STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SKAGIT COUNTY DEPUTY SHERIFF'S GUILD,	)	CASE 18259-U-04-4657
	)	DECISION 8886 - PECB
Complainant,	)	
	)	CASE 18260-U-04-4658
vs.	)	DECISION 8887 - PECB
	)	
SKAGIT COUNTY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

Cline & Associates, by *Christopher J. Casillos*, Attorney at Law, for the union.

Summit Law Group, by *Bruce Schroeder*, Attorney at Law, for the employer.

On February 26, 2004, Skagit County Deputy Sheriff's Guild (union) filed two complaints charging unfair labor practices with the Public Employment Relations Commission naming Skagit County (employer) as respondent. The employer maintains a sheriff's department responsible for providing police protection and correctional facilities. The union represents deputy sheriffs and correctional officers in separate bargaining units who, because they are "uniformed personnel" defined in RCW 41.56.030(7), are subject to interest arbitration under RCW 41.56.450.

At the time of the actions complained of, there was no collective bargaining agreement in existence between the parties. The controversy concerns two alleged unilateral changes, one involving deductibles paid by bargaining unit employees for certain dental procedures and another involving withholding of amounts from employees to cover the amount of employee contributions for industrial insurance provided by the State of Washington.

The union's complaints were received under WAC 391-45-110 and preliminary rulings were issued on March 8, 2004, finding causes of action to exist under RCW 41.56.140(4) and (1). Examiner Vincent Helm held a hearing on October 4, 2004. The parties filed post-hearing briefs.

ISSUES PRESENTED

1. Did the employer fail to bargain a mandatory subject of bargaining by unilaterally deducting from employees' wages amounts to cover portions of industrial insurance premiums?

   a. With respect to Issue 1, was the employer relieved of a bargaining obligation by virtue of a legal necessity to act?

2. Did the employer fail to bargain a mandatory subject of bargaining by unilaterally imposing deductibles to be paid by employees in connection with certain classes of dental insurance benefits or was the change in Issue 2 above so insignificant as to not give rise to a duty to bargain?

   a. With respect to Issue 2, is the subject matter of the dispute a violation of the labor agreement which the Public Employment Relations Commission does not remedy?

3. Did the union waive its bargaining rights by inaction with respect to Issues 1 and/or 2 above?
4. In the event an unfair labor practice is found, what is the remedy?

The Examiner finds the employer did not violate RCW 41.56.140(4) and (1) by unilaterally deducting the employees' share of indus-

trial insurance premiums because of a legal necessity requiring such action. The employer violated RCW 41.56.140(4) and (1) when it unilaterally instituted an annual deductible to be paid by employees for certain dental procedures. The union did not waive its right to protest this conduct through inaction, the impact of the deductible is significant and the conduct complained of did not involve an alleged violation of the collective bargaining agreement over which the Commission would not assert jurisdiction. Because of the factual circumstances herein, neither a "make whole" remedy nor attorney's fees will be included as a part of the remedy.

ANALYSIS

Issue 1: Was there a refusal to bargain by unilaterally implementing payroll deductions for employees' share of industrial insurance?

The mandatory subjects of bargaining under the Public Employee's Collective Bargaining Act, Chapter 41.56 RCW, are set out in RCW 41.56.030(4):

> "Collective bargaining" means the performance of the 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* . . .

(emphasis added). Wages are expressly set forth in the statute and deductions therefrom are mandatory subjects of bargaining except where required or sanctioned by law. Benefits are mandatory subjects of bargaining as alternative forms of wages. Medical and dental benefits are obvious examples of benefits which are a mandatory subject of collective bargaining that an employer may not

change without exhausting its bargaining obligations. *Spokane County*, Decision 2167 (PECB, 1985); *Bates Technical College*, Decision 5140 (PECB, 1995).

The law limits unilateral changes under Commission precedents dating back to *Federal Way School District*, Decision 232-A (PECB, 1978), *aff'd*, WPERR CD-57 (King County Superior Court, 1978) and federal precedents cited therein. An employer commits an unfair labor practice by effecting changes in wages, hours, or working conditions of union-represented employees without first: (a) giving notice to the union;[1] (b) providing an opportunity for bargaining before making the decision on a proposed change;[2] and (c) bargaining in good faith to agreement or impasse prior to unilaterally implementing any change.[3] Discussion by an employer with a committee composed of some bargaining unit members does not satisfy the bargaining obligations of an employer. *Tacoma School District*, Decision 2756 (EDUC, 1987).

