STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANACORTES POLICE SERVICES GUILD,	)	
	)	
Complainant,	)	CASE 17453-U-03-4524
	)	DECISION 9004-A - PECB
vs.	)	
	)	CASE 17454-U-03-4525
CITY OF ANACORTES,	)	DECISION 9012-A - PECB
	)	
Respondent.	)	DECISION OF COMMISSION
	)	
	)	

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

Summit Law Group, by *Bruce L. Schroeder*, Attorney at Law, and *Denise L. Ashbaugh*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Anacortes (employer) and cross-appeal filed by the Anacortes Police Services Guild (union), seeking to overturn Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene.[1] The Examiner dismissed the union's complaint holding that the union's inaction waived its right to bargain a change in the employee co-payments on prescriptions for brand-name drugs, but held that the employer refused to bargain in good faith when it unilaterally increased health insurance premiums on January 1, 2004.

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[1] *City of Anacortes*, Decision 9004 (PECB, 2005). Case 17453-U-03-4524 concerns the employer's commissioned employees; Case 17454-U-03-4525 concerns the employer's non-commissioned employees.

Issues Presented

1. Did the union waive, by inaction, its right to bargain over changes to prescription drug co-pays?

2. Did the employer fail to maintain the status quo when it started deducting the Association of Washington Cities (AWC) health insurance premium increases from employees' pay without bargaining?

3. Should the employer be required to pay interest on back-pay for insurance premiums deducted from employees' pay?

For the reasons set forth below, we affirm the Examiner's decision in its entirety. Substantial evidence supports the Examiner's findings and conclusions that the union waived by inaction its right to bargain over the changes to the prescription drug co-pay. However, we also find that by the terms of the parties' collective bargaining agreement, the employer failed to maintain the status quo when it deducted health insurance premiums without first notifying the union and bargaining, upon request, to impasse. Finally, we modify the Examiner's remedy to include interest as part of the make-whole remedy.

STANDARD OF REVIEW

This Commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings issued under Chapter 391-45 WAC. Rather, we review findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and the order. *Cowlitz County,* Decision 7007-A (PECB, 2000). Substantial evidence exists if the record contains competent, relevant,

and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings. *Ballinger v. Department of Social and Health Services,* 104 Wn.2d 323 (1985).

ANALYSIS

Applicable Legal Principles

Both issues in this case concern the employer's bargaining obligations. The Public Employees' Collective Bargaining Act (PECB or Chapter 41.56 RCW) imposes a duty to bargain on mandatory subjects of bargaining. RCW 41.56.030(4). The duty to bargain is enforced through RCW 41.56.140(4), and unfair labor practices are processed under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof.

This Commission has long held that medical benefits are mandatory subjects of bargaining. Prior to any changes to mandatory subjects of bargaining, employers must give unions advance notice of the potential change, so as to provide unions time to request bargaining, and upon such requests, bargain in good faith to resolution or lawful impasse prior to implementing the change.

However, once notice of a change has been given, it is the union's responsibility to make a timely request to bargain the issue.[2] A "waiver by inaction" defense is appropriate where notice is given of a proposed change to a mandatory subject of bargaining and the party receiving the notice does not timely request bargaining.

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[2] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

Basic to finding a "waiver by inaction" as stated in *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998), is:

> [A] finding that the employer gave adequate notice to the union. Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. If the employer's action has already occurred when the union is given notice, the notice would not be considered timely and the union will be excused from the need to demand bargaining on a *fait accompli*.

Waiver is an affirmative defense, and an employer has the burden of demonstrating that a waiver has occurred. *Lakewood School District*, Decision 755-A (PECB, 1980).

Issue 1 - Prescription Drug Co-Payment

The union claims that a *fait accompli* existed because the employer gave no notice directly to the union regarding the changes to the prescription co-pays. We disagree. The Commission has previously discussed the issue of formal notification and stated that formal notice is not required:

> In the absence of formal notice, however, it must be shown that the union had actual timely knowledge of the contemplated change. The Commission's focus should be on the circumstances as a whole, and on whether an opportunity for meaningful bargaining existed. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a fait accompli should not be found.

Washington Public Power Supply System, Decision 6058-A (PECB, 1998) (footnotes omitted), *City of Edmonds,* Decision 8798-A (PECB, 2005).

In this case, the record demonstrates that the employer provided adequate notice of its intended change to the prescription drug co-payments. It is clear from the record that Human Resources Director Emily Schuh sent a memorandum to all bargaining unit employees on October 23, 2002, notifying them of the anticipated changes to the premiums. Furthermore, this record also supports the finding that Carol Wilmes, the Association of Washington Cities (AWC) Employee Benefit Trust program coordinator, mailed a newsletter to all employees at their residences. This newsletter outlined the anticipated changes to the prescription co-pay.

Since officers of the union are employees of the employer, it is reasonable to conclude that the union was aware of the increases. These two mailings, sent to all bargaining unit employees, provided substantial notice as to place the union on notice of the employer's anticipated change. *Cf. Clover Park Technical College*, Decision 8534-A (PECB, 2004)(notice of parking fee change to only a few employees does not constitute notice).

Having found that the employer provided notice to the union, we must now determine whether the record supports the Examiner's finding that the union waived its right to bargain over the changes through inaction. It is clear that on November 6, 2002, union President Lou D'Amelio sent the employer an e-mail objecting to the anticipated increase in insurance "premium costs."[3] This e-mail specifically references the provision in the collective bargaining agreement that requires the employer to pay "one-hundred percent of insurance premiums." Nothing in this e-mail, however, places the employer on notice that the union was requesting bargaining about the prescription co-payment. Substantial evidence supports the

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[3] Exhibit 14.

Examiner's finding that the union, through its own inaction, waived bargaining.

We find that the employer met its obligation to notify the union of the changes and therefore did not present a fait accompli. The union waived, by inaction, its right to bargain by not requesting bargaining regarding the increases to the prescription co-pays.

Issue 2 - AWC Health Insurance Premiums

Applicable Legal Principle

This issue more specifically concerns the employer's statutory obligation to maintain, during negotiations, the status quo of terms and conditions of employment of an expired contract. With respect to the terms and conditions of employment for noncommissioned employees, RCW 41.56.123 governs. That statute provides that all terms and conditions specified in a collective bargaining agreement must remain in effect until the parties settle a new contract, not to exceed one year from the date the contract expired, unless the parties mutually agree otherwise.[4] With respect to the uniformed personnel in this case, RCW 41.56.470 governs. That statute provides that mandatory subjects of bargaining must remain in effect until agreement is reached either mutually or through interest arbitration.

Analysis

The facts surrounding changes to the employee health insurance premiums are important to the resolution of this case. The parties' 1998-2000 collective bargaining agreement required the

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[4] Although the employer is required to maintain the status quo, the parties are always free to negotiate about, and mutually agree upon, changes in employee terms and conditions of employment.

employer to "contribute $525 per employee per month" for health insurance premiums. In September 2000, the parties agreed to an addendum transferring insurance coverage to the AWC Benefit Trust.

In January 2001, rising health costs meant employees paid the amount of insurance premiums above the $525 rate. During the parties' negotiations for the 2001-2003 collective bargaining agreement, insurance premiums continued to rise, and employees continued to cover insurance premium costs above the $525 cap.

In January 2002, the parties reached agreement on a new collective bargaining agreement covering 2001-2003. Under Article 12 of that agreement, the employer agreed to pay 100 percent of employee health insurance premiums.

In late 2003, insurance premiums continued to escalate, and the employer informed the union that it would continue to pay the 2003 premium amount, but any increase between the 2003 and 2004 levels would have to be covered by the employees. The union timely objected, arguing that the employer was required to maintain the contractual language. The employer responded once again that it was not obligated to cover any expenses above the 2003 level, and beginning January 2004 began deducting excess premium amounts from employee paychecks.

The employer argues that the Examiner erred by finding that the employer was only required to pay the actual amount expended under the terms of the collective bargaining agreement, and not some other amount. We disagree. All clauses of a contract are open to potential change through negotiations when the contract term is open and all clauses are assumed to be valid for the "duration of the agreement" unless carried forward to a new agreement by mutual agreement of the parties through the negotiation process.

Furthermore, the employer ignores Commission precedent requiring that an employer maintain the dynamic status quo. The current terms and conditions of employment which are part of the status quo include both those which currently exist, as well as previously scheduled changes. *Val Vue Sewer District*, Decision 8963 (PECB, 2005). The dynamic status quo recognizes that occasionally circumstances exist where the status quo may not be static. Although dynamic status quo issues typically arise in representation settings, similar principles can be applied to situations where an employer is required to maintain the terms and conditions following the expiration of the agreement.

For example, while general cost-of-living increases have not been considered part of the status quo because they do not follow a fixed formula, employee step increases are part of the dynamic status quo because the employer has no discretion about granting the annual award. *Lewis County PUD*, Decision 7277-A (PECB, 2002), *aff'd*, Decision 7277-B (PECB, 2002).

Here, we agree with the Examiner that the employer's interpretation of the contract language directly conflicts with statutory mandates, and that the employer disrupted the status quo by not funding health benefits as the contract required. Although the change in health insurance premiums was out of the employer's control, it was nevertheless required to abide by the existing contractual provisions. We therefore affirm the Examiner's findings and conclusions that the employer unilaterally changed employee health premiums without satisfying its bargaining obligation.[5]

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[5] See note 4, supra.

Finally, employers faced with changes to mandatory subjects that are beyond their control are not without options under Chapter 41.56 RCW and Commission precedent. Where the parties are in the process of negotiating a collective bargaining agreement, an employer may, after bargaining to a lawful impasse, unilaterally implement its final offer on that issue for non-interest arbitration eligible employees, or seek interest arbitration for those employees who are granted such a right. *See Pierce County*, Decision 1710 (PECB, 1983). When legislation or some other event beyond an employer's control necessitates a change, employers have an obligation to provide as much advance notice as reasonably possible to the union so as to provide the union time to request effects bargaining. *But see Mason County*, Decision 3108 (PECB, 1989)(local government employer required to bargain effects of state law has on mandatory subjects before adopting ordinances to implement state law). However, lawful impasse does not terminate the duty to bargain, rather it temporarily suspends the duty with respect to the issue at impasse. *Skagit County*, Decision 8746-A (PECB, 2006).

Issue 3 - Remedy

Applicable Legal Principle

The rule that applies to back-pay remedies is found in WAC 391-45-410. In sub-section 3 it states:

> Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment.

Analysis

The regulation clearly states that a remedy of back-pay requires the payment of interest and we see no reason to deny the applica-

tion of that statute in this case. There is nothing particularly unusual about this remedy that would justify ignoring the direction of the WAC. We amend the Examiner's order to include payment of interest per WAC 391-45-410(3).

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law issued by Examiner Joel Greene are affirmed and adopted as the Finding of Fact and Conclusions of Law of the Commission.

2. The Order issued by Examiner Joel Greene is affirmed and adopted as the Order of the Commission except Section 2., paragraph a., which is amended as follows:

   a. Reimburse the commissioned and noncommissioned employees represented by the Anacortes Police Services Guild for their portion of health insurance premiums paid as a consequence of the employer not maintaining 100 percent employer-paid insurance premiums beginning on January 1, 2004, including interest assessed per WAC 391-45-410.

Issued at Olympia, Washington, the 9th day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner