Port of Anacortes, Decision 12160-A (PORT, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 25, Complainant, vs. PORT OF ANACORTES, Respondent.	CASE 26287-U-14-6708 DECISION 12160-A - PORT DECISION OF COMMISSION

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Laura Ewan*, Attorney at Law, and *Dmitri Iglitzin*, Attorney at Law, for the union.

Chmelik Sitkin & Davis, P.S., by *Richard A. Davis III*, Attorney at Law, and *Brian D. Rice*, Attorney at Law, for the employer.

The International Longshore and Warehouse Union, Local 25 (union), filed an unfair labor practice complaint alleging that the Port of Anacortes (employer) discriminated against employees and refused to bargain by unilaterally changing working conditions. Examiner Jamie L. Siegel conducted a hearing and concluded that the employer did not unilaterally change working conditions by denying an employee light duty and did not discriminate against an employee when it denied him light duty work for a non-work related injury.[1] The union appealed.

This case presents two issues. First, did the employer discriminate against an employee when it discontinued his light duty assignment? Second, did the employer unilaterally change working conditions by changing the use of light duty assignments without providing an opportunity to bargain?

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial

[1] *Port of Anacortes*, Decision 12160 (PORT, 2014).

evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *C-Tran*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

We have reviewed the record and fully considered the arguments in this matter. The Examiner correctly stated the legal standards for discrimination. Substantial evidence supports the Examiner's findings of fact. The findings of fact support the Examiner's conclusions of law that the employer did not discriminate against an employee when it discontinued his temporary light duty assignment.

The only issue remaining on appeal is whether the employer unilaterally changed working conditions by changing the use of light duty assignment without providing an opportunity to bargain. The parties argued, and the Examiner analyzed, the issue in this case as whether the employer unilaterally changed a past practice. However, in cases involving a newly organized bargaining unit in which a first collective bargaining agreement has not been negotiated, the issue is whether the employer unilaterally changed the status quo without bargaining, and a different legal standard applies. In this case, there was no established process for covering employee's requests for light duty assignments based on off duty injuries. The employer did not have a policy covering such requests. Nor was there any past practice dealing with such requests. Before the employer could make a decision about light duty assignments, it was required to give notice to the union and bargain.

ANALYSIS

Legal Standards

Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it: gives notice to the union, provides an opportunity to bargain before making a final decision; upon request, bargains in good faith; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Griffin School*

District, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). A complainant alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *METRO (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

Status Quo

Once employees have exercised their statutory right to select an exclusive bargaining representative, an employer is prohibited from taking unilateral action on mandatory subjects of bargaining, including the wages, hours, and working conditions of those employees and has an obligation to maintain the status quo until the parties bargain a change to the status quo. *Washington State University*, Decision 11749-A (PSRA, 2013); *City of Seattle*, Decision 9939-A (PECB, 2009); *Asotin County*, Decision 9549-A (PECB, 2007); *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994), *citing Franklin County*, Decision 1890 (PECB, 1984).

In cases involving a newly-certified bargaining unit, the status quo refers to the terms and conditions of employment that existed at the time the union was certified. *City of Seattle*, Decision 9939-A (PECB, 2009). To be part of the status quo, a rule or policy must be a precedent that the employer had used during the relevant past, not merely a written policy cited to defend an unfair labor practice charge. *City of Tacoma*, Decision 4539-A (PECB, 1994). The Commission determines the status quo as of the date the union filed the representation petition. *City of Seattle*, Decision 9939-A (PECB, 2009). To determine what constitutes the status quo, the Commission looks to the employer's policies and past practice. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009), *aff'd*, Decision 10280-A (PECB, 2009).

Between the exclusive bargaining representative's certification and the final ratification and implementation of the parties' first collective bargaining agreement, existing employer policies are part of the status quo for mandatory subjects of bargaining. If the employer does not have a policy governing a mandatory subject of bargaining, or if the policy does not provide a clear and identifiable course of action for the employer to take, the employer may not make a change concerning a mandatory subject of bargaining without first satisfying its bargaining obligation. *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A.

Facts Giving Rise to the Complaint

The union was certified as the exclusive bargaining representative on October 7, 2013.[2] At the time of the hearing, the parties had not yet concluded negotiations on an initial collective bargaining agreement. Consequently, the employer was required to maintain the status quo until the parties bargained a change to the status quo. To determine the status quo, the Commission looks to the terms and conditions of employment that existed when the union was certified, the employer's past practices, and the employer's policies in effect on the date the union filed the representation petition.

