to the union's e-mail and stated it disagreed that the arbitrator selected to hear the wage progression grievance had jurisdiction over the two discipline grievances and would not agree to consolidation.

After the employer's response on February 29, 2012, the union sent a motion to the arbitrator assigned to the wage progression grievance. The union asked the arbitrator to "determine the scope of the proceedings and the issues that [would] be resolved."

The employer responded to the union's letter stating that the arbitrator did not have jurisdiction over the matter, and filed the present unfair labor practice.

ISSUE 1: Does the Public Employment Relations Commission have jurisdiction over the matter?

Legal Standard

RCWs 41.56.140 through .160 establish this Commission as the forum for implementing a legislative policy of peaceful labor-management relations in public employment. *City of Wenatchee*, Decision 6517-A (PECB, 1999) (citing *City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991)). RCW 41.56.150 enumerates unfair labor practices by a bargaining representative:

> It shall be an unfair labor practice for a bargaining representative:
>
> > (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
> > (2) To induce the public employer to commit an unfair labor practice
> > (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> > (4) To refuse to engage in collective bargaining.

Under RCW 41.56.160, aggrieved parties may bring complaints to the Commission if they believe their rights have been violated. *Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983). Because Chapter 41.56 RCW is remedial in nature, its provisions are to be liberally construed to affect its purpose. *Public Utility District 1 of Clark County v. Public Employment Relations Commission*, 110 Wn.2d 114 (1988). Additionally, the

courts of this state give great deference to Commission decisions, and to the Commission's interpretation of the collective bargaining statutes. *City of Kennewick.*

RCW 41.56.160 vests the Commission with considerable discretion in the processing of unfair labor practice cases. *Pierce County*, Decision 1671-A (PECB, 1984). Early in its history, the Commission ruled that deferral to arbitration is a matter of policy, rather than a matter of law, and that agreements between parties cannot restrict the jurisdiction of the Commission. *City of Seattle*, Decision 809-A (PECB, 1980).

The Commission reviewed and restated its deferral to arbitration policy in *City of Yakima*, Decision 3564-A (PECB, 1991), where the type of case appropriate for deferral was narrowly defined:

> This Commission has taken a conservative approach, limiting "deferral" to situations where an employer's conduct at issue in a "unilateral change" case is arguably protected or prohibited by an existing collective bargaining agreement. . . . 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.

As a discretionary, rather than mandatory, policy of the Commission, deferral is ordered only where it can be anticipated that the delay in processing of an unfair labor practice case will yield an answer to the question that is of interest to the Commission in resolving the unfair labor practice case. *City of Wenatchee*, Decision 6517-A (PECB, 1999). In *City of Yakima*, Decision 3564-A the Commission further outlined the following preconditions to "deferral": (1) The existence of a contract; (2) an agreement to accept an arbitration award as "final and binding"; and (3) no dispute between the parties concerning arbitrability.

Arbitrators have no particular expertise in other issues, and the Commission does not defer any "representation," "unit determination," "interference," "domination," or "discrimination" allegations, or other types of "refusal to bargain" charges. *Port of Seattle,* Decision 3294-B (PECB, 1992). Such matters are not susceptible to resolution through contractual grievance

proceedings. *Port of Seattle*; *See, also, City of Pasco*, Decision 3804-A (PECB, 1992) and *City of Kelso*, Decision 2633-A (PECB, 1988).

Application

Based on the employer's complaint, the Unfair Labor Practice Manager found a cause of action to exist involving the union's refusal to bargain by a unilateral change and breach of its good faith bargaining obligations. The union argued that the employer's claim should be deferred to arbitration because it was a unilateral change charge. Although the union is correct in stating that the employer's allegation in this case includes a unilateral change claim, that claim is only part of the allegation. As stated in *Port of Seattle*, Decision 3294-B, the cause of action for breach of good faith bargaining obligations concerns a statutory duty to bargain under Chapter 41.56 RCW that is not subject to deferral. Deferring only part of an unfair labor practice case would provide no economy to the Commission. Therefore, the Commission has had a longstanding practice to not bifurcate unfair labor practice complaints. Thus, even if the unilateral change claim were subject to deferral, the breach of good faith claim precludes deferral.

Conclusion

Because a cause of action regarding the breach of good faith bargaining claim was found to exist, the unfair labor practice cannot be deferred to arbitration. The Public Employment Relations Commission does have jurisdiction over issues involving a bargaining representative's refusal to engage in collective bargaining.

ISSUE 2: Did the union make a unilateral change regarding the consolidation of grievance arbitrations?

Legal Standard

A public employer and exclusive bargaining representative have a mutual obligation to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters. RCW 41.56.030(4). An employer or union commits an unfair labor practice when either fails or

refuses to bargain in good faith on a mandatory subject of bargaining. RCW 41.56.150(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded, International Association of Fire Fighters v. PERC*, 113 Wn.2d 197 (1989) (*City of Richland*); *Federal Way School District*, Decision 232-A (EDUC, 1977), (citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)). The Commission has long held that grievance procedures are a mandatory subject of bargaining. *City of Pasco*, Decision 3368-A (PECB, 1990), *aff'd*, 119 Wn.2d 504 (1992).

A union violates RCW 41.56.150(4) and (1) if it implements a unilateral change of a mandatory subject of bargaining without having fulfilled its bargaining obligations. As a general rule, a union has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the employer; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or impasse concerning any mandatory subjects of bargaining. *Skagit County*, Decision 8746-A (PECB, 2006); *Municipality of Metropolitan Seattle (METRO)*, Decision 2746-B (PECB, 1990).

In *University of Washington,* Decision 10726-A (PSRA, 2012), the Commission reiterated that a complainant alleging a "unilateral change" must establish the relevant status quo. *Municipality of Metropolitan Seattle (METRO)*, Decision 2746-B (PECB, 1990). In *City of Pasco*, Decision 9181-A (PECB, 2008), the Commission explained past practice:

> The past practices of the parties are properly utilized to construe provisions of an agreement that may rationally be considered ambiguous or where the contract is silent as to a material issue. *Kitsap County*, Decision 8402-B (PECB, 2007). A past practice is a course of dealing acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002), citing *City of Pasco*, Decision 4197-A (PECB, 1994).

For a "past practice" to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances. *See Whatcom County*,

Decision 7288-A (no unilateral change violation found where employer lacked knowledge of past practice). The complainant has the burden of establishing the elements of an unfair labor practice, including an established past practice.

Application

In the present case, Article 17 of the parties' collective bargaining agreement defines the relevant grievance and arbitration procedure as follows:

> 17.1.3 An inability by the City Manager to satisfactorily resolve the alleged grievance within a fourteen (14) calendar day period shall permit the Employer or the Guild the right to submit a demand for Arbitration.
>
> 17.1.4 The Employer and the Guild shall immediately thereafter select an arbitrator to hear the dispute. The Employer and the Guild shall request a list of five (5) arbitrators from the Public Employment Relations Commission. After receipt of same, the parties shall within fourteen (14) calendar days alternately strike the names of the arbitrators until only one name remains. The arbitrator shall be asked to render a decision promptly.

The union followed the Article 17 procedure when it submitted the grievances to arbitration to the employer. The parties then requested a list of arbitrators from the Public Employment Relations Commission and alternately struck names of the arbitrators.

The collective bargaining agreement, as both parties testified at the hearing, does not contain language regarding the process for consolidating grievances to arbitration. The collective bargaining agreement also does not include language on the process for dealing with procedural issues before the arbitrator.

The employer argued that while the parties did not have language in the collective bargaining agreement, they did have a past practice of not consolidating grievance arbitrations or requesting that grievance arbitrations be consolidated unless both parties consented. The employer believes that when the union asked the arbitrator to consolidate the grievances, the union changed the past practice and made a unilateral change to the grievance procedure.

The employer pointed to evidence of one prior grievance arbitration three years ago, in 2009, where the union asked the employer to have three separate grievances heard under one arbitrator. In the 2009 grievance arbitration, the employer refused to consolidate the three grievances into one hearing. There, the employer was amenable to having one arbitrator hear all three cases separately. This grievance arbitration was later withdrawn. The only other past practice evidence that was provided at the hearing was testimony that a request for consolidation had never happened.

As the Commission has stated in *City of Pasco*, a past practice is a course of conduct acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. Evidence of one event or the lack of an event cannot prove a past practice. The union asked to consolidate grievances one time, three years ago, which does not establish an existing prior course of conduct. There was no other evidence to prove the parties had an agreement or a mutual understanding to handle procedural arbitration issues.

Conclusion

Because there was no language in the collective bargaining agreement and no past practice, the employer has not proven that there was a relevant status quo. Because the employer did not establish a relevant status quo, there cannot be a unilateral change. Therefore the union did not violate RCW 41.56.150(4).

ISSUE 3: Did the union breach its good faith bargaining obligation in its dealings with the employer over the consolidation of grievance arbitrations?

Legal Standard

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires employers and unions to bargain in good faith. *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996). The scope of bargaining under Chapter 41.56 is "grievance procedures and . . . personnel matters, including wages, hours and working conditions." Commission and judicial precedents interpreting that definition identify three broad categories of bargaining:

mandatory subjects, permissive subjects, and illegal subjects. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958)(cited in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997)); *see also Federal Way School District*, Decision 232-A (EDUC, 1977).

Mandatory subjects, including the "wages, hours and working conditions" of bargaining unit employees, are matters over which employers and unions must bargain in good faith. It is an unfair labor practice for either of them to fail or refuse to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).

Permissive subjects are management and union prerogatives, along with procedures for bargaining mandatory subjects, over which the parties may negotiate, but each party is free to bargain or not to bargain, and to agree or not to agree. *City of Pasco*, 132 Wn.2d at 460.

