STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Complainant, vs. SPOKANE COUNTY, Respondent.	)	CASE NOS. 5187-U-84-913 5188-U-84-914 5191-U-84-917 5306-U-84-953 DECISION NO. 2167 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AN ORDER

Hafer, Price, Rinehart and Schwerin, by Pamela G. Bradburn, Attorney at Law, appeared on behalf of the complainant.

Donald C. Brockett, Spokane County Prosecuting Attorney, by James P. Emacio, Chief Civil Deputy Prosecuting Attorney, and David A. Saraceno, Deputy Prosecuting Attorney, appeared on behalf of the respondent.

On March 30, 1984, Washington State Council of County and City Employees (complainant) filed two complaints charging unfair labor practices, docketed as Case Nos. 5187-U-84-913 and 5188-U-84-914, alleging that Spokane County (respondent) unilaterally modified existing health insurance policies affecting two bargaining units. On April 2, 1984, complainant filed a third complaint, docketed as Case No. 5191-U-84-917, alleging that respondent made a similar unilateral modification of health insurance policies affecting a third bargaining unit. On June 13, 1984, complainant filed a fourth unfair labor practice complaint, docketed as Case No. 5306-U-84-953, claiming that respondent failed to negotiate in good faith and improperly threatened implementation of a final offer. The complaints were consolidated for further processing. A hearing was conducted on August 7 and 8, 1984, in Spokane, Washington. The parties submitted post-hearing briefs.

BACKGROUND

Spokane County has collective bargaining relationships with several employee organizations affiliated with Washington State Council of County and City Employees. The organizations, or "locals", represent employees in several departments within the county's administrative structure. Local 1135, which

represents certain employees in the county's road department, has had a bargaining relationship with the county since 1956. Local 492 represents certain noncommissioned employees of the Spokane County Sheriff's Department employed in the jail, communications and identification sections. Local 1553 represents employees in a number of work classifications in the following departments: assessors, auditor, treasurer, clerk, purchasing, printing and duplicating, systems services, planning, prosecuting attorney, district court, courthouse building and grounds, parks and recreation, animal control, and building and safety.

Events leading to the instant unfair labor practice proceedings arose in the course of collective bargaining negotiations that began in 1982. The collective bargaining agreements between the county and Local 1135 and 1553 were due to expire on December 31, 1982. The contract covering employees represented by Local 492 was to expire on December 31, 1983, but was open for the negotiation over wage and benefit rates for 1983. Bargaining commenced in September, but little progress was made because attention was diverted to upcoming general elections. In December, 1982, complainant made a comprehensive proposal to modify a number of existing contract provisions. Respondent did not make a formal counter-proposal, but rather rejected the union's demands or sought retention of the status quo. Negotiations continued into 1983 without resolution of outstanding issues.

At approximately the same time that complainant made its comprehensive proposal, Spokane County Personnel Director Charles "Skip" Wright initiated an independent review of existing medical insurance plans offered to county employees. Wright contacted the county's insurance broker, David Johnson, to discuss the status of the available benefits. At the time, county employees could choose one of three medical plans: Medical Services Corporation "regular", Medical Services Corporation "maxi", and a Health Maintenance Organization (HMO). Wright expressed an interest in establishing a "comprehensive major medical" plan which would require co-payments by employees as well as increased deductible costs. Johnson determined that such a plan could be obtained from Medical Services Corporation, but insurance company officials were concerned with the cost of providing three separate insurance plans to Spokane County employees. Matters were complicated because employees were allowed to change insurance plans during open enrollment periods, typically held at the end of the calendar year. Taking these concerns into consideration, the company preconditioned the new plan on the basis of enrollment. Johnson testified that the comprehensive major medical plan could be offered if one available insurance plan was eliminated. According to Johnson, the plan with the lowest enrollment at the end of 1983, or the plan with an enrollment of less than 100 Spokane County employees would be eliminated. On January 20, 1983, Winn Spears, vice president of marketing of Medical Service Corporation

wrote to Wright, explaining the company's position on available medical plans:

> I understand that negotiations have been difficult and the determination as to which plan to drop have not been accomplished as yet. We would like to arrive at an understanding that if one of the existing plans drops below 100 subscribers that M.S.C. will be allowed to discontinue that plan and will require the remaining subscribers to transfer to the remaining plans.
>
> Further, we request that the regular or maxi plan be dropped as soon as possible regardless of the total numbers remaining and that this be accomplished no later than the end of the contract year.
>
> I hope the above outlined phase-out of the regular or maxi plan is realistic as to the confines of your bargaining efforts. Please advise if there are any problems with this approach.

