STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

UNITED AUTO WORKERS, LOCAL 4121, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 23174-U-10-5902 DECISION 10771 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On April 19, 2010, United Auto Workers, Local 4121 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the University of Washington (employer) as respondent. The allegations of the complaint concern employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by: (a) its unilateral change to its health insurance broker (broker), without providing an opportunity for bargaining; (b) its unilateral change to its health insurance carrier (carrier), without providing an opportunity for bargaining; (c) breach of its good faith bargaining obligations in its negotiations with the union over (i) selecting brokers and carriers, (ii) the union's involvement in the employer's dealings with brokers and carriers regarding health insurance premium overpayments, (iii) the refund of the overpayments; and (d) its refusal to provide relevant information requested by the union concerning the overpayments.

The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on April 26, 2010, indicated that a cause of action could be found for allegations of employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW

[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

41.56.140(1)], concerning the refund of health insurance premium overpayments, and a refusal to provide relevant information requested by the union concerning the overpayments. However, it was not possible to conclude that a cause of action existed at that time for the remaining allegations of the complaint. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the defective allegations.

The union filed an amended complaint on May 17, 2010. The amended complaint does not cure the defects to the complaint: Although the amended complaint includes alleged changes to employee health benefits, it does not allege that the employer has refused to bargain over the changes or bargained in bad faith. The Unfair Labor Practice Manager dismisses the defective allegations of the amended complaint for failure to state a cause of action, and finds a cause of action for the allegations concerning refunding overpayments and refusing to provide information about the overpayments. The employer must file and serve its answer to the preliminary ruling set forth below within 21 days following the date of this Decision.

DISCUSSION

The deficiency notice discussed the causes of action and deficiencies to the complaint.

Refund/Providing Information

The employer has a duty to bargain with the union over health insurance benefits, including any difference in negotiated benefits resulting from changes in brokers and carriers. *Yakima County,* Decision 9338 (PECB, 2006); *Island County Fire District 1,* Decision 9867 (PECB, 2007). The employer also has a duty to provide relevant information requested by the union concerning collective bargaining or contract administration. *City of Bellevue,* Decision 3085-A (PECB, 1989). The complaint alleges that the employer informed the union of premium overpayments made to its former health insurance carrier, and that the overpayments included premiums paid by bargaining unit members. The complaint alleges that the union requested information on the overpayments and demanded to bargain over them, including bargaining with the employer and its carriers and brokers. The overpayment of employee-paid premiums and any refunds resulting from overpayment is arguably a mandatory subject of bargaining. *See Spokane County,* Decision

8154 (PECB, 2003). The complaint states a cause of action for allegations that the employer breached its good faith bargaining obligations in its negotiations with the union over the refund of the health insurance premium overpayments. The complaint also states a cause of action for allegations that the employer refused to provide relevant information requested by the union concerning the overpayments.

Bargaining: Carriers and Brokers

However, the complaint does not allege that the employer's changes to its broker and its carrier resulted in an alteration of benefits to bargaining unit employees under the terms of the collective bargaining agreement, and that the employer refused to bargain over such altered benefits. Rather, the complaint alleges that the employer has refused to bargain over switching its broker and its carrier. The employer would arguably have a duty to bargain over the carrier if the carrier were specified in the collective bargaining agreement. *Island County Fire District 1*, Decision 9867. Absent such a stipulation, the employer has no mandatory duty to bargain over the selection of its carrier. *City of Dayton*, Decision 1990-A (PECB, 1984); *Island County Fire District 1*.

If the employer has no duty to bargain over its choice of a carrier, neither does it have a duty to bargain over the choice of a broker, since a broker is an intermediary between the employer and the carrier. As with the carrier, the employer's duty to bargain with the union would arise only if the employer's dealings with the broker resulted in alterations to negotiated employee benefits. *Yakima County*, Decision 9338.

The complaint also alleges that the employer bargained in bad faith when it changed its broker after informing the union that the broker would not change; and changed its carrier after telling the union it would not change–after the union had requested information about the carrier and made a proposal about changing the carrier. However, if the employer has no duty to bargain with the union over the selections of a broker and a carrier, a cause of action cannot be found for a breach of its good faith bargaining obligations concerning those selections. The employer has no duty to inform the union about the details of its searches for a new broker and a new carrier, absent knowledge that such actions could produce a difference in negotiated employee benefits.

The complaint further alleges that the employer bargained in bad faith by not including the union in the employer's dealings with carriers and brokers concerning the premium overpayments. As noted, the employer has a duty to fully inform the union about the overpayments and negotiate in good faith with the union over the issue. The union may proceed with those causes of action in an unfair labor practice proceeding. However, because the employer's contractual relationships with brokers and carriers are not subject to collective bargaining, the employer has no duty to include the union in its dealings with those parties concerning the overpayments.

Amended Complaint

The amended complaint re-alleges the claims and remedies of the complaint. The union also filed a separate letter supporting its claims. The union's accompanying letter is considered a request for reconsideration of the preliminary ruling under WAC 391-45-110(2)(b), which provides in pertinent part that "[a] complainant who claims that the preliminary ruling failed to address one or more causes of action it sought to advance in the complaint must, prior to the issuance of a notice of hearing, seek clarification from the person that issued the preliminary ruling."

This Decision involves a preliminary ruling as well as a dismissal of deficient claims, as originally set forth in the deficiency notice of April 26, 2010. The purpose of a preliminary ruling is to limit the causes of action before an examiner and the Commission and to frame the issues for hearing. At the preliminary ruling stage of unfair labor practice proceedings, causes of action are given, and issues framed, based upon Commission precedent and established policy. The preliminary ruling addresses the facts alleged in a complaint and grants causes of action based upon those facts. Legal claims asserted in complaints may serve to clarify a complainant's intent, but do not by themselves determine whether a cause of action will be granted. A preliminary ruling is not intended to establish new legal precedent or create new policy. Although a complainant may request clarification of a preliminary ruling under WAC 391-45-110(2)(b), a preliminary ruling is an interim order and not subject to appeal. WAC 391-45-110(2)(a). If a deficiency notice is issued, the failure by a complainant to cure the deficiencies will result in the dismissal of the entire complaint or those portions of the complaint that are defective. A dismissal or partial dismissal may be appealed to the Commission. WAC 391-45-110(1).

In the present case, the amended complaint details multiple impacts that a carrier may have on employee health benefits. The union alleges that the employer has a mandatory duty to bargain over the change in carriers from United Health Care (UHC) to Lifewise. The union alleges that the collective bargaining agreement stipulates health coverage under "the current plan," which at the time was UHC, and thus arguably that the current plan does stipulate that UHC must be the carrier. In addition, the union discusses the ruling in *City of Dayton*, pointing out the Commission's findings in that case concerning an employer's duty to bargain over health insurance, and asserting that the case does not stand for the narrow holding set forth by the Unfair Labor Practice Manager in the deficiency notice. The deficiency notice cited the *City of Dayton* for the limited purpose of ruling that Commission precedent concerning the duty to bargain over health insurance carriers holds that such a duty will exist only if the collective bargaining agreement so stipulates. Certainly, the *City of Dayton,* along with numerous other Commission decisions on health insurance, focuses on an employer's duty to bargain any changes in the status quo concerning health insurance. *See City of Anacortes*, Decision 9004-A (PECB, 2007) (violation found where employer unilaterally changed health insurance status quo). If a change in carriers results in changes to the status quo, an employer has a duty to bargain those changes.

However, the *identity* of the insurance carrier is not the main issue, unless the parties have named a specific company in the contract. The union points out in its reconsideration request that in the *City of Dayton,* "in sharp contrast to the facts here, the employer engaged the union in discussions of the carrier," and notes that the examiner in *Dayton* found it was important to determine whether the employer responded to the union's concerns about the carrier "with good faith negotiations." While parties always have the option of bargaining over a permissive subject, bargaining over a permissive subject does not make it a mandatory subject. WAC 391-45-550. The question of whether a party may breach its duty to bargain in good faith once it commits to negotiating over a permissive subject is not at issue here. In this case, in contrast to *City of Dayton*, the employer has pointedly excluded the union from its selections of carriers/brokers. The collective bargaining agreement does not name UHC, but refers only to the "current plan." Unquestionably, the employer may not change the terms of the current plan without notifying the union and bargaining over any changes with the union upon demand. The amended complaint alleges that the employer has notified the union that under the Lifewise plan there will be changes to the reimbursement

formula for out-of-network services, as well as a different provider network for non-emergency care outside of the Seattle area; in addition, the employer has informed the union that it has not signed a contract with Lifewise and cannot give information of additional changes. The amended complaint further alleges that the change to Lifewise may also cause a change in the plan administrator. The union argues that these changes will affect the terms and conditions of employee benefits. If so, the employer must bargain the changes upon demand.

Regarding the selection of a broker, the amended complaint details numerous impacts that a broker may have on employee health benefits, and alleges that the employer also has a mandatory duty to bargain over the change in brokers. The union asserts in its request for reconsideration that a duty to bargain over the change of carrier would also result in a duty to bargain over a change in broker. This is the obverse of the ruling stated in the deficiency notice that the absence of a duty to bargain over a change in carrier would mean the absence of a duty to bargain over a change in broker. Both statements reflect a conclusion that carriers and brokers are linked; the ruling in this Decision applies equally to carriers and brokers. The amended complaint states that the change in broker has resulted in changes to the carrier and in reduced premiums, as well as directly contributing to the health insurance premium overpayments noted above. The overpayment issue is the subject of a cause of action that will be set for further unfair labor practice proceedings. The change in carriers allegedly brought about by the broker would be a mandatory subject of bargaining only if the selection of carriers were a mandatory subject. As with the carriers, if the change in brokers results in actual changes to employee benefits, the employer has a duty to bargain over the changes upon demand. Specific to the broker issue, if the change in broker resulted in a reduction in premiums, then the employer has a duty to bargain over that reduction upon demand.

However, the employer's mandatory duty to bargain changes to employee benefits is not at issue here. Multiple readings of the amended complaint have failed to reveal an allegation by the union that the employer has refused to meet and bargain over actual, announced, or likely changes, or has bargained in bad faith. Rather, the amended complaint and request for reconsideration make the argument that bargaining should not be limited to changes in health insurance benefits, but should be extended to bargaining over the choice of carriers/brokers, so that, implicitly, rather than

two-party relationships between the employer and carriers and brokers, the union would become a third party to the process, rather than being limited to negotiating changes only after the fact. This Decision must assess the facts alleged in the amended complaint, which show:

- The employer has informed the union of changes under Lifewise to the reimbursement formula for out-of-network services, as well as a different provider network for non-emergency care outside of the Seattle area; the union is also concerned that the plan administrator will likely change; and that all of the aforementioned changes will affect employee benefits;

- The employer has informed the union that it has not signed a contract with Lifewise and cannot give information on additional changes;

- The change in brokers has resulted in a reduction in premiums, and other changes might result from a different broker; and

- The union does not allege that the employer has refused to meet and bargain actual, announced, or likely changes, or bargained in bad faith.

The amended complaint makes clear that regarding the union's allegations over changes to health benefits, the central issue before the Unfair Labor Practice Manager is whether the employer has a mandatory duty to include the union in–and bargain with the union over–the employer's decisions regarding the selections of carriers and/or brokers; that is, whether those selections are solely management prerogatives or mandatory subjects of bargaining. In accord with Commission precedent, the Unfair Labor Practice Manager rules that decisions to select health insurance carriers and/or brokers are solely the prerogatives of management, but that the employer has a mandatory duty to bargain, upon demand, the effects of any alterations in health benefits resulting from changes to carriers and/or brokers.

NOW, THEREFORE, it is

ORDERED

Preliminary Ruling

1. Assuming all of the facts alleged to be true and provable, the allegations of the amended complaint in Case 23174-U-10-5902 state a cause of action, summarized as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by: (a) breach of its good faith bargaining obligations in its negotiations with the union over the refund of health insurance premium overpayments; and (b) its refusal to provide relevant information requested by the union concerning the overpayments.

Those allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

The University of Washington shall:

> File and serve its answer to the allegations listed in paragraph 1 this Order, within 21 days following the date of this Order.

An answer shall:

a. Specifically admit, deny or explain each fact alleged in the amended complaint, as set forth in paragraph 1 of this Order, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or

organization that filed the amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

Partial Dismissal

2. The allegations of the amended complaint in Case 23174-U-10-5902 concerning;

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative "interference" in violation of RCW 41.56.140(1)], by: (a) its unilateral change to its health insurance broker, without providing an opportunity for bargaining; (b) its unilateral change to its health insurance carrier, without providing an opportunity for bargaining; (c) breach of its good faith bargaining obligations in its negotiations with the union over (i) selecting brokers and carriers, and (ii) the union's involvement in the employer's dealings with brokers and carriers regarding health insurance premium overpayments, are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 26th day of May, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Unfair Labor Practice Manager

Paragraph 2 of this order will be the final order of the agency on any defective allegations, unless a notice of appeal is filed with the Commission under WAC 391-45-350.