STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| COWLITZ COUNTY JAIL EMPLOYEES' GUILD, | ) | |
| Complainant, | ) | CASE 14229-U-98-3529 |
| vs. | ) | DECISION 7007 - PECB |
| COWLITZ COUNTY, | ) | FINDINGS OF FACT, CONCLUSIONS OF |
| Respondent. | ) | LAW AND ORDER |

Emmal, Skalbania and Vinnedge, by Alex J. Skalbania, Attorney at Law, appeared on behalf of the complainant.

Amburgey and Rubin, by Howard Rubin, Attorney at Law, appeared on behalf of the respondent.

On November 6, 1998, the Cowlitz County Jail Employees' Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Cowlitz County (employer) violated RCW 41.56.140(1) and (4) by unilaterally changing its rate of contribution toward and the specifications of medical and life insurance benefits that it offers. An amended complaint filed on November 18, 1998, did not substantively change the allegations. A hearing was held on April 15, 1999, before Examiner Frederick J. Rosenberry. The parties filed briefs.

On the basis of the evidence presented at the hearing, the Examiner holds that the employer did not unilaterally change its contribution toward the cost of medical and life insurance, and did not unilaterally change the specifications of medical, dental, vision, and life insurance plans made available to its employees.

Thus, the employer did not fail or refuse to bargain in good faith or engage in unlawful interference. The complaint is dismissed.

## BACKGROUND

Cowlitz County has a population of approximately 93,100.[1] The employer maintains and operates a detention facility staffed by about 40 correction officers. Those employees meet the definition of "uniformed personnel" contained in RCW 41.56.030(7), so the parties are required to submit any issues at impasse in collective bargaining to interest arbitration under RCW 41.56.430 et seq.

For an undisclosed number of years, the employer's corrections personnel were represented by Teamsters Union, Local 58. The employer and Local 58 were parties to a collective bargaining agreement with a term from January 1, 1996, to December 31, 1997. That contract identified the medical, dental, vision, and life insurance benefit programs to be made available to the employees and how they would be paid for, stating:

> 15.1 Effective January 1, 1996 **the County shall contribute Two Hundred Ninety Four Dollars and Thirty Five Cents ($294.35) per month per employee** to the Oregon Teamster Trust Fund for the FWL medical plan, the D6 dental plan, the V4 vision plan, and included in the ($294.35) is Three Dollars and Forty Cents ($3.40) for the 1104-LD life plan ($4000). **Any amount in excess of ($294.35)**

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[1] Estimated population data from "Directory of County Officials in Washington State," published jointly for the Washington Association of County Officials and the Washington State Association of Counties in 1999 by Municipal Research and Services Center, Seattle, Washington.

> **per month per employee shall be paid by the employee.**
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> 15.2 **Effective January 1, 1997 the County's contribution shall be increased by 95% of the increase in the FLW and D6 plans.** In the event the FWL or D6 plans decrease, the County's contribution shall decrease by 95% of the decrease, the County's contribution shall decrease by 95% of the decrease in either or both FWL and D6 plans. In no event shall the County's contribution exceed the total cost of the plans. **Any amount in excess of the County's contribution shall be paid by the employee.**

[Emphasis by **bold** supplied.]

The Oregon Teamster Employers Trust levied a premium increase for 1997. Application of the cost sharing formula set forth in the collective bargaining agreement increased the employer's monthly contribution to $363.61.[2] The employer and Local 58 did not conclude negotiations on a successor agreement before their 1996-1997 contract expired.

The Oregon Teamster Employers Trust levied a premium increase for 1998. While negotiating a successor collective bargaining agreement early in 1998, the employer and Local 58 entered into an interim agreement that called for application of the 95%/5% cost sharing formula to the 1998 premium rates. Those parties also agreed that the 95%/5% cost sharing formula would be incorporated into a complete agreement when negotiations were concluded. The

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[2] The employer's premium increased $72.91 per month. Based on mathematical extrapolation, the Examiner infers that the total increase was $76.75 per month, and that the increase borne by the employees was $3.65 per month.

employer's share of the cost of the insurance plans was thus increased to $394.46 per month.[3]

On April 27, 1998, the Cowlitz County Jail Employees' Guild filed a petition with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking to replace Local 58 as exclusive bargaining representative of the corrections personnel of Cowlitz County.[4] Negotiations between the employer and Local 58 were suspended when that petition was filed.

On July 8, 1998, the Cowlitz County Jail Employees' Guild was certified as exclusive bargaining representative, as the result of the representation proceeding conducted by the Commission under Chapter 391-25 WAC. Cowlitz County, Decision 6347, (PECB, 1998). The negotiations between the employer and Local 58 were thereupon terminated.

Because participation in the Oregon Teamster Employers Trust plans is contingent on the covered employee being represented by the Teamsters Union, and because of experience with two other bargaining units that had recently been dropped by the trust after they selected other organizations to replace Local 58, the employer anticipated that its corrections personnel would have to be moved to different insurance plans to avoid a lapse of coverage. It is undisputed that the Oregon Teamster Employers Trust coverage terminated on July 31, 1998. The employer immediately took steps

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[3] The employers' premium was increased $30.85 per month. Based on mathematical extrapolation, the Examiner infers that the total increase was $32.47 per month, and that the increase borne by the employees was $1.62 per month.

[4] The Examiner takes notice of the Commission's docket records for Case 13880-E-98-2322, which disclose that the petition was filed on April 27, 1998.

to make available to the corrections officers the same plans it offered to its other represented and non-represented employees. There were differences between the Oregon Teamster Employers Trust plans and the employer's plans, and the existence of those differences were acknowledged by all concerned.

Dick Anderson, the employer's director of personnel, recalled that he was first contacted by Correction Officer Doray, on or about July 23, 1998, regarding the necessity to change insurance providers.[5] Doray inquired regarding how the employer planned to address the matter. Anderson responded that the employer could extend access to the same health care benefits offered to other county employees.

Anderson subsequently conferred with Vice-President Linda Parker of the union, regarding the insurance matter. Anderson and Parker both testified about discussing the termination of the Oregon Teamster Employers Trust coverage at the end of July 1998, and the employer making available the medical, dental vision, and life insurance plans offered to its other employees. Parker gave some assent to the employer's proposed course of action.

Anderson desired to discuss the matter more fully with the union's attorney/chief negotiator, Patrick Emmal. After his attempts to contact Emmal were unsuccessful and Emmal did not return messages left for him on three or four occasions, Anderson sent a letter on July 23, 1998. That letter indicated the Oregon Teamster Employers Trust coverage would terminate on July 31, 1998, and that the employer was offering immediate coverage for the corrections

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[5] The record does not reflect Doray's first name. The record also does not reflect whether Doray was acting as a union representative or as an employee in the bargaining unit represented by the union.

personnel under the insurance plans offered to its other employees. Anderson's letter expressly stated it was "not a request to waive the obligation to bargain health insurance when we begin negotiations" an that it was "simply a way to bridge the gap during this transition". He provided details of the plan costs, and asked Emmal for a response. Emmal did not respond to Anderson's letter.[6]

The employer took the initiative and enrolled the corrections officers in the offered county plans, effective August 1, 1998. In five of the six county plans, the premium was less than the employer's existing $394.46 monthly contribution,[7] and the employer indicated it would pay 100% of the cost, so there would be no employee-paid co-premium. The total premium for the sixth plan was $397.13 per month, so that enrollment in that option would have required an employee to pay a $2.17 monthly co-premium. The record reflects that none of the corrections officers selected the plan that required an employee-paid co-premium.[8] The employer apparently achieved some savings.[9]

The union and employer did not commence negotiations for their first collective bargaining agreement until September 24, 1998. The union submitted a proposal for a complete agreement at the

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[6] Anderson's letter indicates that a copy was sent to President Larry Green of the union.

[7] The total monthly premiums for those options were $389.11, $382.60, $381.49, $374.58, or $366.94.

[8] The record does not disclose the exact amounts saved by the employees due to the elimination of co-premiums they had paid for participation in the Oregon Teamster Employers Trust plans.

[9] The record reflects that 31 of 36 eligible employees selected plan options that cost $389.11 per month. For them, the employer would have saved $5.35 per employee per month, even when paying 100% of the premium.

parties' first negotiations session.[10] At that time, the union's proposal for health and welfare benefits stated:

> 15.1 The employer shall provide Health, Vision and Dental insurance for employees and their dependents and pay the full cost thereof for the duration of this contract. Said insurance shall be substantially similar to the level of coverage that was provided to these employees on January 1st, 1998. In addition, the employer shall provide life insurance in the amount of $50,000 to each employee for the duration of this contract.

Another negotiation session was held on October 1, 1998. The employer presented its complete contract proposal at the parties' third negotiation session, held on November 4, 1998. It stated:

> 15.1 Effective January 1, 1999 the County shall contribute Four Hundred Twenty Eight Dollars and Ninety Cents ($428.90) per month per employee [for] medical, dental and life insurance. The medical plans offered shall be Providence (formerly Selectcare), Kaiser, and Blue Shield Regence. The dental plans offered shall be Standard and Kaiser. The life insurance is Two Thousand ($2000) face value. in no event shall the county's contribution exceed the total cost of the plans. Any amount in excess of $428.90 per month per employee shall be paid by the employee.
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> 15.2 Effective January 1, 2000 the County's contribution shall be increased by 95% of the

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[10] The union's proposal appears to have called for retroactive increases of employer contributions toward the cost of insurance benefits and retroactive enhancement of those benefits. Although such benefits are generally understood to be an alternative form of wages, under Island County, Decision 5388, (PECB, 1995), the question of whether this particular union proposal comported with RCW 41.56.950 and Christie v. Port of Olympia, 17 Wn.2d 534 (1947), is not before the Examiner.

> increase in the lowest cost medical plan and lowest cost dental plan. In no event shall the County's contribution exceed the total cost of the plans. Any amount in excess of the County's contribution shall be paid by the employee.

