King County, Decision 10576-A (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TECHNICAL EMPLOYEES ASSOCIATION, Complainant, vs. KING COUNTY, Respondent.	CASE 22175-U-09-5658 DECISION 10576-A - PECB CASE 22176-U-09-5659 DECISION 10577-A - PECB CASE 22177-U-09-5660 DECISION 10578-A - PECB DECISION OF COMMISSION

Cline & Associates, by *James M. Cline,* Attorney at Law, for the union.

Davis Wright Tremaine, LLP, by *Henry E. Farber*, Attorney at Law, and *Kelsey M. Sheldon*, Attorney at Law, for the employer.

Technical Employees Association (TEA) filed a complaint with this agency alleging that King County (employer) committed an unfair labor practice: 1) by unilaterally implementing mandatory furlough days without first bargaining either the decision, or the effects of the decision, to impasse; 2) by failing to maintain the status quo during the pendency of a representation petition; and 3) by failing to provide relevant collective bargaining information to the union. Examiner Terry Wilson held a hearing and issued a decision finding the employer committed an unfair labor practice with respect to each of these allegations.[1] The employer now appeals that decision.

[1] *King County*, Decision 10576 (PECB, 2009). In its complaint, the TEA also alleged that the employer committed unfair labor practices by illegally entering into parity agreements with other unions that precluded it from bargaining in good faith, failing to provide written counterproposals during negotiations, unilaterally establishing deadlines for bargaining, and circumventing the union. The Examiner held that the union failed to prove the employer committed unfair labor practices with respect to these allegations, and the union has not appealed those findings and conclusions.

For the reasons set forth below, we affirm the Examiner's decision that the employer committed an unfair labor practice by unilaterally implementing mandatory furlough days and by failing to maintain the status quo during the pendency of a representation petition. We reverse the Examiner's decision that the employer failed to provide the union with relevant collective bargaining information.

BACKGROUND

The employer provides multiple services to the residents of King County. The TEA represents three bargaining units of employees within the employer's operation: a bargaining unit of approximately 65 non-supervisory employees in the Design and Construction section of the Transit Division and bargaining units of approximately 12 supervisory employees and 260 non-supervisory employees in the Design and Construction section of the Wastewater Division.

The employer and the TEA were parties to collective bargaining agreements covering the supervisory and non-supervisory Wastewater Division employees that expired on June 30, 2008. Although employees in the Transit Division are employees of a public passenger transportation system and eligible for interest arbitration under RCW 41.56.492, those employees had been without a contract since 2004.

Beginning in February 2008, the TEA and employer started negotiations for successor collective bargaining agreements for the two Wastewater Division bargaining units. The parties were also in the process of obtaining an interest arbitration award for the Transit Division bargaining unit.

The Scope of the 2008 Economic Crisis

During the spring and summer of 2008, the county's financial situation took a dramatic downward turn. During this period, the employer provided updates regarding the state of its financial situation by holding regularly scheduled monthly labor-management meetings. The employer provided exclusive bargaining representatives an opportunity to discuss relevant issues at those meetings.

At the August meeting, the employer provided participants with an update regarding the state of the employer's budget. The employer also engaged in a discussion about the projected revenue shortfall and the need to adopt strategies to operate under a balanced budget. The employer did not announce the adoption of any particular strategy, but did mention that freezing cost-of-living-adjustments and closing down employer buildings could be options. Although the labor/management meetings were open to all bargaining representatives of the employer, the TEA did not attend or participate in any of the labor/management meetings.

As the breadth of the 2008 economic crisis revealed itself, the employer realized that it would be faced with budget deficits for not only its General Fund, but also for the funds that it used to operate other programs. For example, part of the operating budget of the Wastewater Division is based upon the concept that wastewater charges assessed to new business and housing growth will help pay for growth within the system. Additionally, the employer's ability to borrow money through the municipal bond market to help meet the budgetary needs of the Wastewater Division was no longer available option. Although the employer deferred several capital projects for future development, the Wastewater Division still faced a budget deficit.

The employer also faced a budget crisis for its Transit Division. A significant rise in fuel costs that was not anticipated in earlier budget projections dramatically increased the Transit Division's operating costs, and an increase in labor costs from previously negotiated collective bargaining agreements contributed to the crisis. To compound the financial crisis, the sales tax revenue projections decreased significantly. Although the Transit Division took steps to relieve the crisis, such as implementing a two-step increase to rider fares and reducing its capital budget, the Transit Division faced an $83 million budget shortfall.

Decision to Implement Furloughs

On October 7, 2008, King County Executive Ron Sims (Sims) sent an e-mail to all King County employees explaining the current budget crisis and the challenges it faced in crafting its 2009 budget. This record demonstrates that Sims contacted the King County Coalition of Labor Unions (coalition), a group of some, but not all, labor organizations that represent county

employees, and sought its assistance in achieving monetary savings to balance the 2009 budget. The TEA is not a member of the coalition.

Also on October 7, Teamsters Local 117 (Teamsters) filed a petition for investigation of question concerning representation with this agency seeking to become the exclusive bargaining representative for the TEA-represented employees in the Transit Division. Case 22023-E-08-3397. Because those employees were still awaiting an interest arbitration award, Executive Director Cathleen Callahan held that petition in abeyance until the issuance of the award.[2]

On October 13, 2008, Sims informed the coalition that the employer would shut down all non-essential services for ten days in 2009, and offered to bargain the effects of that decision. Throughout the month of October, the employer and the coalition negotiated the effects of the employer's decision to furlough employees, but not the decision itself. On October 27, 2008, the employer and coalition reached a tentative agreement. Although the decision to close certain offices impacted TEA-represented employees, the employer did not inform the TEA of its decision at that time, and did not invite the TEA to participate in bargaining.

On October 28, 2008, Sims sent an e-mail to all King County employees announcing that certain buildings would be closed on ten specific dates in 2009, and as a result of those closures, employees would be furloughed on those dates. That e-mail also explained how the coalition and the employer partnered together in reaching an agreement that would find savings to help solve the budget crisis.

On November 3, 2008, David Levin (Levin), one of the employer's labor negotiators, sent written notice to Roger Browne, a TEA Board Member, informing him that the employer has "announced a partial shutdown of the County" that would affect the TEA's bargaining units and listed the dates scheduled for closure. Exhibit 17. That letter also informed the TEA that the shutdown "will involve the closure of worksites where [TEA] members work" and that "employees at those locations will be furloughed." Levin then offered to bargain the effects of that decision.

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[2] The Teamsters' petition is still pending before the agency.

On November 4, 2008, Amy Bann, who was negotiating on behalf of the employer with the TEA's two Wastewater Division bargaining units, sent an e-mail to James Cline (Cline), the TEA's negotiator, informing him that Levin would be taking over negotiations for her while she was assigned to work on the furloughs and then would be on leave. She suggested that the two meet to talk about "the furloughs and . . . then assess where things are at." Exhibit 20.

On November 4, 2008, Cline sent an e-mail to Bann informing her that the TEA "viewed all aspects of the furlough bargainable and that it was vital that the County's proposal be presented in the course of negotiations." Exhibit 20. Cline went on to state that the TEA "insist that the County agree to withdraw its unilateral imposition of the furlough and put it in abeyance until it completes all negotiations with the TEA." Levin received a copy of that e-mail.

Later that same day, Levin responded to Cline informing him that the employer had a different opinion as to "whether there is an impact vs. decisional bargaining obligation with respect to the furloughs" but also stated that he would like to continue the discussions that Cline had previously had with Bann. Levin also informed Cline that it will be necessary "to complete the "furlough discussion before [the parties] can resume wage bargaining" and also stated that it is vital that the parties meet as often as possible in the next two weeks to work through the furlough issue. Levin also offered to "clear his calendar" to work the issue, and asked Cline to provide him dates for negotiations.

On November 12, 2008, Levin sent a second e-mail to Cline and Browne outlining his attempts to bring the TEA to the table, explaining that the employer believed that the TEA was declining to engage with the employer in bargaining, but also stating that the terms of the agreement reached with the coalition and the employer will not be extended to the TEA unless the parties reach a comparable agreement. Exhibit 20. Levin concluded his e-mail by informing Cline that Bann would be available for bargaining on three dates in early December. Exhibit 20.

Cline replied the next day denying Levin's claim that the TEA had failed to make a timely response to the employer's request for dates and informed Levin that he was not available to negotiate in November. Cline also questioned whether the employer had such an emergency that

required negotiations to be completed by a certain date. Finally, Cline made a request for certain budget information. Exhibit 20. The parties did not meet during the month of November.

The Teamsters filed a second representation petition on November 20, 2008, seeking to represent the supervisory bargaining unit at the Wastewater Division. Case 22123-E-08-3418.[3]

On November 26, 2008, Levin sent Cline an e-mail informing him that he was sending the TEA the information it had requested. Exhibit 137. Levin also informed Cline that Bann would be the employer's contact person. Cline responded on December 4, 2008, by asking Bann for answers to fourteen specific questions that pertained to the Transit Division bargaining unit, including whether the employer believed that it could continue to negotiate the decision to furlough employees in light of the pending representation petitions, what the permissible scope of bargaining was regarding furloughs, and whether the employer could offer and agree to a proposal for the years 2009 and 2010. Exhibit 29, 137. This record demonstrates that Bann declined to provide written responses to Cline's questions, but asked Cline to meet for face-to-face bargaining to resolve outstanding issues.

On December 10, the TEA met with Kim Ramsey, a third employer Labor Negotiator. Although the TEA offered a proposal to implement the shutdown without reducing salaries of TEA bargaining unit members, Ramsey informed the union that the employer would not agree to any terms that would negate the savings that would be achieved through furloughs. On January 2, 2009, the employer implemented its first furlough day, and the TEA filed these complaints.

DISCUSSION

ISSUE 1 - Employer's Decision to Implement Furloughs

Applicable Legal Standard

A public employer covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, has a duty to bargain with the exclusive bargaining representative of its employees. RCW

[3] The Teamsters withdrew its representation petition on November 19, 2009.

41.56.030(4). “[P]ersonnel matters, including wages, hours, and working conditions” of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the statutory collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 8*, Decision 3661-A (PECB, 1991). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1); *Federal Way School District*, Decision 232-A.

Balancing Test to Determine Mandatory and Permissive Subjects

The bargaining obligation is applicable to a decision on a mandatory subject of bargaining and the effects of that decision, but will only be applicable to the effects of a managerial decision on a permissive subject of bargaining. *Skagit County*, Decision 6348 (PECB, 1998); *City of Kelso*, Decision 2120 (PECB, 1985) (both the decision to contract out bargaining unit work and its effects on the employees are mandatory subjects of bargaining); *City of Kelso*, Decision 2633 (PECB, 1988) (decision to merge operation with another employer is an entrepreneurial decision, and only the effects that the decision has upon wages, hours, and working conditions are bargainable). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the "effects" of such decisions could be mandatory subjects of bargaining. *See Spokane Education Association v. Barnes*, 83 Wn.2d 366, 374 (1974).

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. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989); *Federal Way School District*, Decision 232-A.

For example, in *Wenatchee School District*, Decision 3240 (PECB, 1990), a school district facing a budget crisis changed its kindergarten program from a half day to a full day. As a result

of this decision, the mid-day bus runs that transported the kindergarten students were eliminated, and the employees who performed that work were laid off. The union filed an unfair labor practice and the examiner found the employer committed an unfair labor practice by not bargaining the decision to change the kindergarten program.

The Commission reversed the examiner, and held that decisions concerning curriculum and basic education policy are reserved to the employer. *Wenatchee School District*, Decision 3240-A (PECB, 1990). The Commission also noted that even though the employer's decision to change the kindergarten program was economically motivated, that did not convert the programmatic decision into a mandatory one. However, the Commission was also careful to explain that while the employer's decision to change the kindergarten program was permissive in nature, the employer still had an obligation to bargain the effects that its decision had on mandatory subjects, such as any layoff that would be necessitated by the change. *Wenatchee School District*, Decision 3240-A.

In *International Association of Fire Fighters, Local 1052 v. PERC*, a slightly different outcome was reached. In that case, an employer filed a complaint alleging that a union representing uniformed employees was attempting to bargain to impasse the number of employees that would be assigned to emergency vehicles which, in the employer's view, was a permissive subject of bargaining. The Commission agreed, noting that the level of shift staffing is generally a management prerogative.

The Washington State Supreme Court reversed. The Court first admonished the Commission for assuming that equipment staffing was similar in nature to shift staffing. The Court then found that while employers may have the right to determine the number of employees assigned to each shift, safety is a legitimate employee concern, and therefore equipment staffing "is not so importantly reserved to the prerogative of management." *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d at 206.

Employer's Bargaining Obligation Regarding Mandatory Subjects

As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or to a good faith impasse concerning any mandatory subjects of bargaining. *Skagit County*, Decision 8746-A (PECB, 2006). An employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change of a mandatory subject of bargaining without having fulfilled its bargaining obligations.

For employees like those in the Transit Division who are eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but must obtain an award through interest arbitration. *See Snohomish County*, Decision 9770-A (PECB, 2008). The interest arbitration requirements are also applicable to situations where an employer desires to make a mid-term change to terms and conditions of employment. *See City of Yakima*, Decision 9062-A (PECB, 2008).

Presenting a Decision Fait Accompli

It is an unfair labor practice to present a change to a mandatory subject of bargaining as a *fait accompli*. In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole. *City of Edmonds*, Decision 8798-A (PECB, 2005) quoting *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a *fait accompli* should not be found.

Although Commission precedents do not require that an employer provide *written* notice to a union regarding a proposed change in the status quo, an employer's communication to the union must be sufficiently clear to afford the union actual notice of the intended change. *See Washington Public Power Supply System*, Decision 6058-A. The imposition of a change in the

status quo as a *fait accompli* without any prior contact with the employees' authorized bargaining agent is not effective notice, and where an employer presents a decision as a *fait accompli*, failure on the part of the bargaining agent to request bargaining will not create a waiver by inaction. *Washington Public Power Supply System*, Decision 6058-A.

Commission Examines the Totality of the Circumstances

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988). The evidence must support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid reaching an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989).

Application of Standards

The first step of the analysis is to determine whether employee furloughs are a mandatory subject of bargaining. A furlough is generally defined as "a leave of absence from military or other employment duty." BLACK'S LAW DICTIONARY, 648 (7th ed., 1999). Employment furloughs are generally temporary in nature, do not involve an employee being discharged from employment, and contemplate an employee being gone from work for only a fixed period. Furloughs differ from lay-offs, which are generally seen as a permanent or indefinite separation from work. *See* ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS, 217 (1966).

The Examiner found that the employer's desired action, implementing ten days of furloughs, immediately impacted wages, hours, and working conditions in such a manner as to predominate over the employer's managerial prerogative. In reaching this conclusion, the Examiner found that the employer's stated reason for deciding to implement furloughs was to achieve labor savings, and not to eliminate services. The Examiner noted that the employer had the right to determine and manage its own budget, and considered the impact of the looming financial crisis. These facts did not make the decision to furlough employees a permissive one. We agree.

This record supports a finding that the employer's chief motivation for imposing furloughs was to reduce labor costs. Sims's October 3 letter clearly states that the employer wanted to find $15

million in savings by reducing the wages of represented and non-represented employees and the employer has not presented any contrary evidence.

The employer claims that the Examiner's conclusions are incorrect, and asserts that the Examiner failed to properly apply the *Federal Way School District* balancing test. The employer argues that it was important that labor costs not only be reduced, but that it operate under a balanced budget. The employer also argues that the decision to close its offices for ten days during the 2009 calendar year falls squarely within its managerial prerogative because the decision to close offices is inherently a decision related to the level of service that the employer wishes to offer. As demonstrated by the *Wenatchee School District* case discussed above, the employer is correct that Commission precedents hold that an employer has a right to control the scope of its services. This case, however, is distinguishable.

Unlike *Wenatchee School District*, where the respondent made a wholesale change to the scope of its operation, this employer's decision to close its offices does not constitute a programmatic change to any employer service, rather the decision to implement furloughs simply precludes certain services from being available on ten days of the year. The employer presented no evidence demonstrating that the decision to close certain offices was a strategic one based upon a study or experience, or that it was actually eliminating or making wholesale changes to its services. *See Lapeer Foundry and Machine, Inc.*, 289 NLRB 952 (1988)(explaining the different bargaining obligations between decisions to reduce employee wages and decisions to modify the employer's business structure).[4] Accordingly, the employer's argument that the decision to implement furloughs was based upon an entrepreneurial decision is not credible.