Johnson explained the limitations to Wright who, in turn, contacted Randy Withrow, business representative for the three locals involved in these proceedings. Wright and Withrow discussed the addition of the major medical plan. Wright testified that he carefully explained the conditions placed on the plan by Medical Services Corporation with respect to the deletion of the insurance program with the smallest enrollment. Withrow testified that Wright's explanation clearly indicated that only the comprehensive major medical plan would be eliminated if enrollment in that plan was low.

The new plan was made available to county employees during an open enrollment period, and in a letter dated January 24, 1983, Wright explained the county's interest in the new plan to all county employees:

> We will, during this forthcoming year, be offering a fourth medical insurance plan as an additional option for our employees. Continuation of this fourth plan will be dependent upon the number enrolled. In order to help you evaluate the options under the medical insurance we will be conducting employee information meetings during the Open Enrollment period.
>
> When you review the 1983 premiums you will notice substantial increases for Medical Service Corporation Maxi and Regular plans. Because of these premium increases we have elected to offer a Comprehensive Major Medical Program through Medical Service Corporation at a substantially lower premium than either existing Medical Service plan. The Major Medical Plan will have significant differences in coverage compared to the Regular or Maxi Plan. We feel, however, that for a large number of employees, particularly with dependents covered, this plan will provide adequate insurance at a reduced cost to the employee. We would urge any employee who is concerned about minimizing their "out of pocket" cost for medical care to attend the informational meetings at a time convenient to them based on the attached meeting schedule.

* * *

> NOTE: Employees covered under one of our collective bargaining agreements will not be able to enroll on the Major Medical Plan without the agreement of the bargaining unit. We are in the process of securing agreements at this time and expect concurrence from most of the units.

Although negotiations continued, the parties agreed to the implementation of the comprehensive major medical plan, and a number of county employees switched to the new plan during the open enrollment period.

On February 17, 1983, Withrow sent Wright a letter memorializing complainant's understanding of the situation. In pertinent part, the letter stated:

> We do understand that if the Comprehensive Major Medical plan does not work through 1983, that the carrier can remove that plan from being offered, and at that time, employees under Comprehensive Major Medical will be offered the opportunity to go into any of the other remaining plans.
>
> In summary, it is our position that the following plans will be offered: Comprehensive Major Medical through Medical Service Corporation, Medical Service Corporation Regular plan, Medical Service Corporation Maxi plan and INA Health Plan.
>
> Please advise me, Skip, if this will present any problems with the carrier. As you are aware, it was a difficult option for some employees to accept with the knowledge that those remaining on MSC Regular or Maxi might lose their level of benefit coverage, if the plan dropped below 100 participants in the course of 1983.

The insurance issue, at least with respect to the particular plans offered, did not come up in negotiations for several months after the February 17, 1983 letter.

While the insurance issue was temporarily set aside, other difficulties arose in the negotiations between the county and Local 1135. In part, the problems involved a proposed change to a new work shift composed of four-ten hour shifts (commonly referred to as 4/10's). During calendar year 1982, road department employees worked a 4/10 schedule according to the terms of a supplemental agreement negotiated separately from the collective bargaining agreement then in effect. The supplemental agreement, in effect from June 7, 1982 through September 3, 1982, set work schedules, starting times, vacation accrual, holidays, and other specifics. At a labor-management meeting held in the early part of 1983, county representatives expressed a desire to reinstitute the 4/10 shift for the upcoming summer. Withrow,

attending on behalf of Local 1135, pointed out that the shift would not automatically continue under terms of the supplemental agreement, and that respondent could not simply reinstitute the 4/10 shift. The issue was set aside, but complainant notified the county that the matter would be raised in collective bargaining negotiations. To that end, complainant requested information concerning the amount of money respondent saved by using the 4/10 shift in 1982. Respondent could not produce any specific savings, and complainant requested the opportunity to audit county financial records. An auditor was summoned from the union's international office in Washington D.C., and negotiations about the work shift were suspended for several months.

A second difficulty affecting Local 1135 members arose because of a grievance filed by a bargaining unit employee. The employee, Austin Lewis, was an equipment operator in the county road department. At an unspecified time during the latter part of 1982, Lewis believed that respondent had violated terms of the existing collective bargaining agreement by refusing to allow him to work on a specific piece of road machinery. The contractual provision in question, Article XIII, had been in existence for at least twelve years and provided, in pertinent part:

> Supervisors will assign employees to pieces of equipment. Within limitations of work programs, such assignments will not be shifted from day to day.
>
> If such piece of equipment is needed for emergency or special overtime work, the employee regularly assigned the equipment will be given first call to operate the equipment during any such work periods. If the regularly assigned operator is not available for any reason or when other qualified employees are available and the assigned operator chooses not to work any extra hours, the supervisor or foreman may then call any other qualified permanent employee to perform the necessary work. Supervisory personnel shall as far as possible, divide overtime equally among permanent employees, subject to the limitations of work programs. A record of all overtime worked shall be posted monthly on the pertinent district or department bulletin boards.

