STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

EDMONDS POLICE OFFICERS ASSOCIATION,	)	CASE 17478-U-03-4530
	)	DECISION 8798 - PECB
Complainant,	)	
	)	CASE 17479-U-03-4531
vs.	)	DECISION 8799 - PECB
	)	
CITY OF EDMONDS,	)	
	)	FINDINGS OF FACT
Respondent.	)	CONCLUSIONS OF LAW
	)	AND ORDER
	)	

Cline & Associates, by *George E. Merker*, Attorney at Law, for the union.

Ogden Murphy Wallace, by *W. Scott Snyder*, Attorney at Law, for the employer.

On April 30, 2003, the Edmonds Police Officers Association (union) filed two complaints charging unfair labor practices with the Public Employment Relations Commission, naming the City of Edmonds (employer) as respondent. The union is the exclusive bargaining representative of a unit of all non-supervisory commissioned law enforcement officers, and a unit of non-commissioned law enforcement support service employees employed by the employer. The two complaints were filed on behalf of those two bargaining units and they alleged identical facts. They concern an alleged unilateral change in the employee co-payments of prescription, brand-name drugs.

The complaints were reviewed under WAC 391-45-110 and a preliminary ruling was issued on December 31, 2003, finding a cause of action

to exist under RCW 41.56.140(1) and (4). The cases were consolidated and heard before Examiner Robin A. Romeo on June 8 and 9, 2004. Following submission of post-hearing briefs, the record was closed.

ISSUES PRESENTED

1. Did the employer make a unilateral change in a mandatory subject of bargaining when the employee co-payments on prescription brand-named drugs were increased?
2. Did the union waive its bargaining rights by inaction?
3. Did the union waive its bargaining rights by the terms of the parties' contracts?
4. Does the employer have a valid business necessity defense to the change?

On the basis of the record presented as a whole, the examiner finds that the employer did not violate RCW 41.56.140(1) and (4) when employee co-payment levels were increased because the union has waived its bargaining rights of this subject as it never requested bargaining and based on the terms of the parties' contracts. Having found such waivers, it is unnecessary to reach the merits of the employer's defense of business necessity.

ANALYSIS

Issue 1: Was there a unilateral change in a mandatory subject of bargaining?

The union and the employer are signatories to two collective bargaining agreements dated January 1, 2002, through December 31, 2004, representing commissioned and non-commissioned employees of

the City of Edmonds Police Department. Pursuant to such agreements, members are provided health insurance benefits. The employer offers such benefits through the health plan of the Association of Washington Cities (AWC).

On or about January 1, 2003, AWC implemented changes by unilaterally increasing the employee co-payment on the cost of prescription brand name drugs from $7.00 per prescription to $15.00 and from $14.00 to $30.00 for mail-away prescriptions. The co-payment on generic drugs did not change. The union's complaint charged that the employer did not offer to negotiate the change but merely announced it.

The obligation between these parties to bargain changes in a mandatory subject is defined in the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, specifically RCW 41.56.030(4):

> "Collective Bargaining" means the performance of mutual obligations of the public employer and the exclusive bargaining representative 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, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

The topics included within "wages, hours and working conditions" have come to be known as mandatory subjects of bargaining, and an employer that refuses to bargain over or takes unilateral action in this area, commits an unfair labor practice. *City of Pasco v. PERC,* 119 Wn.2d 504 (1992). The Commission has historically held that health insurance benefits are a mandatory subject of bargain-

ing and must be negotiated prior to any unilateral change. *Spokane County*, Decision 2167 (PECB, 1985); *Grays Harbor County*, Decision 8044-A (PECB, 2004). The National Labor Relations Board has found employee co-payments on health insurance benefits to be a mandatory subject of bargaining; *Caritas Good Samaritan Medical Center,* 340 NLRB 6 (2003); as well as employee co-payments on prescription drug benefits; *Tastee Vending Inc,* 319 NLRB 16 (1995); *Palm Court Nursing Home,* 341 NLRB 341 (2004).

At the hearing, the parties did not contest whether the prescription drug co-pays were a mandatory subject of bargaining. Rather, the arguments centered around the employer's requirement to negotiate the change with the union prior to implementation. Based on the foregoing, I find that there was a unilateral change in a mandatory subject of bargaining.

Issue 2: Did the union waive its right to bargain by inaction?

Finding that there was a change in a mandatory subject of bargaining, the inquiry now turns to the employer's failure to bargain the change. Ordinarily, the burden of proof is on the union to prove its claim by a preponderance of the evidence. WAC 391-45-270(1)(a). However, the burden shifts to the employer to prove its affirmative defenses; *City of Wenatchee,* Decision 2194 (PECB, 1985); including the defenses of waiver and business necessity. *City of Pullman,* Decision 7126 (PECB, 2000); *Cowlitz County,* Decision 7007-A (PECB, 2000).

