STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 4189, Complainant, vs. VASHON ISLAND FIRE AND RESCUE (KING COUNTY FIRE DISTRICT 13), Respondent.	CASE 127638-U-15 DECISION 12647 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Laura Ewan, Attorney at Law, Schwerin Campbell Barnard Iglitzin & Lavitt LLP, for the International Association of Fire Fighters, Local 4189.

Michael C. Bolasina, Attorney at Law, Summit Law Group PLLC, for Vashon Island Fire and Rescue (King County Fire District 13).

On September 30, 2015, the International Association of Fire Fighters, Local 4189 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission alleging that Vashon Island Fire and Rescue (employer) refused to bargain when it discontinued a workers' compensation leave program.

On October 14, 2015, the Commission's Unfair Labor Practice Manager issued a preliminary ruling stating a cause of action existed. The employer filed its answer on October 20, 2015. The case was assigned to Examiner Karyl Elinski, who held a hearing on August 16, 2016. The parties submitted post-hearing briefs on October 10, 2016.

ISSUE

As framed by the preliminary ruling, the issue presented by the union is as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] since July 7, 2015, by unilaterally

> terminating the Kept on Salary (KOS) policy and changing compensation for bargaining unit employees who have sustained workplace related injuries, without providing an opportunity for bargaining.

Although both parties agree that the "Kept on Salary" workers' compensation program is a mandatory subject of bargaining, the union failed to prove that the employer's discontinuation of the program's use after a brief trial constituted a unilateral change to a past practice.[1]

BACKGROUND

The employer operates a fire district on Vashon Island in King County. The employer and the union were parties to a collective bargaining agreement effective from January 1, 2015, through December 31, 2016. The union represents a bargaining unit of all full-time uniformed employees of the employer, including the classifications of firefighter/EMT, paramedic/firefighter, "combined," shift captain, battalion chief training and safety, and battalion chief emergency medical services.

Over the course of the last several years, the employer's annual premium for workers' compensation insurance through the Washington State Department of Labor and Industries (L&I) surpassed premiums typical for similarly sized fire departments by $70,000 per year. When a bargaining unit employee sustains a workplace injury requiring absence from work, he or she is placed on workers' compensation leave during the absence. The injured employee receives a full salary equivalent contributed to in the following ratio: L&I pays 60 percent, the employer pays 20 percent, and the employee pays 20 percent from his or her existing leave banks.

In January 2015, Acting Chief George Brown attended a meeting sponsored by L&I where he learned of a program referred to as "Kept on Salary" (KOS). Faced with atypically high premiums, Brown spent the next several months learning what he could about the program.

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[1] The union's complaint and post-hearing brief each address the employer's unilateral adoption of the KOS program. In the present proceeding we are limited to the issue stated in the preliminary ruling, so this decision will not address the employer's initial adoption of the program. *Northshore Utility District (Washington State Council of County and City Employees)*, Decision 10304-A (PECB, 2009).

Under the KOS program an employer pays 100 percent of an employee's salary while he or she is absent due to a workplace injury ("time loss"). The employee is not required to contribute his or her own leave to workers' compensation payments, and L&I is not required to contribute to the employee's workers' compensation payments. To meet minimum staffing requirements, the employer must also pay another employee at an overtime rate to fill in for the absent employee.

The KOS program benefits employers by limiting L&I claims for time loss—one of the components L&I considers in setting annual premiums. Because the employer shoulders the entire responsibility for paying an employee's full salary under the KOS program, the costs of the claims submitted to L&I are lowered. If a claim is filed with L&I for time loss, L&I pays 60 percent of the employee's salary; if the employee is kept on salary, L&I pays nothing toward a time-loss claim. Thus, participating in the KOS program could potentially help to reduce an employer's annual L&I premiums in some cases.

Long-term absences, however, could be cost prohibitive for an employer. As Brown testified, under the KOS program the cost to the employer would amount to full payment of the absent employee's salary plus the overtime rate for the employee filling in for the absent employee. As a result, there would be no benefit to the employer if the costs of paying the absent employee's full salary, in addition to the overtime rate, ultimately exceeded the savings in premium payments.

The employer first considered participating in the KOS program in May 2015 when union vice president Josh Dueweke reported an on-the-job injury. At that time, Brown explained to Dueweke the basic concept of the KOS program as well as the purpose and hope to save money on premium costs. Brown referred to the program as "experimental" and asked to be notified if Dueweke's injuries would require corrective surgery. Brown explained that if Dueweke required surgery, his recovery time was likely to be long and thus his being on KOS status would not be feasible from a cost standpoint for the employer. Brown initially placed Dueweke on KOS status effective May 29, 2015, but took Dueweke off upon learning of Dueweke's need for surgery in mid-July 2015.

In late June 2015, Brown met with union president Randy Tonkin and explained how participating in the KOS program could help to save the employer money on L&I premiums. On July 5, 2015,

firefighter Jason Everett sustained an injury mid-shift. He was placed on KOS status for the remainder of his shift and for the entirety of his shift the following day. Neither Tonkin nor Dueweke demanded to bargain the use of the KOS program after learning about it.

At his request, Brown met with the union's executive board on July 17, 2015, to discuss the discontinuation of the KOS program and the possibility of reinstating it at some time in the future. Tonkin, Dueweke, and firefighter Ben Davidson were present. Brown again explained the KOS program but noted that he intended to eliminate it because of an increase in the number of and absence length in recent L&I claims. Brown explained the intended goal of saving the employer money on L&I premiums. At the meeting, Davidson reminded Brown that he had been promised KOS coverage for a workplace injury-related absence from July 2 through 8, 2015.[2] Brown recommitted to placing Davidson on KOS status for that time frame but said the program was discontinued. During the remainder of the meeting the parties focused on the future use of the KOS program, and both parties committed to researching and discussing it in the future. Discussions ended when the union filed the unfair labor practice complaint in this case on September 30, 2015.

ANALYSIS

Applicable Legal Standards

It is well settled under Washington State law that an employer must bargain with the exclusive bargaining representative of its employees. The duty to bargain extends to all mandatory subjects of bargaining, including wages, hours, and working conditions. RCW 41.56.030(4).

When a union alleges an employer made a unilateral change, the union has the burden to establish that the dispute involves a mandatory subject of bargaining and that the employer made a decision giving rise to the duty to bargain. *City of Renton*, Decision 12563-A (PECB, 2016); *Kitsap County*, Decision 8292-B (PECB, 2007); *Municipality of Metropolitan Seattle (Amalgamated Transit*

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[2] The employer did not consider placing two other employees injured during the time period of May 29 through July 17, 2015, on KOS status. One of those employee's workers' compensation leave lasted approximately 11 months.

Union, Local 587), Decision 2746-B (PECB, 1990). The union must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000). For a unilateral change to be unlawful, the change must also have a material and substantial impact on the terms and conditions of employment. *City of Renton*, Decision 12563-A; *Kitsap County*, Decision 8893-A (PECB, 2007).

To establish a past practice, a party must prove two basic elements: (1) a prior course of conduct and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *Kitsap County*, Decision 8893-A. To establish these elements, "[i]t must . . . be shown that the [prior course of] conduct was known and mutually accepted by the parties." *Id.* The party claiming a past practice bears the burden of proof. WAC 391-45-270(1)(a); *see also Puyallup School District*, Decision 12551 (PECB, 2016) (no past practice found where the union failed to establish that the employer maintained a consistent practice that would create any kind of enforceable expectation by the parties).

A past practice is a course of conduct acknowledged by the parties over an extended period of time, and it may be so well understood between the parties that its inclusion in a collective bargaining agreement is considered unnecessary. *Whatcom County*, Decision 7288-A. Where the parties' course of conduct with respect to a mandatory subject of bargaining is so well established that it constitutes a past practice, a party fails to bargain in good faith if it unilaterally changes that practice without fulfilling its bargaining obligation. *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B.

Application of Standards

In order to trigger a duty to bargain a unilateral change, there must be (1) a change in a mandatory subject of bargaining and (2) a decision giving rise to a duty to bargain. In their post-hearing briefs, both parties acknowledge that the payment source of workers' compensation leave is a mandatory subject of bargaining. Because payment of workers' compensation leave relates to wages, the parties' conclusion is supportable and does not require further analysis. Before considering whether the employer made a unilateral change to a mandatory subject of bargaining,

I must first determine whether the union has met its burden of establishing the existence of a relevant status quo or past practice. The parties disagree about what constitutes the relevant status quo. The union seeks to establish that the employer's use of the KOS program was the relevant past practice that triggered a duty to bargain. The union failed to meet its burden.

The employer argues that the past practice for paying workers' compensation wages is payment in the ratio described above: L&I pays 60 percent, the employer pays 20 percent, and the employee pays 20 percent from his or her own existing leave banks. On the other hand, the union argues that once the employer adopted the KOS program, the employer was obligated to continue it, apply it equally to all bargaining unit members, and bargain any changes to and/or discontinuation of the program. The union seeks to have KOS status applied retroactively and prospectively to any employee on workers' compensation leave and/or light duty assignment.

The first time the employer placed an employee on KOS status was when Dueweke sustained an on-the-job injury on May 29, 2015. At that time, the employer made it clear that its participation in the KOS program was experimental, for the limited purpose of saving money on L&I premiums, and only for short-term absences from work. When it became apparent that Dueweke's injury would keep him out on workers' compensation leave for more than a few weeks, the employer halted the use of the program for Dueweke. The employer subsequently placed employees on KOS status just two more times: once for a five-day absence and once for a shift and one-half absence. Throughout the employer's short-term participation in the KOS program, Brown emphasized the purpose and experimental nature of the employer's participation in the program. The union failed to demand to bargain the employer's initial use of the program.

The KOS program was only in use for a limited time period—May 29 through July 17, 2015—and was applied to only three workplace injuries sustained during this period. No evidence presented at the hearing showed that the union objected when Dueweke's KOS status was discontinued. This alone supports an inference that the union acknowledged the program was not a past practice giving rise to the duty to bargain.

It would have been wiser for Brown to have discussed the KOS program with the union prior to using it for any employee, but his error did not amount to an unfair labor practice violation. The employer's limited use of the KOS program for three employees over a seven-week period, the uncertainty of the program's use for individual absences that were of an indeterminate duration, and the desire of the employer to save money on premiums made the existence and application of the program tenuous at best. The circumstances did not create a situation for the union to receive a windfall requiring the employer to place all employees who claimed or will claim workers' compensation benefits on KOS status. The use of the KOS program failed to rise to the level of a past practice upon which the union could meet its burden.

CONCLUSION

Although both parties agree that workers' compensation is a mandatory subject of bargaining, the union failed to prove that the employer's use of the KOS program constituted a past practice that required the employer to bargain over the program's elimination or continue to offer it in the absence of bargaining.

FINDINGS OF FACT

1. Vashon Island Fire and Rescue is a public employer within the meaning of RCW 41.56.030(12). The employer operates a fire district on Vashon Island in King County.

2. The International Association of Fire Fighters, Local 4189 (union) is an exclusive bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of all full-time uniformed employees of the employer, including the classifications of firefighter/EMT, paramedic/firefighter, "combined," shift captain, battalion chief training and safety, and battalion chief emergency medical services.

3. The employer and the union were parties to a collective bargaining agreement effective from January 1, 2015, through December 31, 2016.

4. Over the course of the last several years, the employer's annual premium for workers' compensation insurance through the Washington State Department of Labor and Industries (L&I) surpassed premiums typical for similarly sized fire departments by $70,000 per year.

5. When a bargaining unit employee sustains a workplace injury requiring absence from work, he or she is placed on workers' compensation leave during the absence. The injured employee receives a full salary equivalent contributed to in the following ratio: L&I pays 60 percent, the employer pays 20 percent, and the employee pays 20 percent from his or her existing leave banks.

6. In January 2015, Acting Chief George Brown attended a meeting sponsored by L&I where he learned of a program referred to as "Kept on Salary" (KOS). Faced with atypically high premiums, Brown spent the next several months learning what he could about the program.

7. Under the KOS program an employer pays 100 percent of an employee's salary while he or she is absent due to a workplace injury ("time loss"). The employee is not required to contribute his or her own leave to workers' compensation payments, and L&I is not required to contribute to the employee's workers' compensation payments.

8. To meet minimum staffing requirements, the employer must also pay another employee at an overtime rate to fill in for the absent employee.

9. The KOS program benefits employers by limiting L&I claims for time loss—one of the components L&I considers in setting annual premiums. Because the employer shoulders the entire responsibility for paying an employee's full salary under the KOS program, the costs of the claims submitted to L&I are lowered. If a claim is filed with L&I for time loss, L&I pays 60 percent of the employee's salary; if the employee is kept on salary, L&I pays nothing toward a time-loss claim. Thus, participating in the KOS program could potentially help to reduce an employer's annual L&I premiums in some cases.

10. Long-term absences, however, could be cost prohibitive for an employer. As Brown testified, under the KOS program the cost to the employer would amount to full payment of the absent employee's salary plus the overtime rate for the employee filling in for the absent employee. As a result, there would be no benefit to the employer if the costs of paying the absent employee's full salary, in addition to the overtime rate, ultimately exceeded the savings in premium payments.

11. The employer first considered participating in the KOS program in May 2015 when union vice president Josh Dueweke reported an on-the-job injury. At that time, Brown explained to Dueweke the basic concept of the KOS program as well as the purpose and hope to save money on premium costs. Brown referred to the program as "experimental" and asked to be notified if Dueweke's injuries would require corrective surgery. Brown explained that if Dueweke required surgery, his recovery time was likely to be long and thus his being on KOS status would not be feasible from a cost standpoint for the employer. Brown initially placed Dueweke on KOS status effective May 29, 2015, but took Dueweke off upon learning of Dueweke's need for surgery in mid-July 2015.

12. In late June 2015, Brown met with union president Randy Tonkin and explained how participating in the KOS program could help to save the employer money on L&I premiums. On July 5, 2015, firefighter Jason Everett sustained an injury mid-shift. He was placed on KOS status for the remainder of his shift and for the entirety of his shift the following day. Neither Tonkin nor Dueweke demanded to bargain the use of the KOS program after learning about it.

13. At his request, Brown met with the union's executive board on July 17, 2015, to discuss the discontinuation of the KOS program and the possibility of reinstating it at some time in the future. Tonkin, Dueweke, and firefighter Ben Davidson were present. Brown again explained the KOS program but noted that he intended to eliminate it because of an increase in the number of and absence length in recent L&I claims. Brown explained the intended goal of saving the employer money on L&I premiums. At the meeting, Davidson reminded Brown that he had been promised KOS coverage for a workplace injury-related absence

from July 2 through 8, 2015. Brown recommitted to placing Davidson on KOS status for that time frame but said the program was discontinued. During the remainder of the meeting the parties focused on the future use of the KOS program, and both parties committed to researching and discussing it in the future. Discussions ended when the union filed the unfair labor practice complaint in this case on September 30, 2015.

14. Payment of workers' compensation wages is directly related to wages and is therefore a mandatory subject of bargaining.

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 the employer's actions and the facts described in Findings of Fact 4 through 14, the employer did not unilaterally change a past practice or refuse to bargain in violation of RCW 41.56.140(4) and (1) when it discontinued the "Kept on Salary" program without providing an opportunity for bargaining.

ORDER

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

ISSUED at Olympia, Washington, this 9th day of January, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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.

COLLECTIVE BARGAINING
PERC
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RECORD OF SERVICE - ISSUED 01/09/2017

DECISION 12647 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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CASE NUMBER: 127638-U-15

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