

City of Seattle, Decision 9957-A (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD,

Complainant,

vs.

CITY OF SEATTLE,

Respondent.

CASE 20402-U-06-5196
DECISION 9957-A - PECB

CASE 20687-U-06-5271
DECISION 9958-A - PECB

DECISION OF COMMISSION

Snyder and Hoag, LLC, by *David Snyder*, Attorney at Law, for the union.

Thomas A. Carr, Seattle City Attorney, by *Jean M. Boler*, Assistant City Attorney, for the employer.

The City of Seattle (employer) appeals certain Findings of Fact, Conclusions of Law, and Order issued by Examiner J. Martin Smith holding that the employer committed an unfair labor practice. [\[1\]](#) The Seattle Police Officers' Guild (union) supports the Examiner's decision.

ISSUE PRESENTED

Did the employer commit an unfair labor practice when the Seattle City Council adopted amendments to the Seattle Municipal Code to provide the Office of Professional Accountability Review Board with un-redacted copies of closed complaints as part of that entity's review process and changed that Board's confidentiality obligations without first satisfying its collective bargaining obligation?

For the reasons set forth below, we reverse the Examiner's decision that the employer committed an unfair labor practice. The amendments to Seattle Municipal Code section 3.28.920 did not change mandatory subjects of bargaining. The union's complaints are dismissed.

BACKGROUND

The Seattle Police Officers' Guild represents the uniformed, nonsupervisory law enforcement officers who work for the City of Seattle. When citizens make a complaint against an officer regarding how that officer discharged his or her duty as a law enforcement officer, the Office of Professional Accountability (OPA) conducts an investigation and makes a recommendation to the Chief of Police whether the employee should be disciplined. As part of the review process, the OPA employs an "Auditor" who reviews all complaints to ensure that complaints meriting investigation are in fact processed by the OPA. Additionally, the OPA Auditor creates reports describing the files and records reviewed by the OPA and summarizing any identifiable trends. The Auditor also has the authority to request further investigation of certain cases not originally referred to the OPA for investigation.

In addition to the OPA Auditor, the city also created the Office of Professional Accountability Review Board (OPARB) as another means for reviewing the actions of law enforcement officers. The OPARB is a three-member citizen review panel that reviews closed complaints and investigations and creates its own yearly report regarding any identifiable trends. For the first part of the OPARB existence, the files provided to it were redacted so that neither the employee who was the subject of the complaint, nor any person interviewed, would be identified. The OPARB has never had the authority to impose discipline or recommend that any officer be disciplined.

Additionally, OPARB members have always been required to keep the information contained within the OPA files confidential, and the OPARB members have always signed agreements stating that they indemnify and hold the employer harmless from any legal action if it were proven that a member intentionally released or disclosed confidential or investigative information. Although the Seattle City Council created the OPARB under the employer's code-making authority granted to it by Title 35 RCW, many of the rights and responsibilities, including the provisions that allow the OPARB to only review redacted files that have been closed by the OPA, were modified through the collective bargaining agreements up until the agreement that expired December 31, 2006.

Prior to May 2006, the OPARB expressed frustration about being provided redacted files. As a result of this expressed frustration, the employer on at least one occasion explored, through the collective bargaining process, the possibility of providing the OPARB with unredacted closed OPA files. The parties did not reach an agreement through bargaining.

In March 2006, City Councilman Nick Licata met with the union to discuss amending the OPARB ordinances to provide the OPARB members with un-redacted files. The union informed Licata that it

opposed the proposed amendment, asserted the subject of the amendment was a mandatory subject of bargaining, and informed Licata that it would file an unfair labor practice if any change to the ordinance was made without bargaining. Shortly thereafter the union made a demand to bargain both the decision and the effects of the decision to provide the OPARB with un-redacted files.

In May 2006, the Seattle City Council amended the city code to provide the OPARB with un-redacted closed complaint files and to clarify the OPARB duty of confidentiality. As part of the amendment, the council delayed the effective date of the changes so that the parties would have an opportunity to bargain any effects that the subject matter of the amendment may have on mandatory subjects of bargaining.

The union filed this complaint alleging that the subject matter of the May 2006 amendments was itself a mandatory subject of bargaining that required decision bargaining, and because the employer failed to provide the union with an opportunity to bargain the decision and the effects of that decision before enacting the amendment, the employer committed an unfair labor practice.

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DISCUSSION

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Applicable Legal Standards

In every case where a unilateral change is alleged, the first step for an examiner or this Commission is to determine whether the duty to bargain existed as to that change. The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires employers to bargain collectively with unions representing their employees. *Peninsula School District v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407 (1996). The scope of bargaining under Chapter 41.56 RCW encompasses "grievance procedures and . . . personnel matters, including wages, hours and working conditions." RCW 41.56.030(4). Both Commission and judicial precedents identify three broad categories of subjects of bargaining. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958)(cited in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997); *Federal Way School District*, Decision 232-A (EDUC, 1977)):

- Mandatory subjects, including the "wages, hours and working conditions" of bargaining unit employees, are matters over which employers and unions must bargain in good faith. It is an unfair labor practice for either of them to fail or refuse to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).
- Permissive subjects are management and union prerogatives, along with procedures for

bargaining mandatory subjects, over which the parties may negotiate, but each party is free to bargain or not to bargain, and to agree or not to agree. *City of Pasco*, 132 Wn.2d at 460.

- Illegal subjects are matters that parties may not agree upon, because of statutory or constitutional prohibitions. Neither party has an obligation to bargain such matters. *City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd*, 93 Wn. App. 235 (1998), review denied, 137 Wn.2d 1035 (1999).

In deciding whether an issue is mandatory or permissive, two principal considerations must be taken into account: (1) the extent to which the action impacts the wages, hours and working conditions of employees, and (2) the extent to which the action is deemed to be an essential management or union prerogative. *IAFF, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989)(*City of Richland*). The Supreme Court held in *Richland* 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 predominantly ‘managerial prerogatives,’ are classified as non-mandatory subjects.” *City of Richland*, 113 Wn.2d 197. The “scope” of bargaining is therefore a question of law and fact for the Commission to determine on a case by case basis. *City of Richland*, 113 Wn.2d 197; WAC 391-45-550.

When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates. *City of Richland*, 113 Wn.2d at 200. While management decisions concerning budgets and programs tend to fall into the "permissive" category, the impacts/effects of such decisions on employee wages, hours and working conditions are still "mandatory" subjects.

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Application of Standards

The starting point for our analysis in this case is the May 2006 amendment to SMC 3.28.290. That amendment states:

A. For the purpose of reviewing the OPA complaint handling process, the ((The)) OPA Review Board shall have access to ((,for purposes of review, redacted)) ~~redacted~~ unredacted complaint forms of all OPA complaints and ~~redacted~~ unredacted files of all closed OPA investigations, except for information the OPA would be required to withhold from persons not members of criminal justice agencies pursuant to the Criminal Records Privacy Act (Chapter 10.97 RCW) as it now exists and may hereafter be amended. The OPA Review Board shall have access to summary information necessary for its reporting obligations as set forth in Section 3.28.910 of

this chapter.

B. In discharging (~~(his or her)~~) their responsibilities, OPA Review Board members shall protect the confidentiality of Department files to which they have been provided access. (~~(in the same manner and to the same degree they would be obligated to protect attorney-client privileged materials under legal and ethical requirements. The OPA Review Board shall also be bound by the confidentiality provisions of the Criminal Records Privacy Act (RCW Chapter 10.97) and Public Disclosure Act (RCW Section 42.17.250 et seq.). The OPA Review Board shall not identify the identity of the subject of an investigation in any public report required by this chapter.)~~) OPA Review Board members shall not disclose information in these Department files and records except in the reports required by ordinance. OPA Review Board reports shall not contain identifying information about anyone involved in an OPA complaint or OPA investigation other than the OPA Director. "Identifying information" is defined as name, badge number, physical description, address, telephone number, email address, photographs or drawings, or any other unique identifying numbers such as driver's license, employee, vehicle or social security numbers. In the event of a public disclosure request pursuant to the Public Disclosure Act (RCW 42.17.250 et seq.), the OPA Review Board shall not disclose any information contained in OPA complaint forms or in files on closed OPA investigations, and shall transmit all such requests to the OPA Director for response.

C. Indemnification and defense of OPA Review Board members is governed by Chapter 4.64 SMC. It is outside the scope of OPA Review Board members' assignments to disclose information in Department files and records other than as allowed in subsection B of this section.

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Section 2. 3.28.920 subsection C of the Seattle Municipal Code supersedes and preempts confidentiality agreements by OPA Review Board members that are inconsistent with that subsection.

Section 3. This ordinance shall take effect and be in force the later of (a) or (b) as follows:

(a) whichever of the following dates (a)(i) or (a)(ii) is the first to occur:

(i) March 31, 2007 (which is ninety days after the expiration of the City's Collective Bargaining Agreement with the Seattle Police Officers' Guild (SPOG) on December 31, 2006), to allow an opportunity to collectively bargain the effects of any of this ordinance's provisions on the wages, hours and working conditions of SPOG members

The Examiner held that these changes to the Seattle Municipal Code impacted the terms and conditions of employment and, as such, the employer was obligated to bargain the decision to enact the amendment, as well as the effects that the amendment may have had on mandatory subjects of bargaining. In applying the balancing test in favor of requiring decision bargaining, the Examiner noted that the OPARB desired un-redacted files in an effort to discover which officers merited special

scrutiny based upon the complaints filed against that officer by the public, and that the OPARB was also pressuring the OPA to provide it open files in an effort to interject itself into the disciplinary process. According to the Examiner, this provided a “clear connection between redaction of [investigatory] files and employee working conditions” and the receipt of un-redacted files to the OPARB could adversely impact an officer’s ability to truthfully testify in court.

With respect to the amendments to the OPARB member’s confidentiality obligations, the Examiner held the amendments included a “hold harmless” clause that protected the OPARB members if they disclosed any confidential information. According to the Examiner, the protective rule was “predicated on the idea that the OPARB would see more and know more about citizen complaints made the prior year, and the OPARB members would know more only because of the unredacted rule.” The Examiner noted that the release of information that could lead to employee discipline is a matter that impacts a mandatory subject of bargaining, and because the redacted file rule and the confidentiality rules are tied together, the employer failed to provide the union with an opportunity to bargain the change.

The employer argues the Examiner’s conclusion that the May 2006 amendment impacts mandatory subjects of bargaining is in error and not supported by substantial evidence. The employer points out that although the amendment allows the OPARB to view un-redacted files, the duties and responsibilities of the OPARB have not changed. The employer asserts that OPARB still does not have the ability to discipline employees, and that it remains an entity that is “all bark and no bite.” With respect to the Examiner’s conclusion that the amendment modified the OPARB members’ confidentiality requirements, the employer claims that the amendment did not change the existing confidentiality requirements. According to the employer, the May 2006 amendments balance in favor of its managerial prerogative, and do not require bargaining. ^[2] We agree.

Redaction of Closed Investigatory Files

The preamble that accompanied the May 2006 amendment states that one of the reasons for changing SMC 3.28.920 was the OPARB’s observation “that the process of redacting OPA files [was] unnecessarily labor intensive . . . , unproductive . . . and . . . a practical impediment to [the OPARB’s] work,” and limited “its ability to effectively perform its duty to review the OPA complaint handling process[.]” This record supports the employer’s stated purpose for enacting the amendment.

For example, an employer witness testified that the process of redacting the closed files was time consuming and caused considerable delay in providing the OPARB with the files it needed to perform its mission. An employer survey of the OPARB’s case management demonstrated that the process for

redacting the files could take up to one year and even then, the redacted files were often unintelligible and difficult to comprehend. The employer attempted to utilize computer software in an attempt to automate the process, but that solution proved to be ineffective.

