University of Washington, Decision 10608 (PSRA, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE 1199NW, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 22340-U-09-5695 DECISION 10608 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Douglas Drachler & McKee, by *Paul Drachler*, Attorney at Law, for the union.

Rob McKenna, Attorney General, by *Mark Yamashita,* Attorney at Law, for the employer.

On March 18, 2009, Service Employees International Union Healthcare 1199NW (union) filed an unfair labor practice complaint with the Public Employment Relations Commission against the University of Washington (employer), charging employer interference and refusal to bargain in violation of RCW 41.80.110(1) (e) and (a). A preliminary ruling was issued on March 26, 2009, and a timely answer was filed on April 16, 2009. Examiner Starr Knutson held a hearing on July 14, 2009, and the parties filed simultaneous briefs on September 4, 2009.

ISSUES

The preliminary ruling found the causes of action to be:

- Did the employer unilaterally suspend and fail to implement market adjustment increases for certain employees without providing an opportunity for bargaining?

- Did the employer breach its good faith bargaining obligations when it took the above action after agreeing to the increases in bargaining and subsequently assuring the union that it would implement the market adjustment increases?

The union bases its complaint on what is essentially a unilateral change theory. However, I see the issues as whether the changes in economic circumstances that occurred in late 2008 and early 2009 permitted the employer to withdraw from its tentative agreement, and whether the employer was required to offer and engage in further bargaining after it withdrew from the tentative agreement.

I find that the employer had a documented reason to withdraw from its tentative agreement regarding market adjustments, and therefore did not commit an unfair labor practice by doing so. As the party withdrawing from a tentative agreement, the employer had the obligation to request that the union return to the bargaining table. Its failure to do so was an unfair labor practice.

APPLICABLE LEGAL STANDARDS

In 2002, the Legislature enacted the Personnel System Reform Act of 2002 (PSRA) which substantially restructured both the collective bargaining rights of most state employees and the administration of the collective bargaining process. *Western Washington University*, Decision 9309-A (PSRA, 2008), citing *University of Washington*, Decision 9410 (PSRA, 2006). Codified in Chapter 41.80 RCW, the PSRA granted state and higher education civil service employees "full scope" collective bargaining rights. *Western Washington University*, Decision 9309-A. These new rights permitted employees covered by the act the opportunity to select an exclusive bargaining representative and collectively bargain directly with the employer on all matters affecting employee wages, hours, and working conditions. RCW 41.80.010(3); *See, also Western Washington University*, Decision 9309-A.

Duty to Bargain in Good Faith

RCW 41.80.005(2) defines collective bargaining as "the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the

subjects of bargaining specified under RCW 41.80.020." It also states that the collective bargaining obligation "does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter."

RCW 41.80.010 defines the employer for state collective bargaining as the governor or governor's designee with an exception for institutions of higher education. An institution of higher education may decide to have the governor bargain for it or have the governing board of the institution or a designee chosen by the board as the bargainer. In this case the University of Washington chose to bargain for itself and delegated that responsibility to its Office of Labor Relations.

RCW 41.80.020 frames the scope of bargaining and excludes certain subjects from bargaining. Germane to this case is the exclusion of health and welfare fringe benefits from bargaining except for the dollar amount expended on behalf of each employee. That premium dollar amount is bargained at one table consisting of the governor's team and a coalition of all unions representing state employees working in general government and institutions of higher education. The statute states that "any provision agreed to by the employer and the coalition shall be included in all master collective bargaining agreements negotiated by the parties."

RCW 41.80.030 (1) states "the parties to a CBA shall reduce the agreement to writing and both shall execute it. *Black's Law Dictionary, Seventh Edition,* defines the word "execute" as "to perform or complete; to make valid by signing; to bring (a legal document) into its final, legally enforceable form."

ANALYSIS

This case presents a unique set of facts, which are primarily undisputed. The parties stipulated to certain facts at the outset of the hearing. That signed stipulation was entered into the record as Exhibit 1 and set forth the following:

1. Complainant. The Union is the exclusive bargaining representative for several bargaining units at the University of Washington Harborview Medical Center. Those units are commonly referred to as the HMC Registered Nurse unit, Professional/Technical unit, Social Worker unit, Health Care Specialist unit,

Respiratory Therapist/Anesthesiology Technician bargaining unit and Airlift NW unit.