The Lewis (Article XIII) grievance was not resolved through the various steps of the grievance procedure and was finally submitted to arbitration. While the matter remained in the arbitration forum, it was not discussed during the course of ongoing negotiations, and neither party made any proposal on the subject. Negotiations continued during spring and summer, 1983, but little progress was made. An arbitration hearing was conducted in the Article XIII dispute before Arbitrator Richard P. Guy on July 15, 1983. As before, the parties did not actively pursue negotiations on Article XIII while the arbitrator's final decision was pending.

By Fall, 1983, the parties remained in essentially the same relative positions they held when negotiations began in 1982. While progress was made in some minor areas, the substance of a new collective bargaining agreement remained unsettled. The level of insurance benefits remained a major issue. In a discussion with Wright, Withrow suggested the formation of a committee to study alternatives to existing insurance plans and rates. Withrow renewed his suggestion in a letter sent to Wright on September 12, 1983. The record indicates that the county never responded to Withrow's inquiries about insurance benefits available to county employees.

Unable to conclude negotiations, the parties requested the assistance of a mediator. At a mediation session conducted in September, 1983, respondent restated its desire to avoid changes in existing collective bargaining agreements. Apart from the addition of the comprehensive major medical plan, respondent proposed to retain the status quo.

In November, 1983, John Cole became the business representative on behalf of Local 1135. Withrow continued to represent Local 492 and 1553 in collective bargaining negotiations.

On November 15, 1983, Arbitrator Guy issued his opinion and award concerning the "Article XIII" grievance. Arbitrator Guy found that respondent had violated the 1982 collective bargaining agreement and interpreted the disputed provision in the following manner:

> This Arbitrator finds from the evidence and from interpretation of the 1982 Working Agreement between the parties, and in particular Article XIII, Section 1, that equipment bid upon and assigned to one employee shall only be operated by that employee when said employee is available and willing to be so employed.

At a negotiation session held December 5, 1983, respondent made its first comprehensive bargaining proposal to Local 1135. The county sought over 50 changes in the existing road department collective bargaining agreement. The changes were presented as a series of written additions and deletions to a copy of the parties' 1982 contract. As part of its proposals, respondent sought complete elimination of Article XIII. In addition, respondent sought a provision allowing discretionary implementation of the 4/10 work shift during summer months. Respondent did not prioritize its proposals, but the county did express a concern that some modifications were required because of the November arbitration award dealing with equipment assignment. The parties met again on December 16 in mediation, as part of a coordinated bargaining effort involving Local 492 and Local 1553. Complainant requested a prioritization of respondent's bargaining proposals, but respondent did not provide such information.

On December 13, 1983, Wright notified employees of an upcoming open enrollment period. In part, the employees were informed that the cost of medical insurance was increasing:

> When you review the 1984 medical insurance premiums you will notice substantial increases for Medical Service Maxi and Regular Plans. The Comprehensive Major Medical Plan through Medical Service is substantially lower in cost than either the Maxi or Regular Plan. Although the Major Medical Plan has differences in coverage we feel that for a large number of employees, particularly with dependent coverage, this plan provides reasonable insurance protection at a reduced cost. We would urge any employee who is concerned about minimizing their "out of pocket" premium cost for medical insurance to consider the Major Medical Plan as a viable alternative.

On January 3, 1984, Wright received a letter from the insurance company explaining that the "regular" insurance plan was to be discontinued because of declining enrollment. Spears' letter set February 1, 1984 as the plan's termination date. On January 4, 1984, Wright sent Spears a letter asking that the termination date be set back to March 1, 1984 in order to give affected county employees a better chance to switch to another plan.

Withrow testified that he spoke with Wright on January 5, 1984, and learned for the first time that respondent intended to eliminate the "regular" insurance plan. Withrow told Wright that the only plan that could be eliminated would be the comprehensive major medical plan initiated in 1983. Wright told Withrow that the decision to eliminate the regular plan came from the insurance carrier.

On January 6, 1984, Spears wrote a second letter to Wright, concurring with Wright's request to delay the termination date of the regular plan. On January 13, 1984, Wright issued a memorandum to county employees, in which a "re-enrollment period" was established for employees who would lose insurance coverage with the elimination of the regular plan. On the same date, Wright sent a letter to Withrow explaining that the insurance company would no longer offer the regular plan and that he would be willing to "discuss" the matter with Withrow. On January 23, 1984, Wright issued another memorandum to county employees reminding them that the regular plan was to be discontinued. On March 1, 1984, the "regular" insurance plan was eliminated for all three bargaining units. By that date, affected employees had switched to other insurance policies and assumed increased premium costs.

The parties next met on February 1, 1984, but no movement was made. At a mediation session held in February 8, 1984, respondent provided a priority list, and the parties reached tentative agreement on several contract articles.

In the course of negotiations on February 8, 1984,[1/] County Engineer Robert Turner explained respondent's desire to delete Article XIII from the collective bargaining agreement. Complainant made a proposal on the issue, believing that it had addressed the county's expressed need to have "flexibility" in the assignment of equipment operators. In addition, respondent identified the 4/10 issue as a priority. After some discussion about savings generated by the implementation of such a shift, complainant proposed that the county engineer could schedule a 4/10 shift if certain conditions were met. Specifically, complainant sought a $100.00 per month increase for employees put on the shift, revision of holiday pay and a limitation that only the "oiling crew" would go on the 4/10 shift, rather than the entire road department workforce. If such conditions were met, commplainant was willing to agree to a new contract provision dealing with the 4/10 instead of retaining a supplemental agreement similar to the 1982 document.

At a bilateral meeting held on February 22, 1983, the parties defined their respective priorities in more detail, and respondent made it clear that revision of Article XIII was of high importance. While discussion was constructive, agreements were not reached on any substantive issues.

On March 9, 1984, complainant presented a proposal to deal with respondent's concern over the Article XIII problem. To address the county engineer's stated need for flexibility in equipment assignment, the proposal allowed temporary assignments if the regularly assigned equipment operator was unavailable or if an emergency situation arose. Respondent did not accept complainant's proposal, nor did it make a counter-proposal on the subject.

On March 16, 1984, the equipment assignment subject was discussed again, and complainant made a further refinement of its March 9 proposal. The new proposal specified that respondent could make permanent equipment reassignments, and expanded respondent's ability to make temporary assignments. In light of the proposals made, complainant believed that progress was being made to resolve the equipment assignment issue.

1/ For the rest of the "Background" section, references to bargaining sessions relate only to negotiations between the county and Local 1135, unless specifically noted.

On March 30, 1984 complainant filed two unfair labor practice complaints (Case Nos. 5187-U-84-913 and 5188-U-84-914) concerning the elimination of the regular insurance plan. A similar complaint (Case No. 5191-U-84-917) was filed on April 12, 1984. Withrow testified that the insurance issue was not actively pursued in negotiations after the unfair labor practice complaints were filed. Complainant believed that the dispute was reserved to the Public Employemnt Relations Commission's final determination.

The parties met again April 12, 1984. Respondent made an extensive proposal on the 4/10 shift issue, setting May through September as the 4/10 shift period, specifying that the county would give one week's notice before implementation of the shift, and otherwise restating the conditions for use of the 4/10 shift set forth in the 1982 supplemental agreement. Respondent also made a proposal concerning Article XIII. The proposal specified that overtime work would be equally divided among permanent employees, and allowed a wider range of discretion in equipment assignment than complainant's earlier proposals. Wright testified that respondent's proposal "surprised" complainant, and union negotiators stated a concern that respondent was engaged in regressive bargaining. Complainant rejected it almost immediately. Wright also testified that negotations about Article XIII degenerated after the April 12 meeting, with restatement of positions being made but no substantive bargaining taking place. The record indicates that complainant did not make further counter-proposals on Article XIII after the April 12, 1984 negotiation session.

On April 24, 1984, respondent and complainant signed two collective bargaining agreements covering Local 1553 and Local 492. The contracts were made effective to January 1, 1984. Both agreements specifically provided for the elimination of the "regular" insurance plan; neither made any reservation of the issue subject to the outcome of these unfair labor practice proceedings.

A negotiation meeting held on April 24, 1984 did not produce any movement, on the road department dispute, and the parties met again in May 5, 1984. On that date, the 4/10 shift was discussed in detail. Complainant agreed that the shift would run from May through September and would be scheduled at the county engineer's discretion. Complainant continued to maintain that the shift should apply only to the "oiling crew". Cole testified that complainant also reduced its wage demand concerning the 4/10 shift from $100.00 per month to $50.00 per month for each employee on the shift. Wright testified that he was never informed that complainant had reduced its monetary demand. However, respondent did propose that the 4/10 shift could remain in a supplemental agreement rather than being placed in the contract. Cole brought the proposal to the local union's executive board, but the board rejected it without seeing the terms of a complete contract offer.

In a mediation session held on June 5, 1984, the 4/10 shift issue was raised again. Cole testified that complainant insisted that the shift remain in a supplemental agreement, but that the union dropped its wage demand entirely. In addition, complainant restated its position that the shift should apply only to the road department's "oiling crew". Wright testified that he was never aware of complainant's change in its wage position, and after approximately 20 minutes of review, he concluded that the parties were at impasse. Wright communicated his belief to Cole.

On June 7, 1984, Wright sent a letter to Cole, detailing respondent's position on implementation of certain changes in light of the impasse respondent claimed to exist. In the letter, Wright informed Cole:

> At the conclusion of the mediation session on June 6th, between Spokane County and Local 1135, I advised Gene Miller, John Malgorine (sic) and you that I felt we were at an impasse in our negotiations. I also advised you at that time that I would send you a a letter stating our position on the issues still unsettled.
>
> We have reviewed the proposals that were made by both parties during mediation. In spite of the efforts of both parties during numerous bargaining and mediation sessions, we have not reached an agreement. We can only conclude that we are at impasse.
>
> The offer made by the County to the Local on June 5th, with one amendment, is our last and final offer. The one amendment is our acceptance of your proposal for extension of insurance benefits. I have attached a copy of that offer, and acceptable language on the insurance extension.
>
> I would urge you to take the proposal to your membership for a vote. In the event that the proposal is rejected and in consideration of the state of impasse in these negotiations, you should be aware of our intent to implement changes based on our final position. Changes will include implementation of our proposals on 4-10 hour workdays and Article XIII, Section 1, effective June 25, 1984.

Apparently, Cole contacted Wright after receipt of the letter and requested that the implementation date be delayed for two weeks. Wright agreed to the delay. On June 13, 1984, complainant filed an unfair labor practice complaint (Case No. 5306-U-84-953) claiming that respondent was illegally threatening implementation of its final offer. The record reflects that Cole was out of town and unavailable to meet during a two-week period at about this time.

On July 5, 1984, respondent's final offer was submitted to local union members for a vote. By a secret ballot, the offer was rejected unanimously. Thereafter, the changes in Article XIII and the 4/10 work shift were

implemented by respondent. Meetings between the parties continued until August, 1984, and the record indicates that the only unsettled issues were the 4/10 work shift and the Article XIII equipment assignment provisions. The record indicates that the dispute remained unresolved as of the time of the hearing in this matter.

POSITIONS OF THE PARTIES

Complainant argues that respondent illegally implemented substantial changes in equipment assignments and work schedules. Complainant maintains that the course of negotiations clearly indicates that respondent refused to negotiate in good faith, and, in such a case, an impasse could not be reached. In addition, complainant argues that an impasse cannot exist in public sector bargaining because public employees do not have the right to strike. Accordingly, complainant requests the Public Employment Relations Commission to overrule the decision reached in Pierce County, Decision 1710 (PECB, 1983). With respect to the change in insurance policies, complainant contends that respondent made an unlawful unilateral change without offering a chance for negotiation.

Respondent denies that it commited an unfair labor practice. Respondent maintains that it negotiated in good faith and, after a protracted series of bargaining sessions, reached a genuine impasse. Respondent argues that implementation of the changes in work shifts and equipment assignment was justified. Turning to the insurance issue, respondent raises several affirmative defenses. Respondent contends that complainant knew of the proposed modification of insurance plans on February 13, 1983, but failed to file an unfair labor practice complaint until March, 1984. Such a delay is in clear violation of the six month statute of limitations. Respondent further contends that complainant's actions indicated that it acquiesced to the proposed change in insurance plans. In addition, respondent argues that the insurance plan dispute should be deferred to arbitration for resolution.

DISCUSSION

Impasse and Implementation

According to complainant's analysis, it is impossible to reach an impasse in public sector collective bargaining where affected employees do not have the right to strike. Without an economic weapon such as a strike or similar

concerted activity, the union asserts that the public employer has unlimited authority to control the course of negotiations and can use the threat of impasse (and subsequent implementation of contractual terms) to gain advantages that could not be achieved through bargaining. Before such an analysis is adopted, it is prudent to examine the nature of an impasse in collective bargaining.

An impasse is reached where, after a reasonable period of good faith negotiation, the parties have reached their final positions but remain at odds over one or more bargaining subjects. In the private sector, employees could strike or take other concerted action in order to break the impasse and continue negotiations in a more favorable bargaining atmosphere. Similarly, a private sector employer may "lock out" employees to gain economic advantage in a period of difficult negotiations. However, such an analysis focuses only upon the final stages of the negotiation process. While the right of public employees in the State of Washington to strike is not granted by Chapter 41.56 RCW, the absence of such an expressed right to engage in a work stoppage cannot remove the possibility that an impasse has been reached. Rather than ruling that an impasse cannot be achieved, analysis of events leading to the impasse should determine whether the accused party has bargained in good faith. If the party in question has not bargained in good faith, the existence of an impasse is properly called into question. It must be remembered that the language of RCW 41.56.030(4) specifies that neither party in negotiations can be "compelled to agree to a proposal or make a concession". See: Federal Way School District, Decision 232-A (EDUC, 1977), where it was held that:

> Differentiating between good faith "hard bargaining" and bad faith "surface bargaining" is no simple task. Where there have been bargaining sessions, one cannot look at any one action or nonaction by the parties in making a determination. The totality of conduct must be considered.

If respondent maintained its position on the work shift and equipment assignment issues sincerely and genuinely, and the totality of conduct does not reflect a rejection of the principles of collective bargaining, an unfair labor practice cannot be found. See: Times Herald Printing Co., 221 NLRB 225 (1975).

In this case, the parties engaged in a series of sporadic negotiations for more than a year with the respondent evidently content with the status quo. Only following the arbitration award adverse to it did the respondent make a formal proposal detailing over 60 changes in the existing collective

bargaining agreement. Negotiations continued for a considerable time after respondent's proposal was made and the record indicates that agreement was finally reached on all issues except the 4/10 shift and equipment assignment articles. Respondent's firm position on those issues is not, in itself, evidence of an unfair labor practice in violation of RCW 41.56.140(4). Respondent was willing to meet and discuss a wide range of bargaining subjects, and through a grueling schedule of bargaining sessions made significant movement toward settlement. Respondent never refused to meet and, upon request even made its financial records available for examination by complainant. The very nature of a protacted negotiation process can lead to additional frustrations, but the examiner is convinced that respondent made a sincere effort to reach agreement on outstanding issues.

Since respondent acted in good faith during the negotiation process, it must be concluded that it did not commit an unfair labor practice by implementing contract changes on the work shift and equipment assignment issues. A similar situation was presented in Pierce County, Decision 1710 (PECB, 1983), where a public employer sought to implement a new policy on the use of county vehicles after the parties reached an impasse on that particular issue. Relying upon Taft Broadcasting Co., 163 NLRB 475 (1967), enforced American Federation of Television and Radio Artistis v. NLRB, 395 F.2d 622 (D.C. Cir., 1968), the examiner found that a "selective impasse" is possible. As stated in Taft Broadcasting:

> ...a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.

Respondent made a concerted effort to reach agreement on the two issues detailed above, and gave complainant adequate notice of its intention to implement its final position. The course of negotiations demonstrates that the 4/10 shift and equipment assignment articles were discussed in great detail and remained unresolved after considerable bargaining. Respondent did not commit an unfair labor practice within the meaning of RCW 41.56.140(4).

Modification of Insurance Benefits

It is undisputed that complainant was made aware that certain changes of insurance benefits were forthcoming. Respondent maintains that the union was aware that the "regular" plan could be eliminated as early as January, 1983. In his letter of February 17, 1983, Withrow indicated that he was troubled by the potential loss of the "regular" and "maxi" plans. However, the letter specifically stated that complainant believed only new "major

medical" plan would be eliminated if enrollment in that plan was low. Elimination of the "regular" plan was tied to a more specific standard. Given the nature of the allegations in this case, the February letter does not acknowledge respondent's right to eliminate the "regular" insurance plan, nor does it serve as a starting point for the computation for the six-month statute of limitations specified in RCW 41.56.160.

Just as respondent's statute of limitations argument fails, the employer's request to defer the insurance modification to grievance arbitration is not persuasive. The Public Employment Relations Commission subscribes to deferral policies as enunciated in Collyer Insulated Wire, 192 NLRB 837 (1971). However, deferral is not automatic and must be considered within the context of the facts presented in each case. See: City of Seattle, Decision 1667 (PECB, 1983). In this case, respondent argues that the underlying dispute is susceptible to resolution through grievance arbitration under terms of a collective bargaining agreement signed in April 1984, but retroactive to January 1, 1984. Complainant learned of the proposed change in medical insurance on January 5, 1984 and made timely requests to negotiate about the elimination of the "regular" plan. The change was implemented on March 1, 1984. At neither time was there a contract in effect under which the dispute could have been arbitrated. Rather, the parties were in bargaining subject to scrutiny under RCW 41.56.030(4) and RCW 41.56.140(4). As presented for resolution, the insurance modification issue is not a "breach of contract" dispute. The Commission does not have such unfair labor practice jurisdiction and would not accept such a case for determination. See: City of Richland, Decision 246 (PECB, 1977). Rather, this issue relates solely to collective bargaining obligations set forth in Chapter 41.56 RCW. Analysis of the disputed course of conduct must be made within the scope of applicable statutory provisions relating to alleged unilateral changes in mandatory subjects of bargaining.