By November 4, 1998, Anderson was aware that the insurance providers were increasing their premiums for 1999, and the employer provided the union with a matrix detailing the costs of various combinations of options available to the members of the bargaining unit. The matrix showed that, based on the employer's 1998 contribution amounts, co-premiums to be paid by employees were slated to range from $11.35 per month to $47.65 per month. The dollar amounts contained in the matrix did not reflect the employer's proposal to increase its contribution to $428.90 in 1999. Had that proposed increase been taken into consideration, the maximum co-premium to be paid by employees would have been approximately $13.00 per month.

There was no substantive discussion by the parties regarding their respective health and welfare proposals at any of the three negotiation sessions. On November 18, 1998, the union filed the complaint to initiate this unfair labor practice proceeding.[11]

The record fairly reflects that the employer has provisions in its collective bargaining agreements with the organizations representing all other bargaining units of its employees that call for the employer to pay 95% of any premium increases and for employees to

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[11] The record reflects that the parties also met in negotiations on March 1, 1999, and subsequently filed for mediation, requesting intervention by the Public Employment Relations Commission to assist them in negotiating a complete agreement. They had not concluded their negotiations at the time the parties submitted post hearing briefs in this case.

pay 5% of any increases. That formula was also applied to the employer's non-represented employees. The employer thus applied the 95%/5% formula to insurance premium increases for 1999 for all of its employees except those in the corrections officers' bargaining unit.

## POSITIONS OF THE PARTIES

The union contends the employer, without its consent, communicated directly with members of the bargaining unit regarding insurance costs and plan specifications, and that it unilaterally enrolled them in plans that offered benefits less favorable than those they had with their previous exclusive bargaining representative. The union also alleges that the employer changed the status quo by passing along the full cost of the 1999 premium increase to the corrections employees, rather than implementing the 95%/5% formula that had been in place. The union contends that all of those changes involve mandatory subjects of bargaining, that the *status quo ante* was the plan specifications in effect at the time it replaced Teamsters, Local 58, as exclusive bargaining representative, and that the employer presented it with a series of unlawful "*fait accompli*" changes. The union acknowledges that the Teamster plans were no longer available, but argues that the employer was obligated to provide the same level of coverage and to pay for any shortfalls in order to match the benefits previously provided. The union requests that the employer be ordered to reinstate the *status quo ante*, that the members of the bargaining unit be made whole for all loss of income and other benefits resulting from the changes and that the union be awarded attorney's fees.

The employer defends that it did not cause the termination of Oregon Teamster Employers Trust coverage, that its contract with

Local 58 only called for it to pay a fixed amount per month for insurance benefits, and that it did not agree to provide (and had no control over) any specific level of benefits. Additionally, the employer maintains it had an agreement with union representatives to offer, on an interim basis, the existing plans made available to its other employees. The employer points out that it sought discussion of the insurance matter with the union's attorney/chief negotiator, and that Emmal failed to respond. The employer further claims it had no alternative but to take the initiative to maintain health care and life insurance coverage for its employees, and that its proposal for an interim solution was not rejected by the union. Finally, the employer argues that the union waived its bargaining rights by inaction. It urges that the complaint should be dismissed.

## DISCUSSION

These parties bargain collectively pursuant to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Their duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, ...

That duty is enforced through RCW 41.56.140(4) and unfair labor practice proceedings under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270. The burden to establish affirmative defenses lies with the party asserting the defense.

## The Standards to be Applied

Mandatory Subjects of Bargaining -

It is well settled that health care and life insurance benefits are alternative forms of wages, making them mandatory subjects of bargaining. Spokane County, Decision 2167 (PECB, 1985); City of Kalama, Decision 6737 (PECB, 1999); Kitsap County, Decision 6218 (PECB, 1998).

It is also well settled that an employer commits an unfair labor practice if it implements a change of existing wages, hours or working conditions on its represented employees, without having first exhausted its bargaining obligations under Chapter 41.56 RCW. The difficulty that an employer faces during a hiatus between contracts is addressed, in relevant part, in City of Pasco, Decision 4197 (PECB, 1992), as follows:

> The most difficult time for employers to change working conditions of its employees is the period where there has been no bargaining and no contract, ... the employer comes under an obligation to maintain the *status quo*, and any change of practice that arguably is more onerous to employees could be seen as a threat or coercion, in violation of RCW 41.56.140(1). Even changes arguably favorable to the employees can be seen as unlawful enticements which interfere with employee rights under RCW 41.56.140(1). ...

Thus, the *status quo ante* must be maintained regarding all mandatory subjects of bargaining, and an employer is prohibited from unilaterally changing mandatory subjects of bargaining except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. City of Yakima, Decision 3501-A (PECB, 1998), affirmed

117 Wn.2d 655 (1991); Spokane County Fire District 8, Decision 3661-A (PECB, 1991); City of Tacoma, Decision 4539-A (PECB, 1994).

