

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DEWITT POLICE OFFICER'S)	
BARGAINING UNIT,)	
Complainant,)	
)	
and)	CASE NO. 8652
)	
CITY OF DEWITT,)	
Respondent.)	

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PROPOSED DECISION AND ORDER

The complainant, DeWitt Police Officer's Bargaining Unit (Union), filed this prohibited practice complaint with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 20.11 and PERB rule 621-3.1(20). The amended complaint alleges that the City of DeWitt (City) committed prohibited practices within the meaning of Iowa Code sections 20.9, 20.10(1) and 20.10(2)(a) through (h) when it unilaterally created a new job classification of Police Recruit - Officer in Training within the police department and established a wage rate without notifying or negotiating with the Union on either the job classification or wage rate.¹ The City denied its commission of any prohibited practice.

Pursuant to notice, an evidentiary hearing on the merits was held before me on August 28, 2013, in DeWitt, Iowa. The Union was represented by attorney David M. Pillers and the City was represented by attorney Robert J.

¹ The Union's original complaint alleged a violation of Iowa Code section 20.9. At hearing, with no resistance by the City, the Union moved to amend its complaint which the undersigned granted.

McGee. Both parties submitted post-hearing briefs which were filed on October 30, 2013. Based upon the entirety of the record, and having considered the arguments in the parties' briefs, I conclude that the DeWitt Police Officer's Bargaining Unit has failed to establish the City's commission of a prohibited practice with regards to Iowa Code sections 20.9, 20.10(1) and 20.10(2)(a) through (h).

FINDINGS OF FACT

The City of DeWitt is a public employer within the meaning of Iowa Code section 20.3(10) and the DeWitt Police Officer's Bargaining Unit is an employee organization within the meaning of section 20.3(4). In 1989, PERB certified the DeWitt Police Officer's Bargaining Unit as the exclusive bargaining representative of a police bargaining unit made up of sworn positions. This bargaining unit was amended in 2002 and currently provides:

INCLUDED: All full time patrol officers, corporals, and sergeants employed by the DeWitt Police Department.

EXCLUDED: Chief of Police, captains, confidential employees, all other City employees and all others excluded by Iowa Code section 20.4.

The bargaining unit description is different from the recognition clause contained in the collective bargaining agreement. The recognition clause does not include corporals and expressly excludes probationary employees, a term which is not listed in the bargaining unit description.² Even though the past

² In the current collective bargaining agreement, effective July 1, 2011 to June 30, 2014, the recognition clause describes the make-up of the unit as:

INCLUDED: All full-time patrolmen, and sergeants employed by the DeWitt Police Department.

two collective bargaining agreements excluded probationary employees, the salary schedule contained within these past two agreements included a step for “Start/Probationary” employees.

On February 18, 2013, the City Council approved the Police Recruit – Officer in Training position, pay grade of 2 with a wage range of \$9.22-\$13.32 per hour.

There is very little evidence in the record about Patrol Officer or Police Recruit – Officer in Training positions. According to the background submitted to the Council:

This position would be when a new police officer is hired who has not graduated from the Iowa Law Enforcement Academy and therefore is not a certified police officer. The new hire, while attending the ILEA and any time prior would be considered an “Officer in Training” and would be paid at a different rate of pay until certified. This would be temporary or holding position.³

Prior to the creation of this position, individuals were hired as patrol officers. With both hires (Patrol Officer or Police Recruit – Officer in Training), the offer of employment was conditional upon successful completion of both the Iowa Law Enforcement Academy (Academy) and the City’s field training program. In addition to the difference in the wage rate there is, however, one significant difference: the timing of when the individual is sworn in by a City official. Historically, when an individual was hired as a patrol officer, the officer was sworn in by a representative of the City prior to attending the

EXCLUDED: Chief of Police, Police Captain, Probationary Employees, confidential employees, all other City employees and all others excluded by section 4 of the Iowa Public Employment Relations Act.

