STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. STATE – ATTORNEY GENERAL, Respondent.	CASE 21156-U-07-5399 DECISION 10733-A - PSRA DECISION OF COMMISSION

Anita Hunter, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Otto G. Klein, III,* Special Assistant Attorney General, and *Paige L. Dietrich,* Senior Assistant Attorney General, for the employer.

On July 9, 2007, the Washington Federation of State Employees (union) filed an unfair labor practice complaint with this agency, alleging that the Office of the Attorney General (employer) committed an unfair labor practice by failing to maintain the status quo while a representation petition was pending before this agency. Examiner Karyl Elinski held a hearing and issued a decision[1] finding that the employer made changes to the dynamic status quo during the pendency of a representation petition, but those changes were within the scope of management rights removed from bargaining under RCW 41.80.040; therefore, the employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a). The union appealed the Examiner's decision, and the employer filed a cross-appeal.

[1] *State- Attorney General,* Decision 10733 (PSRA, 2011).

ISSUE PRESENTED

Did the employer interfere with employee rights when it closed the Spokane Consumer Resource Center (CRC), eliminated a Consumer Service Specialist IV position in the CRC, and reallocated a Consumer Service Specialist 1 position from the CRC?

For the reasons set forth below, we affirm the Examiner's decision that the employer did not interfere with employee rights by making the above changes.

APPLICABLE LEGAL PRINCIPLES

Employees have the right to organize and choose representatives for purposes of collective bargaining free from interference. RCW 41.80.050. Unrepresented employees, who are the subject of a representation petition, do not have a collective bargaining representative. *Central Washington University,* Decision 10967 (PECB, 2011). Changes by an employer of employee wages, hours, and working conditions during the pendency of a representation petition improperly affect the laboratory conditions necessary to the free exercise by employees of their right to vote. *Mason County,* Decision 1699 (PECB, 1983).

When a union files a representation petition, the employer must maintain the status quo and must not take unilateral action regarding wages, hours, and working conditions. *Snohomish County Fire District 3,* Decision 4336-A (PECB, 1994); WAC 391-25-140(2). We determine status quo as of the date the union filed the representation petition. *City of Seattle,* Decision 9938-A (PECB, 2009).

In addition to the "general status quo" obligation, Commission precedent requires employers to maintain the "dynamic status quo." The "dynamic status quo" concept recognizes that, occasionally, the status quo is not static and the employer needs to take action to follow through with changes set in motion prior to the union filing a representation petition. *King County,* Decision 6063-A (PECB, 1998). The Commission in *King County* explained:

> If expected by the employees, changes which are part of a "dynamic status quo" do not disrupt a bargaining relationship or undermine support for a union. *NLRB v. Katz,* 369 U.S. 736 (1962). *See also Spokane County,* Decision 2377 (PECB, 1986). Thus, where wage or benefit increases are previously scheduled, it would be unlawful to withhold them just because a representation petition is filed. *See Emergency Dispatch Center,* Decision 3255-B (PECB, 1990). Conversely, if changes the employees may view as negative merely carry out a "dynamic status quo" (*i.e.,* actions consistent with previously-existing policies and practices), no violation will be found.

Such changes to the dynamic status quo are not disruptive to the laboratory conditions in a representation proceeding.

Employers may not make changes to mandatory subjects of bargaining while a representation case is pending. WAC 391-25-140. Chapter 41.80 RCW modifies the scope of bargaining for the parties it covers. "The employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040." RCW 41.80.020(5). The management rights established in RCW 41.80.040 include:

> The employer shall not bargain over rights of management, which in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:
> (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
> (2) The employer's budget and the size of the agency workforce, including determining the financial basis for layoffs;
> (3) The right to direct and supervise employees...

"Exclusive bargaining representative means any employee organization that has been certified under this chapter as the representatives of the employees in an appropriate bargaining unit." RCW 41.80.005(9).

ANALYSIS

On June 28, 2006, the union filed a petition for a question concerning representation. The union sought to represent employees covered by Chapter 41.06 RCW and Chapter 41.80 RCW in the

Consumer Protection Division of the Office of the Attorney General. The employer objected to the inclusion of the Customer Service Specialist 4 (CSS 4) in the bargaining unit. The Executive Director dismissed the union's petition, finding that the petitioned-for bargaining unit was inappropriate.[2] The determination as to whether the CSS 4 would be included or excluded from the proposed bargaining unit is not relevant to this decision.