On October 11, 2002, employees were sent an e-mail notifying them of the pending change. In addition, the December 2002 monthly newsletter sent by AWC to employees at their home addresses detailed exactly how the level in co-payments would increase.

At some point in mid-December, Don Kinney, the president of the union at the time, contacted Brent Hunter, Personnel Director for the City of Edmonds to discuss the proposed changes in the employee co-payments. An employee, Mike Bard also contacted Mr. Hunter to discuss the changes. In response, a detailed e-mail was sent to Don Kinney and Mike Bard from Brent Hunter on December 20, 2002. However, even though it was clearly aware of the proposed change, at no time did the union ask the employer to bargain over the change prior to its implementation.

If a union fails to request bargaining in a timely manner when notified of a contemplated change, or fails to advance proposals in a timely manner for the employer to consider; a "waiver by inaction" defense asserted by the employer will likely be sustained. If an employer fails to give formal notice of the proposed change but the union leadership has actual knowledge of the employer's pending action, and has adequate opportunity to request bargaining but fails to do so, the union's inaction is a waiver of its bargaining rights as to that matter. *Royal School District*, Decision 1419-A (PECB 1982); *Clover Park Technical College*, Decision 8534-A (PECB 2004).

Here, the union had adequate opportunity to ask the employer to bargain but failed to do so. Although the union was never given formal notice of the proposed change, it was clearly aware of the changes in advance. Employees were given notice of the proposed change almost two months in advance when they were notified on October 11, 2002. They were again notified in December. The union president showed actual knowledge of the change when he discussed the issue with the personnel director in December and was later sent a detailed e-mail. Given the advance notice, the union could easily have asked the employer to bargain but no request was ever

made. Given that no request was ever made, the employer cannot be found to have failed to bargain.

The union has argued that it was presented with a "*fait accompli*" and its failure to request bargaining should be excused. A *fait accompli* occurs where notice is given substantially at the time the change occurs so that no substantive bargaining can take place. *Clover Park Technical College* Decision 8534-A. That was not the case here. Notice was given to employees well in advance. Not only was it given in advance, the notices detailed exactly what the January changes would be. The union had plenty of time to request bargaining and had adequate notice of the details of the change. Further, it was not impossible to have bargained over the change; the parties could have bargained for the employer to reimburse employees for the increase in costs, they could have bargained over the distribution of the decrease in premium increase, or more drastically, they could have bargained to change health insurance carriers or plans. There are many ways the parties could have discussed and bargained over the change but the union never asked.

For that reason, I find that the union waived its right to bargain by its inaction. For that reason alone, the complaint should be dismissed. However, I find that dismissal is even more persuasive when also considering the second waiver defense.

Issue 3: Did the union waive its right to bargain by contract?

An employer will be relieved of its obligation to bargain over a mandatory subject if the matter is fully set forth in the parties' collective bargaining agreement; *Yakima County,* Decision 6594-C (PECB, 1999); *Tacoma-Pierce County Health Department,* Decision 6929-A (PECB, 2001). In other words, once a contract is signed,

the parties will have met their obligation to bargain as to the matters set forth in the contract, relieving the parties of their obligation to bargain for the life of the agreement. No unfair labor practice will be found if a party makes changes in a manner consistent with the contract.

In *Yakima County,* Decision 6594-C, the Commission upheld an Examiner's decision dismissing a failure to bargain charge over the unilateral implementation of a change in the length of time needed by an employee to receive a special assignment where the parties had agreed to contract language allowing the employer to establish lawful work rules.

The contract language at issue here from both the parties' 2002-2004 contracts follows. For commissioned employees:

> 11.1 The employer shall provide health, vision, life and disability plans for all employees in the bargaining unit. The selection of insurance providers shall be at the sole discretion of the Employer: *provided that the benefit levels shall be substantially the same as those in effect as of the signing of this agreement*. Furthermore, there shall be no increase in deductibles, percentage of premium co-payments and of stop loss limits in effect as of the signing of this agreement.

(emphasis added). For non-commissioned employees:

> 10.2 The employer shall pay the costs necessary to provide health, vision, life, dental and disability insurance plans for all employees in the bargaining unit. The selection of providers shall be at the sole discretion of the Employer; *provided that the benefit levels shall be substantially the same as those in effect as of the signing of the agreement*. Furthermore, there shall be no increase in deductibles, percentage of premium co-payments and of

> stop loss limits in effect as of the signing of this agreement.

(emphasis added). Collective bargaining agreements from prior years were introduced into evidence, the pertinent language being unchanged.