³ Union Exhibit 4

Academy. With the Police Recruit – Officer in Training position, the individual was not sworn in until after successful completion of the Academy. This distinction is significant as it determines whether the individual is a patrol officer afforded the authority to act on behalf of the City. By being sworn, the individual became a patrol officer and could be “put on the street” to perform the duties of a patrol officer. Conversely, a non-sworn individual is not a patrol officer and has no authority to act on behalf of the City.

On April 9, 2013, Matthew Whalen was notified by the City of his selection for appointment to the position of Police Recruit – Officer in Training with a wage rate of \$12.50 per hour while attending the Academy. His letter was generally the same as previous appointment letters for patrol officers.

On April 13th, attorney David Pillers wrote to the City Administrator notifying him that if the City hired anyone as a Police Recruit – Officer in Training and paid the individual less than the amount included in the collective bargaining agreement, the Union would file both a prohibited practice complaint and a grievance. The letter stated in part:

You are hereby placed on notice that the City will be in violation of the existing CBA⁴ and Iowa Code [chapter] 20 should it approve compensation to Matthew Whalen for less than the Start/Probationary wage set forth in the current CBA between the City and the bargaining unit (see attached Exhibit “A”). Additionally, by classifying Mr. Whalen as a “Police Recruit-Officer in Training”, the City effectively has created a new position or “job classification” within the DeWitt Police Department. Under Iowa Code [chapter] 20 the City is required to negotiate with the bargaining unit for any job classifications. It is my understanding that the City did not negotiate with the bargaining unit for this classification or for the Police Recruit-Officer in Training wage.

⁴ Collective Bargaining Agreement

Failure to do so may be considered a violation of Iowa Code [chapter] 20.⁵

On April 15, the City Council approved Whalen's terms of employment as a Police Recruit – Officer in Training which included the wage rate of \$12.50 per hour while attending the Academy.

On May 16, 2013, the Union filed the instant prohibited practice complaint with PERB.

Whalen successfully completed the Academy on August 9th and was sworn in by the City on August 19, 2013.

CONCLUSIONS OF LAW

The Union's amended complaint alleges that the City committed prohibited practices within the meaning of Iowa Code sections 20.9⁶, 20.10(1) and 20.10(2)(a) through (h) which provide:

1. It shall be a prohibited practice for any public employer, public employee, or employee organization to refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.
2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
 - a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.
 - b. Dominate or interfere in the administration of any employee organization.
 - c. Encourage or discourage membership in any employee organization, committee or association by

⁵ Union Exhibit 3

⁶ Prohibited practices are, by definition, limited to acts specified in some provision of Iowa Code section 20.10. As a result, the union's allegation of the commission of a prohibited practice complaint within the meaning of section 20.9 cannot be an independent basis for relief under Chapter 20 and therefore this claim is dismissed.

discrimination in hiring, tenure, or other terms or conditions of employment.

d. Discharge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter or because the employee has formed, joined or chosen to be represented by any employee organization.

e. Refuse to negotiate collectively with representatives of certified employee organizations as required by this chapter.

f. Deny the rights accompanying certification granted in this chapter.

g. Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

h. Engage in a lockout.

Although the Union alleges that the City violated Iowa Code sections 20.10(2)(b),(c),(d), (g) and (h), no arguments were advanced by the Union with regards to these allegations. Thus, I conclude that the DeWitt Police Officer's Bargaining Unit has failed to establish the City's commission of a prohibited practice within the meaning of Iowa Code sections 20.10(2)(b),(c),(d), (g) or (h).

The Union also alleges that the City violated Iowa Code sections 20.10(1), and 20.10(2)(a), (e) and (f) by unilaterally establishing the Police Recruit - Officer in Training job classification and setting the hourly rate for this position without giving the Union notice or opportunity to bargain with regards to either the new job classification or the wage rate.

Implementation by the employer of a change in a mandatory subject of bargaining without fulfilling its bargaining obligation may constitute a prohibited practice under sections 20.10(1) and 20.10(2)(a), (e) and (f). See,

e.g., AFSCME/Iowa Council 61, 11 PERB 8146; Des Moines Independent Community School District, 78 PERB 1122.

PERB case law concerning “unilateral change” is well settled. A public employer’s bargaining obligation differs depending upon whether the mandatorily negotiable term is “contained in” or “not contained in” the collective bargaining agreement. If the proposed change is “contained in” the agreement, the change may not lawfully be made by the employer without obtaining the consent of the certified employee organization to the proposed change. If the proposed change is “not contained in” the agreement, then the change may be lawfully implemented by the employer only after the certified employee organization’s representative has received notice of the change and has been given an opportunity to negotiate the proposed change to impasse. *See, e.g., AFSCME/Iowa Council 61, supra; Des Moines Independent Community School District, supra.*

Consequently, a wage rate contained in a collective bargaining agreement for a bargaining unit position may not be altered during the life of the agreement without the consent of both parties. *Lyon County, 87 HO 3254 & 3264 at 8; Cedar Rapids Community School District, 86 PERB 2831 & 2838 at 5; Cedar Rapids Community School District, 86 PERB 2815 & 2818 at 7.* If a new bargaining unit position is created and falls within the current bargaining unit description, then the employer may not unilaterally establish the wage rate for this new bargaining unit position without first giving notice and opportunity to bargain to the union. *Cedar Rapids Community School District,*

86 PERB 2831 & 2838 at 5; *Cedar Rapids Community School District*, 86 PERB 2815 & 2818 at 7. If the new position is not in the bargaining unit as reflected by the bargaining unit description, however, the employer is not required to bargain over it. *Teamsters Local #147*, 02 HO 6240 at 6.

With respect to the merits of this case, the City created the Police Recruit – Officer in Training position without consent from the Union. Whalen was hired as a Police Recruit – Officer in Training at a rate lower than the “start/probationary” rate contained within the collective bargaining agreement. The dispute is whether the job classification of Police Recruit – Officer in Training is a bargaining unit position and therefore subject to the above-mentioned bargaining obligations of the employer.

Normally, questions regarding whether a job classification is placed within a bargaining unit are resolved by either the public employer or the certified employee organization filing an amendment of unit and/or unit clarification petition.⁷ *Southeastern Community College Higher Education Association*, 85 HO 2625 at 10. An amendment of unit proceeding⁸ serves as an avenue for making adjustments in a bargaining unit description and involves the issue of whether a position should be added to or removed prospectively from the existing bargaining unit. Conversely, a unit clarification proceeding⁹ serves as an avenue to determine whether a position constitutes

⁷ Although PERB did find in *State of Iowa*, 90 PERB 3507 and 3513, that unit clarification issues can also be properly raised through the filing of a prohibited practice complaint alleging violations of section 20.10(1) and 20.10(2)(e) of the Act.

⁸ See PERB rule 621-4.6(20).

⁹ See PERB rule 621-4.7(20).

part of the existing bargaining unit and involves the issue of whether the wording of the current bargaining unit description encompasses the position at issue. *Hawkeye Community College*, 02 PERB 6310, 6312, 6321 at 9-10; *City of Waverly*, 00 HO 6093 & 6094 at 10-11; *Eastern Iowa Community College Higher Education Association*, 82 PERB 2110 at 3.

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the charge. *International Association of Professional Firefighters, Local 2607*, 13 PERB 8637 at 10; *AFSCME/Iowa Council 61*, *supra* at 9; *Southeastern Community College Higher Education Association*, *supra*, at 11. In this case, whether the City committed prohibited practices depend upon whether the classification of Police Recruit – Officer in Training is contained within the bargaining unit. As a result, the Union has the burden of proving that the position of Police Recruit – Officer in Training is included within the bargaining unit description.

The Union argues alternative theories; first, that the Police Recruit – Officer in Training position was identical to a newly hired Patrol Officer. Under this theory, since the wage rate for the newly hired patrol officer was contained in the collective bargaining agreement, the City was prohibited from offering a wage rate different from the one contained in the collective bargaining agreement. Alternatively, the Union argues that if the Police Recruit – Officer in Training position is a newly created bargaining unit position, then the City was still required to give notice and opportunity to bargain to impasse before the wage rate could be changed.

The City, on the other hand, argues that the recognition clause contained in the agreement specifically excludes probationary employees. As a result of this exclusion, the City had no obligation to bargain with the Union as to Whalen's wage rate since he, as a probationary employee, was not covered by the collective bargaining agreement.

As an initial matter, any reliance upon the recognition clause of the collective bargaining agreement is misplaced as PERB has the statutory authority to determine the makeup of the bargaining unit pursuant to Iowa Code sections 20.1(2)(a) and 20.13. *State of Iowa*, 90 PERB 3507 & 3513 at 2; *Lyon County, supra* at 8. Thus, the recognition clause containing the parties' agreement does not, in this instance, have legal significance. *City of Cedar Falls*, 81 PERB 1911 at 2. Rather, it is the amended bargaining unit description, approved by PERB, which is used to determine whether the Police Recruit – Officer in Training job position constitutes part of the existing bargaining unit.

The bargaining unit consists of patrol officers, corporals and sergeants, all sworn positions. Although there is very little evidence as to the duties and responsibilities of the Police Recruit – Officer in Training compared to the Patrol Officers, it is uncontested that the training is similar for both the patrol officers and the Police Recruit – Officer in Training positions. What is different is the timing of the swearing in and the authority which is afforded as a result of an officer being sworn. Historically, the City swore the new patrol officer in sometime after taking the position but prior to attending the Academy. As a

result of being sworn, these new patrol officers were afforded the authority to perform the duties of a patrol officer. However the City changed this practice with the creation of the Police Recruit – Officer in Training position. Now the recruit is sworn in after attending the Academy. The change in timing of the swearing in is a significant change as a non-sworn Police Recruit – Officer in Training does not have the authority to act as a patrol officer. Thus, I conclude that the Police Recruit – Officer in Training is a new position not presently included in the bargaining unit.

As a result of finding that the Police Recruit – Officer in Training is a new position, I next consider the Union’s alternative theory; with the creation of this new position, the City was obligated to give notice and opportunity to bargain to impasse before making changes in the wage rate. However, this argument presupposes that the newly created position is contained within the bargaining unit description and this is not the case.

As previously addressed, all of the positions included in the current City of DeWitt police bargaining unit description are sworn positions. Thus all of the patrol officers, including new officers, were sworn. Non-sworn positions are not part of the existing bargaining unit. Because the Police Recruit – Officer in Training position is a non-sworn position, this position is not included in the bargaining unit as presently described.¹⁰

¹⁰ It may be that the Police Recruit – Officer in Training position shares a sufficient community of interest with the Patrol Officer classification contained in the bargaining unit description pursuant to Iowa Code section 20.13 and therefore would be an appropriate addition to the bargaining unit. However, adding a position to the bargaining unit is done via an amendment of unit petition, not through a prohibited practice proceeding.

Since the newly created Police Recruit – Officer in Training job classification is not contained within the bargaining unit, and the City’s bargaining obligation only extends to those positions within the bargaining unit, the City had no obligation nor was it required to give the Union notice or opportunity to bargain as to either the job classification or the wage rate for this position. *See Teamsters Local 147, supra* at 6. Based upon the foregoing, I conclude that the DeWitt Police Officer’s Bargaining Unit has failed to establish that the City committed a prohibited practice when it unilaterally established the Police Recruit – Officer in Training position and set a different wage rate for this position rather than the rate contained within the collective bargaining agreement.

Accordingly, I propose the following:

ORDER:

The Union’s prohibited practice complaint is DISMISSED in its entirety.

DATED at Des Moines, Iowa this 30th day of December, 2013.

PUBLIC EMPLOYMENT RELATIONS BOARD

Susan M. Bolte
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Administrative Law Judge

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