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[1] This is an affirmative obligation. The notice must be directed to the organization, "not just communicated through a member of the bargaining unit." *Clover Park School District*, Decision 3266 (PECB, 1989).

[2] The purpose of requiring an employer to give a union advance notice of proposed changes in mandatory subjects of bargaining is to afford the union an opportunity to negotiate the proposed changes in advance. *City of Vancouver*, Decision 808 (PECB, 1980). The notice must be given in such a manner to allow time for the union to "explore all the possibilities, provide counter-arguments an offer alternative solutions or proposals regarding issue raised by the proposed change." *Clover Park School District*, Decision 3266.

[3] This three-component obligation applies to most employees covered by Chapter 41.56 RCW. Bargaining units covered by the statutory interest arbitration process must submit any impasse issues for resolution under RCW 41.56.430 though .490. *City of Seattle*, Decision 1667-A (PECB, 1984); *City of Chehalis*, Decision 2803 (PECB, 1987).

The Commission normally finds that any refusal to bargain in violation of RCW 41.56.140(4) also has the necessary result of interfering with the rights of bargaining unit employees so that a "derivative" violation of RCW 41.56.140(1) is found to exist. *Washington State Patrol*, Decision 4757-A (PECB, 1995); *Battleground School District*, Decision 2449-A (PECB, 1986).

The facts show that until January 2004, the employer had paid all costs of the state industrial insurance premiums for employees represented by the union. Billie Kadrmus, the employer's human resource and risk manager, sent a letter to the union on October 27, 2003, advising that "[u]nder state law -- an employer may require that a portion of the workers' compensations premium paid per employee to the State Department of Labor and Industries be paid by the employee . . ." The letter went on to note the employees share equally one half of the medical aid rate and the supplemental pension amount. The letter advised the union that, effective January 1, 2004, the employer would be making payroll deductions for such amounts and requested the union contact the employer no later than November 7, 2003, if it wished to discuss the matter.

Counsel for the union responded by letter on November 17, 2003, asking that the employer bargain the matter as a mandatory subject of collective bargaining and offering to meet for that purpose. The union's counsel noted that a unilateral change on this matter could be an unfair labor practice and asked that no deductions be implemented prior to completion of collective bargaining.

Kadrmus replied in writing on November 20, 2003. In this letter she quoted RCW 51.16.140, indicated a willingness to meet on the subject and reiterated the intent to implement the deduction effective January 1, 2004.

The union president and Kadrmus met once prior to the implementation of the deductions. Union President George Smith stated the meeting did not constitute negotiation as Kadrmus basically reiterated the position of the employer with respect to the deductions. Kadrmus did not dispute this assertion.

The amount deducted as the employees' share of workers' compensation premium costs is based upon the rate established and applied to hours worked. Evidence in the form of payroll stubs and testimony indicates that the deductions averaged over $400.00 on an annual basis. Clearly, the actions of the employer adversely impacted income of bargaining unit employees.

Issue 1a: With request to Issue 1, was the employer relieved of a bargaining obligation by virtue of a legal necessity to act?

Where necessity exists, the law will permit unilateral action. The Commission has recognized that business or legal necessity can be the catalyst for permitted unilateral action by the employer on a mandatory subject of bargaining. *Cowlitz County*, Decision 7007 (PECB, 2000); *City of Chehalis*, Decision 2803 (PECB, 1987); *City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd*, 93 Wn. App. 253 (1998), *review denied*, 137 Wn.2d 1035 (1998). Where legal necessity based upon statutory mandate is advanced as a defense, the Commission will reject the defense unless clearly warranted by the wording of the statute. *Bates Technical College*, Decision 5140 (PECB, 1995). In interpreting a statute with respect to whether provisions are mandatory, the Washington Supreme Court has said that the term "shall" is presumed to be mandatory, but that the meaning of the term depends on determining legislative intent as a whole, taking into account the wording in the statute as it relates to the subject matter of the legislation, the nature of the act, the objective sought to be accomplished, and the consequences which

would result from construing the statue in one manner or the other. *State v. Krall,* 125 Wn.2d 146, (1994). For example, "shall" has been construed as directory rather than mandatory when failing to do so would frustrate legislative intent. *State ex rel. Royal v. Board of Yakima County Commission,* 123 Wn.2d 451 (1994).

Necessity, either business or legal, is an affirmative defense which the employer bears the burden of establishing. *Cowlitz County,* Decision 7007-A (PECB, 2000); *Lake Washington Technical College,* Decision 4721-A (PECB, 1985).

The facts in this case are that, sometime in 2003, the employer's human resource and risk manager was informed by its auditor that the employer's payment of the full premium would violate Article VIII Section 7 of the Washington State Constitution, prohibiting a local government entity from giving money in aid of any individual except for necessary support of the poor and infirm. The auditor based this viewpoint on the provision of RCW 51.16.140 (Premium Liability of Worker) which provides "(1) Every employer who is not a self-insurer shall deduct from the pay of each of his or her workers one-half of the amount he or she is required to pay, for medical benefits within each risk classification . . ." and on RCW 51.32.073 (Additional Payments for Prior Pensioners -- Premium Liability of Workers and Employer for Additional Payments) which provides "(1) Except as provided in subsection (2) of this section, each employer shall retain from the earning of each worker that amount as shall be fixed from time to time by the director . . . The money so retained shall be matched by an equal amount by each employer and all such moneys shall be remitted to the department . . . and shall be placed in the supplemental pension fund . . . "

There was also introduced into evidence a January 2003 publication of the Department of Labor and Industries entitled Employer's Guide

to Industrial Insurance. This is intended as a guide rather than to provide legal interpretations. The publication does note that income for the state insurance fund is derived solely from premiums paid by employers and their employees. It further provides that employers only pay the accident fund premium, with both employer and employees paying for the medical aid premium and supplemental pension assessment. With respect to employee contributions, the guide notes that one half of the contributions for medical aid and supplemental pension assessment may be paid by employee contributions with employers having the option of collecting their employees' portion through payroll deductions.

A further publication of the Department of Labor and Industries which sets forth its administrative policy was also introduced into evidence. This policy deals with deductions from wages. It provides that employer deductions from wages are permitted only where authorized by RCW 49.52.060 (Deductions From Wages During Employment). The policy states that such deductions are permitted where required by law and states that withholding for the employees' share of workers' compensation premiums is within the purview of a deduction required by law.

The union presented the testimony of Kathy Kimbel, program manager for employer services of the Department of Labor and Industries. She has held that position for nine years and has 28 years of service with the department. Her duties are to manage the underwriting section, including assigning risk classifications and assessing premiums to be paid into the state industrial insurance funds. She testified the department holds the employer responsible for making all required contributions and has no way of knowing whether the employer has made payroll deductions with respect to employer contributions provided for in the statute. In her view, whether contributions are deducted by the employer from employees for the two funds is optional rather than mandatory.

The evidence as a whole shows the payment by employees of a share of the industrial insurance premiums provided for by statute is mandatory in nature. To hold the employer is not required by law to make payroll deductions to satisfy the employees' obligations with respect to cost sharing would clearly frustrate legislative intent. Moreover the employer's payment of the employees' share of such premium would violate the constitutional mandate against the gift of public funds. Accordingly, the employer's implementation of the payroll deductions without bargaining with the union did not violate the statute as such action was undertaken necessarily to comply with lawful statutory and constitutional requirements.

Issue 2: Was there a refusal to bargain by unilaterally implementing a deductible for certain dental insurance benefits or was the change so insignificant as to not give rise to a duty to bargain?

The employer made the complained of change in the dental insurance plan for employees of the two bargaining units at a time when the parties' collective bargaining agreements had expired, approximately two years previously. The expired collective bargaining agreements provided for the employer to pay the full premium for the dental plan without a deductible for services provided. The parties were in negotiations for new labor agreements and medical benefits remained an open issue.

In the fall of 2003, the employer determined to make certain changes in its dental plan to be effective January 1, 2004, and applicable to all employees including those in the bargaining unit involved herein. The union complains of the change involving the imposition of a $50 deductible for certain classes of dental services. The union received notification of these changes at the same time as employees, in October 2003. Other changes were also implemented with respect to the employer's share of costs for certain services but are not the subject of the union's complaints

nor of a conformance motion pursuant to WAC 341-45-070(c). Accordingly, no finding is made with respect to those changes.

