STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TUKWILA POLICE OFFICERS' GUILD, Complainant,	)	CASE 19989-U-05-5072
vs.	)	DECISION 9691-A - PECB
CITY OF TUKWILA, Respondent.	)	DECISION OF COMMISSION

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

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

This case comes before the Commission on a timely appeal filed by the City of Tukwila (employer) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene.[1] The Tukwila Police Officers' Guild (union) supports the Examiner's decision.

ISSUES PRESENTED

1. Did the employer refuse to bargain with the union with respect to employee medical insurance premiums?

2. Did the union waive its right to bargain the change in medical premiums through its own inaction?

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[1] *City of Tukwila*, Decision 9691 (PECB, 2007).

3. Did the affirmative defense of business necessity relieve the employer from its bargaining obligations before it implemented the change to employee medical insurance premiums?

For the reasons set forth below, we find that substantial evidence supports the Examiner's findings and conclusions that the employer committed an unfair labor practice. The parties' collective bargaining agreement in place explicitly allows either the employer or union to reopen negotiations regarding the employee health benefit provision if premium costs increased by over ten percent from the previous year. When benefit costs increased over the amount set forth in the collective bargaining agreement, the union made a timely request for bargaining, and the employer failed to respond to that request. The Examiner also correctly concluded that the employer failed to demonstrate that the union waived its right to bargain, or that the employer had a legitimate business necessity defense.

ISSUE 1 - Medical Premiums

A short recitation of the facts is in order to place this case in its proper context. The parties' collective bargaining agreement provides employee health benefits under two different plans, the Group Health Plan and the City of Tukwila Self-Insured Plan. As its name suggests, the City of Tukwila plan is a system for providing health benefits to city employees where the city assumes all of the risk for the cost of the benefits.

Article 16 of the parties' collective bargaining agreement addresses employee health benefits. Under that article, employees may select coverage under either the Group Health plan or the City of Tukwila Self-Insured plan. Section 16.1.c addresses medical benefits for employees who select the Self-Insured plan.

Since at least 1992, a committee known as the Healthcare Management Committee (HMC) has existed as an advisory body to assist the employer by making recommendations for managing the health care program. The HMC comprises representatives of management, representatives from the various bargaining units operating within the employer's jurisdiction, and representatives of unrepresented employees. It must be emphasized, however, that the HMC acts in an advisory capacity only, and the HMC charter specifically states that the committee's recommendations are not to displace the collective bargaining process.

In mid-2005, the employer projected that the 2006 cost for the Self-Insured Medical Plan would exceed the ten percent increase mentioned in the union's collective bargaining agreement. The employer then convened the HMC to discuss the best method of responding to the increase in premiums. Based upon the results of an employee survey, the HMC recommended that co-pays for prescription drugs, doctor office visits, and emergency room visits be increased to offset the premium increase. In October 2005, the city communicated the HMC recommendations to the labor organizations representing the city's employees.

In November 2005, at least three of the six bargaining units voted to reject the HMC recommendations.[2] The employer subsequently communicated this fact to the union, and also informed the union that consistent with the parties' collective bargaining agreement, the employer would pay ten percent of the increase, and bargaining unit employees would be required to pay the remaining increase.[3]

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[2] This record demonstrates that the Tukwila Police Officers' Guild voted to accept the HMC recommendations.

[3] Health insurance premiums increased thirteen percent, so the employees would have been obligated to pay the remaining three percent of the increase.

On November 28, 2005, the union informed the employer that it wished to bargain the increase in premiums to the Self-Insurance Plan. The employer rejected the union's request, and the union subsequently filed a complaint alleging unfair labor practices.

Applicable Legal Standards

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining under *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); RCW 41.56.150(1) and (4). Thus, prior to any changes to mandatory subjects of bargaining, employers must give unions advance notice of the potential change. This provides time for unions to request bargaining and, upon such requests, for the parties to bargain in good faith to resolution or lawful impasse prior to implementing the change. The employees at issue in this case are uniformed employees eligible for interest arbitration under Chapter 41.56 RCW, and therefore the employer may not unilaterally implement a term or condition of employment.

This Commission has long held that medical benefits are mandatory subjects of bargaining. *See Spokane County*, Decision 2167-A (PECB, 1985); *see also Snohomish County*, Decision 9834-B (PECB, 2008).

Application of Standards

Neither party disputes that medical benefits are a mandatory subject of bargaining, so we need only to determine whether or not the employer was obligated to inform the union of the change and, upon request, bargain that change to impasse before seeking interest arbitration.[4]

The Examiner found that the relevant status quo required the employer to pay the full premium for medical coverage under the Self-Insured Medical Plan. Specifically, the Examiner concluded that the parties' collective bargaining agreement unambiguously states that the employer "shall pay the full premium for medical coverage under the Self-Insured Medical Plan up to a maximum increase" of certain percentages in subsequent years.

The employer argues that this interpretation is in error, and claims that the pertinent language only places a cap on the employer's contribution. The employer asserts that, should health insurance premiums for the Self-Insured Medical Plan increase above the contractual percentage, the employees are obligated to pay the excess premium amounts. We disagree with the employer's interpretation of the contractual provision because this argument fails to examine the contractual provision as a whole. Section 16.1.c of the parties' collective bargaining agreement states:

> **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 twelve percent (12%) in 2004. The twelve percent (12%) shall be changed to eleven percent (11%) in 2005, and to ten percent (10%)

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[4] Uniformed employees as defined by RCW 41.56.030(7) are eligible for interest arbitration under the provisions of RCW 41.56.430 through 41.56.490. *See City of Pasco*, Decision 4694-A (PECB, 1994).

> 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-Insurance Medical Plan benefits so that the increase in premium costs does not exceed the stated amount.

To better understand this section we break it into its three separate sentences. The first sentence requires the employer to pay the full premium for medical coverage, up to a maximum increase of twelve percent in 2004. The employer is obligated to pay the full amount for health premiums, but, as the employer points out, if premiums increase more than twelve percent, employees are obligated to pay the remainder. We therefore agree with the employer's assertion that this language places a cap on the employer's contribution to health insurance premiums. The second sentence of this section changes the cap on the employer's contribution in subsequent years.

However, the third sentence of section 16.1.c allows either party to reopen negotiations regarding the Self-Insurance Medical Plan benefits in the event that premium costs increases beyond what the employer is contractually obligated to pay in any given year to make changes to the benefits plan so the premium costs do not exceed the employer's contribution. This language unambiguously allows either party to request bargaining, provided the triggering event occurs. Had the collective bargaining agreement only discussed the amount that the employer would contribute to employee health benefits, and not included this final sentence, then an argument could be made that the language placed a hard "cap" on the employer's contribution to health premiums, and the employees would have been obligated to pay the excess amounts for the life of the contract. That is not the case here.

Once the premium costs exceeded the ten percent threshold for the 2006 calendar year, a fact that neither party disputes, the union made an unambiguous demand to bargain. The employer was then required to bargain with the union before changing the premium cost or the coverage.

The Employer's Affirmative Defenses

The employer raises the affirmative defenses of waiver by inaction and business necessity. The employer failed to demonstrate that either defense is applicable to this case.

Waiver by Inaction

The "waiver by inaction" defense is apt where appropriate notice of a proposed change has been given, and the party receiving notice does not request bargaining in a timely manner. *See City of Yakima*, Decision 1124-A (PECB, 1981) (union responded to notice of a bargaining opportunity with a public information campaign, but never requested bargaining); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995)(union filed a grievance under a collective bargaining agreement, but never requested bargaining). The key ingredient in finding a waiver by inaction by a union 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.

Washington Public Power Supply System, Decision 6058-A (PECB, 1998) (footnotes omitted).

Application of Standard

The employer argues that the Examiner erred by not finding the union's delay in requesting bargaining constituted a waiver by inaction. Specifically, the employer asserts that the union could have requested bargaining as early as September 2005 when it recognized that health premiums would be increasing by thirteen percent, but did not request bargaining until November 28, 2005. Additionally, the employer claims that by initiating the HMC process, the city satisfied the intent of the reopener provision of Section 16.1.c of the collective bargaining agreement, and that the city should not be required to hold a separate set of negotiations with the union. We disagree.

Although the union might have been aware that health insurance premiums could increase in 2006, the HMC was convened to address the issue and make recommendations to the employer on how the plan might be changed to keep costs down. Thus, it cannot be said that the parties would have actually known what the change would be until the HMC completed its work. Once the HMC recommendations were voted down, only then did the union become fully aware of what the status quo would be for the 2006 calendar year.

More importantly, the HMC charter specifically states that the committees' findings are not meant to displace the collective bargaining process, and should the parties not agree to the provisions of the health benefit program, unresolved issues should be resolved through collective bargaining. We find this language demonstrates a clear intent on the part of the parties to create a mechanism for the city and the representatives of its organized and unorganized employees to find mutually acceptable solutions for the employees' health benefits, while at the same time preserving the collective bargaining rights of the individual union should that process fail. The union did not waive its bargaining rights.

Business Necessity Defense

An employer can raise a "business necessity" defense when compelling practical or legal circumstances necessitate a unilateral change of employee wages, hours or working conditions, but such an employer is still obligated to bargain the effects of the unilateral change. *Skagit County*, Decision 8476-A (PECB, 2006); *see also Cowlitz County*, Decision 7007-A (PECB, 2000) (business necessity defense sustained where employer contacted union regarding change of health insurance). This Commission examines all of the relevant facts and circumstances surrounding the particular event before ruling on the legality of a decision to implement a unilateral change without satisfying its collective bargaining obligation. *Skagit County*, Decision 8476-A.

Application of Standard

The Examiner found that although the employer was in a difficult situation because of the rejection of the HMC's recommendations, the employer nevertheless still had time to bargain with the union. The Examiner also noted that the Mayor distributed a memorandum offering to delay making changes to the Self Insured Medical Plan for six weeks. Based upon this evidence, the Examiner rejected the employer's business necessity defense.

The employer argues that the Examiner disregarded testimony and evidence provided by the employer demonstrating a legitimate business need for the employer to maintain only one benefit schedule. Specifically, the employer claims that as compelling practical business need, from both an administrative and cost savings perspective, that it needed to offer only one schedule of benefits for all groups of employees. We disagree.

This record supports the Examiner's finding that the employer had ample time and opportunity to discuss this matter with the union, particularly in light of the mayor's December 19 letter offering to delay the changes to the plan for six weeks.

We also reject the employer's argument that difficulties of maintaining two sets of benefits schedules somehow creates a compelling business need that relieves the employer of its bargaining obligation. The employer bases its argument on the assumption that the only result of negotiations would be a second benefits schedule. Although the employer may fear that result, that fear alone does not alleviate it from its collective bargaining obligation, and also fails to recognize that while Chapter 41.56 RCW requires the employer to negotiate in good faith with the union regarding mandatory subjects, it does not compel agreement. RCW 41.56.030(4).

Finally, even if the employer had demonstrated a legitimate business necessity, it only would be relieved of bargaining the decision to change health benefit premiums, and it still would have been obligated to notify the union of its intent, and, upon request, bargain the effects that its decision had on mandatory subjects of bargaining. *Seattle School District*, Decision 2079-B (PECB, 1986).

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Joel Greene in the above-captioned case are AFFIRMED and

ADOPTED as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 15th day of September, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner