City of Tukwila, Decision 9691 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TUKWILA POLICE OFFICERS GUILD,	)	
	)	
Complainant,	)	CASE 19989-U-05-5072
	)	
vs.	)	DECISION 9691 - PECB
	)	
CITY OF TUKWILA,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

Aitchison & Vick, by *Jeffrey Julius*, Attorney at Law, for the union.

Kenyon Disend, by *Kari L. Sand*, Attorney at Law, for the employer.

On December 8, 2005, the Tukwila Police Officers Guild (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission). The union's complaint named the City of Tukwila (employer) as respondent. Commission staff issued a preliminary ruling that the union's complaint stated a cause of action under RCW 41.56.140(4) for refusal to bargain and RCW 41.56.140(1) for interference with employee rights. The employer filed an answer to the complaint. Examiner Joel Greene held a hearing on August 17 and 18, and October 18, 2006. Each party filed a post-hearing brief.

ISSUES PRESENTED

1. Did the City of Tukwila unlawfully refuse to bargain before it implemented medical insurance premium sharing?

2. Did the affirmative defense of business necessity relieve the City of Tukwila from its obligation to bargain before it implemented premium sharing?

Based upon the record, I hold the City of Tukwila committed an unfair labor practice when it refused to bargain and unilaterally implemented medical insurance premium sharing. I also hold the employer did not prove its affirmative defense of business necessity.

ANALYSIS

Issue 1: Refusal To Bargain Before Implementing Premium Sharing

Legal Standards

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs the relationship between the union and the employer. RCW 41.56.030(4) defines collective bargaining and requires the parties engage in good faith negotiations over mandatory subjects of bargaining:

> "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 . . . collective negotiations on personnel matters, including wages, hours and working conditions . . . .

The duty to engage in good faith negotiations over mandatory subjects of bargaining is enforced through the unfair labor practice provisions in RCW 41.56.140 and .150, and Chapter 391-45 WAC. The complaining party who alleges an unfair labor practice has the burden of proving by a preponderance of the evidence that

the responding party committed an unfair labor practice. *Whatcom County*, Decision 7244-B (PECB, 2004); *City of Tacoma*, Decision 6793-A (PECB, 2000); WAC 391-45-270(1)(a).

Health insurance benefits are a form of wages and are a mandatory subject of bargaining. *Yakima County*, Decision 9338 (PECB, 2006); *City of Edmonds*, Decision 8798-A (PECB 2005).

An employer commits an unfair labor practice if it implements a unilateral change to a mandatory subject of bargaining of its union-represented employees, without having exhausted its obligations under the collective bargaining statute. *Grays Harbor County*, Decision 8043-A (PECB, 2004); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

The obligation to bargain does not compel either party to agree or to make concessions:

> [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.

Port of Seattle, Decision 7271-B (PECB, 2003), citing *Awrey Bakeries, Inc.*, 217 NLRB 730 (1975); *Stone & Thomas*, 221 NLRB 567 (1975); *Dixie Ohio Express Co.*, 167 NLRB 573 (1967). *See also* RCW 41.56.030(4) ("neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter").

In determining whether a party committed an unfair labor practice, the examiner must analyze the "totality of the circumstances." *City of Wenatchee*, Decision 8028 (PECB, 2003), citing *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988).

In this case, the union alleges the employer made a unilateral change to a mandatory subject of bargaining. In unilateral change cases, the complaining party must prove four elements to establish the responding party committed an unfair labor practice:

> In summary, a complainant alleging a unilateral change must establish the following: (1) the existence of a relevant status quo or past practice; (2) that the relevant status quo or past practice was a mandatory subject of bargaining; (3) that notice and an opportunity to bargain the proposed change was not given or that notice was given but an opportunity to bargain was not afforded and/or the change was a fait accompli; and (4) that there was a change to that status quo or past practice.

Val Vue Sewer District, Decision 8963 (PECB, 2005).

Applicable Facts

The union represents police officers through the rank of sergeant who work for the employer. The employer and the union were parties to a collective bargaining agreement (CBA) for calendar years 2005, 2006, and 2007. Pursuant to Article 16 of the CBA, the employer offered two medical plans: Group Health and the City of Tukwila Self-Insured Plan. This case involves a higher than anticipated increase in costs to pay for the self-insured plan.

The parties agree that Section 16.1.C of their collective bargaining agreement controls the disposition of this case. The parties

disagree about the meaning and application of Section 16.1.C, which addresses the cost of premiums for the self-insured plan, and reads in relevant part as follows:

> **Cost of premiums.** The Employer shall continue to pay the full premium for medical coverage under the Self-Insured Medical Plan up to a maximum increase of . . . ten percent (10%) in 2006 and 2007. In the event the monthly premiums increase more than the stated amount in a year, the Employer or the Guild has the right to reopen the Agreement to negotiate changes in the Self-Insured Medical Plan benefits so that the increase in premium costs does not exceed the stated amount.

When cost projections for 2006 indicated premiums for the self-insured plan would increase by more than the ten percent in CBA Section 16.1.C, the employer convened the Tukwila Healthcare Management Committee (HMC). The HMC is composed of representatives from the employer's six bargaining units, the employer, and non-represented employees. The HMC's charter indicates it functions "in an advisory capacity" and its "recommendations are not meant to displace the collective bargaining process." In previous years, the HMC's recommendations have been adopted and implemented through consensus by ratification votes from the employer's bargaining units.

Beginning in June 2005, the HMC held a series of meetings to discuss strategies to address the premium increase. The union actively participated in the meetings and the discussions. At the request of the HMC, the employer sent a survey to all city employees requesting their opinions regarding how to respond to the premium increase. Based on the survey results, the HMC voted to recommend increased co-pays to offset the premium increase. Members of the HMC attempted to have a final decision ratified by the bargaining units in early to mid November, prior to December

2005, the employer's open enrollment period for employees to change insurance plans.

On November 22, 2005, the employer sent a memorandum to the union informing it that three of the city's six bargaining units had voted to reject the HMC's co-pay recommendation. The employer's memo stated that, in reliance on CBA Section 16.1.C, the employer would pay ten percent of the thirteen percent premium increase. This decision meant bargaining unit members would incur a three percent increase in medical insurance premiums, the amount in excess of the ten percent figure in the CBA. The employer's November 22 letter was the first time the union learned its employees would be responsible for premium sharing, not increased co-pays as recommended by the HMC.

On November 28, 2005, a representative for the union met with representatives for the employer. The union informed the employer, both orally and in writing, that the union did not accept the city's implementation of premium sharing. The union requested to bargain how the city addressed the increase in medical insurance premiums. The union also gave the employer a memorandum indicating the union had voted several days earlier to accept the HMC's co-pay recommendation. The union's ratification of the co-pay recommendation did not change the fact that the co-pay recommendation had failed because several of the city's bargaining units had rejected it.

The employer did not accept the union's request to bargain. The employer and the union never negotiated how to respond to the higher than anticipated costs for the self-insured plan. The union filed its unfair labor practice complaint on December 8, 2005.

On December 19, 2005, the Mayor of the City of Tukwila wrote to the city's bargaining units and gave them one more chance to implement the HMC's co-pay recommendation. The mayor stated the city would pay the increased premium costs for January 2006 and delay implementing co-pays until February 2006 -- if the bargaining units could ratify the co-pay recommendation by December 30, 2005. The bargaining units took no actions in response to the mayor's letter. The employer implemented premium sharing effective January 1, 2006.

Discussion - Application of Law to Facts

In this case, the union alleges the employer made a unilateral change to a mandatory subject of bargaining, the amount bargaining unit members paid to receive health insurance benefits under the city's self-insured medical plan. In cases alleging an improper unilateral change, the complaining party must prove the four elements listed above in *Val Vue Sewer District.* I will next examine whether the union proved each of these four elements.

Element 1: Did a relevant status quo exist?

Collective bargaining obligations prohibit the employer from unilaterally changing a mandatory subject of bargaining, except when a change is made in conformity with collective bargaining obligations or the terms of a collective bargaining agreement. *King County Library System,* Decision 9039 (PECB, 2005); *City of Yakima,* Decision 3503-A (PECB, 1990), *aff'd,* 117 Wn.2d 655 (1991).

The status quo in this case is established by the first phrase in CBA Section 16.1.C. That provision indicates the employer "shall continue to pay the full premium for medical coverage under the Self-Insured Medical Plan."

The employer argues the status quo is established by the provision in CBA Section 16.1.C indicating the employer is responsible for a "maximum increase of . . . ten percent (10%) in 2006." This argument misinterprets the section as a whole and fails to take into account the next sentence in the section, which authorizes either party to request negotiations if the maximum increase exceeds ten percent:

> In the event the monthly premiums increase more than the stated amount in a year, the Employer or the Guild has the right to reopen the Agreement to negotiate changes in the Self-Insured Medical Plan benefits so that the increase in premium costs does not exceed the stated amount.

The ten percent limitation language in CBA Section 16.1.C authorized the union to request bargaining, which it did. The ten percent limitation language in CBA Section 16.1.C does not establish the status quo, as the employer argues.

Therefore, a relevant status quo existed: the employer's duty to pay "the full premium."

Element 2: Was the relevant status quo a mandatory subject?

This case involves increased costs for medical insurance. As discussed above in *Yakima County* and *City of Edmonds,* health insurance benefits are a form of wages and are a mandatory subject of bargaining. Therefore, the relevant status quo was a mandatory subject.

Element 3: Did the employer give notice and was the union afforded an opportunity to bargain?

On November 22, 2005, the employer sent a memorandum to the union informing it that the employer was implementing premium sharing.

This memorandum explained that the employer would begin charging bargaining unit members three percent more to purchase or remain members of the employer's self-insured medical plan.

On November 28, 2005, the union informed the employer, both orally and in writing, that the union requested to bargain the issue of increased medical insurance premiums. The parties agree, and the record proves, that bargaining never occurred. Therefore, the employer gave notice of the proposed change but did not afford the union an opportunity to bargain.

Element 4: Did the employer change the status quo?

The employer wrote to the union on November 22, 2005, and wrote to all city employees on November 30, 2005, that the city was implementing premium sharing for the self-insured medical plan for plan year 2006. The record proves the employer implemented premium sharing effective January 1, 2006. Therefore, the employer changed the status quo on January 1, 2006, when it required bargaining unit members to pay an additional three percent for their self-insured medical insurance premiums.

Conclusion

The union proved each of the four elements in *Val Vue Sewer District*. The union proved: (1) a relevant status quo existed (the employer's duty to pay the full medical insurance premiums); (2) the status quo (employer payment of health insurance premiums) was a mandatory subject; (3) the union requested bargaining (the union's November 22 oral and written requests) but the employer did not afford the union an opportunity to bargain; and (4) and the employer changed the status quo (implementation of premium sharing effective January 1, 2006).

Analyzing the totality of the circumstances, as described above in *City of Wenatchee,* I find the employer's decision to unilaterally implement premium sharing without bargaining constitutes an unfair labor practice in violation RCW 41.56.140(4).

The union alleges the employer violated two separate provisions in the statute that prohibits unfair labor practices. Under RCW 41.56.140(4), employers may not refuse to engage in collective bargaining; under RCW 41.56.140(1), employers may not interfere with, restrain, or coerce public employees in the exercise of their collective bargaining rights. If the union proves a refusal to bargain violation of RCW 41.56.140(4), which it has, Commission decisions automatically find a derivative interference violation of RCW 41.56.140(1). *Skagit County,* Decision 8746-A (PECB, 2006); *Washington State Patrol,* Decision 4757-A (PECB, 1995). Therefore, I also find the employer's decision to unilaterally implement premium sharing without bargaining constitutes a derivative interference unfair labor practice violation of RCW 41.56.140(1).

Issue 2: The Employer's Affirmative Defense of Business Necessity Legal Standards

Commission precedent establishes that the employer is not required to bargain a change to a mandatory subject of bargaining when the employer is faced with an emergency, a compelling legal or practical need:

> [T]he 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.

Yakima County, citing *Cowlitz County*, Decision 7007-A (PECB, 2000) (footnote omitted).

Business Necessity is an affirmative defense. After the complaining party proves the responding party committed an unfair labor practice, the responding party has the burden of proving affirmative defenses. *Skagit County,* Decision 8886-A (PECB, 2007); *Cowlitz County.*

Applicable Facts

In previous years, the HMC's recommendations to reduce higher than anticipated medical insurance costs had been ratified by all of the city's bargaining units. The record in this case supports the conclusion that the union and the employer assumed the HMC's recommendations would once again be adopted and implemented, this time for the 2006 plan year. For the first time, the city's bargaining units did not ratify the HMC's recommendations.

Unfortunately, the parties had not discussed what would happen if the HMC recommendations were not ratified and implemented. The union was surprised and shocked when it received the city's November 22 memorandum and learned for the first time that the employer intended to implement premium sharing rather than co-pays as recommended by the HMC.

When the bargaining units did not ratify the HMC's recommendations, the employer found itself in an extremely difficult situation. The HMC had numerous meetings and agreements on timelines, some of which were extended at the last minute, with the goal to enable the plan administrator and the employer to be prepared for the December 1 start of the employer's open enrollment period. Most city employees did not work during the Thanksgiving holiday vacation, which further slowed and complicated the final decision and implementation process. The employer had historically maintained a single schedule of benefits for all city employees who choose to be covered by the self-insured plan. The employer understandably

wanted to minimize costs and maintain a single schedule of benefits. The employer also wanted to implement the decision immediately so its plan administrator could prepare accurate information in time for the December open enrollment period.

Discussion - Application of Law to Facts

Although the employer was in an extremely difficult situation, the employer could have negotiated with the union and discussed alternative solutions to solve the problem. The employer and the union each presented testimony at the hearing regarding whether various potential alternative solutions were, or were not, viable options. I make no decision regarding what the parties could have decided and whether that alternative would have been viable. When two parties sit down to discuss solving a problem, one can rarely predict the solution that may result. Although the employer faced the time pressure imposed by the December open enrollment period and its goal of a January 1 implementation date, those dates do not represent the "compelling legal or practical need" described above in *Yakima County* and *Cowlitz County*.

The mayor's December 19, 2005, memorandum to the employer's bargaining units reinforces the conclusion that the employer had time or could have made time to negotiate with the union. On December 19 - three weeks after the union's November 28 request to bargain - the mayor offered to delay making changes to the self-insured plan by over six more weeks to February 2006 if certain conditions were met. The mayor's memorandum supports the conclusion that the employer had the ability to be flexible with time; the employer could have used the time extension in the mayor's memorandum or made time to negotiate with the union.

Conclusion

I find the employer did not prove the "compelling legal or practical need" required by *Yakima County* and *Cowlitz County*. The

employer did not prove the affirmative defense of business necessity relieved it from its obligation to bargain before implementing premium sharing.

Any facts or arguments presented at the hearing that are not cited within this decision are immaterial or not persuasive.

FINDINGS OF FACT

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

2. The Tukwila Police Officers Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(3). The union represents police officers through the rank of sergeant who work for the employer.

3. The employer and the union were parties to a collective bargaining agreement for calendar years 2005, 2006, and 2007.

4. The employer maintained and offered a self-insured medical plan to all city employees, including bargaining unit members.

5. Section 16.1.C of the collective bargaining agreement between the parties required the employer to continue to pay the full premium for the self-insured plan. In the event premiums increased more than ten percent for calendar year 2006, the employer or the union could reopen the agreement to negotiate changes in the plan benefits so the premium increase would not exceed ten percent. For calendar year 2006, the anticipated increased cost of the self-insured plan was thirteen percent.

6. The employer convened the Tukwila Healthcare Management Committee (HMC) to address the anticipated cost increase of the self-insured plan. The HMC is composed of representatives from the employer's six bargaining units, the employer, and non-represented employees. The HMC's charter indicates it functions "in an advisory capacity" and its "recommendations are not meant to displace the collective bargaining process."

7. In previous years, the HMC's recommendations had been adopted and implemented through ratification votes from the employer's bargaining units. The union and the employer assumed the HMC's recommendations would once again be adopted and implemented for the 2006 plan year.

8. After surveying all city employees, the HMC recommended employees pay higher co-pays to offset the anticipated increased cost of the self-insured plan.

9. The employer wanted any changes to the self-insured plan adopted in advance of the city's December 2005 open enrollment period. The employer intended to implement any changes effective January 1, 2006.

10. Three of the employer's six bargaining units did not ratify the HMC's recommendations. The parties had not discussed what would happen if the bargaining units did not ratify the HMC's recommendations.

11. On November 22, 2005, the employer notified the union that three of the employer's bargaining units had voted to reject the HMC's recommendation to increase co-pays, and the employer was implementing premium sharing effective January 1, 2006.

As a result of this decision, bargaining unit members would be required to pay a three percent increase in premiums to purchase or remain members of the self-insured medical plan. This was the first time the union learned its bargaining unit members would be responsible for premium sharing, not increased co-pays as recommended by the HMC.

12. On November 28, 2005, the union informed the employer, both orally and in writing, that the union did not accept the employer's implementation of premium sharing. The union requested to bargain. The employer did not agree to the union's request to bargain, and the parties never bargained the issue.

13. The union filed its unfair labor practice complaint on December 8, 2005.

14. On December 19, 2005, the Mayor of the City of Tukwila wrote to the employer's bargaining units and offered to delay making changes to the self-insured plan until February 2006 if certain conditions were met. The bargaining units took no actions in response to the mayor's letter. The employer implemented premium sharing effective January 1, 2006.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this case pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By its unilateral change in a mandatory subject of bargaining as described above in findings of fact 11, 12, and 14, the

City of Tukwila refused to bargain in good faith under RCW 41.56.140(4) and (1) when it unilaterally implemented medical insurance premium sharing without bargaining.

3. By the events described in the above in findings of fact 11, 12, and 14, the City of Tukwila did not prove, as required by WAC 391-45-270(1)(b), that a business necessity relieved it from its obligation to bargain under RCW 41.56.030(4) before it implemented premium sharing.

ORDER

The City of Tukwila, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
   a. Refusing to bargain in good faith with the Tukwila Police Officers Guild regarding medical insurance premiums.

   b. Refusing to pay 100 percent of the premiums for the self-insured medical plan for employees in the Tukwila Police Officers Guild.

   c. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under 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. Reimburse the employees represented by the Tukwila Police Officers Guild for their portion of premiums paid to

purchase the self-insured medical plan as a consequence of the employer not paying 100 percent of the premiums beginning on January 1, 2006, including interest as authorized by WAC 391-45-410(3).

b. Restore the *status quo ante* by reinstating the wages, hours, and working conditions which existed for employees in the Tukwila Police Officers Guild prior to the employer's implementation of medical insurance premium sharing, which was found unlawful in this order.

c. Give notice to and, upon request, negotiate in good faith with the Tukwila Police Officers Guild before implementing changes to medical insurance premiums.

d. Post copies of the notice attached to this order in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the employer, and shall remain posted for 60 consecutive days from the date of initial posting. The employer shall take reasonable steps to ensure that these notices are not removed, altered, defaced, or covered by other material.

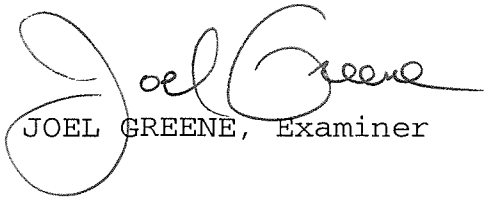
e. Read the notice attached to this order into the record at a regular public meeting of the City Council of the City of Tukwila, and permanently append a copy of the notice to the official minutes of the meeting when the notice is read as required by this paragraph.

f. Notify the Tukwila Police Officers Guild, in writing, within 20 days following the date of this order, as to what steps the employer has taken to comply with this order, and at the same time provide the union with a signed copy of the notice attached to this order.

g. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps the employer has taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on this 23rd day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JOEL GREENE, 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.

Case 19989-U-05-5072

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to bargain with the Tukwila Police Officers Guild before we implemented medical insurance premium sharing to pay for the city's self-insured medical plan.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL reimburse employees represented by the Tukwila Police Officers Guild for their portion of premiums paid to purchase the self-insured medical plan as a consequence of the city not paying 100 percent of the premiums beginning on January 1, 2006, including interest as authorized by WAC 391-45-410(3).

WE WILL restore the status quo ante by reinstating the wages, hours, and working conditions which existed for employees in the Tukwila Police Officers Guild prior to the city's implementation of medical insurance premium sharing.

WE WILL give notice to and, upon request, negotiate in good faith with the Tukwila Police Officers Guild before implementing changes to medical insurance premiums.

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: _____ CITY OF TUKWILA:

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.