Cowlitz County, Decision 7007-A (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

| | | |
|---|---|---|
| COWLITZ COUNTY JAIL EMPLOYEES' GUILD, | ) | |
| Complainant, | ) | CASE 14229-U-98-3529 |
| vs. | ) | DECISION 7007-A - PECB |
| COWLITZ COUNTY, | ) | DECISION OF COMMISSION |
| Respondent. | ) | |

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.

This case comes before the Commission on an appeal filed by Cowlitz County Jail Employees' Guild, seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner Frederick J. Rosenberry.[1] We affirm; the complaint is dismissed.

BACKGROUND

The facts are fully detailed in the Examiner's decision, and are only summarized here in relevant part.

---

[1] Cowlitz County, Decision 7007 (PECB, 2000).

Cowlitz County (employer) maintains and operates a detention facility, and employs corrections officers. Cowlitz County Jail Employee's Guild (union) was certified on July 8, 1998, replacing Teamsters Union, Local 58 (Teamsters).

The Teamsters and the employer were parties to a series of collective bargaining agreements, the last of which expired on December 31, 1997. Article 15 of the employer's contract with the Teamsters detailed a cost sharing formula and provided for the county to make a dollar contribution to the Oregon Teamster Trust Fund for bargaining unit members' medical, dental, vision, and life insurance benefits programs. In early 1998, the employer and the Teamsters negotiated an extension of the health and welfare portion of the agreement, whereby the employer agreed to pay a premium rate of $394.46 per month per bargaining unit member. The contract did not provide for any particular level of benefits or require the employer to provide specific benefits. Any amount in excess of the dollar contribution was to be paid by the employee.

Because participation in the Oregon Teamster Employers Trust plans is contingent on the covered employees being represented by the Teamsters, bargaining unit members' insurance coverage terminated on July 31, 1998. The employer anticipated that its corrections personnel would have to be moved to different insurance plans.

In July of 1998, the employer contacted the union and offered to make available the same insurance plans that were available to the employer's represented and non-represented employees available to bargaining unit members.[2]

---

[2] Generally, the Teamsters' plan was an indemnity plan that imposed annual deductibles, and the employer's plans are HMO and PPO plans that have no deductible, but that impose co-payments.

- The employer had at least two conversations with the union's vice-president in July of 1998. The vice-president testified that she assented to the interim health insurance offered by the employer and helped to post sign-up notices.

- The employer attempted to contact the union's attorney/chief negotiator by telephone on at least three occasions. However, the union's attorney did not return the employer's telephone calls.

- The employer sent a letter on July 23, 1998, to the union's attorney with a copy to the union's president stating that the Teamster insurance coverage would terminate on July 31, 1998, and that the employer was prepared to offer bargaining unit members those plans offered to other county employees. The employer's letter explicitly stated that: (1) the letter was not a request to waive the obligation to bargain health insurance when negotiating over the collective bargaining agreement and (2) accepting this coverage was simply a way to bridge the gap during transition and to assure that officers would not be without coverage. The employer requested a response to arrange sign-ups; however, no response was forthcoming.

The employer enrolled bargaining unit members in plans offered by the employer, effective August 1, 1998, and continued to pay the $394.95 dollar contribution previously agreed to with the Teamsters.

On September 24, 1998, the union and the employer began negotiations for their first collective bargaining agreement. The parties held three negotiation sessions between September 24 and November

4, 1998. The union received notice of the 1999 rate increases at the November 4 session. Although each side presented proposals, there was no substantive discussion of health insurance or of rate increases for 1999.

The union filed an unfair labor practice complaint on November 6, 1998. A hearing was held on April 15, 1999. The Examiner dismissed the complaint, holding that: (1) 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; (2) the employer was faced with a compelling business necessity to provide different insurance benefits to its employees; and (3) the employer had every reason to believe that its offered alternative was accepted by the union and that the union waived its bargaining rights through its inaction.

On April 12, 2000, the union filed a notice of appeal, and on April 26, 2000, filed a brief, bringing this case before the Commission.

