City of Seattle, Decision 11588 (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 24026-U-11-6144 DECISION 11588 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Vick, Julius, McClure, by *Jeffrey Julius,* Attorney at Law, for the union.

Seattle City Attorney Peter S. Holmes by *Paul Olsen* and *Jennifer K. Schubert,* Assistant City Attorneys, for the employer.

On June 3, 2011, the Seattle Police Officers' Guild (union) filed an unfair labor practice complaint against the City of Seattle (employer) with the Public Employment Relations Commission. The union alleged the employer violated RCW 41.56.140 (4) and (1) by refusing to bargain when it unilaterally changed the false arrest insurance benefits and required employees to sign an agreement for legal representation. On June 8, 2011, a preliminary ruling was issued finding a cause of action and the employer filed a timely answer on June 30, 2011. On July 1, 2011, the matter was assigned to Examiner Emily H. Martin, who presided over a hearing on April 23, 24 and 25, 2012. The parties submitted post-hearing briefs to complete the record.

ISSUES

1. Did the employer change a mandatory subject of bargaining when it changed an element of the false arrest insurance benefit and used in-house attorneys?

No, the employer's change to use an in-house attorney rather than an attorney from the law firm of Stafford Frey Cooper was not a mandatory subject of bargaining, so the employer did not have an obligation to bargain this change.

2. Did the employer refuse to bargain a mandatory subject when it used a legal representation agreement which said that information could be shared with other defendants?

No, the use of the representation agreement was not a mandatory subject of bargaining, therefore, the employer did not have an obligation to bargain this change.

BACKGROUND

Since 1952, the union has represented a unit of both police officers and sergeants which will collectively be referred to as police officers in this decision. In the course of their work, police officers may be subject to lawsuits stemming from work activities such as using force or making arrests. These lawsuits, referred to as police action cases, are not only filed against individual police officers but can also include multiple defendants, such as the employer.

According to the Seattle Municipal Code, city employees, including police officers, can be indemnified and defended by the employer for employee action taken during the "scope and course" of their employment. SMC Chapter 4.64. Indemnification does not automatically include punitive damages. Instead, the employer makes a case-by-case determination about whether punitive damages will be indemnified.

In addition to the municipal code's provision on indemnification, since at least 1973 the union and employer have included a false arrest insurance provision in their collective bargaining agreement. The parties' most recent agreement states that the employer shall provide false arrest insurance either through self-insurance or an insurance policy. As stated in the collective bargaining agreement, the intent of the parties was to provide "no less benefits for false arrest

insurance than currently enjoyed by the parties." Furthermore, "administration of the plan will be in accordance with prior practice or as mutually agreed upon in writing."

In 1973, the false arrest insurance benefit was provided through a policy from the Industrial Fire and Casualty Company. One of the conditions of that policy was that the insurance carrier could take over the defense of any claim "provided that the attorney retained is approved in writing by the Insured and acceptable to the carrier." The policy defined the insured as including the employer and police officers. From 1994 through 2010, the employer continued to provide the false arrest benefit through self-insurance.

Before the employer moved to a self-insured plan, the law firm of Stafford Frey Cooper was contracted to provide a majority of the police officer's legal representation in police action cases. Once the employer moved to a self insured plan, the employer continued to use this law firm through 2010. In some lawsuits, both the employer and police officers were named defendants, and the law firm represented both. In recent years, Stafford Frey Cooper had been earning $1.5 to $2 million dollars annually from its police action contract with the employer.

City Attorney Peter Holmes addressed the Stafford Frey Cooper no-bid contract during his successful campaign to become city attorney. On September 10, 2010, the employer's City Attorney Peter Holmes notified Stafford Frey Cooper and the union that the employer would not be renewing its contract with the law firm which expired at the end of 2010. Shortly afterwards the union demanded to bargain with the employer.

When the employer terminated the Stafford Frey Cooper contract, the city announced it planned to bring 75 percent of the police action work in-house. The employer planned to hire outside counsel for the remaining work. The employer invited the union to participate in the selection process. The union rejected the employer's invitation because it believed this matter should have been brought to the bargaining table rather than unilaterally implemented.

The employer hired two in-house attorneys to handle the police action cases, one of which had several years of experience defending public employees in New York. In May 2011, the

attorney who had worked in New York used a legal representation agreement modeled on what he had used with his New York clients. This agreement was to be signed by police officers at or before their first meeting with their in-house attorney. This representation agreement had the police officer agree that "I understand that the same counsel is representing the City and other named defendants and that information provided by me may be shared with the other defendants." The initial version of this agreement was used at least one time, shortly before the filing of the unfair labor complaint that initiated these proceedings.

LEGAL STANDARD

Duty to Bargain Mandatory Subjects

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires a public employer to bargain collectively with a union representing its employees. A public employer has a duty to bargain, in good faith, "personnel matters, including wages, hours and working conditions." The determination as to when the duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer commits an unfair labor practice when it refuses to engage in collective bargaining. RCW 41.56.140.

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, and working conditions of employees, and (2) the extent to which managerial action is deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC,* 113 Wn.2d 197, 200 (1989) (*City of Richland*). The inquiry focuses on which characteristic predominates. *City of Richland,* 113 Wn.2d at 200. The Supreme Court in *City of Richland* held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects." *City of Richland,* 113 Wn.2d at 200.

Derivative Interference

When the Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights. *Battle Ground School District*, Decision 2449-A (PECB, 1986).

ANALYSIS

ISSUE 1: Did the employer change a mandatory subject when it used in-house attorneys to represent police officers?

The union claims the employer changed the false arrest insurance benefit by terminating its contract with the law firm Stafford Frey Cooper and using in-house legal representation. The union argues that because legal representation is provided to the police officers through an insurance benefit, it is a mandatory subject. In a similar case, *City of Tacoma*, Decision 4740 (PECB, 1994) a union argued that having an in-house nurse available to provide health care was mandatory subject of bargaining. In *Tacoma*, the employer's in-house industrial nurse retired and the employer decided unilaterally not to fill this empty position. The examiner found that the employer's change to part of a health benefit had been a permissive subject of bargaining. Likewise, it must be determined if the alleged change involves a mandatory subject of bargaining.

City of Richland requires the application of a balancing test to determine whether a subject is mandatory to bargain. On the one side of the test is the extent to which this change impacts employee wages, hours and working conditions. The union argued this change does impact employee's wages, hours and working conditions.

First, the nature of the legal representation can result in out-of-pocket expenses for employees. Under the employer's indemnification procedures, punitive damages are not automatically indemnified and a case by case decision is made by the employer. Employees are potentially liable for punitive damages. The union's concern is if the change to in-house counsel results in more punitive damages, employees would be faced with more out-of-pocket expenses.

A second potential way this change could impact employees' out-of-pocket expenses would be if more employees hire their own attorney rather than use the one assigned by the employer. By doing so, the employee forgoes indemnification and faces additional out-of-pocket expenses than would have occurred if the employer had not hired a different attorney.

Both arguments are based on the union's assumption that an in-house attorney would provide an inferior level of legal representation than Stafford Frey Cooper. In *City of Dayton,* Decision 1990-A (PECB, 1984) the choice of health insurance carrier was not considered a mandatory subject when the new plan's benefits were equivalent to that of the prior plan. Likewise, the employer here filled its in-house positions with experienced attorneys, and the legal representation has not been shown to be less than what was provided by the external law firm. The record shows the union fears that the legal representation would be worse but it did not prove the fears are likely or should outweigh the employer's interest to best manage its litigation. This concern may have been bolstered by the assertions made by the Stafford Frey Cooper law firm when it asked the employer to reconsider its decision not to renew its contract. For example, the firm argued that its expertise helped contain costs and minimize punitive damages. While the record demonstrated that the union had concerns, the record is not sufficient to determine whether these fears were reasonable or actually realized after the legal work was brought in-house.

The union also argues the change creates a conflict of interest since in-house attorneys are within the "chain of command" of the City Attorney. As such, they are part of the office which represents the employer in many other matters including discipline and criminal charges against police officers. However all licensed attorneys in Washington must abide by the rules of Professional Responsibility and there are repercussions if the City Attorney's office does not guard against conflicts of interest. Because of the potential for a conflict of interest, the City Attorney's office has taken measures to block the flow of confidential information between the attorneys representing a police officer with other attorneys in the office who would represent the employer in discipline or criminal charges against that officer. While these measures were not necessary when the legal work was performed by Stafford Frey Cooper, these measures are a reasonable way to address conflict of interest concerns.

In addition, the union's conflict of interest argument is not persuasive because the legal work performed by Stafford Frey Cooper had been overseen by the employer. In some cases the law firm represented multiple defendants, including the employer, in the police action litigation. Therefore, in practice, the outside law firm's work was never completely independent from the City Attorney's office.

On the other side of the balancing test is the extent to which the decision is a management prerogative. The City Attorney's office is responsible for managing the litigation needs of the employer. As police officers can be indemnified under the municipal code, with the possible exception of punitive damages, the employer is liable for the police officers' legal fees and judgments. Therefore, the employer bears the majority of risk of an adverse result against an officer. Thus, the employer has a strong self-interest in successful representation of its officers and itself. The decision related to how that work is managed is a strong management prerogative.

This case differs from *Kitsap Transit*, Decision 11098-A (PECB, 2012), where there was a change to a mandatory subject of bargaining. In *Kitsap*, the examiner recently found that an employer changed a mandatory subject of bargaining when it changed its health care plan and altered which doctors would provide health care under the health care plan. *Kitsap* involved a change to different designs in the health care plans and a in the ability of patients see a specialist without needing prior approval. The *Kitsap* change resulted in disruptions in some patients' care and delays. *Kitsap* is not persuasive in this case because in *Kitsap* the health care benefits changed, not just the identity of the health care providers. In contrast, in the current case the police officers maintained the same benefit of legal representation in police action cases even though that representation is provided by in-house counsel.

Conclusion

Applying the *Richland* balancing test, I find that management prerogatives predominate over any effect the alleged change may have on the wages of the employees. The potential, if any, extra cost is small when compared to the employer's interest to most efficiently manage legal representation for police officers and itself. Therefore I find the change to in-house counsel is a

permissive subject of bargaining. As the in-house issue involved only a permissive subject, there was no obligation to bargain this decision.

ISSUE 2: Did the employer refuse to bargain a mandatory subject when it used a legal representation agreement?

Again, the *City of Richland* balancing test applies here. On one side of the balancing test is the extent to which this change impacted employee wages, hours and working conditions. The union argues that the employer's use of a legal representation agreement was a further change in the nature of the legal representation because it forced police officers to share their confidential information. The union's concern is that confidential information would be shared by in-house counsel with others in the employer's organization, and thereby become the basis of an investigation or discipline against police officers.

The new legal representation agreement was part of the process to establish an attorney-client relationship and the full context of the agreement must be considered when evaluating whether this involved a mandatory subject. As explained through testimony, the agreement was to be discussed in the first conference between the attorney and client where questions about how information would be shared would be answered. At the hearing, the attorney who drafted this agreement clarified that this agreement was not intended to force officers to waive attorney-client privilege. Instead the document was created to inform police officers that in order to successfully defend multiple defendants in a joint representation case, there is a need for an attorney to have conversations with each defendant to explore what occurred so they can best present a defense.

The wording of this representation agreement may have been especially jarring to the union because Stafford Frey Cooper had not had a practice of using a legal representation agreement. Although Stafford Frey Cooper did not use a legal representation agreement, they also were involved in the joint defense of police officers and the employer. In order to do that work, it likely made determinations about what information could or could not be disclosed in conducting a joint defense. Therefore, I find that the use of the legal representation agreement, and the accompanying discussions, made joint defense disclosures more transparent to police officers.

The representation agreement did not make a difference in what type of information and to whom the in-house attorney would disclose compared to what type of information Stafford Frey Cooper had disclosed.

When the full context of the agreement is considered, I find that the impact this change had to wages, hours and working conditions was minimal because employees were not waiving attorney-client privilege with this document.

On the other side of the Richland balance test is the extent to which the representation agreement is an essential management prerogative, which in this case is more substantial than the impact on wages, hours and working conditions. Prior to the filing of this unfair labor practice change, there had been challenges raised in at least two local proceedings regarding the lack of legal representation agreements in police action cases. No orders were issued in those local proceedings before the filing of this unfair labor practice. However, the in-house attorney who practiced in New York testified this had also been a concern raised in connection to a lawsuit in New York involving the improper joint defense of a police officer and an employer. Because of these reasonable legal concerns about the lack of transparency regarding how information is used during the joint defense of police officers, I find that the use of this representation agreement is a permissive subject of bargaining. The possible impact on wages, hours and working conditions of employees is outweighed by the extent of which this decision involves the management prerogative of stemming criticism regarding the lack of transparency in the joint defense procedures.

CONCLUSION

Based on the totality of the circumstances and the record as a whole, I find the employer did not commit an unfair labor practice when it decided to move legal work from an outside law firm to in-house counsel or when the new in-house counsel introduced the representation agreement. The employer was not required to negotiate because its decisions were permissive, not mandatory, subjects of bargaining. Because the employer did not refuse to bargain and did not violate RCW 41.56.140(4), the employer did not commit a derivative interference violation of RCW 41.56.140(1).

FINDINGS OF FACT

1. The City of Seattle (employer) is an employer within the meaning of RCW 41.56.030(12).

2. The Seattle Police Officers' Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of police officers.

3. The employer and union are parties to a collective bargaining agreement effective July 17, 2008, through December 31, 2010.

4. Bargaining unit members may be subject to lawsuits when performing job duties.

5. Bargaining unit member are indemnified for employee action conducted during the "scope and course" of their employment.

6. From before 1994 through 2010, the employer contracted with the law firm of Stafford Frey Cooper to provide legal representation for bargaining unit members in police action cases.

7. On September 10, 2010, the employer's City Attorney Peter Holmes notified Stafford Frey Cooper and the union that the employer was not renewing its contract with the law firm in 2011.

8. In order to most efficiently manage the legal representation of police officers, the city brought 75 percent of the police action work in-house. The employer predicted it would hire outside counsel for about 25 percent of the work.

9. Due to legal concerns, in 2011 the in-house counsel used a legal representation agreement which stated "I understand that the same counsel is representing the City and other named defendants and that information provided by me may be shared with the other defendants."

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By its actions described in the above findings of fact, the employer did not refuse to bargain and did not violate RCW 41.56.140(4) when it used in-house counsel for legal work that had been done by the outside law firm of Stafford Frey Cooper.

3. By its actions described in the above findings of fact, the employer did not refuse to bargain and did not violate RCW 41.56.140(4) when the employer began using a legal representation agreement.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 4th day of December, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

EMILY H. MARTIN, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

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DETAILS:	-				
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