In order to prove a waiver by contract, it must be shown that it is clear, unmistakable and knowing. *City of Wenatchee,* Decision 2194. To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter was fully discussed by the parties and that the party relinquishing its rights did so consciously. *Whatcom County,* Decision 7244-B (PECB, 2004).

Contrary to the employer's assertion that an Examiner does not have jurisdiction to interpret the contract, the Commission has long held that an Examiner does have the authority to interpret the contract in order to establish a possible waiver.

The contract language in question states that "the benefits shall be substantially the same as those in place at the time the contract was signed . . ." The contract does not specifically list the benefits that may not be substantially changed, nor does it mention prescription drug co-payments. Given that the health insurance benefits are referred to generally, I understand this language to mean that it includes all of the benefits, including prescription drug co-payments.

Looking at the contract language, it allows for small changes in benefits. By including a prohibition on "substantial" changes, the parties left open the possibility that small changes could be made. The increase in employee co-payments was not a substantial change

in violation of the contract. The increase in cost included only brand name drugs, not generics, and the increase in payment was small: from $7 to $15 on a 30 day supply and from $14 to $30 for a three month mail-away supply. Given that the cost to the City in 2003 per employee for health insurance benefits can range from approximately $223.38 to $621.39 per month depending on the number of dependents, plus the cost of dental and vision benefits, by comparison, the increase was small.

In fact, there was testimony that other changes in health benefits had been made without objection from the union; such as changes in the number of covered chiropractic visits, well-baby care, annual physical exams, and optometry exams. Also, significantly, on January 1, 2003, concurrently with the change in employee co-payments, there was a decrease in the premium paid by employees for dependent health insurance coverage from 15 percent to 10 percent. Yet, that change was not included in the complaint by the union as a change that was not bargained. There is no distinguishing difference between those changes and the change in employee co-payments.

Given the language in the contract, the past practice and the fact that a concurrent change occurred without complaint, I find that the parties clearly have fully bargained to allow for small changes in health insurance benefits, and the employer is relieved of its obligation to bargain over the change in employee co-payments.

Issue 4: Did the employer have a business necessity to make the change?

Having found that the union waived its right to bargain by inaction and by contract, it is unnecessary to rule of the merits of the

business necessity defense. However, I do want to correct the argument made by the employer that it had no ability to bargain over the change made in employee co-payments because it did not make the change. The fact that the change was made by AWC does not mean that bargaining could not have taken place. As I stated above in response to the union's argument that it was presented with a *fait accompli* and could not have asked for bargaining, there are numerous agreements that the parties could have come to in bargaining. The employer should not merely dismiss the possibility of bargaining by stating that it had no responsibility itself for the change.

Finally, having found no violation of the requirement to bargain, it is not necessary for me to rule on the derivative claim of interference.

FINDINGS OF FACT

1. The City of Edmonds is a "public employer" within the meaning of RCW 41.56.030(1).

2. The Edmonds Police Officers Association is a "bargaining representative" within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of a unit of law enforcement officers and a unit of non-commissioned law enforcement support service employees of the employer.

3. The parties have a history of a collective bargaining relationship and have entered numerous collective bargaining agreements, including those covering the period 2002-2004.

4. The current collective bargaining agreements contain a provision which covers health insurance and state in pertinent part, "the benefit levels shall be substantially the same as those in effect as of the signing of this agreement." Previous collective bargaining agreements provided substantially the same language.

5. The employer provides health insurance to employees through the Association of Washington Cities Plan.

6. On October 11, 2002, employees were sent an e-mail notifying them that changes would be made to employee co-payments on brand-name, prescription drugs and in December 2002 employees were mailed an AWC newsletter detailing the change.

7. In December 2002, the union president discussed the proposed changes with the personnel director.

8. The union did not request that the employer bargain over the change in employee co-payments prior to its implementation.

9. Previous and concurrent changes in health benefits occurred without objection from 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. The issue of a change in employee co-payments of prescription drugs pursuant to the health insurance plan is a mandatory

subject of bargaining which must be bargained prior to a unilateral change under RCW 41.56.140(4).

3. The employer did not commit an unfair labor practice within the meaning of RCW 41.56.030(4) as the union never requested bargaining over the change in employee co-payments of prescription drug benefits.

4. The employer's obligation to bargain within the meaning of RCW 41.56.030(4) over an increase in employee co-payments on prescription drugs has been pre-empted by the collective bargaining agreement which controls this subject.

5. The employer did not commit an unfair labor practice of the failure to bargain within the meaning of RCW 41.56.140(4), and nor did it commit a derivative claim of interference within the meaning of RCW 41.56.140(1).

ORDER

Based upon the foregoing and the record as a whole, it is ordered that the complaints of unfair labor practices, as charged in the above entitled action, are hereby DISMISSED.

Issued at Olympia, Washington, this 10th day of December, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBIN A. ROMEO, 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.