Having determined that furloughs are a mandatory subject of bargaining, we must now determine whether the Examiner correctly concluded that the employer failed to satisfy its bargaining obligation.

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4 Decisions construing the National Labor Relations Act are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984); *Community Transit*, Decision 10267-A (PECB, 2009).

The Employer's Bargaining Obligation

When Levin contacted the TEA on November 3, 2008, to discuss furloughs, the employer approached bargaining as if the decision to implement furloughs was not negotiable. Levin specifically stated in his November 3, 2008 e-mail that the employer was willing to negotiate "the *effects* of the furloughs for both the Transit Division and the Wastewater Treatment Division." (emphasis added). Exhibit 17. Furthermore, Bann and Ramsey both approached bargaining with the TEA as if the decision to implement furloughs was not negotiable. Accordingly, we find that the employer presented its decision to furlough employees as a *fait accompli*, and in doing so committed an unfair labor practice.

Furthermore, with respect to the employees in the Transit Division, the employer was not entitled to unilaterally implement a term or condition of employment upon reaching a good faith impasse. This Commission has consistently held that an employer of interest arbitration eligible employees is required to seek interest arbitration should negotiations about the effects of a decision to change a mandatory subject of bargaining reach impasse. *City of Kelso*, Decision 2633-A (PECB, 1988), *aff'd*, *International Association of Fire Fighters, Local 1445 v. Kelso*, 57 Wn. App. 721 (1990), *review denied*, 115 Wn.2d 1010 (1990).

Business Necessity Defense

Although the employer argued that the decision to implement its furlough plan was a permissive subject of bargaining, it alternatively argues that even if the decision to implement furloughs were a mandatory subject of bargaining, a business necessity existed that enabled it to implement its decision absent an impasse in bargaining.

Necessity, either business or legal, is an affirmative defense which the respondent bears the burden of establishing. *Cowlitz County*, Decision 7007-A (PECB, 2000). An employer may raise a "business necessity" defense when compelling practical or legal circumstances necessitate a unilateral change of employee wages, hours, or working conditions, but an employer is still obligated to bargain the effects of the unilateral change. *Skagit County*, Decision 8476-A (PECB, 2006); *see also Cowlitz County*, Decision 7007-A (business necessity defense sustained where employer contacted union regarding change of health insurance). This Commission examines all

of the relevant facts and circumstances surrounding the particular event before ruling on the legality of a decision to implement a unilateral change without satisfying the collective bargaining obligation. *Skagit County*, Decision 8476-A.

The Examiner found that the employer failed to establish a valid business necessity defense. In reaching this conclusion, the Examiner found that although this employer affirmatively established that it needed to reduce its budget by decreasing labor costs, nothing *required* this employer to implement furloughs. The Examiner also found that nothing stood in the way of the employer's bargaining obligation, and that the employer failed to provide evidence or explanation as to why it did not request bargaining with the union in early October 2008 when it was considering the furlough option.

The employer argues that the options available to balance its budget were limited and reducing services was not an option that the employer was willing to take. The employer also argues that the union had ample notice of the proposed change and asserts that the standard only required the employer to demonstrate a compelling need, not an absolute need, or an utter lack of alternatives. According to the employer, it had already made cuts, budget revisions, issued layoffs, spent down reserves, and because the employer did not want to cut services, it chose an option that had the least impact upon the public and its workforce. Finally, the employer asserts that the Examiner improperly considered the time prior to the employer's October 27, 2008 announcement as time the employer could have been bargaining with the TEA. In the employer's opinion, adequate notice "is not measured from the date notice is given to other unions, but when it is given to the complaining union."

The business necessity defense *excuses* an employer from satisfying its obligation to bargain the decision to change a mandatory subject of bargaining provided certain circumstances exist. For example, in *Skagit County*, Decision 8886-A (PECB, 2006), the Washington State Legislature changed the statute governing when employers were required to deduct industrial insurance premiums from employees' paychecks. Thus, the *Skagit County* employer was excused from bargaining the decision, but not the effects, because a third party instituted a change that was beyond the employer's control.

A different conclusion was reached in *Spokane County*, Decision 2167 (PECB, 1985), *aff'd*, *Spokane County*, Decision 2176-A (PECB, 1985). In that case, an employer argued a business necessity defense, claiming that it was forced to change the insurance plan that was offered to employees because the insurance carrier canceled the existing insurance plan. The business necessity defense was rejected because the evidence demonstrated that the employer actually approached the insurance carrier to find ways to reduce the employer's costs.

Here, although outside forces may have impacted the employer's budget, no outside force compelled the employer to choose furloughs as the means by which to reduce its budget. The employer could have utilized the lay-off provisions contained within the expired collective bargaining agreements or attempted to bargain some other reduction to employee wages and hours. It simply chose not to exercise those provisions.

Furthermore, the employer's argument that the Examiner improperly considered the time period prior to Sims's October 28, 2008 announcement is not well taken. If we were to condone this employer's act of informing one group of employees of an intended action on one date, while allowing it to notify a second group of employees of that same decision on a significantly later date, we would, in effect, be permitting an employer to disparately treat the bargaining representatives of its employees by affording one group a longer period for bargaining. This delay is amplified by the fact that the employer wanted to implement furloughs on a fixed date.

Finally, the employer's arguments fail to consider that this Commission examines the totality of the circumstances when determining if an unfair labor practice has occurred. Thus, it was not improper for the Examiner to consider the time period before the employer's actual announcement of its decision to the TEA, particularly in light of the fact that the employer was negotiating the furlough issue with other bargaining representatives.

Waiver by Inaction

The employer also argues that the union waived its right to bargain by inaction. If a union fails to request bargaining in a timely manner when notified of a contemplated change, or fails to advance proposals in a timely manner for the employer to consider, a "waiver by inaction"

defense asserted by the employer will likely be sustained. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

Here, because the employer presented its decision as a *fait accompli* and consistently declined to bargain that decision, the union was relieved of its duty to request bargaining. Therefore, it cannot be said that the union waived its right to bargain the decision to reduce the work calendar through inaction. Furthermore, this record demonstrated that Cline repeatedly made a timely demand to bargain the decision and the effects of the decision to implement furloughs on November 4, 2008. Exhibit 20.

The employer nevertheless asserts that the TEA waived its right to bargain because Cline did not make himself available to bargain during the month of November. The employer argues that it informed Cline of its need to complete bargaining over furloughs, made its negotiators available throughout the month of November for bargaining, and despite repeated attempts to secure dates for bargaining during the month of November, Cline failed to engage in bargaining in a timely manner. In the employer's opinion, the TEA should have made someone available to bargain on its behalf if Cline was unavailable to meet in the month of November.

The employer is correct that even where a party receives notice of a contemplated change, it still can waive its right to bargain by failing to meet and negotiate in a timely manner. The fact that TEA did not make someone available to negotiate on its behalf during the month of November is troubling, particularly in light of the fact that the employer communicated to the TEA the importance of reaching a decision as quickly as possible.

This Commission recently found a different employer guilty of an unfair labor practice for not making itself available to bargain in a timely manner. *State – Washington State Patrol*, Decision 10314-A (PSRA, 2010). Cline's unavailability did not permit the TEA to shut down bargaining, and Cline should have found a replacement negotiator. *See Highline School District*, Decision 1054-A (PECB, 1981)(If one party or the other had valid reasons for excusing its chief negotiator, it also had the obligation to replace that individual).

However, the union's failure to replace Cline with a different negotiator is mitigated by the fact that this record demonstrates that the employer was *never* willing to negotiate the decision to implement furloughs. Even if Cline had found a new negotiator, bargaining would have been an exercise in futility. Accordingly, the totality of the circumstances demonstrates that the employer has not established a waiver defense.