A thorough examination of the May 2006 amendments to SMC 3.28.290 reveals that the only actual change to the OPARB processes is that the Board would now receive un-redacted closed files of citizen complaints, as opposed to the redacted closed files that it received prior to the amendment. The ordinance that governed the OPARB's actual responsibilities otherwise remained intact. At the time of the union's complaint, SMC 3.28.900 stated that the OPARB shall "not participate in the management of the day-to-day functions of the [police] Department." SMC 3.28.910 governed the report the OPARB issued, did not allow the OPARB access to open files, and stated that the report issued by the OPARB "shall not contain any recommendations concerning the discipline of any particular police officer, nor shall the report comment upon or make any recommendation concerning potential civil or criminal liability of specific employees, police officers, or citizens," and there is no evident intent to allow the OPARB to insert itself into the disciplinary process through the information

the Board obtains in the un-redacted files ^[3] The May 2006 amendment does not authorize the OPARB to review open files, and it does not allow the OPARB to recommend that any particular employee be disciplined based upon the information provided in the file being reviewed. Thus, the employer has narrowly tailored the amendment to SMC 3.28.920 to address only a needed change to the OPARB process.

Furthermore, SMC 3.28.920 still provides that any report issued by the OPARB "shall not contain identifying information about anyone involved in an OPA complaint or OPA investigation other than the OPA Director." Although the union asserts that the employer could simply change the names in the OPA files to protect employee confidentiality, this assertion nevertheless fails to demonstrate how providing un-redacted files to the OPARB impacts the terms and conditions of employment. In fact, a union witness testified that he could not think of an instance where the OPARB either interfered with an OPA investigation or attempted to interject itself into the disciplinary process. ^[4]

The Examiner's conclusions that providing the OPARB with un-redacted files will impact the terms and conditions of employment are based upon the union's speculation of what could occur, not what actually has occurred. Under the facts of this case, the union's speculation does not transform the subject matter of the May 2006 amendment into a mandatory subject of bargaining because the OPARB's authority is still limited by ordinance.

Confidentiality Agreement

Prior to the May 2006 amendment, SMC 3.28.920 simply stated that the OPARB “shall not identify the identity of the subject of an investigation in any public report[.]” The parties agreed through bargaining that the employer, but not the individual OPARB member, would be held harmless from any legal action arising from the intentional release or disclosure of confidential investigative information. In the employer’s view, this confidentiality agreement was vague. The May 2006 amendment to SMC 3.28.920 clarified that indemnification and defense of OPARB members is governed by Chapter 4.64. SMC 4.64.010 provides, in part, that:

. . . in the event there is made against such officers or employees any claims and/or litigation arising from any conduct, acts or omissions of such officers or employees in the scope and course of their City employment, the City Attorney shall, at the request of or on behalf of the officer or employee, investigate and defend such claims and/or litigation

Simply stated, the employer will only defend the OPARB members from suits arising out official duties, including those duties defined by statute.

In fact, a full reading of the OPARB ordinance reveals that OPARB members are not permitted to disclose any “identifying information about anyone involved in an OPA complaint or OPA investigation other than the OPA Director.” Thus, if an OPARB member were to intentionally disclose confidential information in violation of SMC 3.28.920, the employer would not be obligated to defend that member against any legal suit arising out of that disclosure.

Furthermore, there is no evidence that the OPARB confidentiality agreement impacted terms and conditions of employment. Although the evidence and testimony demonstrate that there have been times where the OPARB received un-redacted files prior to the May 2006 amendment, there is no evidence that any OPARB member has violated his or her confidentiality agreement. The Examiner’s conclusion that the amendment to SMC 3.28.920 creates a new confidentiality agreement or provides for a more protective rule that would hold OPARB members harmless in the event information contained with a file is disclosed is simply in error. [\[5\]](#)

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Conclusion

The May 2006 amendment to SMC 3.28.920 is a management prerogative and did not impact any term or condition of employment that would require this employer to engage in either decision or effects bargaining with the union. Accordingly, there is no need to examine whether the employer satisfied its bargaining obligations prior to or after adoption of the amendment.