Illegal subjects are matters that parties may not agree upon because of statutory or constitutional prohibitions. Neither party has an obligation to bargain such matters. *City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd*, 93 Wn. App. 235 (1998), *rev. denied*, 137 Wn.2d 1035 (1999).

When determining mandatory subjects, the Commission assesses whether the particular proposal directly impacts wages, hours or working conditions of bargaining unit employees. *Whatcom County*, Decision 7244-B (PECB, 2004), citing *Lower Snoqualmie Valley School District*, Decision 1602 (PECB, 1983), and *International Association of Fire Fighters*, Local 1052 v. PERC, 113 Wn.2d 197, 200 (1983). The "scope" of bargaining is a question of law and fact for the Commission to determine on a case-by-case basis. *City of Richland* 113 Wn.2d at 203; WAC 391-45-550.

Application

It is clear that the grievance procedure is a mandatory subject of bargaining. *City of Pasco*, supra. However, in this case, the union did not change the grievance procedure, but rather submitted a procedural motion to the arbitrator. The motion requested that the arbitrator determine the scope of the grievance before her. The union's action was that of standard motion practice and was not a mandatory subject of bargaining. When parties appear before the Public

Employment Relations Commission or any other court, parties have the ability to make procedural motions, without the consent of the opposing party, before the hearing examiner or judge prior to moving forward with the substantive issues. The hearing examiner or judge will rule on the procedural issue and then move onto the substantive issues. As explained above, the union's action did not change the collective bargaining agreement or a past practice. The one-time motion did not affect the employees' wages, hours, or working conditions. Parties are free to make motions before arbitrators without the consent of the opposing party. The arbitrator then has the jurisdiction to rule on the motion and determine the scope of the proceedings.

Because the union made a motion to the arbitrator, it did not have a duty to bargain over that motion with the employer. The parties' ability to make motions before an arbitrator is separate from the grievance procedure. Thus, the union did not violate its good faith bargaining obligation.

Conclusion

Based on the totality of the circumstances, the union did not violate its duty to bargain in good faith when it did not bargain with the employer prior to making a motion before the arbitrator. Therefore, the union did not violate RCW 41.56.150(4).

FINDINGS OF FACT

1. The City of Mountlake Terrace (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The Mountlake Terrace Police Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union and employer are parties to a collective bargaining agreement effective January 1, 2011, through December 31, 2012.

4. The parties' collective bargaining agreement contains a grievance and arbitration procedure. Article 17 states in part:

> 17.1.3 An inability by the City Manager to satisfactorily resolve the alleged grievance within a fourteen (14) calendar day period shall permit the Employer or the Guild the right to submit a demand for Arbitration.
>
> 17.1.4 The Employer and the Guild shall immediately thereafter select an arbitrator to hear the dispute. The Employer and the Guild shall request a list of five (5) arbitrators from the Public Employment Relations Commission. After receipt of same, the parties shall within fourteen (14) calendar days alternately strike the names of the arbitrators until only one name remains. The arbitrator shall be asked to render a decision promptly.

5. Prior to July 2011, the union was handling a wage progression grievance in addition to two separate disciplinary grievances. The union pursued these grievances to arbitration under Article 17. One arbitrator was selected to hear the wage progression grievance. A different arbitrator was selected to hear the two other discipline grievances separately.

6. The union requested that the employer agree to consolidate the three grievances under one arbitrator on four separate occasions. The first request was on October 18, 2011. The second request was on October 30, 2011. The third request happened between October 30, 2011, and January 2012. The fourth request was on January 9, 2012. The employer would not agree to the consolidation.

7. On February 29, 2012, the union e-mailed the employer stating it believed the one wage progression grievance incorporated the other two discipline grievances. Because it believed the three grievances incorporated each other, the union explained to the employer that it would ask one arbitrator to determine the scope of the arbitration to see if the grievances could be consolidated. The union offered that if the parties could agree, no letter would be necessary.

8. On February 29, 2012, the employer responded to the union's e-mail and stated it disagreed that the arbitrator selected to hear the wage progression grievance had jurisdiction over the two discipline grievances and would not agree to consolidation.

9. On February 29, 2012, after the employer's response, the union sent a motion to the arbitrator assigned to the wage progression grievance. The union asked the arbitrator to "determine the scope of the proceedings and the issues that [would] be resolved."

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Based upon the above Findings of Fact, the union did not make a unilateral change regarding consolidation of grievance arbitrations in violation of RCW 41.56.150(4) and (1).

3. Based upon the above Findings of Fact, the union did not breach its good faith bargaining obligation in its dealings with the employer over consolidation of grievance arbitrations in violation of RCW 41.56.150(4) and (1).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 20th day of December, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24640-U-12-06296	FILED:	03/05/2012	FILED BY:	EMPLOYER
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BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
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