STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2088, Complainant,	CASE 22646-U-09-5791
vs.	DECISION 10536-B - PECB
CITY OF TUKWILA, Respondent.	DECISION OF COMMISSION

Merker Law Offices, by *George E. Merker,* Attorney at Law, for the union.

Kenyon Disend, PLLC, by *Bruce L. Disend,* Attorney at Law, for the employer.

On August 17, 2009, the International Association of Fire Fighters, Local 2088 (union) filed an unfair labor practice complaint alleging that the City of Tukwila (employer) committed an unfair labor practice by unilaterally changing the work schedule of certain bargaining unit employees without first providing the union notice and an opportunity to request bargaining of both the decision to make such a change and the effects that decision had on terms and conditions of employment. The union is the exclusive bargaining representative of the fire fighters who work for the employer.

Examiner Lisa A. Hartrich held a hearing and found that the employer did in fact commit the alleged unfair labor practices.[1] In her remedial order, the Examiner ordered the employer to "restore the status quo ante by reinstating the hours of work which existed for the day-shift Fire Prevention Officers prior to the unilateral change in work schedules" that were found to be

[1] *City of Tukwila*, Decision 10536-A (PECB, 2010).

unlawful. The Examiner's order also directed the employer to give notice to and, upon request, bargain with the union before changing employee work schedules.

Although the employer did not appeal the Examiner's ruling, the union filed a timely notice of appeal seeking modification of the Examiner's remedial order. The union asks that the Order issued by the Examiner be modified so that: 1) it is applicable to all bargaining unit employees, not just the Fire Prevention Officers; 2) bargaining unit employees will be made whole for losses they may have suffered as a result of the employer's unlawful act; and 3) the union be granted attorney fees because the employer's act shows an intentional disregard for this state's collective bargaining laws.

DISCUSSION

Applicable Legal Standard

The Legislature empowered this Commission to prevent and remedy unfair labor practices. RCW 41.56.160. The fashioning of remedies is a discretionary action of the Commission. *City of Seattle*, Decision 8313-B (PECB, 2004). When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish its purpose, and the Supreme Court interpreted the statutory phrase "appropriate remedial orders" as including those remedies necessary to effectuate the purposes of the collective bargaining statute and to make the Commission's lawful orders effective. *METRO v. Public Employment Relations Commission*, 118 Wn.2d 621, 633 (1992).

Should the Remedial Order be Applicable to All Bargaining Unit Employees?

In its reply brief, the employer agrees with the union that the remedial order should be applicable to all similarly situated employees who may (or may not) have been impacted by the employer's unlawful conduct, and not just the Fire Prevention Officers as stated by the Examiner's decision. The employer concurs with the union's assertion. We agree that the order should be applicable to all affected bargaining unit employees, and modify it accordingly.

What is the Appropriate *Status Quo Ante*?

The standard remedy for a unilateral change violation is restoring the *status quo* that existed prior to the unilateral change, making employees whole for any loss to wages, benefits, or working conditions as a result of the employer's unlawful act, posting a notice of the violation, and reading that notice into the record at a public meeting of the employer's governing body. *City of Anacortes*, Decision 6863-A (PECB, 2001), citing *Seattle School District*, Decision 5733-A (PECB, 1997). The typical order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining unless the employer first provides the complainant union with notice of such changes and the opportunity to request bargaining over the proposed change.

As a remedy for the employer's unfair labor practices, the union asked the Commission to order the employer to repay employees:

> back wages for any lost time and wages; *i.e.*, the [employer] should reimburse all affected "day shift" members of the bargaining unit all reasonable costs that the unilateral change of their work schedule caused them, including but not limited to additional commute mileage, other additional commute expenses, additional child care expenses, and other reasonable expenses.

Union's Complaint at 3. The union correctly points out that the Examiner's decision is silent with respect to ordering that the affected bargaining unit employees be made whole for any loss they might have suffered. We amend the Examiner's remedial order accordingly.

Because we anticipate there may be disagreement as to what constitutes a "make whole" remedy for this case, we provide the following guidance and limitations. Generally, a "make whole" remedy requires any wages, benefits, or working conditions that were lost or unlawfully modified as a result of the employer's unilateral act to be restored or reinstated. *See Kennewick Public Hospital District 1*, Decision 4815-A (PECB, 1996), citing *METRO*, Decision 2845-A (PECB, 1988). This Commission has previously held that sick leave and vacation time are alternative forms of wages and therefore both subjects are mandatory in nature. *See City of Wenatchee*, Decision 6517-A (PECB, 1999)(sick leave), and *City of Yakima*, Decision 3546-A (PECB, 1991)(vacation time).

In this case, bargaining unit employees are entitled to a restoration of any mandatory subjects of bargaining that were affected or modified due to the employer's unilateral act. Because some employees used sick leave or vacation time on days that they were previously scheduled to have off in order to offset the impacts of the unlawful schedule change, those employees are entitled to restoration of expended sick or vacation time. The employer and union shall work collaboratively to identify those employees who are eligible for restoration of sick or vacation leave based upon existing records.[2]

Is an Award of Attorney Fees Appropriate in this Case?

Attorney fees have been awarded as a punitive remedy in response to egregious conduct, recidivist conduct, or to frivolous defenses asserted by a party. *Western Washington University*, Decision 9309-A (PSRA, 2008), citing *Lewis County*, 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982)(attorney fees awarded where it is clear that history of underlying conduct evidenced patent disregard for statutory mandate to engage in good faith negotiations) and *Auburn School District*, Decision 2710-A (1987)(motion for attorney fees on appeal denied where Commission found that although employer's appeal had no merit, it was not frivolous).

In this case, although the employer did not give the union sufficient notice of the contemplated change and implemented that change without satisfying its bargaining obligations, we find no historical pattern of this employer failing to abide by its collective bargaining obligations with this union that is required to award attorney fees. *See, e.g., City of Seattle*, Decision 4164-A (PECB, 1993)(denying attorney fees where union failed to demonstrate a pattern of recidivist conduct by the employer with the complainant bargaining unit). Furthermore, even though the employer's waiver by contract defense may not have had merit, it cannot be said that it was frivolous. Accordingly, the union's request for attorney fees is denied.

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[2] We decline to grant employees a monetary award for miscellaneous expenditures that may have been associated with the employer's unlawful act, as any remedy beyond the restoration of mandatory subjects of bargaining to the *status quo ante* constitutes an extraordinary remedy that is not appropriate in this case.

NOW, THEREFORE, it is

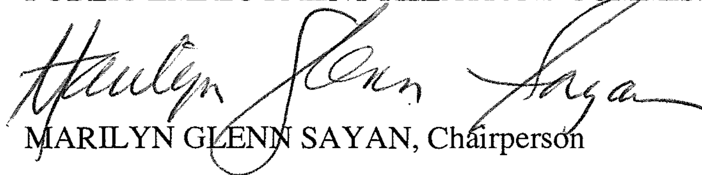
ORDERED

The Order issued by Examiner Lisa A. Hartrich is AFFIRMED and adopted as the Order of the Commission, except paragraph 2.a., which is amended as follows:

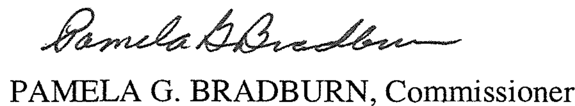
> Restore the *status quo ante* by reinstating the hours of work which existed for all affected bargaining unit employees prior to the unilateral change in work schedules found unlawful in this order and by reimbursing all affected bargaining unit employees any sick leave and vacation time that they used as a result of the employer's unilateral act.

ISSUED at Olympia, Washington, this 5th day of October, 2010.

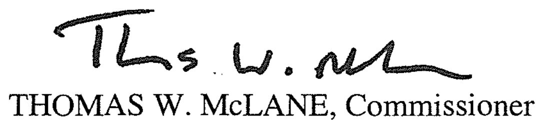
PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER: 22646-U-09-05791 FILED: 08/17/2009 FILED BY: PARTY 2

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BAR UNIT: FIREFIGHTERS
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