STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SKAGIT COUNTY DEPUTY SHERIFF'S GUILD,	)	
	)	CASE 18259-U-04-4657
Complainant,	)	DECISION 8886-A - PECB
vs.	)	CASE 18260-U-04-4658
	)	DECISION 8887-A - PECB
SKAGIT COUNTY,	)	
Respondent.	)	DECISION OF COMMISSION

Cline & Associates, by *Christopher J. Casillas*, Attorney at Law, for the union.

Summit Law Group, by *Bruce Schroeder*, Attorney at Law, for the employer.

These consolidated cases come before the Commission on a timely appeal filed by the Skagit County Deputy Sheriff's Guild (union) seeking to overturn certain Findings of Fact, Conclusions of Law, and Orders issued by Vincent M. Helm.[1] Skagit County (employer) supports the Examiner's decision.[2]

ISSUES PRESENTED

1. Did the employer commit an unfair labor practice when it unilaterally implemented deductions for the employees' share of industrial insurance premiums?

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[1] *Skagit County*, Decision 8886 (PECB, 2005).

[2] The employer did not appeal any of the violations the Examiner found it to have committed.

2. Did the employer commit an unfair labor practice when it unilaterally implemented a deductible for certain dental insurance benefits?

We affirm the Examiner's decision that the employer did not commit an unfair labor practice when it unilaterally implemented payroll deductions. The industrial insurance statutory scheme required the employer to deduct the employees' share of the premiums. As such, the employer was only required to bargain the effects of implementing the industrial insurance statutory scheme upon request. The union failed to present any evidence that it timely requested effects bargaining. We reverse the Examiner's decision that the union was not entitled to a remedy where the employer unilaterally changed the deductible for dental premiums, even though the parties had subsequently agreed upon a new collective bargaining agreement.

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

APPLICABLE LEGAL STANDARDS

Both of the issues to be decided in this case invoke the duty to bargain under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, so that the same basic standards apply. A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 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). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); 41.56.150(1) and (4).

In determining whether an unfair labor practice has occurred, the totality of 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 an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989).

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 of that decision on employee wages, hours, and working conditions are mandatory subjects of bargaining). Similarly, 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. *Wenatchee School District*, Decision 3240-A (PECB, 1990); *Federal Way School District*, Decision 232-A.

ISSUE 1 - INDUSTRIAL INSURANCE

Legal Necessity Defense

The Examiner found the employer unilaterally implemented a wage deduction for industrial insurance premiums. Although he found a unilateral change, the Examiner determined that the employer was statutorily required to make the unilateral change to the insurance premiums; thus, the employer presented a successful legal necessity defense which absolved it from committing an unfair labor practice. The union argues the employer's defense did not rise to the level of business or legal necessity precluding it from bargaining over the decision and effects of that decision.

Necessity, either business or legal, is an affirmative defense which the respondent bears the burden of establishing. *Cowlitz County*, Decision 7007-A (PECB, 2000). A respondent claiming a defense of legal necessity to a unilateral change must prove that: (1) a legal necessity existed; (2) the respondent provided adequate notice of the proposed change; and (3) bargaining over the effects of the change did, in fact, occur or the complainant waived bargaining over the effects of the change. *Wenatchee School District*, Decision 3240-A.

Industrial Insurance Statutory Scheme

The employer claims that it was required to deduct insurance premiums from the bargaining unit employees' wages in accordance

with Chapter 51.16 RCW and the constitutional prohibition on gifts of public funds. RCW 51.16.140(1) states:

> (1) Every employer who is not a self-insurer shall deduct from the pay of each of his or her workers one-half of the amount he or she is required to pay, for medical benefits within each risk classification.

Additionally, RCW 51.32.073(1) states:

> (1) Except as provided in subsection (2) of this section, each employer shall retain from the earnings of each worker that amount as shall be fixed from time to time by the director, the basis for measuring said amount to be determined by the director.

The union argues that because the Department of Labor and Industries (L&I) cannot monitor whether the employer has made deductions from employee wages, the employer "may" deduct up to one-half the amount of industrial insurance from employee wages. We disagree.

Absent a specific definition, contrary legislative intent, or ambiguity, statutes are accorded their plain and ordinary meaning. *Dennis v. Department of Labor and Industries*, 109 Wn.2d 476, 479 (1987); *see also City of Yakima*, Decision 3503-A. A statute is not ambiguous merely because different interpretations are conceivable. Neither this Commission, nor the courts of appeal, are obligated to discern an ambiguity by imagining a variety of alternative interpretations. *State v. Tilly*, 139 Wn. 2d 107 (1997); *State - Transportation*, Decision 8317-B (PSRA, 2005). This Commission interprets the plain and ordinary meaning of words in the context of the statutory subject matter and the grammatical placement of the words. When reading an unambiguous statute, we first look to the wording of the statute and not to outside sources. *See Western Telepage, Inc. v. City of Tacoma Department of Financing*, 140 Wn.2d

599 (2000)(declining to give weight to an interpretation of law made in a state agency newsletter absent a clearly stated agency-issued interpretive policy statement or administrative rule).

Evidence provided by the union fails to demonstrate a legislative intent to administer the statute as a permissive "may." The inability of L&I to monitor the employer's actions does not affect the intent of the statute. While an L&I publication, entitled *Employer's Guide to Industrial Insurance*, states that employers may deduct up to one-half of the funds from employee wages, that contradictory wording does not create ambiguity in the statute, although it is confusing. Recognizing that this Commission is not the agency charged with enforcing Chapter 51.16 RCW, we will not speculate about the legislative intent. The union could not show a specific definition, contrary legislative intent or that the language is ambiguous in the above statute. Thus, under the existing statutory scheme, the employer was required to deduct the employees' share of the premium.[3] Therefore, we uphold the Examiner's Findings of Facts 3 and 4.

Union Failed to Request Effects Bargaining

The union argues on appeal that even if the employer did have a legal or business necessity defense, it still had the duty to bargain the effects of such change. We agree that the employer would have had an obligation to bargain the effects of the change to industrial insurance but for the fact that the union failed to explicitly request effects bargaining, and therefore waived its right to effects bargaining.

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[3] It is enough to say that Chapter 51.16 RCW requires employee premium contributions in this case, and we decline to address any of the constitutional arguments raised by the parties.

On October 27, 2003, the employer provided notice to the union of its intent to begin employee payroll deductions effective January 1, 2004. This deduction for industrial insurance would be equal to one-half of the medical aid rate and supplemental pension amount. The notice stated that if the union would like to discuss the change, it should contact the writer of the letter. The union responded by letter on November 17, 2003, requesting to bargain the *change*. The employer's November 20, 2003, letter to the union stated that it was making the payroll deduction in accordance with RCW 51.16.140. The letter stated once again the employer's intent to implement the change but said the employer was willing to meet with the union, if the union would like.

The Examiner's decision states that a meeting was held at some time prior to January 1, 2004, between the employer and union regarding the industrial insurance payroll deduction. There is no indication in the testimony, however, that this meeting was a negotiation between the employer and union. At this stage, the union could have requested effects bargaining, but nothing in this record demonstrates that such a specific request was made. Unless a specific demand to bargain effects is made, a union will be deemed to have waived its right to bargain the effects that a change to a permissive subject of bargaining has upon a mandatory subject. We affirm the Examiner's decision dismissing the union's complaint with respect to the change in industrial insurance premiums.

ISSUE 2 - DENTAL INSURANCE

Additional Unilateral Changes Not Properly Pled

In its complaint, the union alleged that the employer unilaterally charged a $50 annual deductible for dental insurance that had not been previously required. The union also argues on appeal that the Examiner should have found the employer committed additional unfair

labor practices when it unilaterally changed the coverage on orthodontia from 70 percent to 50 percent, and the coverage on Class III dental from 75 percent to 50 percent.

In *City of Seattle*, Decision 8313-B (PECB, 2004), this Commission declined to grant additional remedies to a union's successful unfair labor practice complaint where that union failed to amend its complaint to include similar instances that occurred after the complaint was filed. The Commission first examined WAC 391-45-070, and noted that the rule unambiguously states that "[a] complaint may be amended upon motion by the complainant" by making a request prior to the appointment of the Examiner, making the same request after the appointment of the Examiner but prior to the opening of the hearing, or prior to the closing of the hearing by making a request to conform the complaint to the evidence. The Commission concluded that the union in *City of Seattle* had ample time to amend its complaint and declined to modify the Examiner's remedy.

Here, the union had three opportunities to raise the two changes stated in the paragraph above. The union failed to make a motion at any of these times. Rather, it waited until its post-hearing brief to argue these changes.

Unilateral Change to $50 Deductible

The Examiner found that the employer violated Chapter 41.56 RCW when it unilaterally implemented a $50 deductible for dental insurance, but declined to grant a remedy because the parties' collective bargaining agreement adopted the employer's unilateral change to the dental insurance. The union now argues on appeal that the new dental deductible was not part of the agreement.

Prior to the November 6, 2003, benefits fair, the employer sent its represented and unrepresented employees a benefit packet which

reflected a $50 deductible for dental insurance. The parties were in bargaining at the time and no communication was provided to the union that the $50 deductible would be implemented. Upon implementation the union filed the instant complaints, but the parties continued contract negotiations, including negotiations over dental coverage. However, there was no bargaining on the $50 dental deductible. The parties came to an agreement on health insurance and ratified the 2002-2004 agreement in June of 2004.

There is no specific language in the parties' 2002-2004 collective bargaining agreement which defines the terms of the dental insurance. Article 19.1 of the parties' agreement only briefly mentions dental insurance, and states:

> The County agrees to provide a PPO medical plan, dental plan, vision plan, life insurance plan, and employee assistance plan for members and dependents with the full premium paid by the employer for 2002, 2003 and 2004 up to the end of the month in which this contract is signed.
> . . . .
> Beginning in Year 2004, with the first month after signing of this contract, the County will pay 95% of the aggregate monthly premiums for the preferred provided medical insurance, dental insurance, vision insurance, life insurance, employee assistance program and the employee will pay 5% of the aggregate monthly premium, with a maximum employee contribution not to exceed $40.15 per month.

The above agreement is that which the union and employer agreed to regarding dental benefits. There is no mention of a deductible in the contract, nor is there evidence that the parties bargained over the deductible. Therefore, it cannot be found on this record that the parties' collective bargaining agreement adopted the changes in the dental insurance implemented by the employer.

Remedy

The restoration of the *status quo ante* is a common remedy in unilateral change cases, of which this is one. *Kennewick Public Hospital District 1*, Decision 4815-A (PECB, 1996). This Commission may exercise some creativity when crafting remedial orders, but such orders must be consistent with the purposes of Chapter 41.56 RCW. *See Community College District 13*, Decision 8117-B (PSRA, 2005); *METRO*, Decision 2845-A (PECB, 1988), *aff'd, Municipality of Metropolitan Seattle v. PERC*, 118 Wn.2d 621 (1992).

Here, the Examiner erred in declining to grant a *status quo ante* remedy for the employer's unfair labor practice. The employer was required to maintain the status quo until the parties reached a successor agreement. With respect to bargaining units eligible for interest arbitration, we closely scrutinize unilateral changes to mandatory subjects, and before any change an employer must fulfill its bargaining obligation. *See, e.g., City of Seattle*, Decsiion 1667-A (PECB, 1984). The employer failed to fulfill that obligation. Therefore, the employer is ordered to reimburse any deductible for dental service expended by bargaining unit employees as a result of the employer's decision for the period beginning January 1, 2004, until June 21, 2004, the date that the parties signed the 2002-2004 collective bargaining agreement. This period represents the timeframe between the employer's unlawful unilateral change and the point at which the parties reached contractual agreement. However, to effectuate the purposes of Chapter 41.56 RCW, our remedy does not end there.

Article 19.2 of the parties' January 1, 2002, through December 31, 2004, collective bargaining agreement states that "[a]ll health and welfare plans specified in this article shall be those in place at the time of ratification of this Agreement, or plans with equal or

greater benefit levels." It is unclear from this record whether the parties intended: (1) the dental benefits levels to be those in existence on the actual date of ratification, or (2) what the employees were actually paying on June 21, 2004, or (3) whether the intent of the language was what the employees should have been paying without the unilateral change is unclear from this record.

We will hold this case open an additional 30 days to allow either party to submit this matter to arbitration under the terms of the 2002 through 2004 contract to determine the intent of Article 19.2. If arbitration is requested and the other party refuses to arbitrate, the case will be returned to the Commission for further proceedings. If neither party requests arbitration on this issue, then our decision shall stand as the final order of the Commission.[4]

If the disputed language becomes the subject of an arbitration, we shall keep the case open and retain jurisdiction pending the issuance of the arbitrator's decision, and once the arbitrator submits his or her award to the parties, the parties may then submit that award as a binding interpretation as to the intent of Article 19.2, and we may then modify our remedy accordingly.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

The Findings of Fact issued by Examiner Vincent M. Helm are affirmed and adopted as the Findings of Fact of the Commission, except Finding of Fact 10, which is amended to read as follows:

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[4] Our current Findings of Fact, Conclusions of Law, and Order reflect the employer's current obligations to remedy its unfair labor practices.

10. On June 21, 2004, the parties executed collective bargaining agreements covering the period January 1, 2002, through December 31, 2004. This agreement did not adopt the specific language adopted in the change in the employee dental insurance program similar to the one implemented by the employer on January 1, 2004.

AMENDED CONCLUSIONS OF LAW

The Conclusions of Law issued by Examiner Vincent M. Helm are affirmed and adopted as the Conclusions of Law of the Commission, except Conclusion of Law 4, which is amended as follows:

4. The employer violated its obligation to bargain in good faith under RCW 41.56.030(4) by unilaterally instituting a deductible for certain services provided under the dental insurance plan covering employees of the two bargaining units herein at the time when the parties were in contract negotiations.

AMENDED ORDER

Skagit County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practice:

1. CEASE AND DESIST FROM:

   a. Refusing to bargain collectively with the Skagit County Deputy Sheriff's Guild, as the exclusive bargaining representative of the appropriate bargaining units described in paragraph 2 of the foregoing findings of fact.

b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Prior to any change to the deductible for certain services provided under the dental insurance plan, notify the Skagit County Deputy Sheriff's Guild of such changes, and, upon request, negotiate in good faith such changes with the Skagit County Deputy Sheriff's Guild.

b. Reimburse the employees represented by the Skagit County Deputy Sheriff's Guild any amount those employees expended on the deductible for dental insurance for the periods between January 1, 2004, and June 21, 2004.

c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice attached to this order into the record at a regular public meeting of the Board of Commissioners of Skagit County, and permanently append a copy of the

notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

f. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, the 2nd day of February, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY violated our obligation to bargain in good faith under RCW 41.56.030(4) by unilaterally instituting a deductible for certain services provided under the dental insurance plan covering employees represented by the Skagit County Deputy Sheriff's Guild.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL, upon request, negotiate with the Skagit County Deputy Sheriff's Guild regarding any change to the deductible for certain services provided under the dental insurance plan covering employees of the two bargaining units represented by the Skagit County Deputy Sheriff's Guild.

WE WILL reimburse the employees represented by the Skagit County Deputy Sheriff's Guild any amount those employees expended on the deductible for dental insurance between January 1, 2004, and May 1, 2004.

WE WILL NOT refuse to bargain in good faith with the Skagit County Deputy Sheriff's Guild regarding changes to the deductible for certain services provided under the dental insurance plan covering employees of the two bargaining units represented by the Skagit County Deputy Sheriff's Guild.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ SKAGIT COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.