

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-11

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY SHERIFF'S)	
EMPLOYEES' ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
JACKSON COUNTY SHERIFF'S)	CONCLUSIONS OF LAW,
DEPARTMENT,)	AND ORDER
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) Peter A. Rader on September 27, 2011, in Salem, Oregon. The record closed on October 28, 2011, following receipt of the parties' post-hearing briefs. The ALJ issued his Recommended Order on August 29, 2012. On December 10, 2012, the Board heard oral argument on Complainant's objections to the Recommended Order.

Aila Hoss and Rhonda J. Fenrich, Fenrich and Gallagher, PC, Eugene, Oregon, represented Complainant at the hearing. Seth Davis and Ms. Fenrich represented the Complainant at oral argument.¹

Joel C. Benton, Jackson County Senior Assistant County Counsel, Medford, Oregon, represented Respondent.

On April 26, 2011, the Jackson County Sheriff's Employees' Association (Association) filed this unfair labor practice complaint alleging that the Jackson County Sheriff's Department

¹Ms. Hoss, a certified law student, and Mr. Davis, a law clerk, represented the Complainant under the supervision of Attorney Fenrich.

(County) violated ORS 243.672(1)(e) when it unilaterally reduced the number of corrections deputies eligible to take vacation on the same shift and refused to bargain over the assignment of new duties to the records clerks.

The issues presented are:

1. Did the County unilaterally change a past practice (the *status quo*) by limiting the number of corrections deputies eligible to take the same vacation shift? If so, did this violate ORS 243.672(1)(e)?
2. Did the County refuse to bargain over adding new duties to the position of records clerk? If so, did this violate ORS 243.672(1)(e)?
3. If the County violated ORS 243.672(1)(e), what is the appropriate remedy?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of corrections deputies, criminal deputies, court security officers, corrections records clerks, criminal records clerks, civil clerks, and criminal data technicians employed by the County in its Sheriff's Department. The County is a public employer.

2. The County Sheriff is Michael Winters. At the time, Anthony (Tony) Keller was the County's interim managing director whose duties included labor relations. The Association's president was Corrections Deputy Christopher Zornes.

3. The Association's bargaining unit has approximately 131 members, approximately 42 of whom are corrections deputies. Corrections deputies are responsible for the inmates at the County jail, including their safety, movement, feeding, court appearances, and medical issues. The unit's criminal, corrections, and civil records clerks process and maintain records related to the public safety functions of the Sheriff's Department.

The Parties' 2008 - 2011 Agreement

4. The Association and the County were parties to a collective bargaining agreement (Agreement) effective July 1, 2008 through June 30, 2011.

5. Article 2 of the Agreement, which has remained largely unchanged over the years, addresses management rights. It states:

“It is recognized that an area of responsibility must be reserved to the employer if the County is to effectively serve the public. Except as specifically abridged in this Agreement or in accordance with the County’s bargaining duties and responsibilities under the [Public Employee Collective Bargaining Act] PECBA, it is recognized that the responsibilities of management are exclusively functions to be exercised by the County and are not subject to negotiation. By way of illustration and not of limitation, the following are listed as such management functions:

- “A. The determination of the services to be rendered to the citizens served by the County.
- “B. The determination of the employer’s financial, budgetary, accounting and organization policies and procedures.
- “C. The continuous overseeing of personnel policies, procedures and programs promulgated under any ordinance or administrative order of the County establishing personnel rules and regulations not inconsistent with any other term of this Agreement.
- “D. The management and direction of the work force including, but not limited to, the right to determine the methods, processes and manner of performing work; the determination of the duties and qualifications of job classifications; the right to hire, promote, train, transfer and retain employees; the right to discipline or discharge for just cause; the right to lay off for lack of work or funds; the right to abolish positions or reorganize the departments or divisions; the right to determine schedules of work; the right to purchase, dispose and assign equipment or supplies; and the right to contract or subcontract any work.”

6. The County jail operates twenty-four hours a day, seven days a week, which requires three shifts of deputies to staff. Article 3.7(a) of the Agreement permits the deputies to bid for work and vacation shifts based on seniority, as follows:

“3.7(a) Shift bidding generally. Employees shall bid shifts and days off based on seniority without regard for gender. Should the county determine that, upon conclusion of the shift bidding process, the operational needs of the department are not being met,

the County has the right and the responsibility to reassign bargaining unit members to meet its needs. Such reassignments shall take place before the beginning of the designated quarter * * * .”

Article 3.7(c) further clarifies the process:

“3.7(c) Shift bidding for corrections deputies. Corrections deputies shall bid shifts and days off based on seniority. Deputies may elect to remain on a single shift for the full fiscal year or choose any variety of shift changes for the four quarters of the year.

“* * * * *

“If an employee is reassigned by the County under Section 3.7(a) and that new assignment conflicts with a more senior employee’s scheduled vacation, the reassigned employee shall retain one-half (1/2) of the employee’s scheduled vacation.”

7. Article 5 of the contract contains the vacation leave provisions, including accrual rates, accumulation limits, and how and when vacation accruals can be used by bargaining unit members. Article 5.2 states in relevant part:

“5.2(d) Use of Vacation and Seniority. Employees shall be allowed to take vacation at a time of their choosing, *subject to departmental requirements*. [Emphasis added.]

“Corrections deputies and corrections records clerks may exercise seniority vacation preferences as defined in Article 3, Section 7(c), provided no employee will be permitted to exercise this preference more than once each fiscal year. If an employee is forced by the County to cancel a scheduled vacation, that employee may exercise bumping rights provided that the employee provides at least thirty (30) days written notice to the senior employee’s supervisor before he/she can exercise his/her right to bump.

“5.2(e) Vacation Credit if Prevented From Taking Vacation. If an employee is prevented, by the department’s personnel requirements, from taking vacation during the normal vacation period, he shall not lose vacation credit.”

8. Article 15.15 permits the Sheriff to make job assignments within the records clerk job classification. It provides:

“The Association agrees that the Sheriff has the authority to make job assignments within the Records Clerk job classification in order to operate the department productively. The Sheriff agrees to assign duties fairly and objectively.

“Some responsibilities that are normally assigned to only one clerk include, but are not limited to, warrants and concealed weapons permits, civil processes, and returns to the court. These assignments may be performed by one or more clerks depending on the Sheriff’s assessment of the operating requirements of the department.”

The Parties’ History Regarding Vacation Bidding

9. The Agreement is silent as to how many corrections deputies may take the same vacation shift. From at least 1999, the procedure followed by the Department has been to issue a memorandum, called a cover letter, before the start of the fiscal year, announcing the shift bidding practice for the following year. The Association never demanded to bargain the practice because it was always agreed to and the County did not believe that it was required to bargain.

10. In 1999, when there were 61 deputies, and in 2001, when there were 64 deputies, only one deputy was permitted to take a particular work or vacation shift. The cover letter to corrections deputies in 1999 states in part:

“*1 & 2. At the conclusion of bidding should the County feel that the needs of the Division are not being met as bid, the county will invoke the following provision of the contract:

“3.7(a). Shift bidding generally. Employees shall bid shifts and days off based on seniority without regard for gender. Should the county determine that, upon conclusion of the shift bidding process, the operational needs of the corrections facility are not being met, the county has the right and the responsibility to reassign bargaining unit members to meet its needs.

“*3. Vacation

“Due to overtime concerns, only one person per shift (not location) will be allowed off at a time. To accommodate for differing days off, you can overlap other vacation/s by no more than a total of two working days.” (Emphasis in original.)

11. From 2004 through 2011, two corrections deputies were permitted to take the same vacation shift. During that period, the number of deputies working in the Department

ranged from 38 to 55. Except for the number of deputies eligible to take time off, the language in the annual cover letter remained the same:

Vacation bidding; A maximum of two (2) weeks (80 hours) may be taken in a single two week period or broken up into **two** one week (or less) periods, not to exceed eighty (80) hours. To limit the need for overtime to cover vacations, a **maximum** of two (2) deputies will be allowed off from each shift at the same time. There will be no overlapping of vacation days to exceed the **maximum** of two deputies off at the same time restriction.

“* * * * *

“Should the County determine that, upon conclusion of the shift bidding process, the operational needs of the corrections facilities are not being met, the County has the right and the responsibility to reassign bargaining unit members to meet its needs.” (Emphasis in original.)

12. On December 17, 2010, having learned the County intended to reduce from two to one the number of corrections deputies who could take the same vacation shift, Association counsel Rhonda Fenrich sent a letter to Sheriff Winters demanding to bargain over that intended reduction.

13. On December 29, 2010, interim managing director Keller responded to Fenrich’s letter stating that the County was permitted to make the vacation reduction without bargaining.

14. On December 30, 2010, corrections supervisor Lieutenant Christine Dismukes informed the corrections deputies through a cover letter that to limit the need for overtime, a maximum of one deputy will be allowed off from each shift at any given time. Her letter stated, in part:

“To limit the need for overtime to cover vacations, a **maximum** of one (1) deputy will be allowed off from each shift at any given time. There will be no overlapping of vacation days to exceed the **maximum** of one deputy off at the same time restriction. At the conclusion of the bidding, and acceptance and posting of the schedules, additional personal leave requests will be accepted for consideration starting on a designated date and time.” (Emphasis in original.)

15. The Association’s demand to bargain was repeated in letters or e-mails to the County dated January 13, February 16, and March 10, 2011, but each one was denied.

The Assignment of New Duties to the Records Clerks

16. The County's records clerks are responsible for processing prisoner paperwork, which includes obtaining information from prisoners, photographing, fingerprinting, inventorying personal property, tracking and preparing paperwork for court appearances, running criminal history checks, handling bail transactions, registering sex offenders, processing transfers to other institutions, and completing other miscellaneous tasks.

17. The County's court duties, which include processing video arraignments and calculating prisoner release dates, were traditionally performed by supervisors. Video arraignment duties include attending court when a prisoner is charged and processing inmate paperwork based on indictment, sentencing, and other court actions.

18. Calculating a prisoner's release date can be straightforward or complicated, depending on the circumstances. Data that must be factored into the calculation include such things as the date of surrender, the sentence for each offense if there are multiple convictions, credits for time served, credits for time worked in the facility, trustee time off, time off for good behavior, court sentencing instructions, and probation violations. If the calculations are incorrect, it can result in a prisoner being released before or after their official release date.

19. The County uses a software program called Tiburon to assist with the release date calculations. The practice in the County has been to have someone check complicated calculations because mistakes are frequent.

20. In 2010, the supervisor who performed the court duties retired and the work was assigned to Records Clerks Supervisor Denise Bottoms. Bottoms found the work to be time-consuming and she incurred overtime to complete these tasks. While on vacation for two weeks in 2010, Bottoms temporarily reassigned the court duties to the records clerks, but the Association did not agree to the permanent reassignment of these duties.

21. On December 27, 2010, the jail's commander, Lieutenant Robert Sergi, issued a memorandum stating that, effective immediately, the video arraignment duties were being reassigned from the supervisors to the records clerks. Lt. Sergi's memorandum listed the documents that needed to be tracked and distributed to inmates upon completion of their video appearance. These included charging documents such as the district attorney's information, district attorney's indictment, motion to show cause, letters to the public defender or alternate attorney group letter if appointed by the judge, plea petitions for DUII diversions, a short form plea petition, waiver of presentment of indictment for felony pleas, and sex offender registration form after conviction. It was understood that the calculation of prisoner release dates was being transferred to the records clerks as well.

22. On December 28, 2010, Fenrich sent a letter to Sheriff Winters demanding to bargain the impact of these workload reassignments. The demand to bargain was repeated in letters or e-mails dated January 13, February 16, and March 10, 2011.