In the fall of 2013, bargaining unit employee David Bost was placed on leave for an on-duty injury and remained on leave until December 23, 2013, when the doctor treating the workplace injury (L & I doctor) released him to return to light duty work. The L & I doctor anticipated that Bost would be on light duty until February 15, 2014.

While Bost was working a light duty assignment for his workplace injury, he suffered a non-work related illness. The employer placed Bost on FMLA leave. Bost was treated by a different doctor (FMLA doctor) for his non-work related illness. The FMLA doctor anticipated that Bost would be unavailable to work from January 14, 2014, until February 7, 2014.

On February 3, 2014, Bost saw his L & I doctor. The L & I doctor released Bost from the light duty workplace injury restriction to his job without restriction. On February 4, 2014, Bost spoke to Lindsey Herrick, the employer's human resources generalist. Bost reported that his FMLA doctor might release him to light duty on February 10, 2014. Assuming Bost was still under

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2 *Port of Anacortes*, Decision 11942 (PORT, 2013).

restrictions from his L & I doctor, Herrick e-mailed Bost the job description for the work he performed while on L & I light duty for the FMLA doctor to review. On February 5, 2014, the FMLA doctor released Bost to work light duty.

On February 10, 2014, Bost returned to light duty work. On February 11, 2014, Bost provided the employer the L & I doctor's release to full duty. After learning the L & I doctor had released Bost to full duty, Herrick met with Deputy Executive Director Chris Johnson and Executive Director Bob Hyde to discuss Bost's light duty accommodation. The employer determined that light duty work was not available for Bost's non-work related injury. Herrick called Bost and told him to remain home until released for full duty by his FMLA doctor.

Application of Legal Standards

Did the employer make a unilateral decision on a mandatory subject of bargaining?

To prove the employer unilaterally changed working conditions, the union must prove that the dispute involves a mandatory subject of bargaining, that there was a decision giving rise to the duty to bargain, the relevant status quo or past practice, and a meaningful change to a mandatory subject of bargaining.

A light duty assignment involves employee working conditions, and the Commission has found light duty assignments to be mandatory subjects of bargaining. *See City of Wenatchee*, Decision 6517-A (PECB, 1999). Light duty work assignments directly relate to employee wages, hours, and working conditions because a light duty work assignment would allow an employee to continue to work at a time he or she might not otherwise be able. In this case, Bost could have worked rather than used leave if a light duty assignment was available. Thus, the dispute involves a mandatory subject of bargaining. The employer decided that light duty work would not be available to the employee for his off-duty injury. The record supports finding the employer made a decision on a mandatory subject of bargaining. The union had the burden to prove the relevant status quo or past practice.

What was the status quo on light duty assignments for off-duty injuries?

The union argued that the employer had a past practice of providing light duty work to employees who were injured off duty. Substantial evidence supports the Examiner's findings of

fact that "providing light duty assignments is not the known and mutually accepted response when employees are injured off-duty. The union did not establish a past practice with respect to light duty assignments."

Did the employer have a policy governing the light duty work for off-duty injuries?
The employer maintains an employee handbook, which it reviews annually.[3] The employer does not have a policy for light duty assignment and evaluates requests on a case-by-case basis.

In the six years before the hearing, human resources had not received a request for a light duty assignment for an off-duty injury, other than Bost's. Bost's request for FMLA light duty was the first instance Herrick had encountered in which an employee had been released to return to work from two different doctors treating the employee for two different injuries with conflicting duty assignments.

The employer did not have a policy addressing light duty assignments for off-duty injuries. The status quo cannot be established through an existing employer policy, because none existed. Therefore, the decision presented by Bost's request was the first time the employer was poised to make a decision on this mandatory subject of bargaining.

Did the employer have an obligation to give notice and provide an opportunity for bargaining before making a decision on a mandatory subject of bargaining?
When an employer and a union are negotiating a first collective bargaining agreement, an employer is not free to change or initially establish policies concerning mandatory subjects of bargaining without first providing notice, an opportunity to bargain, and bargaining to an agreement or a good faith impasse. In *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280-A, the parties were negotiating a first collective bargaining agreement when the employer changed its lay off policy. In its decision, the Commission first determined the relevant status quo, *i.e.*, the layoff policy in place when the union was certified. That policy was the status quo for layoffs until the parties negotiated a change to the policy.

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[3] The only portions of the employee handbook offered as evidence were Exhibit 13, Section 5.3 Injuries – Reporting of, and Exhibit 14, Section 4.3 F Shared Leave.

Next, the Commission determined that the employer did not follow its policy, but rather crafted a new reduction-in-force plan without notifying the union or providing an opportunity to bargain. That new reduction-in-force plan differed from the employer's existing layoff policy. The Commission then determined that while the parties were negotiating a first collective bargaining agreement, the employer was obligated to bargain a change to an existing policy before implementing a new policy, even in the face of a budget crisis.

In this case, the evidence presented by the union failed to establish that the employer had a past practice of either providing or denying light duty work for off duty assignments. The evidence established that the employer did not have a policy covering light duty assignments and, in the relevant past, no employee had requested light duty work for an off-work injury. The employer made a decision on a mandatory subject of bargaining, light duty assignments for employees injured off duty, without providing notice or an opportunity to bargain.

The bargaining obligation is not onerous and does not have to be drawn out. An employer is not required to engage in futile discussions and may lawfully refuse to continue negotiations when good-faith bargaining demonstrates that the parties are unable to reach agreement. *Vancouver School District*, Decision 11791-A (PECB, 2013). An employer can implement a change to a mandatory subject of bargaining after bargaining in good faith to impasse. *Vancouver School District*, Decision 11791-A, *citing Spokane County*, Decision 2167-A (PECB, 1985). Indeed, as the Commission noted in *Tacoma-Pierce County Employment and Training Consortium*, impasse may be reached in a compressed time frame.

When time is of the essence, parties are expected to act promptly. If an employer needs to make a decision on a mandatory subject of bargaining while the parties are negotiating a first collective bargaining agreement, and time is of the essence, the employer should promptly notify the union of those facts. Once placed on notice of the need to bargain on a time sensitive issue, the parties are obligated to act as promptly as circumstances permit. Bargaining may be conducted under a compressed schedule and impasse may be reached more quickly when a decision needs to be made quickly. There can be no bright line for the definition of what is timely action. Each case must be analyzed on the particular fact pattern.

Before an employer can make a decision about whether to offer or not offer light duty to an employee for an off-duty injury, it is required to: provide notice; provide an opportunity to bargain; upon request, bargain in good faith; and bargain to agreement or to a good faith impasse. Here, the employer did not provide notice of its intent to make a decision on a mandatory subject of bargaining, but rather, unilaterally decided to not offer Bost a light duty assignment for his off-duty injury. The decision was presented as a *fait accompli.* Thus, the union was excused from its obligation to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

CONCLUSION

The employer did not have an existing policy or past practice regarding light duty work assignments for off-duty injuries and would make those decisions on a case-by-case basis. Therefore, before the employer could grant or deny a request for light duty assignment for an off-duty injury, the employer was required to give notice to the union and provide an opportunity to bargain a light duty policy.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Jamie L. Siegel are AFFIRMED and adopted as the Findings of Fact of the Commission. The following Findings of Fact are added:

28. The employer did not have a policy for light duty assignments.

29. There is no evidence that the employer notified the union of its intent to make a decision on light duty assignments. The decision was presented as a *fait accompli.*

Conclusions of Law 1 and 3 are AFFIRMED. Conclusion of Law 2 is vacated and a new Conclusion of Law is substituted:

2. By its actions described in the Findings of Fact, the Port of Anacortes unilaterally changed working conditions and derivatively interfered by changing the use of light duty assignments without providing an opportunity to bargain in violation of RCW 41.56.140(4) and (1).

The Port of Anacortes, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing or refusing to bargain the decision about the use of light duty assignments.

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under 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. Restore the *status quo ante* by reinstating the working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change in the use of light duty assignments found unlawful in this order.

   b. Give notice, and upon request, negotiate in good faith with International Longshore and Warehouse Union, Local 25, before unilaterally changing the use of light duty assignments.

   c. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The

respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Port Commission of the Port of Anacortes, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify the complainant, 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 complainant with a signed copy of the notice provided by the Compliance Officer.

f. Notify the Compliance Officer, 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 her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 22nd day of January, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	26287-U-14-06708	FILED:	02/13/2014	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	OPER/MAINT				
DETAILS:	-				
COMMENTS:					

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