A complainant alleging a "unilateral change" must establish the relevant *status quo*. Municipality of Metropolitan Seattle, Decision 2746-B (PECB, 1989). Union allegations of failure to maintain a *status quo* have been rejected where historic practices, such as granting annual "cost of living" salary increases, have been taken for granted as the *status quo ante*, rather than an outcome of collective bargaining. In Snohomish County Fire District 3, Decision 4336-A (PECB, 1994), the Commission wrote:

> In this case, the union argues that the *status quo* includes wage practices that pre-date recognition of the union. The Executive Director correctly stated that the wages of bargaining unit employees became a subject for collective bargaining "and the employer's *status quo* obligations commenced, as soon as the union became the exclusive bargaining representative of the employees involved here". That being the case, granting the bargaining unit employees a general wage increase in January of 1993 would have involved a change from the *status quo* which the employer was legally required to maintain.

The handling of insurance premium increases while contract negotiations were underway was addressed in Snohomish County, Decision 1868 (PECB, 1984), where it was pointed out that medical and dental insurance was a part of total compensation. Accordingly, that employer was not obligated to pay additional costs while bargaining was underway for a complete agreement for a "uniformed personnel" bargaining unit, and the Examiner in that case pointed out that implementation of an increase (albeit, most likely looked upon with favor by the union) could well be an

unlawful unilateral change in violation of RCW 41.56.030(4) and RCW 41.56.470.

Notwithstanding that medical plan specifications are a mandatory subject of bargaining, an employer does not necessarily breach its bargaining obligation by unilaterally determining the plan provider. City of Dayton, Decision 1990 (PECB, 1984). A violation was found in Spokane County, Decision 2167-A (PECB, 1985), where the evidence showed that the employer actually prompted a change of plan specifications announced by an insurance provider. Accord, City of Kalama, Decision 6739 (PECB, 1999).

The Obligation to Provide Notice -

Where a change regarding a mandatory subject of bargaining is desired, the party proposing the change is obligated to provide notice to the other party in advance of a proposed implementation date. The period of notice must be sufficient to allow an opportunity for intelligent evaluation of the merits of the proposal, and formulation of a response. City of Anacortes, Decision 6830 (PECB, 1999). If bargaining is requested, the party proposing the change is obligated to bargain in good faith regarding the matter.

Implementation of a change is unlawful where a mandatory subject of bargaining is altered without providing advance notice and affording an adequate opportunity to respond. Such a *fait accompli* eliminates the obligation to request bargaining, and no waiver by inaction will be found. Accordingly, an employer violates RCW 41.56.140(4) if it presents a union with a *fait accompli*, or if it fails to bargain in good faith, upon request. Federal Way School District, supra; Green River Community College, Decision 4008-A (CCOL, 1993); North Franklin School District, Decision 5945-A (PECB, 1998).

Exceptions to the Bargaining Obligation -
Where there is no collective bargaining agreement in a "uniformed personnel" bargaining unit, the maintenance of the *status quo ante* is further required by RCW 41.56.470. In such an environment, a change of a mandatory subject of bargaining can only be lawfully implemented if: (1) the employer and exclusive bargaining representative reach an agreement on the matter; (2) a party waives its bargaining rights by inaction, after adequate notice of the proposed change has been provided; or (3) the employer establishes a "business necessity" to impose the change. North Franklin School District, Decision 3980-A (PECB, 1993); City of Chehalis, Decision 2803 (PECB, 1987).

The "Waiver by Inaction" defense is available where a party has given appropriate notice of a proposed change of a mandatory subject of bargaining, and the other party does not request bargaining in a timely manner. See, Lake Washington Technical College, Decision 4721-A (PECB, 1995); Newport School District, Decision 2153 (PECB, 1985). Where an employer notifies a union of its desire to change a personnel matter involving a mandatory subject of bargaining a union may do nothing and accept the change. If a union desires to influence the outcome of the desired change, it has an affirmative obligation to promptly notify the employer of its interest and desire to submit the matter to collective bargaining. Lake Washington Technical College, supra. A waiver by inaction will also be found where a union fails to make itself accessible to an employer, who desires to discuss the matter. North Franklin School District, Decision 5945-A (PECB, 1998). A waiver by inaction will also be found where a union initiates a proposal and then declines to respond to an employer's request to discuss the matter in detail. Spokane County, Decision 2377 (PECB, 1986). The burden of proof is on the party claiming waiver. North

Franklin School District, supra, City of Wenatchee, Decision 2194 (PECB, 1985).

The "Business Necessity" defense is apt where a party to a collective bargaining relationship is faced with a compelling legal or practical need to make a change affecting a mandatory subject of bargaining. It may then be relieved of its bargaining obligation, to the extent necessary to deal with the emergency. Even then, a business necessity which justifies a particular decision or action will not relieve that party of its obligation to bargain the effects of the decision on the affected employees. City of Chehalis, supra. Evaluation of the merits of an employer's business necessity defense must be made in the context of all of the relevant facts and circumstances of the personnel action. City of Sumner, Decision 1839 (PECB, 1984). Although a violation was found in Spokane County, Decision 2167, supra, that decision inherently acknowledges the possibility of an employer showing a compelling business necessity for changing a medical plan.

Contract Terminates with Change of Representative -
Collective bargaining relationships between employers and unions are ongoing, so long as the union retains its status as exclusive bargaining representative. RCW 41.56.950 authorizes such parties to negotiate retroactive wage and benefit changes, as follows:

> RCW 41.56.950 RETROACTIVE DATE IN COLLECTIVE BARGAINING AGREEMENTS ALLOWABLE, WHEN. Whenever a collective bargaining agreement between a public employer and a bargaining representative is concluded after the termination date of the previous collective bargaining **agreement between the same parties**, the effective date of such collective bargaining agreement may be the day after the termination date of the previous collective bargaining agreement and all benefits included in the new collective bargaining agreement including wage

> increases may accrue beginning with such effective date as established by this section.
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> [Emphasis by **bold** provided.]

That statute makes automatic the agreement required by Christie v. Port of Olympia, supra, to avoid violation of provisions of the state constitution which generally prohibit retroactive pay increases for public employees. The strong policy reason for making retroactivity available in ongoing relationships is to reduce the pressures associated with "no contract, no work" slogans and strike threats. Thus, this employer and Teamsters, Local 58, as the parties to an ongoing bargaining relationship, were in a position to negotiate terms in a successor contract retroactive to the December 31, 1997 expiration date of their previous contract.

RCW 41.56.040 secures the right of public employees to change their exclusive bargaining representatives. Thus, the corrections personnel of Cowlitz County had a right to form and join the union which is the complainant in this proceeding, and that union had a right to file and process its representation petition under RCW 41.56.060, 41.56.070, and Chapter 391-25 WAC. The exercise of that right is not entirely free of risks and costs, however. One of the more serious considerations for employees who exercise their right to change unions is that there will necessarily be a breach of continuity. The specific "between the same parties" language in RCW 41.56.950 has been enforced according to its terms. King County, Decision 4236 (PECB, 1992). The bargaining relationship between a union and employer commences with the certification or recognition of that union. While the wages, hours and working conditions then in effect mark the *status quo ante* from which alleged unilateral changes must be evaluated, any contractual commitments and tentative agreements made prior to that date between the employer and individual employees, or between the

employer and a previous exclusive bargaining representative, are completely severed upon the change of exclusive bargaining representatives.

In City of Tacoma, Decision 5085 (PECB, 1995), an incumbent union argued that RCW 41.56.123 was tantamount to an automatic one year extension of a collective bargaining agreement and served as a contract bar, prohibiting the filing of a representation petition which challenged its status as exclusive bargaining representative. It was noted, however, that:

> RCW 41.45.123 does not, by its terms, provide a universal solution to the "unilateral change" debate: ... it has no apparent effect on parties negotiating their first collective bargaining agreement.

The arguments of the incumbent union were rejected in that case, and the representation proceedings went forward.

A collective bargaining agreement is a voluntary act of two parties. A union only enjoys the benefits of the duty to bargain and has capacity to sign a collective bargaining agreement covering a particular group of employees while it holds status as exclusive bargaining representative of that bargaining unit under RCW 41.56.080. Fundamental principles of contract law dictate a conclusion that a contract between an employer and particular union terminates in all respects when that union loses its status as exclusive bargaining representative. There is no legal or logical reason to hold employees who have just separated themselves from a union to the contract terms negotiated by that union with their employer. Among the matters particularly affected by a change of exclusive bargaining representatives are waivers of statutory bargaining rights regarding mandatory subjects of bargaining. It

has been uniformly held that waivers contained in a collective bargaining agreement expire with the certification of a new exclusive bargaining representative. City of Bremerton, Decision 2733 (PECB, 1987); City of Marysville, Decision 5306 (PECB, 1995).

Direct Dealing -

An employer is obligated to bargain with the exclusive bargaining representative of its employees, to the exclusion of all other organizations and also to the exclusion of direct dealings with employees on matters that are mandatory subjects of collective bargaining. City of Seattle, Decision 6357 (PECB, 1998). An employer which circumvents its obligations towards the exclusive bargaining representative commits a "refusal to bargain" violation under RCW 41.56.140(4). City of Wenatchee, Decision 2216 (PECB, 1985).

Inherent Interference -

Like the decisions of the National Labor Relations Board (NLRB) under the counterpart federal statute, the Commission has generally found that any "refusal to bargain" violation under RCW 41.56.140(4) inherently interferes with the rights of bargaining unit employees, and so routinely finds a "derivative" interference violation, under RCW 41.56.140(1), whenever a violation is found under another of the other subsections of RCW 41.56.140. See, Washington State Patrol, Decision 4757-A (PECB, 1995); Battle Ground School District, Decision 2449-A (PECB, 1986).

## Application of Standards

The Change of Insurance Plans -

The predicament faced by these parties concerning insurance benefits for the corrections personnel could not have come as a surprise to either side. Their representatives have been through

this before. Bargaining units consisting of uniformed employees of the Cowlitz County Sheriff's Department and the employees of the Cowlitz County Technical Services Department were both formerly represented by Teamsters, Local 58, until they chose representation by independent guilds. Anderson was director of personnel for the employer throughout that period, and the record establishes that those independent organizations were represented by the same law firm which represents the Cowlitz County Jail Employees' Guild. In each of the earlier situations, Anderson and the Emmal firm faced the problems associated with termination of coverage under the Oregon Teamster Employers Trust soon after the employees ceased to be represented by Local 58. The record fairly reflects that the employer made available to those bargaining units the same health care plans that were made available to the corrections officers.

The Examiner rejects the union's claim that there has been an unlawful disruption or change of a past practice, along with its demand for a remedy returning the employees to the *status quo* ante marked by the level of benefits they received under the Teamsters plans. One of the inherent costs to the corrections officers of exercising their statutory right to change exclusive bargaining representatives was a predictable loss of eligibility to participate in the Oregon Teamster Employers Trust healthcare plans. In determining the *status quo ante*, the Examiner is mindful that an employer cannot be held responsible for guaranteeing a term or condition of employment over which it has no control, or which is established and controlled by an outside third party. City of Seattle, Decision 651 (PECB, 1979).

The employer cannot be faulted for acting as it did. The employer was faced with a compelling business necessity to provide different insurance benefits to its employees less than a month after they chose a new exclusive bargaining representative. It responded by

offering the insurance plans it provided to all of its other employees, and offered to pay the full costs of those plans up to the maximum dollar amount of its commitment under the interim agreement it had reached with Local 58. Depending on the plan chosen by the employee, the employer's costs were between 93% and 100% of its maximum commitment under the Teamsters plans. For the plan chosen by the vast majority of the employees, the employer's contribution was more than 98.6% of its maximum commitment under the Teamsters plans. If the employer saved a minimal amount per month, that occurred in a context where the employees pocketed the amounts (at least the $5.27 per month accumulated for 1997 and 1998) they had been paying as co-premiums. In the context of the overall change forced upon these parties, this record does not establish a significant change of benefits.[12]

The Examiner also rejects the union's contention that this employer was obligated to replicate the level of benefits provided by the Oregon Teamster Employers Trust plans. The record fairly reflects that the collective bargaining agreement covering the corrections officers when they were represented by Local 58 placed control of the specifications of the medical, dental, vision, and life insurance plans in the hands of the trustees of the Oregon Teamster Employers Trust. The dental and medical plan specifically provided that the trustees reserved the right to change those plans.

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[12] Anderson testified that he is not familiar with the details of the various plans offered by the Oregon Teamster Employers Trust. Anderson generally characterized the Oregon Teamster Employers Trust plans as imposing annual deductibles, while he characterized the employer's plans as imposing co-pays for specific services instead of annual deductibles. Anderson thus declined to state that one approach was superior to another, because that depends on the nature of the particular ailment and treatment. The union did not provide detailed testimony on benefit comparisons.

Although such control is not expressly pointed out in the descriptive summary of the vision program, it is inherent to the trust concept that the plan specifications were controlled by the trustees in the same manner as was specified for medical and dental benefits. It is thus clear that Cowlitz County had no control over the plan provider or specifications, or over when any benefits were made available to or eliminated for its corrections employees. That authority was reserved to the board of trustees, to the exclusion of any authority in the hands of covered unions or employers. Under its collective bargaining agreement with Local 58, this employer was not a guarantor of anything other than a fixed dollar amount per month for premiums.

Direct Dealing -

The record in this case includes reference to a conversation between Anderson and a bargaining unit employee. The evidence is so lacking that the Examiner cannot form any opinion as to whether anything resembling "bargaining" or a "circumvention" of the union occurred in that conversation.

The record establishes that Anderson had one or two conversations with Linda Parker, and that she was a vice-president of the union. It is unclear why the employer discussed the change of insurance benefits with Linda Parker. On the other hand, Parker never resisted Anderson's effort to discuss the insurance issue with her. If Parker was not the appropriate union official for Anderson to confer with, her status as a high-ranking union officer certainly imposed an obligation on her to either direct Anderson to the appropriate union official or to have the appropriate union official make contact with Anderson.

Agreement or Waiver by Inaction -

The evidence supports a conclusion that the employer had every reason to believe its offered alternative was accepted by this

union, or that this union waived its bargaining rights on the change of insurance plans. That conclusion is based on Parker's actions, together with the inaction of Emmal and the union president.

As already indicated, Anderson conferred with Parker regarding the insurance matter. Anderson testified that he pointed out that the Oregon Teamster Employers Trust coverage would terminate at the end of July 1998, that other medical, dental, vision, and life insurance plans accessible through the employer were immediately available, and that the matter needed prompt action. Anderson testified of a second conversation with Parker, in which he restated the employer's offer and Parker asked for confirmation that the offered plans were the same ones available under a collective bargaining agreement covering the employer's deputy sheriffs. Parker testified that she recalled discussing the matter with Anderson on one or two occasions, that he expressed the urgency of the matter, and that he provided some information regarding the programs that were available.[13] Anderson testified that Parker raised no objection, and that he viewed Parker's comments as being tantamount to granting authorization to enroll the corrections officers in the offered plans. Importantly, Parker testified that, based on her understanding that the employer was looking for a temporary resolution of the matter, and that insurance would be a subject of negotiations for a collective bargaining agreement between the employer and union, Parker indicated her assent to the interim arrangement.

The employer did not rely exclusively on its conversations with Parker, however. According to Anderson, Parker responded during

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[13] Parker was familiar with the details of at least one of the plans offered by the employer. Her husband, who was also employed by Cowlitz County, was enrolled in it.

their first conversation that she needed to discuss the matter with Emmal before she could respond. Anderson also desired to discuss the matter with Emmal, and he testified of making unsuccessful attempts to contact Emmal.[14] After receiving no reply to telephone messages left for Emmal on three or four occasions, Anderson sent the letter dated July 23, 1998, stating, in relevant part:

> I can set up immediate signups for Corrections personnel to be covered under one of the existing plans that the County offers. The County is currently paying $394.96 [sic] toward the cost of medical, dental, vision and life insurance for these personnel. The plans being offered to County personnel are enclosed for your review. With one exception, the County's share of the cost would cover the full amount for the balance of 1998. ...
>
> This is not a request to waive the obligation to bargain health insurance when we begin negotiations. It is simply a way to bridge the gap during this transition and to ensure that the Corrections Officers have health coverage. ...

Given the immediacy of the situation, Emmal's failure to reply to either Anderson's telephone call or Anderson's letter provides basis for a conclusion that the union waived its bargaining rights by inaction, even if Parker had no authority to assent.

Finally, a "waiver by inaction" conclusion is based on the fact that the union's president, Larry Green, did not respond to the copy of Anderson's letter which was sent to him. Even if the

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[14] Mr. Emmal is known to the Examiner from a previous case. The Examiner observed that Mr. Emmal was in the hearing room at the outset of the hearing, and during the presentation of at least part of the union's case in chief. He then left the hearing room, and was not called as a witness.

employer guessed wrong in its actual or attempted contacts with Parker and Emmal, Green's union office certainly imposed an obligation on him to act if the union wanted to bargain the issue. Under the circumstances, the employer had no alternative but to take the initiative regarding insurance benefits for its employees. To its credit, the employer did not allow the employees health care insurance to lapse.

It is clear that the union was provided the opportunity to become involved in the matter. By a combination of acceptance, cooperation, and acquiescence, it allowed the employer to enroll the corrections officers in the interim programs.

The Employer's "Funding" Obligations for 1999 -

At the time this union was certified as exclusive bargaining representative, the employer was paying up to $394.46 per month toward the cost of the employees' insurance benefits. The employer's specific contribution was determined by the individual employee's selection of insurance options. When the employees moved to the employer-provided plans, the employer indicated it would maintain its $394.46 contribution level. Because most of the employees selected benefit packages that cost $389.11 per month, their benefits were fully funded by the employer in 1998, and their co-premium costs were eliminated. As indicated above, the tentative agreement reached between the employer and Local 58 concerning subsequent years ceased to exist when this union was certified, and the employer did not in any way limit the discussion of insurance benefits for either 1998 or subsequent years.

The Examiner is not persuaded by the union's complaint that the employer unlawfully failed to implement the 95%/5% formula for 1999. This union had not negotiated a collective bargaining agreement with the employer when the cost of insurance benefits

increased for 1999, and the employer passed through the entire premium increase to the employees.[15] In City of Seattle, supra, an employer that had no obligation to pay increased premium costs during a contract hiatus was found guilty of an unfair labor practice only because it first created a new *status quo* by undertaking to pay the increase for a time, and then implemented a unilateral change by reverting to the contribution rates which preceded the premium increase.[16] In the case now before the Examiner, premium sharing was required by the terms of the employer's collective bargaining agreement with Local 58, but the union's arguments fail to acknowledge that the Teamsters' agreement was no longer in effect. The 95%/5% formula ceased to be part of the *status quo* with the agreed upon or bargaining-waived implementation of the insurance plans in 1998, and the employer had no obligation to re-create that formula for 1999 except as a result of further collective bargaining between the parties.

Conclusions -

Rather than constituting an unlawful *fait accompli*, the evidence establishes that the employer implemented new insurance plans for its corrections personnel only after it was faced with a business necessity not of its own creation, it gave notice to the union and

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[15] There is indication in the record that at least some corrections officers urged others to refrain from cooperating in providing a completed "employee payroll deduction form" as requested by the employer for the 1999 insurance plans premiums. The Examiner does not deem it necessary to determine the propriety of those actions.

[16] As suggested by the discussion in City of Seattle, the increased of employer contributions now called for by this union would have been an unlawful unilateral change from the *status quo* marked by the fixed dollar amount the employer had contributed toward the cost of insurance benefits. Even if such an increase would have been favorable to the employees, it would have contravened the employer's bargaining obligations under RCW 41.56.140(4).

sought the union's input on the matter, and the union's officials either indicated assent or ignored the employer's multiple offers to negotiate the matter.

These parties were required to deal with insurance benefits prospectively. See, City of Clarkston, Decision 3286 (PECB, 1989). They had not reached agreement on insurance benefits by the time the increases for 1999 went into effect, and the employer had no obligation to implement any contribution increases at that time.

## FINDINGS OF FACT

1. Cowlitz County is a public employer within the meaning of RCW 41.56.030(1), with a population of approximately 93,100. The employer maintains and staffs a detention facility which is a jail within the meaning of RCW 70.48.020(5). At all times relevant to this proceeding, Richard Anderson was the employer's director of personnel.

2. The Cowlitz County Jail Employees' Guild, a bargaining representative within the meaning of RCW 41.56.030(3), was certified as exclusive bargaining representative of corrections personnel of Cowlitz County on July 8, 1998. At all times relevant to this proceeding, Larry Green was the president of that union, Linda Parker was a vice-president of that union, and Patrick Emmal was its attorney/chief negotiator.

3. For an undisclosed period of time prior to July 8, 1998, Teamsters Union, Local 58, was the exclusive bargaining representative of non-supervisory corrections officers employed by Cowlitz County. The employer and Local 58 were

parties to a collective bargaining agreement which was in effect for the period from January 1, 1996 to December 31, 1997, and which provided for employer contributions in fixed dollar amounts for coverage under insurance benefit plans provided by the Oregon Teamster Employers Trust. The employer and Local 58 had no authority over the plan specifications for those benefits.

4. Under the 1996-1997 collective bargaining agreement between the employer and Local 58, a 95%/5% co-premium formula was applied to the insurance cost increases for 1997.

5. The employer and Local 58 did not conclude negotiations on a successor agreement prior to the expiration of their 1996-1997 contract. Early in 1998, the employer and Local 58 entered into an interim agreement that called for continuation of the 95%/5% formula and a maximum employer contribution of $394.46 per month for 1998.

6. Negotiations between the employer and Local 58 were suspended on or about April 27, 1998, when the Cowlitz County Jail Employees' Guild timely filed a petition with the Public Employment Relations Commission seeking to replace Local 58 as exclusive bargaining representative of the employer's corrections officer.

7. The collective bargaining relationship between the employer and Local 58 was terminated on July 8, 1998, when the Cowlitz County Jail Employees' Guild was certified as exclusive bargaining representative of the non-supervisory corrections officers employed by Cowlitz County.

8. Upon the termination of the status of Local 58 as their exclusive bargaining representative, the corrections officers employed by Cowlitz County ceased to be eligible for participation in the benefit plans provided by the Oregon Teamsters Employers Trust. The employer and union became aware that the employees' insurance coverage would lapse at the end of July 1998.

9. On at least two occasions in July of 1998, Anderson had discussions with Parker concerning the need to provide other insurance benefits. The employer proposed to provide coverage for the employees under the insurance plans offered by the employer to its non-represented employees and its other represented employees. Parker indicated her assent to the employer's proposed changes.

10. Prior to July 23, 1998, Anderson attempted to contact Emmal by telephone, and he left messages for Emmal to return the call. Emmal did not respond to those messages.

11. On July 23, 1998, Anderson sent a letter to Emmal, with a copy to Green, detailing the employer's proposal to provide insurance benefits to the employees on and after August 1, 1998. Anderson detailed that the employer would continue to pay the premiums for insurance coverage up to $394.46, the effect of which was to reduce or eliminate the co-premium costs theretofore being paid by employees. Neither Emmal nor Green responded to that letter at that time.

12. The parties commenced negotiations for a first collective bargaining agreement. They had not reached an agreement prior to December 31, 1998.

13. The insurance providers increased the premium rates for 1999 for the insurance plans available through the employer. In the absence of agreement on a first contract, the employer passed along premium increases in excess of $394.46 per month to its employees in the bargaining unit represented by the union.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Cowlitz County had a business necessity to provide different insurance benefits for its employees upon their selection of a different exclusive bargaining representative and the termination of their coverage by the Oregon Teamster Employers Trust, and had no duty under RCW 41.56.030(4) to maintain or replicate the benefits which had been provided for those employees through the Oregon Teamster Employers Trust.

3. By the assent of its vice-president and by the inaction of its president and attorney/chief negotiator, Cowlitz County Jail Employees' Guild waived its bargaining rights under RCW 41.56.030(4) concerning the substitution of employer-provided insurance benefits for corrections personnel of Cowlitz County, effective August 1, 1998.

4. Cowlitz County Jail Employees' Guild has failed to sustain its burden of proof to demonstrate, by a preponderance of the evidence, that the employer failed or refused to engage in collective bargaining under RCW 41.56.030(4) so that no violation of RCW 41.56.140(4) has been established in this case.

5. Cowlitz County Jail Employees' Guild has failed to sustain its burden of proof to demonstrate, by a preponderance of the evidence, that the employer engaged in unlawful interference of employees rights so that no violation of RCW 41.56.140 (1) has been established in this case.

## ORDER

The complaint charging unfair labor practices filed in this matter is DISMISSED on its merits.

Issued at Olympia, Washington, on the 27th day of March, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.