23. On January 3, 2011, Keller denied Fenrich's demand to bargain the reassignment of the new duties on the grounds that the work was non-supervisory and the management rights clause in Article 2 authorized the County to make the "determination of the duties and qualifications of job classifications." Keller also cited Article 15.15, which addresses the "Sheriff's authority to make job assignments within the Records Clerk job classification in order to operate the department productively."

24. On January 26, 2011, Keller again denied the Association's demand to bargain by alleging the work was clerical and quoting the language of ORS 243.650(7)(d), which states that "[e]mployee relations' does not include subjects that have an insubstantial or de minimus effect on public employee wages, hours, and other terms and conditions of employment."

25. On February 14, 2011, Lt. Dismukes wrote to records clerk Alisha Bridges and attached a copy of the new Records Clerk job description, which included the recently-transferred court duties. Dismukes advised Bridges that failure "to perform the assigned duties may result in disciplinary action against you as an employee and/or legal action against the union for failure to follow the terms and conditions of the collective bargaining agreement." Dismukes also wrote that it was management's prerogative to assign these duties under Articles 2 and 15.15 of the Agreement.

26. On March 3, 2011, Keller again denied the Association's demand to bargain and stated in his letter that there was no "effect on the workload of the records clerks due to the change" or that if there was an effect, it was insubstantial. Keller wrote that the new duties were not subject to the definition of "employee relations" under ORS 243.650(7)(g), and that the impact, if any, on the records clerks' duties was minimal because they were using the same software and skills as their existing duties.

27. Five months after the court duties were transferred, the records clerks were regularly incurring overtime arising solely from their court duties. From May 1 through September 15, 2011, the records clerks incurred a combined total of approximately twenty hours of overtime.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County did not violate ORS 243.672(1)(e) when it unilaterally reduced the number of corrections deputies eligible to take the same vacation shift.
3. The County violated ORS 243.672(1)(e) when it refused to bargain the impact of adding new duties to the records clerks.

DISCUSSION

The Association alleges that the County violated ORS 243.672(1)(e) by refusing to bargain over unilaterally 1) reducing the number of corrections deputies permitted to take vacation during the same shift, and 2) assigning new duties to the records clerks that were previously performed by supervisors. The County argues that it was not required to bargain under the PECBA and therefore did not violate ORS 243.672(1)(e).

Legal Standards

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” In general, a public employer violates its duty to bargain in good faith under subsection (1)(e) if it makes a unilateral change in the *status quo* concerning a subject that is mandatory for bargaining. An employer must generally bargain about its decision to change a mandatory subject of bargaining before making the decision. Although an employer is not required to bargain about a decision to change a permissive subject, it is obligated to bargain regarding the impact of that decision on mandatory subjects, before implementing the change. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575 (2013) (citations omitted).

When reviewing an allegation of an unlawful unilateral change, we consider (1) whether an employer made a change to the *status quo*; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177 (2013) (*AOCE*), citing to *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 897 (2005).² We need not apply our analysis in a mechanical manner, however, and may proceed to a particular step if that step will be dispositive of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761-62 (2012).

Unilateral Change in the Number of Deputies Permitted to Take the Same Vacation Shift

We begin with the “preliminary step in any unilateral change claim—whether there has been a change in the status quo.” *AOCE*, 353 Or at 184. To make that determination, we consider “[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition.” *Id.* (quoting *Coos Bay Police Officers’ Association v. City of Coos Bay and Coos Bay Police Department*, 14 PECBR 229, 233 (1993)). In doing so, we look “to a variety of sources, including not only the terms of a current or an

²When asserted, we also consider an employer’s affirmative defense of waiver: namely, that a party may waive its right to bargain by (1) “clear and unmistakable” contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) the party’s action or inaction. *AOCE*, 353 Or at 177 (citing 20 PECBR at 896). Here, as the County did not plead an affirmative defense of “waiver,” we do not consider it.

expired collective bargaining agreement, but work rules, policies, and an employer's 'pattern of behavior.'" *AOCE*, 353 Or at 184 (quoting *Coos Bay*, 14 PECBR at 233).