Conclusion

The employer committed an unfair labor practice when it unilaterally implemented employee furloughs without providing the TEA with notice and an opportunity to bargain both the decision and the effects of that decision to impasse. Additionally, with respect to the Transit Division bargaining unit, the employer not only failed to provide notice and an opportunity to bargain, but also implemented its decision without first bargaining to impasse and obtaining an award through interest arbitration. Accordingly, the Examiner's remedy directing the employer to restore the status quo ante is also affirmed.[5]

ISSUE 2 – Altering the Status Quo During the Pendency of a Representation Petition

Applicable Legal Standard

WAC 391-25-140(4) directs an employer to shut down bargaining with an incumbent union on a successor contract when a representation petition is filed challenging the existing bargaining relationship. WAC 391-25-140(4) codifies Commission precedents dating back to *Yelm School District*, Decision 704-A (PECB, 1980). In that case, an employer and incumbent union shut down negotiations concerning a new contract for the portion of a bargaining unit affected by a "severance" petition, but continued bargaining and concluded a contract on the remainder of the historical unit. The petitioning union argued that the employer should have shut down negotiations for all bargaining unit employees, not just those that were subject to the representation petition. The Commission disagreed, and held that "the employer followed well-settled principles in avoiding controversial involvement with a class of employees disputed under a question concerning representation." *Yelm School District*, Decision 704-A. In *Whatcom*

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[5] The Examiner's remedial order must be amended to direct the employer to seek an award through interest arbitration before making any changes to the terms and conditions of employment for those employees.

County, Decision 8245-A (PECB, 2004), the Commission reaffirmed that WAC 391-25-140(4) installs "an absolute bar on bargaining . . . during the pendency of a representation petition" regarding the employees that are the subject of the representation petition.

In 2008, the Commission altered the *Yelm School District* and *Whatcom County* standards when it amended WAC 391-25-140 to include the following language:

> [A]ny party to the proceeding may petition the commission to stay either of those obligations where the petitioning party demonstrates a need for a change in terms and conditions of employment due to circumstances that are beyond that party's control, or where the failure to resume bargaining would substantially harm the petitioned-for employees and leave them without an adequate administrative remedy. A petition filed under this subsection shall be accompanied by affidavits and evidence.

The purpose for this amendment, which became effective on April 1, 2008, was to provide parties the option of petitioning the Commission for the ability to bargain changes to the status quo during the pendency of a representation proceeding in the event that maintenance of the status quo could potentially harm bargaining unit employees.

Here, the Teamsters filed its representation petition for the Transit Division bargaining unit on October 7, 2008. At that time, the employer was required to shut down bargaining and maintain the status quo for all terms and conditions of employment. The employer's decision to implement furloughs occurred well after the filing of the Teamsters' petition. Thus, it is clear that the employer altered the status quo in violation of WAC 391-25-140.

The employer argues that the WAC 391-25-140 status quo obligation cannot serve to hamper its operations and points out that in cases such as this, the factual circumstances could require the employer to maintain the status quo obligation for an extended period of time. This argument not only ignores Commission precedent, but also ignores the fact that the Commission amended WAC 391-25-140 to provide employers with flexibility, should such a situation arise.

Conclusion

The employer committed an unfair labor practice when it altered the status quo of the Transit Division bargaining unit in violation of WAC 391-25-140.

ISSUE 3 – Failure to Provide Information

Applicable Legal Standard

Chapter 41.56 RCW governs the relationship between these parties. Under RCW 41.56.030(4), the parties have an obligation to negotiate in good faith. Under both federal and state law, this duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd, City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information necessary to the administration of the parties' collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999). A party that receives an information request has an obligation to respond and the duty to explain any objection to the request. *City of Seattle*, Decision 9526-A (PECB, 2009).

Application of Standard

This issue focuses upon Cline's December 4, 2008 e-mail to Bann where he asked her to answer fourteen specific questions. Exhibits 29, 137. Cline apparently wanted clarification regarding the employer's bargaining position on how the employer would implement wages for the bargaining units the TEA represents. His questions included:

1. Are you proposing to extend the Coalition agreement to the TEA Transit Unit? (Cline then included a "yes/no" check box option).
2. If yes to number 1, what [cost-of-living-adjustment] formula are you proposing for 2009 and 2010?

3. If yes to number 1, when will that wage be implemented if there is no signed contract in effect on January 1, 2009?
4. If yes to number [1], how will the COLA be applied if the wages are not yet determined for 2005-07 and 2008?

The remaining nine questions are similar in nature and tone, and all relate to the employer's legal position regarding employees' wage increases in relation to bargaining over the implementation of furloughs. Bann replied to Cline's e-mail by stating that she "must respectfully decline to be deposed, as [she] remain[ed] convinced that face-to-face bargaining is the appropriate forum to resolve these issues."

The Examiner found that the employer committed an unfair labor practice when Bann failed to make a timely response to Cline's questions. In reaching this conclusion, the Examiner held that this state's labor laws were designed to ensure that parties engage in full and meaningful conversations in order for them to fully understand each other and their respective positions. The Examiner also found that the employer was required to answer the TEA's questions, and those questions did not require complex answers. Although we agree with the Examiner that the employer should have answered the employer's questions, we disagree with the Examiner that the employer failed to provide the TEA with collective bargaining information.

Cline's questions are not a request for information; rather, they are a request for the employer's *position* on certain bargaining topics. While it may have been a "refusal to bargain" violation for the employer to refuse to answer the union's questions, this was not a "failure to provide information" violation. The preliminary ruling potentially framed this issue under two different violations: [1](b)(iv) "breach of its good faith obligation by . . . refusing to make written proposals or respond to relevant questions concerning negotiations" or under [1](e) "refusal to provide relevant information requested by the union concerning collective bargaining negotiations." The fact that the Examiner analyzed this issue under [1](e) as opposed to [1](b)(iv) is not reversible error, and had the union wanted this issue analyzed under [1](b)(iv), it could have sought appellate review of the Examiner's decision.

Conclusion

The Examiner's conclusion that the employer committed an unfair labor practice by failing to provide the union with information is reversed. The Examiner did not make specific Findings of Fact or Conclusions of Law regarding this issue. Additionally, the Examiner's remedial order is silent as to the employer's obligation to provide the TEA with necessary and relevant collective bargaining information in a timely manner. Accordingly, there is no need to amend the Examiner's Findings of the Fact, Conclusions of Law, and Order as to this issue.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner Terry Wilson are AFFIRMED and adopted as the Findings of Fact by the Commission.

2. The Conclusions of Law issued by Examiner Terry Wilson are AFFIRMED and adopted as the Conclusions of Law of the Commission, except Conclusion of Law 6, which is amended to read as follows:

   > The employer refused to bargain and derivatively interfered with employee rights in violation of RCW 41.56.140(4) and (1) when it implemented the furlough program, which required bargaining unit employees in the Transit Division to take days off without pay, without negotiating to a good faith impasse and, upon a lawful impasse obtaining an award through interest arbitration.

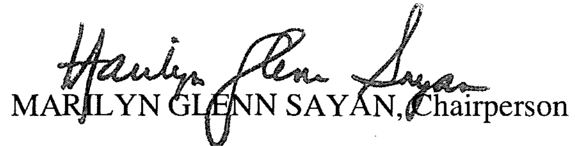
3. The Order Issued by Examiner Terry Wilson is AFFIRMED and adopted as the Order of the Commission, except for paragraph 1.b., which is amended to read as follows:

   > Refusing to bargain the decision to implement the furlough program or the effects of such implementation without first negotiating in good faith to impasse with the Supervisory and Non-supervisory bargaining units in the Wastewater Treatment Division. With respect to the Transit Division bargaining unit, implementing the furlough program without first

negotiating the decision and the effects of the decision in good faith to impasse and obtaining an interest arbitration award.

ISSUED at Olympia, Washington, this 22nd day of June, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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The attached document identified as: DECISION 10576-A - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	22175-U-09-05658	FILED:	01/02/2009	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	SUPERVISORS				
DETAILS:	Design and Construction of the Wastewater Division/Supervisors				
COMMENTS:					

EMPLOYER: KING COUNTY
ATTN: JAMES JOHNSON
500 4TH AVE STE 450
SEATTLE, WA 98104-2372
Ph1: 206-205-5321 Ph2: 206-296-8556

REP BY: HENRY FARBER
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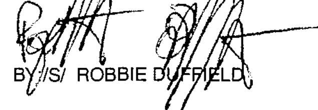

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	22176-U-09-05659	FILED:	01/02/2009	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	MIXED CLASSES				
DETAILS:	Design and Construction Section of Transit Division				
COMMENTS:					

EMPLOYER: KING COUNTY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	22177-U-09-05660	FILED:	01/02/2009	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	MIXED CLASSES				
DETAILS:	Design and Construction of the Wastewater Division / All Employees				
COMMENTS:					

EMPLOYER: KING COUNTY
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