## POSITIONS OF THE PARTIES

The union first contends that the employer did not meet its burden of proving waiver. The union argues that the Examiner relied primarily on telephone calls between the employer and the union vice-president to establish waiver. The union maintains that the record does not support a finding that the union did not respond to the letter the employer sent to the union's attorney and president; rather, the union claims that a telephone conversation occurred between the union attorney and the employer in response to the letter and asserts that the union president testified that

after the telephone conversation he was left with the impression that the employer was going to make up any shortfalls in coverage.[3] Secondly, the union contends that the employer did not meet its burden of proving business necessity. The union argues that because the employer led the union to believe that it was going to make up any shortfalls and then failed to do so, the employer committed an unfair labor practice and divested itself of the ability to claim a business necessity defense. The union asserts that the employer had made what the union understood to be an agreement to make up shortfalls and that the Examiner overlooked this. The union maintains that the employer does not point to any circumstances which would justify its conduct on the basis of business necessity.

The employer contends that the union has the burden of proving that the employer violated RCW 41.56.140(1) and (4) and the burden of establishing the relevant status quo. The employer asserts that it maintained the status quo by continuing to contribute the same dollar amount per month for insurance coverage. The employer argues that the union waived its right to bargain in two ways: (1) through the assent of its vice-president and (2) the inaction of its attorney and president. The employer argues that given the union's failure to respond and the impending loss of insurance coverage, it had a business necessity to provide interim health insurance benefits or bargaining unit members would have been without health insurance.

---

[3] It is unclear if "shortfalls" refers to insurance co-payments and/or other out-of-pocket expenses that did not have to be made under the Teamsters' plan.

## DISCUSSION

### Standards To Be Applied

Each party asserts that the other party has failed to sustain its burden of proof. The Commission finds that the union failed to sustain its burden to prove an unfair labor practice, that the employer was faced with a compelling need to change insurance benefits coverage, and that the union waived its bargaining rights through its inaction.

Substantial Evidence and Deference to Examiner -
On appeal, Washington state courts look for substantial evidence to support our decisions. Likewise, we have affirmed numerous decisions where, after reviewing the record on appeal, we found substantial evidence to support the Examiner's Findings of Fact and these findings support the Conclusions of Law. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Bering v. Share, 106 Wn.2d 212 (1986). The rule is based upon the notion that the trier of fact is in the best position to decide factual issues. Moreover, the Commission attaches considerable weight to the factual findings and inferences therefrom made by our Examiners, and this deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal. Educational Service District 114, Decision 4361-A (PECB, 1994).

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). It is

also well settled that an employer commits an unfair labor practice if it implements a change of existing wages without having first exhausted its bargaining obligations under Chapter 41.56 RCW. Employers are prohibited from unilaterally changing mandatory subjects of bargaining. City of Yakima, Decision 3501-A (PECB, 1998).

Burden Of Proof -

Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270. However, the burden to establish a defense lies with the party asserting the defense. Thus, the burden of proof is on the party claiming waiver and business necessity. See Lake Washington Technical College, Decision 4721-A (PECB, 1995); City of Chehalis, Decision 2803 (PECB, 1987).

Business Necessity -

As the Examiner stated, 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.[4] It may then be relieved of its bargaining obligation to the extent necessary to deal with the emergency. Cowlitz County, supra.

Waiver -

The collective bargaining process is activated by one party notifying the other party of its desire to alter or amend a

---

4 The Examiner's explanation of the duty to bargain is not disputed by either party. Although an unfair labor practice was found based on the employer's breach of good faith in creating the emergency, Spokane County stands for the proposition that health and life insurance benefits are alternative forms of wages, making them mandatory subjects of bargaining. Spokane County, Decision 2167 (PECB, 1985).

contractual provision or an existing practice. City of Anacortes, Decision 6830-A (PECB, 2000). A party may waive its bargaining rights, however:

> When given notice of a contemplated change affecting a mandatory subject of bargaining, a union which desires to influence the employer's decision must make a timely request for bargaining. The Commission does not find waivers by inaction lightly, but a "waiver by inaction" defense asserted by an employer will likely be sustained if the union fails to request bargaining, or fails to make timely proposals for the employer to consider....