Here, the parties' contract contains specific provisions regarding vacation use and bidding in Articles 3.7 and 5, which grant the County the right to modify the number of deputies who may take vacation at the same time. Specifically, Articles 3.7 and 5.2 permit corrections deputies to bid on shifts and vacations. Those same provisions, however, state that the granting of such bids is "subject to departmental requirements" and is contingent on the County's determination that "the operational needs of the department are * * * being met." The agreement further recognizes that "an employee may be forced by the County to cancel a scheduled vacation" (Article 5.2(d)), and that "the department's personnel requirements" may prevent an employee "from taking vacation during the normal vacation period" (Article 5.2(e)).

Likewise, the County's annual bid cover letters repeatedly indicated that the County had the authority to change (for operational reasons) the number of employees who could take vacation at the same time. Moreover, the County exercised that authority in 1999 by limiting vacation time to only one person per shift.

After considering the parties' agreement, work rules, policies, and the County's "pattern of behavior," we find the *status quo* to be that the County retained (and exercised) the right to determine (for operational needs) the number of corrections deputies who could take vacation at the same time. As a result, there was no change in the *status quo* in December 2010, when the County again exercised that right.

We reached a similar conclusion in *International Association of Firefighters, Local 3564 v. City of Grants Pass*, Case No. UP-23-94, 15 PECBR 390 (1994). In *City of Grants Pass*, a hiatus-period case, the parties' agreement allowed for two employees to schedule vacation at the same time, but also contained language stating that vacation scheduling was contingent on the "head of the department's judgment as to the needs of the efficient operations and the availability of vacation relief." *Id.* at 391. During the hiatus-period, the employer reduced the number of employees who could take vacation from two to one in order to maintain a minimum staffing level of three employees per shift.

We held that the employer's action did not violate ORS 243.672(1)(e). We reasoned that the employer's decision was consistent with both the language of the agreement and the parties' past practice in applying that language. *Id.* at 395-96. Consequently, we found that the employer "did not alter the status quo reflected in the expired terms of the agreement." *Id.* at 396. We find the instant facts analogous.

In sum, for the foregoing reasons, we hold that the County did not violate ORS 243.672(1)(e) by allowing only one corrections deputy to take vacation at any one time. Therefore, we will dismiss this claim.

New Duties Assigned to the Records Clerks

The ALJ determined that the County violated ORS 243.672(1)(e) by not bargaining over the mandatory impact of transferring new duties to the records clerks. Neither party objected to this portion of the recommended order, and we consider any objections to that issue waived. Therefore, we adopt the ALJ's conclusions on that claim, and we will order the County to bargain with the Association over the mandatory impact of the transfer of duties to the records clerks.

Remedy

As in most cases involving a unilateral change to a mandatory subject of bargaining, we will order the County to rescind the change and restore the *status quo* with regard to the records clerks' workload until the required bargaining is complete. However, due to the nature of the change and the amount of time that has passed since the change occurred, we will give the County 30 days from the date of this order to effectuate the return to the *status quo*. Of course, the parties are free to implement any other resolution that they jointly agree on before then.

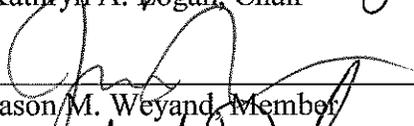
ORDER

1. The County did not violate ORS 243.672(1)(e) when it unilaterally reduced the number of corrections deputies who could take the same vacation shift. This claim is dismissed.
2. The County violated ORS 243.672(1)(e) when it transferred duties previously performed by a supervisor to the Sheriff's Department records clerks without bargaining the impact of its decision with the Association. The County will cease and desist from transferring these duties without bargaining the impact of the decision on the job classification.
3. Within 30 days from the date of this order, the County shall restore the *status quo* that existed before the unilateral reassignment of the work to the records clerks, until such time as the parties complete the required interim bargaining.

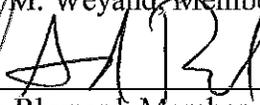
DATED this 11 day of April, 2013.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.