A unilateral modification of a mandatory subject of bargaining (wages, hours, and working conditions) is presumptively an unfair labor practice. See: NLRB v. Katz, 369 U.S. 736 (1962); South Kitsap School District, Decision 472 (PECB, 1978). The term "wages" has been construed to mean both salary and other forms of monetary compensation such as insurance benefits. See: NLRB v. Carilli, 648 F.2d 1206 (1981).

In this case, respondent concedes that a change in medical benefits took place. However, respondent maintains that complainant's actions clearly demonstrate that it understood the nature of the change and that the change was necessary because of insurance company requirements. Respondent argues that the insurance carrier forced cancellation of the "regular" insurance

plan. When the modification of such a benefit is outside the employer's control, the resulting change affecting bargaining unit employees is not an unfair labor practice. See: City of Seattle, Decision 651 (PECB, 1979). A "business necessity" may provide a defense to a charge that an employer made unilateral changes in mandatory subjects of bargaining. See: Lower Snoqualmie School District, Decision 1602 (EDUC, 1983). However, the defense is not available in every case. As anticipated in cases such as City of Seattle, supra, a "business necessity" involves a decision made by an independent third party. In this case, the record indicates that respondent actually initiated the changes in medical benefits by approaching the insurance company to find ways of reducing the cost of such benefits. In response to the county's initiative, the insurance company developed alternatives that would save the county some money. Such a response is hardly the effort of an independent party, unexpectedly forcing the employer to make changes in existing wage or benefit rates. Since respondent initiated the changes in benefits, it logically owed complainant a duty to bargain on the proposed change.

There was notice to the union. There was discussion of the insurance issue at the bargaining table, but the employer's position in those negotiations was inherently tainted by the employer's continuous assertion of the claim that the change was being forced upon it by the insurance carrier. A troubling circumstance is raised, however, by complainant's conduct after it was put on notice that the "regular" plan was to be eliminated. After filing the instant unfair labor practice charges, complainant executed two collective bargaining agreements which specifically exclude the disputed plan and altogether ceased to bargain on the insurance issue in the remaining unit. A question of waiver thus arises. A "waiver" of bargaining rights must be knowingly made, and must specifically deal with the subject upon which the waiver is claimed. See: City of Kennewick, Decision 482-B (PECB, 1978). A waiver can be found by specific action, such as agreeing to particular contract language, see: Adams County, Decision 1520 (PECB, 1982); or by inaction, such as failing to raise timely objection to an act or proposal, see: City of Yakima, Decision 1124-A (PECB, 1981). Here, complainant filed unfair labor practice charges in a timely fashion. Withrow testified that complainant believed the insurance issue was "reserved" for determinatinon in this forum, and that complainant would not have to negotiate while the unfair labor practice complaints were pending. Such an attitude does not reflect the mutual obligation of the parties to negotiate and conclude an agreement reflecting the substance of the negotiations. While respondent was on notice of the unfair labor practice complaints, the Examiner must conclude that complainant's actions speak louder than words. The two signed agreements make no reference to the existence of the

complaints filed. There is no indication of any simultaneous or prior written notice that its signatures on the contract were conditioned on the outcome of the unfair labor practice cases. Complainant's own testimony clearly established that it paid very little attention to the insurance dispute in the remaining unit once the charges were filed with the Commission. Merely filing an unfair labor practice complaint does not relieve the aggrieved party of its obligation to bargain collectively. In this case, it must be concluded that complainant waived its right to dispute the elimination of the "regular" insurance plan.

FINDINGS OF FACT

1. Spokane County is a political subdivision of the State of Washington and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees is a "bargaining representative" within the meaning of RCW 41.56.030(3). Three of the union's local affiliates have collective bargaining relationships with Spokane County. Local 1135 represents employees in the county road department, Local 492 represents certain support employees of the sheriffs' office and Local 1553 represents employees in a number of departments in the county courthouse.

3. Collective bargaining agreements covering the three bargaining units mentioned in Findings of Fact 2 were open for negotiation in 1982. Contracts involving Local 1135 and Local 1553 were due to expire on December 31, 1982, and the agreement covering Local 492 was open for negotiation concerning wage and benefit articles.

4. The union made a comprehensive bargaining proposal in December, 1982. The county sought retention of the status quo, but did not make a complete counter proposal.

5. At approximately the same time that the union made its proposal, Spokane County Personnel Director Charles "Skip" Wright contacted the county's insurance broker to explore methods of saving money on insurance premiums. The insurance carrier fashioned a "comprehensive major medical" plan which would require higher deductibles and co-payment of premiums. In order to offer the new plan, the company required elimination of one insurance program offered to county employees. The plan with the lowest enrollment would have to be removed if the major medical plan was to be offered.

6. Wright informed Randy Withrow, business representative for the three locals, that a new insurance plan would be available. Withrow understood that enrollment would be a factor in the availability of the plan, but also acknowledged that any of the insurance plans could be removed if enrollment in that program was low. A number of county employees enrolled in the new plan during an open enrollment period.

7. Bargaining continued after the contracts covering Local 1135 and Local 1553 expired on December 31, 1982. Particular problems arose in negotiations over Local 1135's contract, with respect to modified work shift and a change in equipment assignment procedures.

8. During the summer of 1982, road department employees had worked a "4/10" work shift under terms of a supplemental agreement between the parties. The agreement expired, but the county was interested in using the modified work shift again. For its part, the union conditioned the implementation of the shift on increased wages and restrictions on the number of employees to be involved.

9. A second difficulty involved a grievance filed over equipment assignment procedures. The affected employee believed that he was improperly precluded from operating his regularly assigned vehicle in favor of a junior employee in the department. While the grievance was pending before an arbitrator, neither party actively pursued the issue in negotiations.

10. Negotiations continued through 1983 without success. In November, 1983, the parties received copies of Arbitrator Richard Guy's award in the equipment assignment dispute. The arbitrator ruled in favor of the grievant, and threw the existing equipment assignment policy into doubt.

11. At a negotiation session held in December 5, 1983, the county made a comprehensive proposal, detailing over 60 proposed changes in the contract. The 4/10 work shift and the equipment assignment provision were among items that the county sought to change.

12. In the latter part of 1983 and the early part of 1984, the insurance problem arose again. In a letter received from the insurance company on January 3, 1984, Wright was informed that the "regular" plan was to be discontinued on February 1, 1984. Wright requested the termination date be moved back to March 1, 1984, and the company complied.

13. On January 5, 1984, Wright informed Withrow that the "regular" plan was to be eliminated. Withrow maintained that the issue must be submitted for negotiation.

14. The parties continued to meet in February, 1984, but were unable to conclude negotiations for a successor collective bargaining agreement.

15. On March 1, 1984, the "regular" insurance plan was eliminated. On March 30, 1984, the union filed two unfair labor practice complaints involving the "regular" plan's removal (Case Nos. 5187-U-84-913 and 5188-U-84-914). A third complaint was filed on April 2, 1984 (Case No. 5191-U-84-917) dealing with the same subject.

16. After the complaints were filed, the union did not actively negotiate about the change in medical benefits. On April 24, 1984, the parties executed two collective bargaining agreements covering Local 1553 and Local 492. The contracts reflected the removal of the "regular" insurance plan. Negotiations continued between the county and Local 1135, but the insurance issue was not pursued by the union.

17. Representatives from the county and Local 1135 continued to meet through May, 1984 and a number of issues were resolved. The parties were unable to resolve their dispute over the 4/10 shift and equipment assignment procedure.

18. On June 5, 1984, Wright notified the union that the employer believed that an impasse existed over the 4/10 shift and equipment assignment issues. On June 7, 1984, Wright sent a letter to union representatives, detailing the employer's plan to implement changes in the 4/10 shift and equipment assignment articles on June 25, 1984.

19. On June 13, 1984, the union filed an unfair labor practice complaint (Case No. 5306-U-84-953) concerning the proposed implementation.

20. At the union's request, implementation was delayed for two weeks. By July 17, 1984, the changes had been implemented, but the parties continued to negotiate on the 4/10 shift and the equipment assignment procedure.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By events described in paragraphs 17 through 20 of the above Findings of Fact, and specifically by implementing changes in mandatory subjects of collective bargaining following an impasse in bargaining, Spokane County did not violate RCW 41.56.140(4).

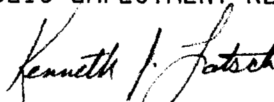
3. By events described in Findings of Fact 16, 17 and 20, Washington State Council of County and City Employees acquiesced to the elimination of the "regular" insurance and waived its right to bargain about the issue, so that Spokane County has not violated RCW 41.56.140(4).

ORDERED

Based on the foregoing and the record as a whole, the complaints charging unfair labor practices are hereby DISMISSED.

DATED at Olympia, Washington this 15th day of March, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KENNETH J. LATSCH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.