Prior to the union filing its petition, the employer began the process of selecting a new phone system. Along with the new phones, the employer selected a software system to route calls among the CRCs. The record is not clear about when the employer decided which phone software to implement. James Larsen testified that the employer began looking for software "as early as January, February 2005" and the employer made the decision "sometime in early 2006." The employer began installing a new phone system in Septemer 2006. Implementation of the phone system was complete by March 2007.

During the pendency of the representation proceeding, the employer reorganized the delivery of its services in eastern Washington, which included closing the Spokane CRC, eliminating a CSS 4 position in the Spokane CRC, and reallocating a CCS 1 position to a Communications Consultant 1 (CC 1), thereby increasing the employee's wages and altering his hours of work. The employer also implemented voice over internet protocol (VOIP phones) and software allowing calls to CRCs to be routed across the state.

The employer relies on *City of Seattle*, Decision 9938-A, to support its position that the status quo doctrine does not prohibit an employer from reclassifying positions and that reallocation of the CSS 1 to a CC 1 did not change the status quo. According to the employer, "the test is not whether the employer makes individual personnel changes, the test is if the employer modifies the procedures by which those changes are made."

We do not see *City of Seattle* as supporting the employer's position. *City of Seattle* dealt with the employer's bargaining obligation with the certified exclusive bargaining representative over an individual disciplinary action while the status quo requirement was in effect during contract

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[2] *State – Attorney General,* Decision 9951 (PSRA, 2008), *aff'd,* Decision 9951-A (PSRA, 2009).

negotiations. Here, the union was not the exclusive representative so this case is not about the employer's bargaining obligations. Rather, it deals with whether the employer unlawfully altered the status quo during the pendency of a representation petition.

To prove that the employer interfered with employee rights, the union must establish that the employer made a change to wages, hours, and working conditions of the employees affected by the petition. Additionally, for cases under Chapter 41.80 RCW, the union must establish that the changes to the status quo are not removed from bargaining under RCW 41.80.040. The Examiner properly identified the standard.

If the employer makes changes to subjects removed from the scope of bargaining under RCW 41.80.040, the employer cannot be found to have interfered with employee rights.

The employer argues that the union needed to additionally establish that a typical employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit associated with that employee or another employee's union activity. A party does not need to additionally meet the standard for proving interference. The party alleging interference by a change to the status quo meets its burden of proof when it establishes that the employer unlawfully altered the status quo.

The employer altered the status quo when it closed the Spokane CRC, eliminated the CSS 4 position in the Spokane CRC, reallocated the CCS 1 to a CC 1, and implemented software allowing calls to be routed among CRCs across the state. The employer's implementation of VOIP phones was part of the dynamic status quo. The Legislature granted state employers certain management rights when it enacted RCW 41.80.040. The employer is privileged to make changes to those subjects covered by RCW 41.80.040 at any time, including during the pendency of a representation petition, even if there is a bargaining obligation with an exclusive bargaining representative. State employers are not privileged to make changes during the pendency of the representation petition unless those changes are within the management rights granted in RCW 41.80.040.

CONCLUSION

When the employer implemented VOIP phones, it was continuing with the dynamic status quo in existence when the union filed the representation petition. The employer altered the status quo when it closed the Spokane CRC, eliminated the CSS 4 position in the Spokane CRC, reallocated the CCS 1 to a CC 1, and implemented software allowing calls to be routed among CRCs across the state. The employer did not interfere with employee rights when it altered the status quo because those changes fall within management rights granted to unilateral employer control under RCW 41.80.040.

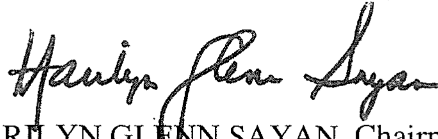
NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Karyl Elinski are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 2nd day of December, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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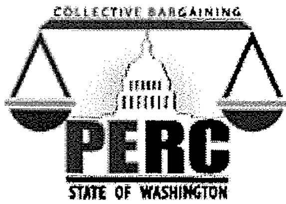

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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CASE NUMBER:	21156-U-07-05399	FILED:	07/09/2007	FILED BY:	PARTY 2
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DETAILS:	Consumer Protection Division				
COMMENTS:					

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