NOW, THEREFORE, it is

ORDERED

I. The Commission issues the following Findings of Fact:

1. The City of Seattle is a municipal corporation and an employer within the meaning of RCW 41.56.030(1).
2. The Seattle Police Officers' Guild is a labor organization and exclusive bargaining representative within the meaning of RCW 41.56.030(3).
3. The Office of Professional Accountability, established in 1999 by the city council, reviews citizen complaints about police conduct. The OPA was granted independent review authority to audit, examine, and review arrest records and contacts between police officers and citizens. At the same time it established the OPA, the city council also created an independent "auditor" position and a secondary review panel called the Office of Professional Accountability Review Board.
4. The OPARB reviewed closed investigatory files and the employer redacted identifying information, including the name of the officer who is the subject of the complaint and any witnesses. The OPARB does not have the authority to discipline any employee or recommend that any employee be disciplined.
5. The process of redacting the closed investigatory files was labor intensive and often caused delays in providing the files to the OPARB. Additionally, the OPARB found the redacted files unintelligible and difficult to read.
6. During negotiation of their collective bargaining agreement in 2000, the employer and the union agreed to implement certain changes to OPA and OPARB. The parties agreed to allow review of "all redacted files" of closed citizen complaint cases, and those stemming from internal investigations.
7. During bargaining in 2003, the employer proposed eliminating the redacted file requirement. It ultimately withdrew that proposal and signed a collective bargaining agreement through the end of 2006 that left the redacted file rule in place. That collective

bargaining agreement continued to include language barring OPARB members from disclosing information about a particular case.

8. In March 2006, City Councilman Nick Licata met with the union president and informed him that the city council planned to change the city ordinance regarding file redaction and confidentiality matters relating to OPARB. Following that meeting, in March 2006, union attorney Chris Vick sent a letter to Labor Relations Coordinator David Bracilano, alerting him that the union would file unfair labor practice complaints if the employer adopted an ordinance without bargaining that sent un-redacted closed investigatory files to OPARB file ordinance without bargaining.
9. On May 30, 2006, the city council adopted a change to Seattle Municipal Code 3.28.920(a). That change, to become effective on March 31, 2007, allowed OPARB to review un-redacted files from the OPA investigations. The city council also amended SMC 2.28.920(b) to clarify that OPARB board members were obligated to keep confidential information contained within the investigatory files and clarified that the city will hold OPARB members' harmless only for those actions taken in conformance with members official duties. The amendment did not provide the OPARB with the authority or ability to discipline any employee.

II. The Commission issues the following Conclusions of Law:

1. The Public Employment Relations Commission has jurisdiction in these cases under Chapter 41.56 RCW.
2. The employer did not violate RCW 41.56.140(4) and (1) when it adopted the May 2006 amendment to Seattle Municipal Code 3.28.920 as described in Finding of Fact 9. The subject matter of that amendment was a permissive subject of bargaining that did not impact the terms and conditions of employment of the employees represented by the Seattle Police Officers' Guild.

III. The Commission issued the following Order:

1. The complaints filed in cases 20402-U-06-5196 and 20687-06-5271 are DISMISSED.

ISSUED at Olympia, Washington, this 6th day of October, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

[1]

City of Seattle, Decision 9957 (PECB, 2008).

[2]

The employer is not arguing that it has the ability to circumvent its collective bargaining obligation through its statutory right to adopt and amend its city code.

[3]

Although the ordinances governing the OPARB were amended once again in 2008, the SMC 3.28.910 still provides that the OPARB may only review closed case files, and the OPARB “shall not comment on the discipline of any officer or lack thereof, or on the liability of anyone involved in any specific complaint.”

[4]

Tr. 163, lines 5-14.

[5]

Because the Examiner misinterpreted the changes to the OPARB confidentiality agreement, reliance upon *City of Spokane*, Decision 5054 (PECB, 1995) is also misplaced.