City of Anacortes, supra.

Here, the union had an affirmative obligation to notify the employer promptly if it was interested in bargaining the matter. See Lake Washington Technical College, supra.

## Application of Standards

The union assigns error to several of the Examiner's Findings of Fact and Conclusions of Law. The Commission finds that the findings are supported by substantial evidence and that they support the Examiner's Conclusions of Law.

Employer's Conversations With Union Vice-President - Finding of Fact 9 states: On at least two occasions in July of 1998, Dick Anderson, the employer's principal representative, and the union vice-president had conversations, wherein the employer offered to provide insurance coverage for corrections officers under the insurance plans offered to its other employees, and the vice-president indicated her assent to the proposed changes. The

union assigns error to this finding, but its brief does not address which part(s) of the finding are in error.

On appeal, the union asserts that the vice-president was not part of the bargaining team, did not interpret conversations as a waiver, and did not hear Anderson give any indication that the employer refused to make up shortfalls. The employer asserts that there is no evidence the union ever asked to negotiate.

The Examiner explained that while it is unclear why Anderson contacted the vice-president, she never resisted the employer's discussions, and her status as a high ranking officer imposed an obligation to facilitate contact with appropriate union officials. Anderson testified that he had at least two conversations with the vice-president in July of 1998 about the need to provide other insurance benefits. The vice-president testified she spoke with Anderson and his assistant about interim coverage and sign-ups. They both testified that the vice-president assented to the interim plans offered by the employer, and the vice-president testified she helped post notices about the sign-up procedures. Thus, this finding is supported by substantial evidence.

Unsuccessful Attempts to Contact Union Attorney -
Finding of Fact 10 states: Prior to July 23, 1998, Anderson attempted to contact the union attorney/chief negotiator, Patrick Emmal, by telephone; Anderson left messages to return his calls; and Emmal did not return his calls. The union assigns error to this finding, but otherwise does not address it whatsoever.

The Examiner explicitly stated that, given the immediacy of the situation, the failure of Emmal to respond to Anderson's telephone calls provided one of several bases for a conclusion that the union

waived its bargaining rights. Anderson testified that he made unsuccessful attempts to contact Emmal, and Emmal did not testify. Thus, there is substantial evidence in the record to support this finding.

Letter Notifying Union of Desire to Provide Different Insurance - Finding of Fact 11 states: On July 23, 1998, Anderson sent a letter to Emmal, with a copy to the union president, detailing the employer's proposal to provide insurance benefits to employees on and after August 1, 1998, and explaining that the employer would continue to pay insurance benefits up to $394.45; however, neither Emmal nor the president responded at that time.[5] On appeal, the employer asserts that the union never responded to the letter and never asked to negotiate over interim replacement insurance. The union argues that it did respond, citing a telephone conversation between Emmal and Anderson.

The union president testified that he was present with Emmal at the time of the telephone conversation between Emmal and Anderson and that he was left with the impression that the employer was going to make up the co-payments. He testified that after the telephone conversation ended, Emmal stated that the employer had agreed that the co-pay problem would be taken care of. The president testified that he knew the conversation occurred after July 8, 1998, but he never testified that it occurred after July 23 or that it was in response to the employer's letter. The president admitted he had no idea what Anderson said. Finally, the president never testified he responded to the letter himself.

---

[5] Anderson testified that, after a negotiating session on November 4, 1998, the union attorney asked him what the employer was going to do about paying for co-payments, but that he did not respond to the question.

In contrast, Anderson testified that he never told anyone the employer would make up co-payments and that Emmal never responded to the July 23rd letter. Anderson testified that he had a conversation with the union attorney about another issue mentioned in the July 23, 1998, letter and not about health insurance, but that conversation occurred prior to July 23, 1998.[6]

Thus, comparing the inconclusive and hearsay testimony of the union president with Anderson's testimony, there is substantial evidence in the record to support the Examiner's finding that the union did not respond to the employer's July 23, 1998, letter.

