SNYDER AND HOAG, LLC CLIENT NEWSLETTER

2010 -- FIRST EDITION

LIMITATIONS OF HEAD CAMERAS

Force Science News number 145 that went out on March 12, 2010 features an article on the advantages and limitations of head cameras. John Hoag and his son James Hoag (an officer with the San Jose PD) contributed to this important article. Head cameras are being used by the San Jose Police Department on an experimental basis and have been loaned to them by Taser International. Training Officer James Hoag, who has been on the department for over 10 years and is as Master Taser Instructor, providing training for the experimental program. However, with the advantages of having the video comes a word of caution. A head camera or any other camera which may have taped an event will not perfectly capture what an officer sees and may capture pictures that the officer could not have seen, either because of the angle of the camera or a phenomenon called "inattentional blindness." Working with Force Science, John Hoag wrote a video advisory is in the article and should be reviewed by investigators who are relying on video images in their work.

Editorial Comment: Snyder & Hoag, LLC are proud of John and James' contributions to Force Science. We hope all of our clients are receiving the free emails of the Force Science News Articles. At the end of this newsletter, we comment upon an older but related Force Science Article.

Oregon

EMPLOYMENT RELATIONS BOARD

ERB RECOGNIZES PRIVLEGE OF DISCUSSIONS IN ASSOCIATION MEETING

The case of *Hood River County v. Oregon AFSCME*, Council 75 (UP 009-08) arose when the county accused *AFSCME* of bad faith bargaining by its membership rejecting a tentative agreement. The county also accused the union's bargaining team of urging its members to reject the tentative agreement in violation of the parties' ground rules.

The issue of privilege arose when union negotiators testified that they supported the agreement, but a number of bargaining unit members did not and spoke out against it. The county asked who specifically spoke out against it and initiated strike discussions. The union objected on the grounds that those discussions should be privileged communication. The ERB extended its ruling in case of *AFSCME v. City of Portland*, 22 PECBA 752 (2008) when it held that a bargaining units' members conversation with the union official was confidential. They stated:

> "an employer's attempt to compel a union official to reveal the contents of communications with bargaining unit members is prohibited."

The ERB also cited previous cases where it stated that as a general rule in house conversations at bargaining caucuses and other activities that have like nature are protected by an expectation of confidentiality. Importantly, in a footnote that the Board noted that it probably lacks jurisdiction to "impose a full evidentiary privilege that applies to parties outside of the labor management relationship. However, they impose that confidentiality 'for purposes and policies of the PECBA.'" **(**Public Employees Collective Bargaining Act.)

The county also argued that even if there was a general confidentiality rule that the union waived it when its bargaining unit spokesman and president testified about some of the discussions at the ratification meeting. However, the Board stated:

> "We conclude there was no waiver here because the two union official witnesses were not entitled or authorized to waive the confidentiality right of individual members."

The Board went on to comment that the union and the individual employees may have diverging interests: the union in defending itself against an unfair labor practice charged based on the conduct of its officers, and the individuals who want to have their conversations remain anonymous. However, in an attempt to strike a compromise, the Board also struck the direct examination of the union witnesses so it protected "both the bargaining unit member's right to confidentiality and the county's right to a fair hearing." The Board went on to state that the union's failure to produce its minutes of the meeting in response to the county's request would be held against it. The ERB pointed out that the union could redact or cross out parts of the minutes so that they would not identify individual unit members, as it would be fair for the county to see the minutes as it regards statements made by the union's bargaining team.

Turning to the merits of the case the Board found that the union committed an unfair labor practice by failing to recommend the ratification of the tentative agreement. The reason it did so was its bargaining team made a proposal but didn't recognize the affect of that proposal on some of its members regarding the health care payments. Previously part time employees had medical insurance fully paid. Under the tentative agreement they would have to contribute to the payment based on their percentage of time worked for the county. The ERB based much of its rational on the fact that the union negotiators realized they had a problem with the tentative agreement after they signed it and tried to renegotiate it. However, the agreement arose out of the union's own proposal. In addition, after mediation failed, the union made a new proposal in its

final offer that had never been negotiated at the table. That also was deemed to be an unfair labor practice.

The remedy that was ordered was the union cease and desist bargaining in bad faith. The union was also ordered to a post notice indicating that it had committed an unfair labor practice.

Editorial Comment: The extension of a privilege to a union or association meeting decision was important to protect the right of individual bargaining unit members. More interesting was that the county did not get a remedy of the union being required to sign the agreement that the members' rejected. Much more draconian remedies have been posed against each side during the interest arbitration process. So this case reinforces the importance of careful bargaining both in making sure that well crafted proposals are made at the negotiating table and that no new proposals are introduced after the end of bargaining.

THE ERB RULES THAT CONTRACT WAIVER ISSUES ARE SUBJECT TO THE GRIEVANCE PROCESS

In the case of *Clackamas County Employees Association v. Clackamas County* (UP-053-09) the parties had a collective bargaining agreement that allowed for insurance coverage changes to be made by a county wide insurance committee. The county changed its insurance plans during the term of negotiations and the association filed an unfair labor practice. The Board dismissed the complaint stating that "a failure to bargain in good faith could not be made when the only real issue was whether or not the county had violated the parties' collective bargaining agreement." The association had pleaded only a 1(e) violation which is a failure to bargain in good faith, and the ERB noted that did not plead a 1(g) violation which is a violation of the collective bargaining agreement which results in bad faith bargaining.

Editorial Comment: Even if there had been a 1(g) violation pled by the association, then prior Board decision would have required the parties to have exhausted their administrative remedies, i.e. arbitrated whether the actions of the county violated the contract. The county had a strong argument that they did not. Beware of labor management committees that have the power to make decisions.

ERB FINDS THAT WRITTEN WARNINGS WERE ISSUED TO A BARGAINING UNIT MEMBERS IN RETAILATION FOR UNION ACTIVITY

In the case of *International Union Operating Engineers v. Grant County*, (UP-008-09) in what was a very lengthy stipulated order, the ERB found that the county had written warnings to employees in retaliation for their engaging in protected activity. This is even though the parties' collective bargaining agreement did not provide for the written warning to be discipline. Also, at times during a series of bad work place interactions the ERB found that the county committed an unfair labor practice by making threats against a number of bargaining unit members. However,

statements made generally against the union was found “not to be the type of serious or credible threat that violates subsection 1 (a).”

In addition, the ERB ordered as a remedy that employees who had to use vacation to testify at the ULP hearing be reimbursed by the county for the time spent testifying.
Editorial Comment: So it appears that negative comments themselves against the labor organization are not enough. But the standard isn't quite the same for negative comments against individual bargaining unit members.

ERB FINDS A WAIVER OF THE RIGHT TO BARGAIN

In the case of *Washington County Police Officers Association v. Washington County*, Up 15-08, the ERB ruled that the association waived its right to bargain over transferring bargaining unit work from corrections officers to civilianized non-association employees. The work in question was in the control pods of the jail where corrections officers use to open and close doors, monitor the work in the pods.

The Board concluded that while the county changed its position occasionally it did ultimately offer to bargain and did not offer to bargain simply the impact of its change, but the decision as well, and that the association waived its rights to bargain by claiming that without a clear statement from the county that it was negotiating without any conditions, that the county was not really negotiating. In this case, attorneys Goldberg and Garrettson were found to have an opportunity to bargain in good faith about the county's actions and failed to do so because the County stated that it would bargain while not waiving its position that it was not legally obligated to do so.

Editorial Comment: Too much to do was made as to form over substance in this case.

GRIEVANCE

ARBITRATOR PATRICK HALTER REVERSES A TERMINATION FOR DISHONESTY BASED UPON DUE PROCESS VIOLATIONS

Lane County's Peace Officers' contract has a standard just clause provision and also has a statement about internal investigation protections that “the employee shall not be investigated by a supervisor who has a personal interest in the investigation.” In this particular case a corrections officer was ordered to report for firearms training. The officer asked if she could relinquish her weapon as opposed to going to firearms training, and her request was denied. On the day of the training the officer did not attend the training but at the end of the day filled out a timecard claiming two and half hours of compensatory time from having attended the training. The sheriff's department commenced an internal investigation for dishonesty for filling out the timecard.

During the IA process the investigation was stopped while a state police investigation was commenced for potential theft 3. The state police ended up not doing their own investigation but taking the county's IA's finding minus the grievant's compelled statement to the district attorney. The district attorney's office declined to prosecute based on its workload.

Then a captain overseeing the investigation ordered the sergeant who had conducted it to write up investigation finding the grievant culpable by relying on the fact that criminal charges would have been filed by the district attorney's office. The case went to a predetermination hearing, where a lieutenant terminated the grievant. However, at the arbitration the lieutenant testified had it not been for the captain's memorandum, he was considering discipline less than termination.

The arbitrator also was concerned that the termination letter stated that "no noted improvement has been chronicled in the grievant's behavior since returning from extended leave." The arbitrator decided that this meant that other complaints had been filed against the grievant but had not been investigated, and yet must have been considered by the county in deciding to terminate the grievant.

All of the above caused the arbitrator to declare that the due process violations were so egregious that he ordered the grievant reinstated with no back pay. He also found that she was dishonest and but for the due process violations would have been terminated. He ordered the grievant to be placed on a "last chance" agreement for 12 months and if the grievant violated further department orders that she would be terminated.

Editorial Comment: So what are the provisions of the last chance agreement? Some last chance agreements include an employee giving up the employee's right to challenge a subsequent termination. This is indeed an unusual award.

ARBITRATOR HERMAN TOROSIAN REDUCES A 10 DAY SUSPENSION WITHOUT PAY TO A WRITTEN REPRIMAND FOR OFF DUTY CONDUCT

In arbitration between *AFSCME and the City of Portland* involved a 10 hour suspension without pay for a non sworn police employee who was charged with violating policy directives by driving inappropriately while off duty and passing a car with excessive speed in a school zone.

The case became complicated because the same employee had been terminated by the Portland Police Bureau and the ERB had ruled that the employee had been terminated for engaging in protective activities as the union steward. In this case the employer had imposed a 10 day suspension without pay on the employee for her off duty driving. The arbitrator quickly concluded the employee had violated policy by her bad driving. However, based on previous discipline issued by the Bureau to other employees for off duty driving, the arbitrator reduced the 10 day suspension without pay to a written reprimand.

Washington

PERC

PERC Finds That a Refusal to Bargain Promptly Violates RCW 41.56

The Washington State Patrol (WSP) committed an unfair labor practice when it refused to meet with the Washington State Patrol Troopers Association (WSPTA) for more than three and one-half months. PERC declared that the duty to bargain in good faith is an affirmative obligation on both employers and unions to make reasonable efforts to schedule bargaining following a demand to bargain. Once a valid demand to bargain has been made, the party seeking to delay negotiations must explain why it needs the delay.

PERC applied a "totality of the circumstances" analysis and emphasized that complaints alleging a failure to bargain in good faith are fact specific. In this case, the WSPTA initiated efforts to schedule bargaining in the Fall of 2007, even though the parties' contract stated that a demand to bargain could only be made during the month of January. The Association made its demand on January 1. The employer responded by naming its negotiator on January 16—her identity was already known to the Association. On February 7 the employer finally proposed a bargaining date of April 21, 2008, explaining that because the legislature was in session and because it was concerned that the Association might declare impasse prematurely, it would not meet until that date.

PERC stated that given the parties' "developed" bargaining relationship, the fact that the WSPTA knew the identity of the employer's negotiator, the fact that it took the negotiator 38 days to respond to the Association's demand (and subsequent "prodding" by the Association to get bargaining started) the employer failed to timely respond to the demand to bargain. Furthermore, the employer's failure to inquire as to what subjects the Association wanted to bargain over and its reliance on the fact the legislature was in session (only until March 15) supported the Examiner's conclusion that the WSP failed to bargain in good faith. *Washington State Patrol*, Decision 10314-A (PECB 2010).

Editorial Comment: No games. PERC wants to see bargaining, and bargaining without delay.

GRIEVANCE

GRIEVANCE THAT AROSE AFTER THE CONTRACT EXPIRED MUST BE ARBITRATED ACCORDING TO PERC

In *Community Transit*, Decision 10267-A (PECB, 2009) PERC reversed its prior decisions and held that for interest eligible public employees (including police and fire) arbitration clauses in collective bargaining agreements survive the expiration of the agreement unless the parties have

agreed that the arbitration clause expires with the agreement. PERC explained that its decision would assure that interest arbitration eligible employees would have a continuous method for resolving labor disputes during the interim period between contracts. It distinguished private sector precedent by observing that in the private sector employees has the option of going on strike over such grievances. Because it was reversing earlier decisions, PERC did not apply its new rule of law to this case; the new rule will only apply prospectively.

Editorial Comment: A well-reasoned decision that assures that the unions will be able to proceed to arbitration regardless of when the grievance arose. Given the duty to maintain the status quo during negotiations, if the contract violation concerns a mandatory subject of bargaining, unions will continue to have alternative of filing a unilateral change ULP as well.