2. Respondent. Respondent is the University of Washington.
3. Collective Bargaining Statute. Complainant and Respondent engage in collective bargaining under RCW41.80. (sic)
4. 2008 Bargaining. During the summer and fall of 2008, the parties engaged in collective bargaining for a successor collective bargaining agreement for the 2009-2011 biennium covering the bargaining units referenced in paragraph 1 of this statement of facts, above. The chief negotiator for the Employer was Daniel Kraus. The chief negotiator for the Union was Lisa Jacobs.
5. Agreement. On or about September 16, 2008, the University and the Union reached agreement on a successor collective bargaining agreement (CBA) for the 2009-2011 biennium (CBA).
6. Ratification. The CBA was ratified by the Union on or about September 25, 2008, and by the UW Board of Regents on or about October 16, 2008.
7. Market Adjustment Increases. The CBA includes provisions for market adjustment wage increases scheduled to take effect on January 1, 2009. These market adjustment wage increases are: five percent (5%) for Respiratory Care Practitioners; one percent (1%) for Anesthesia Technicians; and one percent (1%) for employees in all Imaging classifications.[1]
8. Other CBA Terms. The other terms of the CBA are scheduled to take effect on July 1, 2009, after the predecessor collective bargaining agreement expires.
9. September 17, 2008, Email. On September 17, 2008, Lisa Jacobs received from Daniel Kraus an email in which Kraus summarized the economic provisions of the agreement reached the previous day. The email includes the amounts and effective dates of the agreed-upon market adjustment increases for Respiratory Care Practitioners, Anesthesia Technicians, and all Imaging Classifications.
10. November 14, 2008, Email and Letter. On November 14, 2008, Lisa Jacobs received from Daniel Kraus an email with an attached letter concerning the January 1, 2009 market adjustments. The email and letter again confirmed that the market adjustment increases would be implemented in a timely manner, effective January 1, 2009.
11. January 15, 2009, Telephone Conversation, On or about January 15, 2009, Lisa Jacobs and Daniel Kraus had a telephone conversation about the market adjustment increases. Kraus confirmed that the market adjustments (sic) increases were being implemented, as agreed, that month.
12. January 23, 2009, Email. On or about January 23, 2009, Johnese Spisso, UW Vice-President of Medical Affairs and Clinical Operations Officer for UW

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[1] The issue of the validity or appropriateness of the parties' agreement to implement market adjustments on January 1, 2009, for an agreement not scheduled to be effective until July1, 2009 is not before me. While I accept that the parties bargained what they refer to as "early money" as part of their successor agreement, it is very uncommon to bargain in such a manner, although it does equate to the method used prior to the passage of Chapter 41.80 RCW. The same result could have been reached through mid-term bargaining or a letter of understanding executed during the term of the agreement in which the increases were scheduled to take place.

Medicine, announced to all bargaining unit employees by email that the Employer was suspending the market adjustment increases that were to be effective January 1, 2009.

13. January 23, 2009, Letter. On or about January 23, Lou Pisano, UW Assistant Vice President of Labor Relations, notified the Union by letter that the Employer had decided that the Employer would not implement the market adjustment increases that were to be effective January 1, 2009.

The Dispute

The union argues that the employer was obligated to adhere to the provisions of the tentative agreement and implement the market adjustments on January 1, 2009. The parties' tentatively agreed in September 2008 (see stipulation 5 above) to a successor agreement to be effective on July 1, 2009 through June 30, 2011. The employer defends its action to suspend the market adjustments (see stipulation 12 above) as a "reasonable exercise of judgment and discretion by management made in the exercise of their authority as directed by the Legislature in RCW 41.80.040. Further, the employer claims it made a logical and defensible decision when the State Office of Financial Management failed to include a request for funding the fringe benefit provisions of the tentative agreement, because it does not bargain the fringe benefit provisions of the contract with the union, and did not therefore know the extent to which its finances might be impacted by future bargaining. The union asserts the employer cannot rely on the failure of the Office of Financial Management (OFM) to certify the tentative agreements and fringe benefits provisions as financially feasible because it is undisputed that this employer did not need to request monies from the Legislature to fund their agreement.

More Complex Question of Law

The employer did not dispute the union's assertion that the funding for the Harborview contracts came from local money and not the Legislature. The budget documents introduced as evidence in this case support that this employer was not requesting funds from the Legislature. Thus the issue becomes more complex.

Did the parties have a tentative agreement?

Did the employer withdraw from that agreement?

Did the reasons articulated by the employer permit it to withdraw from its agreement?

If the employer had a reason to withdraw, did it have an obligation to bargain further?

If so, did the employer offer to bargain with the union?

The parties answered the first two questions affirmatively in their stipulations above. It is thus undisputed that the parties had a tentative agreement, and that the employer withdrew from that agreement.

Employer Reasons

Pisano outlined the employer's reasons for withdrawing from the tentative agreement in his January 23 letter. He asserted that the employer had two reasons for not moving forward with the market increases in January. First, "the health care coalition agreement, which is an important component of the new agreement, has not been approved by the legislature. It is not clear whether it will be approved or returned to the parties for further bargaining." Second, Pisano reasoned that "both the University and the Medical Centers have funding requests before the legislature, and we do not want to do anything which may negatively impact those requests." Pisano testified that he did not believe the employer could implement any part of the tentative agreement until that agreement was complete. The tentative agreement was not complete without the health care agreement as bargained by the governor's office and the coalition of unions.

RCW 41.80.020(3) states that matters subject to bargaining include "negotiations regarding . . . the dollar amount expended on behalf of each employee for health care benefits shall be conducted between the employer and one coalition of all the exclusive bargaining representatives subject to this chapter." It goes on to say that "any such provision agreed to by the employer and the coalition shall be included in all master collective bargaining agreements." Thus the dollar amount of health care premiums was not bargained by this union and the university as employer.[2] Rather, these parties were required by statute to accept the result of the coalition bargain.

The Legislature's Approval Process

RCW 41.80.010(3)(a) directs the Governor to request from the Legislature funds necessary to implement the compensation and fringe benefit provisions of any negotiated collective

[2] This union did have a representative at the health care coalition bargaining table; the governor's representatives bargained for the university.

bargaining agreement as part of his or her budget request. Uniquely, the Governor may only request such funds if the compensation and fringe benefit provisions of a negotiated agreement are submitted to OFM by October 1 prior to any legislative session in which the requests will be considered. That provision means the parties to a tentative agreement have close to a year prior to the effective date of that successor collective bargaining agreement. If the legislature rejects or fails to act on the request for funds, either party may reopen all or part of the agreement. The statute also specifies that the effective dates of the agreements run for only one specific biennium at a time. Here that period ran from July 1, 2009, through June 30, 2011.

On December 18, 2008, the governor submitted her budget to the Legislature and did not request funding for the various 2009-2011 tentative agreements or fringe benefits. That day Diane Leigh, the Director of the Labor Relations Office (LRO), sent a letter to the unions representing state employees in general government and institutions of higher education informing them that director of the Office of Financial Management (OFM) failed to certify the tentative agreements as financially feasible. The letter was sent to the exclusive bargaining representatives of state bargaining units; no employer representatives were copied. Pisano heard about the letter; however he did not receive a copy until December 29, 2008, when he requested and received a faxed copy from Leigh.[3] After reviewing the letter, Pisano decided that he needed to consult the university executive management team. Daniel Kraus, a labor negotiator who reported to Pisano, credibly testified that he did not know that his supervisor was approaching the employer's executive management team about suspending the market increases at the time he assured the union that the increases would be implemented (see stipulations 9, 10 and 11).

As a result of Leigh's letter, this union filed a charge of unfair labor practices, on behalf of general government bargaining units it represents at the Department of Health and Department of Social and Health Services, against the Governor's Office asserting the employer unilaterally changed the method that the collective bargaining agreements were negotiated and ratified under Chapter 41.80 RCW. The Commission processed those cases[4] and issued a decision on April 1, 2009. *State- Office of the Governor,* Decision 10353 (PSRA 2009). The Commission found "the

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[3] Pisano was on leave when the letter was issued and did not return until the end of December.

[4] Cases 22289-U-09-5685 and 22298-U-09-5687.

employer had not committed an unfair labor practice when it withdrew from its tentative agreement based upon drastic changes in economic circumstances between the time the contract was negotiated and the time the employer was required to submit a request for funds necessary to implement that agreement."

RCW 41.80.010(4) authorizes institutions of higher education to bargain on their own if they so choose. It also states that *if* appropriations are necessary to implement the compensation and fringe benefit provisions of the bargaining agreements reached between institutions of higher education and exclusive bargaining representatives agreed to under the provisions of this chapter, the governor shall submit a request for such funds to the legislature according to the provisions of subsection (3) of this section. (Emphasis added.)

This employer did not require appropriations from the state general fund; however it did need to have the fringe benefit language, specifically the health insurance premiums, in order to have a complete agreement. That language was only available when a new agreement had been forged through additional coalition bargaining in early 2009.[5] The employer had financial concerns about the total cost of the tentative agreement without the dollar premiums as well as the status of other separate funding requests it had made to the Legislature. The dollar amount of health insurance premiums affected all of the employer's bargaining units.

I find the employer had legitimate documented reasons for withdrawing from the tentative agreement.

Obligation to Bargain

Recently, the Commission found the Governor's Office committed an unfair labor practice when it failed to request further bargaining with the union after the Governor did not include the tentative agreements and fringe benefits negotiated by it as part of her budget. The employer's good faith obligations required it, as the party withdrawing from a tentative agreement, to request that the union return to the table and continue the collective bargaining process. *State – Office of the Governor,* Decision 10353-A. That same principle would apply in this situation.

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5 That coalition bargaining was completed in May 2009.

On January 22, 2009, Johnese Spisso, Chief Operating Officer of the University of Washington Medicine, sent an electronic message to the staff at Harborview Medical Center and the UW Medical Center. The letter in relevant part states:

> [F]or other agreements (SEIU Local 1199 and ...), while no feasibility determination was made by OFM, the status of a significant portion of the labor agreement, the provision that covers healthcare benefits, is pending before the legislature. Given the State's financial deficit, we have no idea whether it will be approved. As such, the status of those agreements remains uncertain. One component of our 2009 agreements was that a few of the market based increases were scheduled to begin prior to July 2009. Some of you have been scheduled for market adjustment increases to be effective this January, ... Unfortunately, as a result of the ongoing debate and review in Olympia, *we must suspend those increases* until such time as the University receives clarification through the legislative process regarding the status of the collective bargaining agreements. I will update you on the status of those agreements as more information becomes available. Thank you for your patience during these challenging times.

(Emphasis added.)

Pisano testified that Kraus called the union the same day the above message was sent to relay the same message.

On January 29, 2009, Emily Van Bronkhorst, Executive Vice-President of the union, wrote back to Spisso asserting the union's position on the suspension of the market adjustments. Her letter stated in part:

> Furthermore, we completely disagree with your statement that "*...the status of a significant portion of the labor agreement, the provision that covers healthcare benefits, is pending before the legislature.*
>
> The Governor's budget contains a request for funds for healthcare benefits for *all* state employees, but that request is not a request to fund any collective bargaining agreement.
>
> Healthcare negotiations were concluded, and there is no request to reopen Healthcare (sic) bargaining.
>
> Your action in not implementing the market adjustments must be immediately revoked, and Harborview must move forward with all due speed to implement market adjustments retroactively to January 1, 2009, with interest.

If you have any questions, do not hesitate to call me . . . .

(Emphasis in original)

On February 3, 2009, Pisano replied to Van Bronkhorst's letter. In Pisano's letter he explained the employer's reasons for believing the tentative agreements might not be valid. He also offered a "potential approach for resolving the matter for the union to consider: a union commitment to accept the final outcome of the health care coalition as well as agree to not request a wage reopener due to that outcome." He did not clearly offer to bargain with the union in that letter. The parties exchanged letters on February 13 (Van Bronkhorst), February 20 (Pisano), March 13 and April 2 (Van Bronkhorst), April 13 (Pisano), April 21 (Van Bronkhorst) without any substantive movement by either party.

On or about May 8, 2009, the Healthcare Coalition and the employer agreed on the terms of the healthcare provisions of the state collective bargaining agreements. On May 21, 2009, Pisano wrote Diane Sosne, President of the union, a letter stating the employer would pay the market adjustments retroactively to January 1, 2009, now that the "Super Coalition" has concluded health care negotiations. The union demanded the employer pay interest on the retroactive pay.[6] The employer disagreed that it was obligated to pay interest and did not.

Pisano testified without rebuttal that the financial concerns of the total cost to the employer for healthcare benefits for all employees of the university plus the status of other important funding requests made to the legislature were significant enough to warrant suspension of the market adjustments. He testified that the university did not intend to completely withdraw from its agreement to give market adjustments to certain bargaining unit employees. Rather the employer wanted to be certain of the total financial impact of its collective bargaining agreements, a significant part of which was the cost of healthcare benefits, before moving forward with those increases.

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[6] It had demanded interest in its February 13 letter and continues to demand interest as a remedy to this case.

The union argues that because the employer did not request funding for its agreement with this union, the employer was obligated to act on its tentative agreement. I disagree. The union did not present evidence that the financial concerns stated by Pisano were a pretext for unlawfully withdrawing from its tentative agreement. The economic climate in January 2009 was volatile at best. Although the union asserts no request to reopen healthcare bargaining had been made, it should have known the previously agreed upon terms of the healthcare provisions were now in limbo until the Legislature convened and gave the Governor's office some direction. I do not believe a tentative agreement exists until all of its provisions are agreed upon by the parties. Here an economic provision, healthcare benefits, had not been approved by the legislature and therefore was not tentatively agreed to by the parties.

CONCLUSION

The employer violated the statute by not offering to bargain with the union after it withdrew from its tentative agreement with the union.

Because I find that the employer did not commit an unfair labor practice when it withdrew from the tentative agreement, I also find no interest is due. Although I find no unfair labor practice regarding that action, I am concerned that the employer did not pursue prompt and frank discussion of these issues, which may have led to a more positive outcome in this matter.

FINDINGS OF FACT

1. The University of Washington (employer) is an institution of higher education within the meaning of RCW 41.801.005(10).

2. Service Employees International Union Healthcare 1199NW (union) is a bargaining representative under RCW 41.80.005(9).

3. The employer and union are parties to a collective agreement from July 1, 2007 through June 30, 2009.

4. The parties negotiated a tentative agreement for a successor agreement to be effective from July 1, 2009, through June 30, 2011.

5. The employer withdrew from that tentative agreement on January 23, 2009.

6. The employer had legitimate documented reasons for its withdrawal from the tentative agreement.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The employer did not violate RCW 41.80.110(1) (a) and (e) by withdrawing from its tentative agreement with the union on January 23, 2009.

3. The employer violated RCW 41.80.110(1) (a) and (e) when it failed to request that the union return to the bargaining table once it withdrew from the parties' tentative agreement.

ORDER

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

1. CEASE AND DESIST from:

   a. Refusing to engage in collective bargaining by failing to immediately request that the union return to the bargaining table when it withdrew from the parties' tentative agreement.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

a. Give notice to and, upon request, negotiate in good faith with the union, before suspending or failing to implement market adjustment increases agreed to during collective bargaining.

b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission 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 respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of Regents of the University of Washington, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the 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 complainant with a signed copy of the notice provided by the Compliance Officer.

e. 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 have been taken to comply with this order, and at the same time provide the

Compliance Officer with a signed copy of the notice provided by the Compliance Officer.

ISSUED at Olympia, Washington, this 25th day of November, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

STARR H. KNUTSON, 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 22340-U-09-5695
DECISION 10608 - PSRA

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 THE *UNIVERSITY OF WASHINGTON* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY failed to request that Service Employees International Union Healthcare 1199NW return to the bargaining table to continue negotiations for a 2009-2011 collective bargaining agreement when we withdrew from the previously negotiated tentative agreement.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL immediately request that Service Employees International Union Healthcare 1199NW return to the bargaining table to negotiate a 2009-2011 collective bargaining agreement.

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.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.