

PERC

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2008

WORK STATION RECONFIGURATION IS PERMISSIVE PERC EXAMINER RULES

In February 2008 a Washington Public Employment Relations Commission examiner rejected a charge by the Seattle Police Dispatchers' Guild that the City of Seattle violated Washington law when it reconfigured its dispatch center by moving four telephone reporting unit officers into the main center and removing a round conference table. The examiner concluded that the decision to reconfigure the dispatch center was permissive and the Dispatcher's Guild waived their right to bargain over the impact of the decision (if any) by failing to make a prompt demand to bargain.

In determining whether a matter is a mandatory subject of bargaining under Washington law PERC balances the relationship with subject to wages, hours and conditions on the one hand and against the extent to which the subject lies "at the core on entrepreneurial control."

The City reconfigured the dispatch center by moving four telephone reporting unit officers who had previously worked in a separate room into the same room with other City dispatchers. The City argued that this move increased accountability and accessibility of telephone reporting unit officers, freeing up their former work space to be used as a training area or conference room, and allowing for increased staffing of dispatchers at peak times. The City added the change demonstrated employee equality. The examiner concluded that the reconfiguration is a management prerogative because the employer has the right to decide how rooms are arranged, the amount of equipment in the room, and how to manage or supervise its employees.

The examiner rejected the Union's contentions that the reconfiguration had an impact on mandatory subjects of bargaining that rendered the decision itself a mandatory subject. The Guild argued that the reconfiguration affected employees' health and safety, specifically the noise level in the dispatch center. However, the Union offered no evidence to support an increased noise level. The Union argued that with more employees working in the center there would be increased germ transfer and more sickness. The employer rebutted this argument by presenting evidence that sick leave usage declined after the reconfiguration.

The examiner rejected the Union's reliance of an argument that the reconfiguration impacted the health and safety of the public. The Guild president testified that the proximity of the dispatchers to each other made it more difficult to hear the caller and that this resulted in an increased risk of error and a safety risk to the public. The examiner emphatically rejected this argument. He concluded that it is within the employer's entrepreneurial control to determine how it will run its business and provide services to the public. If the employer concludes that the potential risk of error or risk to the public is an acceptable risk, then the employer has the right to conduct its business in such a manner.

The examiner rejected the Guild's argument that the reconfiguration affected employee relations because employees now worked closer together and could more acutely smell their coworkers. The examiner stated that the fact that employees might smell each other was a matter that the employees should work out between themselves and not directly attributable to the reconfiguration.

Finally, the examiner rejected the Guild's argument that there was an increased risk of discipline since employees were evaluated in part on the accuracy of their dispatching and that if the newly configured dispatch center was noisier they might have an increased risk of error.

The examiner concluded that the Guild waived its right to bargain over the reconfiguration of the dispatch center. The City sent the Union notice in July 2005 of its plan to move the four telephone reporting unit officers into the dispatch center. The Guild's only response was to ask what would happen to a round conference table in the middle of the dispatch center. The examiner declared that an employer does not have a duty to notify the Union of what the nature of the impacts of a permissive decision would be on bargaining unit employees, reasoning that a public employee union is in the best position to know what those impacts might be. The City's notice was adequate and since the Union did not make a demand to bargain until nearly one year after the employer's initial notice in July 2005, the Guild waived its right to bargain over any impact on mandatory subjects of bargaining through its inaction.

Editorial Comment: Once again the Guild's failure to make a timely demand to bargain was fatal to its claim that the employer committed a ULP by not bargaining over the affects of its decision to reconfigure the dispatch center. In addition, with respect to PERC's analysis as to whether or not a decision itself is a mandatory subject to bargaining, the examiner's decision makes clear a point that should be obvious: A public employee union cannot simply declare that a decision has an impact on health and safety or discipline. In order to establish that a decision is a mandatory subject of bargaining, the Union will have to offer actual evidence of such an impact.

2007

PERC CONCLUDES UNION'S DISCIPLINE OF MEMBER DID NOT VIOLATE WASHINGTON LAW

In late 2007 PERC for the first time consider a challenge to discipline imposed by a Union on a Union member. Zappler was employed by the City of Seattle as a gardener and represented by Local 609. Zappler wanted her work schedule changed and presented her arguments to the employer. In addition, when the City announced that it was considering eliminating positions from the gardening staff, Zappler communicated her opposition to this plan to the school board and proposed other plans. Local 609 informed her that her efforts undermine the livelihood of other Union members and the authority of

the Union. Local 609 advised her that her actions violated the Union's constitution and she could be subjected to Union discipline. Zappler persisted in her efforts to convince the school board to change its policies and plans. After an internal Union trial, Local 609 imposed a \$1,200 fine and issued an official censure of Zappler. The Union suspended the fine provided that she refrained from future communication with the school board on Union issues.

PERC rejected Zappler's challenge to the discipline. PERC concluded that it did not have jurisdiction over complaints where the Union has disciplined a member in order to enforce a properly adopted rule that reflects legitimate Union interests, impairs no policy stated in the Washington Labor Laws, and is reasonably enforced against Union members who are free to lead the Union and escape the rule (and discipline). Zappler's communications and arguments to the school board were not protected collective bargaining activity because her Union was certified as the exclusive bargaining representative and Zappler was contradicting her Union's efforts. Zappler was a full member of the Union and therefore had a contractual relationship with the Union and made herself subject to the Union's properly adopted rules. She had not elected to become an agency fee payer (fair share).

PERC rejected the challenge to the amount of the fine (\$1,200) noting that the fine did not threaten Zappler's employment (particularly since it had been suspended). PERC also rejected Zappler's claim that her Union interfered with her rights to engage in collective bargaining because it referred to her in two Union newsletters. Her name wasn't mentioned, but it would have been clear to Union members who were the subject of the articles. PERC reasoned that it is fundamental to the collective bargaining process that Unions and employers must be able to have full and frank discussions. They must be able to speak openly to each other about their conflicts. In this case, since the Union was not urging or suggesting that the employer itself take any actions against Zappler, the Union's decision to report the incident and the internal penalty to the employer was not an unfair labor practice.

Finally, PERC concluded that the Union's action did not breach its duty of fair representation and that the Union did not have to explain that Zappler's employment status was not threatened by the impending discipline.

Editorial Comment: We are not aware of any police Guilds in Washington which have imposed internal Guild discipline on their members. While this decision would allow them to do so, we would recommend a cautious approach. As PERC suggested, the way for bargaining unit members to escape from such internal discipline is clear: Become a fair share payer. To the extent a Guild needs to act to assure that the employer understands the Guild's position on pending workplace issues, it seems that could be readily accomplished simply by informing the employer in writing of the Guild's position and reminding the employer that the Guild speaks for the bargaining unit and that it would be an unfair labor practice for the employer to deal directly with a bargaining unit member.

WASHINGTON PERC RULES BELLEVUE MUST BARGAIN OVER CHANGES IN STAFFING OF FIRE STATION

Washington courts and a Public Employment Relations Commission (PERC) hearings officer revisited the question of when does a Washington fire departments have to bargain over staffing changes?

The Bellevue Fire Department operates 9 fire stations. 2 stations are “light force companies” staffed with 5 fire fighters who operate both an aerial ladder truck and a fire truck with water capacity and a water pump. When dispatched to alarms, fire fighters always respond with both pieces of equipment.

The City decided to reduce the staffing of each light force company by one fire fighter each. These employees were assigned to work as assistants to the battalion chiefs. Seriously.

PERC concluded that reduction in the staffing of the light force companies involved a mandatory subject of bargaining. The City had previously determined that these companies needed to be staffed with 5 fire fighters and reducing staff to 4 had an “actual impact on the procedures used at fire scenes” including (1) 4 fire fighters would probably not do a forward lay procedure when arriving at a fire scene and (2) the OIC of a light force unit arriving first at a fire scene probably would not be able to assign 2 firefighters to do a roof ventilation procedure. Moreover, the Fire Chief acknowledged that the reduction to 4 would change the manner in which the light force companies would operate at fire scenes. Thus, the changes made were “equipment staffing” changes that must be bargained.

However, PERC also concluded that by agreeing to the following language in the CBA’s management rights article, *the union waived its right to bargain*:

“Management rights and responsibilities as described above shall include, but are not limited to, the following: D. *To determine number of personnel (e.g., total per shift and per equipment)*”

Thus, although the change involved a mandatory subject, the Union had waived its right to bargain by agreeing to this management rights language.

Finally, PERC also held that the unions ULP was untimely—by one day—based on the date of the employer’s memo addressed to “All Personnel”. This memo was deemed sufficient notice to the union of the planned change. *City of Bellevue*, Decision 9343 (PECB, 2006).

Editorial Comment: Staffing issues for Washington fire fighters arise continually. PERC’s conclusion will depend on the specific facts and whether it views the change as a change in shift staffing (permissive) or equipment staffing (permissive). This case also teaches the importance of (1) thinking about what the management rights article actually

means and (2) paying attention to notices sent to all employees—clearly PERC deems the latter as sufficient notice to unions.

PERC FINDS NO CHANGE IN KITSAP COUNTY ANNUAL LEAVE SCHEDULING POLICIES

In mid-2002 the Kitsap County Sheriffs Office announced that use of annual leave would be restricted in February-March 2003 when service training would be conducted. The Guild challenged this limitation. The County backed down and granted leave requests during this time period. Then, in January 2003 the County's Patrol Chief issued a memo stating that the training would commence in February and requested the deputies' cooperation. He asserted that the County had the right to limit leave, but also informed the deputies that if they needed a specific day off during this time period, they should ask. When the County refused to modify this limitation on leave usage, the Guild filed a ULP charge with PERC.

The parties' contract contained broad management rights language concerning work schedules. In addition, Sheriffs Office policy provided that "Annual leave is to be taken at the convenience of the department."

Although PERC's Hearing Examiner found that the County had committed a ULP, the Commission reversed, finding no change in past practice. Instead, the January 2003 memorandum simply restated an existing policy, that is the broad management rights provision of the contract and the policy provision quoted in the preceding paragraph. In addition, PERC rejected the Guild's argument (accepted by the Hearing Examiner) that in the past, annual leave had only been denied because of an emergency. The contract discussed use of leave in emergencies, but no contract provision stated that such leave would be denied *only* in emergencies. Finally, the Commission noted (1) that the Chief invited deputies who needed a day off to ask and (2) the record demonstrated that no deputy was actually denied annual leave during the training block. *Kitsap County*, Decision 8893-A (PECB, 2007).

Editorial Comment: If there's no change, there's no unilateral change ULP. Both employer policies and actual past practices must be scrutinized carefully to establish the pre-existing practice, and then that practice must be compared to the employer's newly adopted practice.

PERC REAFFIRMS THAT BARGAINING OVER DISCIPLINE IS MANDATORY

Consistent with long-standing precedent, PERC recently reaffirmed that discipline standards, such as a just cause requirement, are mandatory subjects of bargaining under Washington law. The Commission reversed a decision by its Unfair Labor Practices

Manager that a one-time deviation from a just cause standard did not violate Washington law. PERC noted that while Washington law recognizes an exception to the duty to bargain where there is only an “isolated instance” where the employer deviates from an established practice, it would not do so in this case for two reasons. First, the change occurred during contract negotiations, a time when such changes can be especially detrimental. Second, a change that results in an employee’s termination has a substantial effect on working conditions—isolated or not.

Interestingly, PERC also stated that it was prepared to reexamine its prior decisions holding that the parties’ obligation to submit contract disputes to arbitration does not survive the expiration of their contract. PERC indicated that it might require arbitration even if the dispute itself arose after the contract expired. However, it declined to decide the issue without further briefing by the parties. *Asotin County*, Decision 9549-A (PECB, 2007).

Editorial Comment: Recent PERC decisions make it clear that much of PERC’s case law is open for reconsideration.

2006

PERC REJECTS “LATE HIT” CHARGE

In September 2004—21 months after opening contract negotiations—Snohomish County notified the Snohomish County Deputy Sheriffs Association that it proposed to open negotiations for the purpose of amending its payroll system to allow for a “lag payroll” system and elimination of its current monthly draw payroll system.

The County and the Association had opened negotiations for a new contract in early 2003. The expired contract included a reopener allowing the County to open the contract on changes to its payroll system. However, throughout the three year term of that contract the County never opened the contract. By the time the County finally raised this issue in September 2004 the parties had completed negotiations, mediation, and had been certified for Interest Arbitration.

The Association took the position that it was not required to bargain over the County’s payroll proposal because the proposal was an escalation of demands and a late hit. Nevertheless, it met informally with the County to try to work out a compromise on this issue. Those efforts were unavailing.

The Association then filed an unfair labor practices charge against the County charging that making a late hit proposal on payroll system, the County had failed to bargain in good faith. In response, the County filed an unfair labor practices charge against the Association charging that the Association had refused to bargain over the payroll issue and therefore had violated the duty to bargain in good faith.

PERC Hearing Examiner Walter Stuteville dismissed both charges. He cited existing PERC precedent holding that:

“An employer’s sudden injection of a new proposal at an advanced stage in bargaining has been held to be indicative of lack of good faith and unfair labor practice. Such tactics are subject to close scrutiny.”

Nevertheless, he concluded that the County’s decision to raise the payroll issue 21 months after negotiations opened did not amount to a late hit. He noted that an extended period had elapsed between the time of the opening and closing of negotiations and nearly one year had elapsed between the end of negotiations and the certification of issues for Interest Arbitration. He asserted that the Association ignored the ongoing duty to bargain which continues even during the term of a contract. The Examiner gave no weight to the Association’s argument that the reopener in the expired contract as well as a notice the County received during the term of that contract indicating that its payroll practices were not in compliance with law established that if the County chose not to reopen the expired contract, it certainly should have placed this issue on the bargaining table at the outset of negotiations. The Examiner concluded that opening the issue of payroll practices in September 2004 did not frustrate the bargaining on the successor contract and had “no connection” with the prolonged period of negotiations and mediation which preceded the certification of 14 issues for Interest Arbitration.

The Examiner also dismissed the County’s charge that the Association had failed to bargain in good faith. He noted that the Association responded in a timely manner when the County finally raised the issue of payroll practices and the Association came to the bargaining table for negotiations and mediation on the payroll practices issue. Under Washington law the Association was not obligated to agree with the employer’s proposal. The employer had the option of pursuing this issue for interest arbitration. The Examiner dismissed both charges.

Editorial Comment: The Examiner’s refusal to affirm the Association’s charge that raising the issue of payroll practices 21 months after the opening of negotiations could lead to greatly complicated and protracted negotiations in Washington. There was ample evidence on record to establish that the County knew, or should have known, that it had serious legal and practical problems with its payroll system prior to opening negotiations in early 2003.

2005

WASHINGTON PERC HEARING EXAMINER RESTRICTS PAID UNION LEAVE

On May 10, 2005 PERC hearing examiner Katrina Boedecker ruled that it is an unfair labor practice for Washington public employers to pay union representatives to (1)

attend executive board and general membership meetings, (2) attend WACOPS or other political action conventions, (3) attend meetings with union attorneys or business representatives to plan negotiations or consider other labor matters and (4) participate in mediations, arbitrations or other activities not involving formal disciplinary investigations and hearings.

Under Boedecker's ruling, an employer may grant paid union leave only for collective bargaining or labor management meetings pursuant to an explicit agreement set forth in a collective bargaining agreement or to represent members in discipline (interviews, Loudermill hearings and grievance arbitrations concerning discipline.

Boedecker observed: "Common logic and experience dictates that an employer who provides a free meeting place for unions, and pays union members to conduct union business, is assisting and dominating the union." *Kitsap County*, Decision 8292-A (PECB 2005). Such employer domination and assistance is an unfair labor practice prohibited by RCW 41.56.140(2).

*Editor's Note: Kitsap County Deputy Sheriff Guild attorney Jim Cline reports that the Guild has appealed the hearing examiner's decision. In 1983 the Washington Supreme Court rejected a similar argument that paid leave would lead to "company" unions and amount to illegal employer domination of public employee unions. The Supreme Court ruled that paid union leave did **not** violate Washington law. Prior PERC decisions hold only that unrestricted paid union leave that would permit pay for organizing employees of other public employers would violate Washington law.*

Despite the fact that the decision is less than 2 months old, it has been raised in contract negotiations in Washington as support for proposals to severely limit use of paid union leave and barring union use of employer facilities. We will report PERC's decision when it is received.

PERC FINDS REDMOND (WASHINGTON) DID NOT BARGAIN IN GOOD FAITH

A Washington's Public Employment Relations Commission hearings examiner recently concluded that the City of Redmond Washington failed to bargain in good faith when it reduced its wage proposal and when it failed to produce information concerning wages paid by comparable employers.

The contract for non-sworn employees of the Redmond Police Department included a wage reopener for 2002. In June 2002 the City's attorney left a voice mail message for the Association's attorney in which he offered a 3.51% wage increase provided that was the only change in compensation and "the process does not drag out." In response to the City's June 2002 offer of a 3.51% increase, the Association's attorney promptly sent the City's attorney an e-mail message in which he requested the results of the City's wage survey so that the Association could consider the 3.51% offer in light of that information.

Four months later, the City withdrew the 3.51% offer and offered only a 2.53% increase in mediation. Predictably mediation broke down. The Association filed unfair labor practices charges challenging the City's regressive wage proposal and its failure to produce the wage survey. *After* the ULP was filed, the City finally produced its wage survey.

PERC's Examiner concluded: "The significant reduction of the [City's] wage offer with no positive offset is sufficient evidence of the employer's lack of good faith to find an unfair labor practice violation." He found that both contingencies mentioned in the voice mail were satisfied: the wage increase was the only change in compensation and the process had not dragged out. He noted that the "not drag out" condition was so vague as to not afford the Association notice as to any actual time frame for acceptance of the offer. The offer should have remained open at least through the first mediation session.

The Examiner found that although the City probably had not completed its wage survey before it was finally produced in December 2002, the underlying data were available and could have been produced. He rejected the City's defense that it did not understand that the Association was requesting its survey until the ULP was filed.

PERC's Order requires that the City reinstate its 3.51% offer, and if accepted, "act in good faith as required to implement the resulting agreement."

David A. Snyder represented the Association in this case.

Editorial Comment: We'd expect the same result under Oregon law. The ERB would also frown on an employer reducing its wage offer and failing to produce information requested for bargaining. Under Oregon law, such information must be produced in 2 weeks.

2004

PERC REAFFIRMS UNION'S ABILITY TO PROTECT BARGAINING UNIT WORK

In September 2004 PERC once again applied its "well-established" rule that transfers of bargaining unit work to persons outside the bargaining unit are a mandatory subject of bargaining. *Shelton School District*, Decision 8729 (PECB 2004).

The Shelton case arose when the Shelton School District laid off a mechanic effective September 1, 2003 and posted a "new" position of "utility person" on September 15, 2004. The union objected, asserting that the vast majority of the work to be done by the "utility person" had historically been bargaining unit work. A PERC Examiner agreed, concluding that the employer committed an unfair labor practice by refusing to bargain concerning the skimming of bargaining unit work to a new position.

The Examiner ordered the School District to restore the skimmed work to the bargaining unit and reinstate the laid off mechanic with full back pay and benefits.

Transfers of bargaining unit work to other employees is “skimming” while transfers to employees of another organization are known as “subcontracting.” Both cost cutting strategies have been used by Washington public safety employers. The *Shelton* case demonstrates that skimming and subcontracting can be successfully resisted if the Guild or union acts promptly. Although the *Shelton* case was not a public safety decision, the same rules will apply to a Washington police, fire or corrections case.

PERC examines 5 factors to determine whether the work at issue in a skimming or subcontracting case is in fact bargaining unit work:

- 1) The employer’s previously established operating practice as to the work in question—had non-unit personnel done the work before?
- 2) Did the transfer of the work involve a significant detriment to bargaining unit members? Did the transfer change conditions of employment, significantly impair job tenure or reasonably anticipated work opportunities?
- 3) Was the employer’s motivation solely economic?
- 4) Was there an opportunity to bargain generally about the changes in existing work practices?
- 5) Was the work fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills or working conditions?

The Guild or union must make a prompt demand to bargain to preserve the union’s ability to challenge the transfer of bargaining unit work.

Under Washington law, the duty to bargain requires that a party seeking changes of existing wages, hours and working conditions must:

- 1) give notice to the opposite party;
- 2) provide an opportunity for bargaining prior to making a final decision;
- 3) bargaining in good faith, upon request; and
- 4) bargaining to agreement or impasse concerning any mandatory subjects of bargaining.