The Commission must find the existence of a status quo and a meaningful or substantial change or impact upon employees' wages, hours, or terms and conditions of employment before finding a violation of the statute through unilateral change. *City of Kalama*, Decision 6773-A (PECB, 2000); *City of Dayton*, Decision 1990 (PECB, 1984). The Commission has stated its reluctance to brush aside impacts as *de minimis* where even a nominal but real impact can be shown to exist. *Mason General Hospital*, Decision 7203 (PECB, 2000); *Richland School District*, Decision 6269 (PECB, 1998).

The employer's contention, that the impact of the implementation of the $50 deductible for certain classes of dental insurance benefits was too insignificant to warrant a finding of a violation of the statute, is rejected. While the specific economic impact upon bargaining unit employees was not established, the evidence in the record shows that over $18,000 has been paid by all employees of the employer for the deductible implemented by the employer for calendar year 2004. The employer, depending upon the nature of the service paid, would have fully paid 50 to 70 percent of that figure absent its institution of the deductible. By the change with respect to the deductible, and employer cost sharing for certain services, the monthly premium was less than would have otherwise been the case. Until ratification of the current contract, the employer paid the full cost of the premium for bargaining unit employees. Upon ratification of the current labor agreement, the employees began paying five percent of the premium. At all times, the employees paid nothing for utilization of preventative services, *e.g.*, X-rays and cleaning. The gross figure, without regard to the exact amount attributable to members of the bargaining units herein is of sufficient magnitude to render a *de minimis* defense of no avail to the employer.

Issue 2a: With respect to Issue 2, is the subject matter of the dispute a violation of the labor agreement which the Commission does not remedy?

The Commission does not remedy contract violations through unfair labor practice provisions of the statute, leaving the parties to utilize the grievance and arbitration procedures of their labor agreement. *City of Walla Walla*, Decision 104 (PECB, 1976); *Dayton School District*, Decision 8042-A (PECB, 2004). The employer's reliance on this premise is misplaced and that defense herein is rejected. While the parties executed collective bargaining agreements in June 2004 covering the time frame of January 1, 2002, through December 31, 2004, there was no collective bargaining agreement in effect at the time of the implementation of the change in the dental insurance plan on January 1, 2004, which is the subject matter of the complaint herein. Clearly, under established precedent, the employer had an obligation to maintain the status quo on this matter pending the agreement of the parties where both bargaining units are interest arbitration eligible under the statute.

Issue 3: Did the union waive its bargaining rights by inaction with respect to Issues 1 and/or 2 above?

A union normally may waive through inaction a unilateral change in a mandatory subject of bargaining implemented by an employer if the union was afforded notice and an opportunity to bargain upon the matter. *Newport School District*, Decision 2153 (PECB, 1985); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). Where an employer does not provide adequate notice and offer to engage in meaningful bargaining so as to present the union with a *fait accompli*, no waiver by inaction will be found. *Green River Community College*, Decision 4008-A (CCOL, 1993); *City of Tukwila*, Decision 2434-A (PECB, 1987).

In the instant case, the evidence makes clear that the employer had a fixed intent to implement the changes without regard to the union's opposition. While the employer did agree to meet with the union prior to deducting the industrial insurance premiums, its representative at that meeting emphasized there was going to be no change in its position. With respect to the deductible for certain dental services, the facts show the change was determined upon and communicated in writing to employees in the fall of 2003. The union became aware of the employer's decision through receipt of the employee benefit handbook at the same time as employees. In this situation, to request bargaining would have been a futile gesture and no waiver by inaction can be found. While the employer raised this defense in its answer, it did not advance it in its post-hearing brief.

Issue 4: What is the appropriate remedy for the unfair labor practice?

Posting of an appropriately worded notice, restoration of the *status quo ante*, and making whole employees is the usual remedy for a finding of a violation of RCW 41.56.140(4) by virtue of a unilateral change in a mandatory subject of bargaining. In this case, only posting of a notice will be required. This is predicated upon the fact that subsequent to the filing of the complaint and antecedent to the hearing herein, the union ratified and signed a collective bargaining agreement retroactive to January 1, 2002, which incorporated the change in the dental insurance plan which in part, is a subject of this complaint. Under that circumstance, a remedial order is not deemed to be appropriate. *See Spokane County Fire Protection District 1*, Decision 3447-A (PECB, 1990).