Furthermore, prior to the appeal, the union only vaguely referenced the contents of any telephone conversation between the employer and the union attorney by making statements that any conversations did not meet the necessary criteria for waiver to have occurred. It is only for the first time on appeal that the union argues that any telephone conversation was a response to the July 23, 1998, letter and that this same telephone conversation produced an agreement that the employer would cover co-payments.

Premium Increases in Excess of Dollar Contribution -
Finding of Fact 13 states: Insurance providers increased the premium rates for the insurance plans available through the employer for 1999, and in the absence of agreement on a first contract between the employer and the union, the employer passed along premium increases in excess of $394.46 per month to bargaining unit members. The union assigns error to this finding, but it does not address which part(s) of the finding are in error.

---

[6] The employer testified he discussed union dues with the union attorney, but that issue is not relevant to this decision.

Anderson's uncontested testimony is that insurance companies notified the employer of premium rate increases in the fall of 1998 for 1999 coverage, that the employer passed this information on to the union, and that the employer passed on the full premium increase to the employees. It is also undisputed that the parties had not executed an initial collective bargaining agreement by the beginning of 1999. Thus, there is substantial evidence in the record to support this finding.

Business Necessity to Provide Different Insurance Benefits - Conclusion of Law 2 states: The employer 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 that had been provided. The union assigns error to this conclusion, but it does not address the duty to maintain or replicate benefits. The union argues that the burden is on the employer to prove business necessity and states that because the employer led it to believe it was going to make up shortfalls and then did not, the employer had an agreement with the union, thereby divesting itself of the ability to claim this defense.

In this instance, the facts do not support the union's argument. As detailed above, the employer testified that it became aware that the employees' insurance coverage would lapse at the end of July 1998 if it did not take the initiative to provide insurance to bargaining unit members. The union vice-president assented to the offer to provide insurance coverage, and Emmal failed to respond to calls and a letter. Thus, the Findings of Fact support the Examiner's conclusion that the employer was faced with a business

necessity to provide different insurance coverage for corrections officers or their coverage would lapse.

Waiver of Bargaining Rights -
Conclusion of Law 3 states: By the assent of its vice-president and by the inaction of its president and attorney, the union waived its bargaining rights under RCW 41.56.030(4) concerning the substitution of employer-provided insurance benefits for corrections personnel. The union assigns error to this conclusion again citing its view of the facts.

As discussed above, paragraphs 9 through 11 of the Findings of Fact specifically support the Examiner's conclusion that the union waived its bargaining rights.

Union's Failure to Sustain Burden of Proof -
Conclusion of Law 4 states: The union failed to sustain its burden of proof to demonstrate, by a preponderance of the evidence, that the employer failed or refused to negotiate in violation of RCW 41.56.140(4). Conclusion of Law 5 states: The union 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 in violation of RCW 41.56.140(1) so that no violation has been established. The union assigns error to these conclusions, but argues that the employer failed to maintain its burden to prove both business necessity and waiver. The employer argues that the union never requested bargaining or proposed any different insurance plan option.

The union's arguments are misplaced, because they focus on the employer's burden of proof with regard to defenses, rather than its own burden to prove its case-in-chief. See WAC 391-45-270. As

discussed above, the Findings of Fact support these Conclusions of Law that no violation occurred.

Conclusion -

The union bore the ultimate burden of proving an unfair labor practice occurred, and this is the burden the Examiner properly found the union did not meet. The employer proved that it had a business necessity to provide different insurance benefits for its employees, rather than leave them without coverage. The union waived its bargaining rights by the assent of its vice-president and by the inaction of its president and attorney. Substantial evidence exists to support all of the Findings of Fact and Conclusions of Law to which the union has assigned error on appeal.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Frederick J. Rosenberry in the above captioned matter on March 27, 2000, are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, on the 31st day of August, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner