STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY 911 GUILD, Complainant, vs. KITSAP COUNTY, Respondent.	CASE 25231-U-12-6462 DECISION 11612 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On October 18, 2012, the Kitsap County 911 (non-supervisors) Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Kitsap County (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on November 2, 2012, indicated that it was not possible to conclude that a cause of action existed at that time. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the complaint. The union filed an amended complaint on November 26, 2012.

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 as set forth in the preliminary ruling below. The employer must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

911 Non-Supervisors

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 its unilateral changes regarding health insurance benefits, without providing an opportunity for bargaining.

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[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.

The deficiency notice pointed out the defects to the complaint.

Assuming the allegations are true and provable, the following facts apply to the complaint:

- The parties have a collective bargaining agreement effective through December 31, 2012;
- A status quo exists for health insurance benefits for bargaining unit members;
- The parties began bargaining in September 2012;
- The employer notified the union of the employer's intentions regarding health insurance benefits;
- The union filed this complaint on October 18, 2012.

Under RCW 41.56.123, the employer has a duty to maintain the status quo for health insurance benefits until December 31, 2013, absent mutual agreement to changes. The union alleges that the employer has made bargaining proposals that would change the status quo for health insurance benefits beginning in January 2013. The union alleges that the employer's actions constitute unilateral changes through *faits accomplis,* and that the employer has breached its good faith bargaining obligations. The union also requests temporary relief to prevent the employer from instituting its plans.

The complaint does not contain sufficient information to conclude that a cause of action exists for a breach of good faith bargaining obligations approximately one month after the commencement of bargaining. The parties are currently in negotiations. Based upon the facts presented, the employer's proposals to change health insurance benefits do not state a cause of action for an unfair labor practice, any more than would union proposals to change the terms of a labor contract under similar facts. In addition, the complaint indicates that the employer gave notice of its plans several months prior to their proposed implementation and has not, as of the date of the complaint, actually changed any health insurance benefits. Thus, apparently there have been no unilateral changes by *faits accomplis.*

Finally, the union's motion for relief prior to any employer implementation would seem to fall under the declaratory order provisions of WAC 391-08-520, rather than under the temporary relief provisions of WAC 391-45-430. [The employer must agree to declaratory order proceedings (WAC 391-08-520(3)(b)].

Amended Complaint

The amended complaint does not cure the defects concerning the union's unilateral change allegations. There is no cause of action for unilateral changes concerning the employer's decision to self-insure, its initial setting of employee contribution rates, or its use of reserve insurance funds. However, the amended complaint states a cause of action for employer breach of its good faith bargaining obligations concerning the effects of self-insurance on health insurance for bargaining unit members, and insisting on bargaining health insurance as part of general contract negotiations.

The union alleges that the employer:

- Made unilateral changes by *faits accomplis* when it made the decision to become self-insured, set the rates upon which the employee's contribution rates would be based (employee contribution), and claimed ownership of funds contributed by employees that exceed actual insurance costs (reserve funds);
- Agreed to bargain only over how much of the proposed percentage increase for the 2013 rates would be paid by the employer versus the employees (employer contribution);
- Tied bargaining over health insurance to negotiations on the entire agreement, rather than negotiating health insurance separately, as the parties had done prior to this year;
- Refused to bargain, or even acknowledge it has a duty to bargain, over the decision to become self-insured, the employee contribution rates established under the self-insurance system, the use of reserve funds, and that it must maintain the status quo on employee contributions; and
- Refused to bargain over insurance plan benefits.

Unilateral changes

The union alleges that the employer has stated that it will implement increased employee premiums on January 1, 2013, with or without the union's agreement. However, an employer's stated intentions do not establish causes of action for unilateral changes; only allegations of actual changes to the status quo can establish causes of action for unilateral change claims. *State – Office of the Governor,* Decision 10948-A (PSRA, 2011); *Kitsap County,* Decision 10836-A (PECB, 2011). There are no facts showing that the employer has made any changes to health insurance for bargaining unit members.

Regarding self-insurance, although the employer has not actually changed any insurance benefits for bargaining unit members, the union alleges that the employer should have given notice that it intended to self-insure and should have bargained that decision with the union prior to making it. Thus, in the union's view, a *fait accompli* occurred when the employer gave notice of its decision to self-insure, without providing the union the opportunity to bargain over that decision.

The employer had no duty to bargain with the union over its decision to self-insure. The union offers no authority for its claim that the employer had to negotiate with the union over this business decision. "Managerial decisions which lie at the core of entrepreneurial control are not subject to the duty to bargain collectively." *Federal Way School District,* Decision 232-A (PECB, 1977); *City of Anacortes,* Decision 6830-A (PECB, 2000). An employer's choice of a health care provider is not by itself a mandatory subject of bargaining. *City of Dayton,* Decision 1990-A (PECB, 1984); *City of Dayton,* Decision 1990 (PECB, 1984). In the present case, the employer's managerial decision to change health care providers did not become a mandatory subject of bargaining because it chose to self-insure rather than to contract with outside insurance companies.

An employer's decision to change health care providers–including self-insuring–will result in a duty bargain only if it impacts employees' wages, hours, and working conditions. In the present case, if the employer's decision to self-insure changes health insurance premiums and benefits for bargaining unit members, the employer has a duty to bargain with the union over the effects of its

decision. Apparently there have not been any actual changes to employee premiums or benefits. The amended complaint does not state a cause of action for a unilateral change by *fait accompli* over the employer's decision to self-insure.

The employer had no duty to bargain with the union over its decision to initially set employee contribution rates for its self insurance plan. The union alleges that a *fait accompli* occurred when the employer announced its employee contribution rates, stated they were non-negotiable, and stated it would bargain only over the employer's contribution. The union offers no authority for its claim that the employer had to negotiate with the union over its business decision to initially set employee contribution rates. The union acknowledges that an employer becoming self-insured must determine how much money it needs to take into its insurance fund. The employer's decision to set rates higher than the insurance companies' former rates was a managerial decision that it did not have to bargain with the union. The employer's bargaining duty arises only if those rates impact employee health insurance rates and benefits, in which case the employer has a duty to bargain the effects of its decision on employees.

The union alleges that under the employer's proposals, the employer could unilaterally take actions that would increase employee contribution levels, whereas under insurance coverage provided by third party insurance companies, those companies would have to announce premium increases in advance. However, even if the self-insurance model means that the employer could increase rates without notice, as the union alleges, the employer still has a duty to bargain the effects of increases. There has apparently been no change in employee contribution rates. The amended complaint has not stated a cause of action for a unilateral change by *fait accompli* concerning employee contribution rates.

In addition, the union alleges that bargaining over self-insurance should include how employee contributions will be established and maintained, who would own the accumulated reserves, under what conditions reserves could be transferred, how premiums would be set, and how premiums would be increased. The union is essentially alleging that the employer had a duty to bargain with the union over how the employer would structure its insurance business. However, unless the

employer specifically waives the right to manage its business, it has no duty to bargain over the entrepreneurial control of its insurance operations with the union, although it has a duty to bargain the effects of its decisions.

Regarding reserve funds, the employer's use of excess insurance funds it may collect through employee contributions is not a mandatory subject of bargaining, since those funds are considered unanticipated. *City of Dayton,* Decision 1990-A; *City of Dayton,* Decision 1990; *Federal Way School District,* Decision 232-A. A statement by the Examiner in *City of Dayton* is on point:

> The union here has only shown that it is dissatisfied with what the city is doing with the $8.00 to $20.00 per employee per month monetary savings that the city received by changing carriers. It is not necessary to decide whether the city committed an unfair labor practice by refusing to exchange a savings on the new medical carrier for additional money allocated to employee uniforms and other benefits. It is clear that an employer need not bargain over the use of unanticipated funds.

City of Dayton, Decision 1990, citing *Federal Way School District,* Decision 232-A.

The union may certainly propose that the employer apply reserve funds to mitigate employee contribution rates, but that is a permissive subject of bargaining, and the employer has no duty to bargain over that issue.

Breach of good faith bargaining obligations

An employer has a duty to bargain the effects of its decisions on the wages, hours, and working conditions of bargaining unit members. *City of Anacortes,* Decision 6830-A; *Kitsap County,* Decision 10836-A. The union alleges that the effects of the employer's plan will result in an increase in health insurance costs to bargaining unit members, and that in addition to refusing to bargain over employee rates, the employer has refused to bargain over insurance plan benefits. The employer has a duty to bargain in good faith over any changes to the status quo for health insurance. When the union filed its complaint on October 19, it alleged that the employer's

statements constituted bad faith bargaining over the course of one month of bargaining. The amended complaint alleges that employer has not changed its positions in nearly three months.

The union alleges that it demanded effects bargaining related to employee rates and benefits, but that the employer has limited effects bargaining to employer contributions. The employer's position that it will bargain only over employer contributions was perhaps based on a belief that once it fixed the employee rates, it would not have to bargain over them. However, while the employer might have needed to initially and unilaterally set its employee rates, the union must have the opportunity to negotiate with the employer over premiums paid by its members, rather than only negotiate with the employer over what the employer will contribute. Obviously, employee and employer contribution rates are intertwined and bargaining should necessarily include discussion of both rates.

A cause of action for breach of good faith bargaining obligations will be found where a complainant demands to bargain over a mandatory subject of bargaining and provides information showing that the respondent has engaged in conduct or a course of conduct that frustrates the collective bargaining process. The union alleges that the employer has taken predetermined positions on employee insurance contribution rates and insurance benefits and refused to bargain over those issues. The amended complaint states a cause of action for the employer's breach of its good faith bargaining obligations in refusing to bargain over employee insurance contribution rates and insurance plan benefits.

Combining health insurance and general contract bargaining

The union alleges that prior to this year, the parties had bargained over health insurance separately. This apparently is not a provision in the collective bargaining agreement, but rather a good faith bargaining issue. It is a question of fact as to whether the employer's insistence on including health insurance in general contract talks has frustrated the bargaining process; the amended complaint states a cause of action regarding this issue.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the following allegations of the amended complaint in Case 25231-U-12-6462 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 breach of its good faith bargaining obligations concerning negotiations over employee health insurance contributions, plan benefits, and the inclusion of health insurance as part of general contract negotiations.

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

Kitsap County shall:

> File and serve its answer to the allegations listed in Paragraph 1 of 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.

2. The allegations of the amended complaint in Case 25231-U-12-6462 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 its unilateral changes, without providing an opportunity for bargaining, regarding the employer's decision to self-insure, initial setting of employee contribution rates and related business decisions, its use or intended use of reserve insurance funds, and actual changes to employee premium costs and plan benefits, are DISMISSED for failure to state a cause of action.

Temporary relief

The union has requested temporary relief under WAC 391-45-430. The union is directed to the provisions of WAC 391-45-430(3), and the employer to the provisions of WAC 391-45-430(4).

ISSUED at Olympia, Washington, this 28th day of December, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Unfair Labor Practice Manager

Paragraph 2 of this order dismissing defective allegations will be the final order of the agency unless an appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	25231-U-12-06462	FILED:	10/18/2012	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	ALL EMPLOYEES				
DETAILS:	-				
COMMENTS:					

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