The union's request for attorney's fees is denied. In appropriate cases when violations are flagrant, defenses raised are frivolous and totally without merit, or there is a pattern of repetitious

conduct, the Commission has awarded attorney's fees and this remedy has court approval. *Lewis County v. Public Employment Relations Commission*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982); *Public Utility District 1 of Clark County*, Decision 3815-A (PECB, 1992); *Pasco Housing Authority*, Decision 5927 (PECB, 1997).

In the circumstances herein, the defenses urged by the employer were sustained, in part. Where an unfair labor practice was found, the union subsequently agreed to the change made by the employer in ratifying its current collective bargaining agreement. That nullified the financial impact of the employer's actions by retroactively adopting that change as a part of the labor agreement. In view of the foregoing, and because the past history of unfair labor practice violations with respect to this employer are not egregious, there is no basis to impose attorney's fees as part of the remedy.

Conclusions

The employer did not violate the statute by initiating the deduction of the employees' share of the cost of industrial insurance premiums because this unilateral change was required by law. The employer did violate the statute by unilaterally instituting a deductible for certain services under its dental insurance plan. Under the circumstances herein, no "make whole" remedy will be imposed, nor will attorneys' fees be awarded.

Any facts or arguments presented at the hearing that are not cited herein are immaterial or not persuasive.

FINDINGS OF FACTS

1. Skagit County is a "public employer" within the meaning of RCW 41.56.030(1).

2. Skagit County Deputy Sheriff's Guild is a "bargaining representative" within the meaning of RCW 41.56.030(3) and represents employees in two bargaining units who are "uniformed personnel" within the meaning of RCW 41.56.030 (7).

3. RCW 51.16.140 and 51.32.073 require employees to pay one half of the premium cost for medical benefits and for a supplemental insurance fund and provides for payroll deductions for such purpose.

4. On January 1, 2004, the employer, for the first time, began deducting from the pay of employees of the two bargaining units represented by the union the amounts equal to the amount required to be paid by employees under the statute referenced in paragraph 3 above.

5. The employer notified the union by letter of its intent to begin such deduction, and indicated a willingness to meet with the union on this subject. Union counsel responded twice in writing, objecting to any unilateral action on the part of the employer.

6. The union accepted the offer to meet and a meeting was held prior to January 1, 2004. The employer at that time reaffirmed its intent to begin such deductions and did so.

7. On January 1, 2004, the employer unilaterally implemented a $50 deductible to be paid by employees for certain procedures for which benefits are provided under the employer's dental insurance plan.

8. The actions set forth in paragraph 7 above were undertaken without negotiations with the union and were announced to the union at the same time all employees were notified and in the

same manner, by means of a written announcement of the change and its effective date issued on or about November 6, 2003.

9. The parties did not have collective bargaining agreements in existence on January 1, 2004, as the prior agreements had expired December 31, 2001, and the parties were then engaged in negotiations for a successor agreement.

10. On June 21, 2004, the parties executed collective bargaining agreements covering the period January 1, 2002, through December 31, 2004. These agreements adopted the changes in the dental insurance program implemented by the employer on January 1, 2004.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter to decide the unfair labor practice allegations made against the employer pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The employer did not violate its obligation to bargain in good faith under RCW 41.56.140 by deducting from the earnings of employees in the two bargaining units their statutorily mandated share of industrial insurance premiums as such deductions were a legal necessity.

3. The employer did violate its obligation to bargain in good faith under RCW 41.56.030(4) by unilaterally instituting a deductible for certain services provided under the dental insurance plan covering employees of the two bargaining units herein at a time when the parties were in contract negotiations including the subject of dental insurance for bargaining units composed of "uniformed personnel."

4. The union, in June 2004, executed a collective bargaining agreement with the employer adopting the changes in dental insurance and therefore is not entitled to a make whole remedy.

ORDER

Skagit County, its officers and agents shall immediately take the following actions to remedy its unfair labor practice:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with the Skagit County Deputy Sheriff's Guild, as the exclusive bargaining representative of the appropriate bargaining units described in paragraph 2 of the foregoing findings of fact.

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such

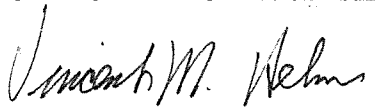
notices are not removed, altered, defaced, or covered by other material.

b. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

c. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, this 1st day of March, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



VINCENT M. HELM, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT breach the obligation of good faith bargaining imposed by RCW 41.56.030(4) of the Public Employees' Collective Bargaining Act by unilaterally implementing changes on mandatory subjects of collective bargaining.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

SKAGIT COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.