Port of Anacortes, Decision 12225 (PORT, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 25, Complainant, vs. PORT OF ANACORTES, Respondent.	CASE 26395-U-14-6737 DECISION 12225 − PORT FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Laura Ewan*, Attorney at Law, joined on the brief by *Dmitri Iglitzin*, Attorney at Law, for the union.

Chmelik Sitkin & Davis, P.S., by *Richard A. Davis III*, Attorney at Law, joined on the brief by *Brian D. Rice*, Attorney at Law, for the employer.

On April 11, 2014, the International Longshore and Warehouse Union, Local 25 (union) filed an unfair labor practice complaint against the Port of Anacortes (employer). The union's complaint alleged that the employer unilaterally implemented changes regarding employee health insurance benefits, without providing an opportunity for bargaining. By so doing, the union alleged that the employer refused to engage in collective bargaining with the certified exclusive bargaining representative concerning personnel matters, including wages, hours and working conditions.

After a review of the complaint under WAC 391-45-110, a preliminary ruling[1] was issued on April 24, 2014, and found a cause of action to exist as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4)[2] [and derivative interference in violation of RCW 41.56.140(1)], by its unilateral

[1] The April 24, 2014 preliminary ruling advised the parties that deferral to arbitration under WAC 391-45-110(3) applies only where the parties have a collective bargaining agreement (CBA). As the parties were in negotiations for their first CBA for this bargaining unit, the complaint could not be deferred to arbitration.

[2] RCW 53.18.015 provides that port districts and their employees shall be covered by the provisions of Chapter 41.56 RCW except as otherwise provided in Chapter 53.18 RCW.

> changes to health insurance benefits for bargaining unit members, without providing an opportunity for bargaining.

The employer filed a timely answer on April 29, 2014. On May 2, 2014, the Commission assigned the matter to Examiner Page Garcia, who presided over an evidentiary hearing on August 11, 2014. The parties filed timely post-hearing briefs for consideration.

ISSUE PRESENTED

Did the employer change the status quo during negotiations for a first collective bargaining agreement by changing health insurance benefits for bargaining unit employees without providing an opportunity for bargaining? If so, did the employer carry its burden of proving the affirmative defense of business necessity in regard to its change in health insurance benefits without bargaining?

Based on the totality of the evidence presented, the Examiner finds the employer changed the status quo of health insurance benefits for bargaining unit employees and presented the change as a *fait accompli*. Despite the employer's change to the status quo, the Examiner finds the employer met its burden of proof to support that it had a business necessity to change the health insurance benefits offered to the bargaining unit employees. The employer provided notice to, and met with, the union to discuss the changes and continued to offer to meet and discuss the effects of the changes.

APPLICABLE LEGAL STANDARDS

The Duty to Bargain

"Collective bargaining" is defined as "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 grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions . . . ." RCW 41.56.030(4). A public employer's duty to bargain is enforced through RCW 41.56.140(4) and unfair labor practice complaints are processed by the Commission under RCW

41.56.160 and Chapter 391-45 WAC. A complainant has the burden of proof to show, by a preponderance of the evidence, that a respondent has committed the complained-of unfair labor practice. WAC 391-45-270(1)(a). A respondent is responsible for the presentation of its defense, but only has the burden of proof as to any affirmative defenses. WAC 391-45-270(1)(b).

Three types of bargaining subjects exist between an employer and union: mandatory, permissive, and illegal. *Kitsap County*, Decision 8292-B (PECB, 2007). Those subjects indicated in RCW 41.56.030(4) − wages, hours and working conditions − are mandatory subjects of bargaining. Permissive subjects are matters considered to be remote from employee wages, hours and working conditions, including matters which are regarded as prerogatives of employers or of unions. Illegal subjects are matters where an agreement between a union and employer would contravene other statutes or court decisions. *Kitsap County*, Decision 8292-B.

The duty to bargain imposes a duty to give notice and provide an opportunity for good faith bargaining prior to implementing any change of past practices concerning the wages, hours, and working conditions of bargaining unit employees. *Kitsap County*, Decision 8292-B, *citing METRO (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990).

The determination as to whether a subject is mandatory or nonmandatory is a question of law and fact for the Commission to decide, and is not subject to waiver by the parties by their action or inaction. WAC 391-45-550. When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) (*City of Richland*); *Snohomish County*, Decision 9770-A (PECB, 2008).

Unilateral Changes

Under longstanding Commission precedent, an employer seeking changes to existing wages, hours, or working conditions must give notice to the union, provide an opportunity for

bargaining prior to making a final decision, bargain in good faith upon request, and bargain to agreement or impasse concerning any mandatory subject(s) of bargaining.

The burden of proof lies with the union when it charges an employer with making unilateral changes to mandatory subjects of bargaining. WAC 391-45-270(1)(a). Under *Val Vue Sewer District*, Decision 8963 (PECB, 2005), there are four elements the union must prove in order to prevail in a unilateral change case:

1. Existence of a relevant status quo or past practice

   Once employees have exercised their statutory right to select an exclusive bargaining representative, an employer is prohibited from taking unilateral action in regard to the wages, hours, and working conditions of those employees and has an obligation to maintain the status quo. *Washington State University*, Decision 11749-A (PSRA, 2013), *citing Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994), *citing Franklin County*, Decision 1890 (PECB, 1984).[3] Where a new bargaining unit is concerned, the relevant status quo is determined as of the date of the filing of the union's petition for representation. *Central Washington University*, Decision 10967-A (PECB, 2012), *citing Val Vue Sewer District*, Decision 8963. An employer is required to maintain the status quo regarding mandatory subjects of bargaining during contract negotiations. *Washington State University*, Decision 11749-A, *citing Asotin County*, Decision 9549-A (PECB, 2007). The pre-existing terms and conditions of employment are the starting point for any negotiations between parties. *Washington State University*, Decision 11749-A, *citing Shelton School District No. 309*, Decision 579-B (EDUC, 1984). When negotiating an initial collective bargaining agreement, an employer has a duty to maintain the status quo for health insurance benefits until changes are made in conformity with collective bargaining obligations or the terms of a collective bargaining agreement. *Kitsap County*, Decision 11611 (PECB, 2012), *citing King County Library System*, Decision 9039 (PECB, 2005), *aff'd*, Decision 11611-A (PECB, 2013).

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[3] Changes of the status quo concerning wages, hours or other terms and conditions of employment of employees in the bargaining unit are prohibited during the period that a petition is pending before the commission under Chapter 391-25. WAC 391-25-140.

2. The relevant status quo or past practice was a mandatory subject of bargaining

   The Commission consistently holds that health insurance benefits, representing a form of wages, are a mandatory subject of bargaining. *Spokane County*, Decision 11627 (PECB, 2013), *citing City of Tukwila*, Decision 9691-A (PECB, 2008). That does not mean that everything related to health insurance benefits is a mandatory subject of bargaining. For example, an employer changing its insurance broker or carriers is not a mandatory subject of bargaining, unless those changes impact the level of benefits or employee costs. *Spokane County*, Decision 11627, *citing University of Washington*, Decision 10771 (PECB, 2010).

3. Notice and an opportunity to bargain the proposed change was not given or notice was given but an opportunity to bargain was not afforded and/or the change was a *fait accompli*

   An employer contemplating a change in a mandatory subject of bargaining must give adequate notice to the union prior to making a decision in order to allow for a reasonable opportunity to bargain. If the employer fails to do so and then implements the decision, the employer risks presenting the action as a *fait accompli* – a decision that has already been made or an action that has already occurred. *Wenatchee School District*, Decision 11138 (PECB, 2011), *citing City of Edmonds*, Decision 8798-A (PECB, 2005), *aff'd*, Decision 11138-A (PECB, 2012). In determining whether a *fait accompli* has occurred, the Commission focuses on the circumstances as a whole, and whether the employer provided a meaningful opportunity to bargain. *Clover Park Technical College*, Decision 8534-A (PECB, 2004), *citing Seattle School District*, Decision 5733-B (PECB, 1998); *Wenatchee School District*, Decision 11138, *aff'd*, Decision 11138-A.

4. An actual change to the status quo or past practice occurred

   In order for there to be a "unilateral change" giving rise to a duty to bargain, there must be some change in the status quo. No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours or working conditions. *Washington Public Power Supply System*, Decision 6058-A

(PECB, 1998), *citing City of Yakima,* Decision 3564-A (PECB, 1991), *Clark County Fire District 6,* Decision 3428 (PECB, 1990).

Val Vue Sewer District, Decision 8963; *City of Tukwila,* Decision 10536-A (PECB, 2010).[4]

In determining whether a union has met its burden of proving an unfair labor practice charge, the trier of fact is not at liberty to fill in gaps. *Seattle School District,* Decision 11161 (PECB, 2011), *citing Reardan-Edwall School District,* Decision 5750 (PECB, 1996), *aff'd,* Decision 5750-A (PECB, 1997), *aff'd,* Decision 11161-A (PECB, 2013).

RELEVANT FACTS

This agency certified the bargaining unit on December 3, 2013, as: "All full time employees of the Port of Anacortes performing facilities and maintenance services, excluding seasonal employees, supervisors, confidential employees, and all other employees." The employees elected the union as the exclusive bargaining representative for the purpose of bargaining with their employer. *Port of Anacortes,* Decision 11942 (PORT, 2013).[5] The union represents a bargaining unit of approximately five full-time employees in the facilities and maintenance services. The parties began to bargain their first collective bargaining agreement (CBA) on April 10, 2014. At the time of the hearing, the parties were still negotiating the terms of the CBA.

The Port of Anacortes Personnel Manual, Chapter 4.1, provides, in relevant part, for the following health and welfare benefits to all regular full-time Port employees: "Medical, Dental & Vision Health Insurance (Employee and dependents are generally covered. Cost sharing is determined annually at the sole discretion of the Port.)" While different provisions of the personnel manual have different effective or revised dates, Chapter 4.1 was in effect at the time of the December 3, 2013 certification of the bargaining unit.

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[4] Examiner's Order adopted by the Commission under *City of Tukwila,* Decision 10536-B (PECB, 2010), with a modified Order defining the *status quo ante* for the bargaining unit employees affected by the employer's unilateral act.

[5] *See footnote 2.*

On February 28, 2014, the employer e-mailed the union's business agent, Tyler Ashbach, to advise that the current Regence plan "will no longer be available due to Federal regulations. In an effort to maintain the status quo, our Broker has found a nearly identical plan with Regence." The employer's e-mail offered to meet briefly with Ashbach in order to "come to understanding on these changes," which the employer indicated would affect open enrollment in March and finalize on April 1, 2014.

On March 13, 2014, the parties met to discuss the change in medical benefits. Ashbach testified that he was joined by three other bargaining team members at the March 13 meeting. One of the team members was Rich Austin Senior, a retired longshoreman who assisted the bargaining unit in putting the union's initial CBA proposals together. According to Ashbach's testimony, during the March 13 meeting the employer proposed a memorandum of understanding (MOU) "to go ahead and make that change of the insurance." Ashbach testified that he never saw the proposed MOU in writing and neither party offered the MOU as an exhibit at the hearing. Ashbach testified that he didn't have the authority to make the decision right there on the spot and wanted to gather more facts and look at the whole package together.

After meeting with Lindsey Herrick, Human Resources Generalist, and Jill Brownfield, Admin and Finance Services Manager, Ashbach sent the employer an undated letter proposing that the employer pay $500 to each bargaining unit member as a "token of good faith," on or before April 1, 2014. The letter advised that thereafter, health care would be considered "negotiated" and the $500 payment would not be "referenced or otherwise included in contract bargaining which is set to commence in late March."

Ashbach testified that after the March 13 meeting Austin checked with the employer's insurance broker regarding the Regence plan. According to Ashbach, Austin was advised by the broker that the employer's current insurance plan was expiring on March 31 and that the employer's chosen plan "was the closest they could get to that plan."

Open enrollment for the new plan began in March 2014, and the 2014-2015 Regence plan was to become effective April 1, 2014. Neither party offered evidence of the exact dates of open enrollment for employees.

On March 25, 2014, Herrick responded via e-mail to Ashbach's undated letter advising that, "Regence is discontinuing its current medical plan which is currently available to all Port employees; several changes have been imposed on the plan which are outside our control. Therefore, the Port has a business necessity and legal necessity of accepting the revised plan." The employer's March 25, 2014 e-mail advised that as soon as it became aware of Regence discontinuing its current medical plan, it notified the union "of these changes." The e-mail explains the employer's belief that at the nearly hour-long March 13 meeting "the union was able to ask questions and to articulate its concerns," and offered the Union the opportunity to discuss its concerns further. Finally, the March 25 e-mail identified that the employer had a duty to bargain the impacts and effects of the changes imposed by Regence on the health care plan, and it was prepared to do so. The employer offered to discuss the changes further at the first bargaining session on April 10, 2014. The employer also offered the union the opportunity to schedule a different time for such a discussion if it preferred. Ashbach testified that he did not recall responding to the employer's March 25 e-mail.

The employer implemented the Regence plan on April 1, 2014, which provided medical benefits to all regular full-time employees. Tammy Masalonis, Independent Health Producer with MacGregor Benefits, testified to the changes made in health insurance benefits between the 2013-2014 Regence plan and the 2014-2015 Regence plan. Masalonis has assisted the employer in choosing health care benefits for its employees since 2009. Masalonis testified that she works with over 50 insurance carriers throughout Washington State. The Regence Summary of Benefits and Coverage corroborated Masalonis' testimony: that the 2013-2014 plan carried the same name, "Regence Blue Shield: Innova," had the same co-pays, and the same deductible as the 2014-2015 plan. Masalonis further testified that the out-of-pocket expense cap for an individual employee increased from $2,000/member in 2013-2014 to $3,000/member in 2014-2015. Under

the 2014-2015 plan, co-pays, deductibles, prescription drugs, premiums, and balance bill charges were now included in the out-of-pocket maximum.[6]

Another change to the 2013-2014 plan was the removal of the annual limit on what the plan pays, formerly $2,000,000. Masalonis characterized the latter two changes as beneficial to the employees and were a result of implementation of the Affordable Care Act (ACA). Masalonis also indicated that the employer is of such a small size that they have to "take what the insurance carriers give them, they're not of the size where they can negotiate the benefits." Regence no longer offered the 2013-2014 plan in its current state due to federal health care reform and had to come into compliance, offered Masalonis. The Examiner credits Masalonis testimony as a third-party resource, based on her knowledge of the evidence admitted via her testimony, her time working with the employer, and her general industry experience working with other insurance carriers.

ANALYSIS

Did the employer change the status quo during negotiations for a first collective bargaining agreement by changing health insurance benefits for bargaining unit employees without providing an opportunity for bargaining? If so, did the employer carry its burden of proving the affirmative defense of business necessity in regard to its change in health insurance benefits without bargaining?

The parties' arguments regarding health insurance benefits as a mandatory subject of bargaining and bargaining obligations

The union asserts that medical benefits are a mandatory subject of bargaining and that the employer did not provide the union with an opportunity for input or bargaining over the selection

[6] Masalonis explained that if a person were afflicted with a serious ailment under the 2013-2014 plan, he would pay the $500 deductible, 10% up to $2,000 for out-of-pocket expenses, prescription drug co-pays up to $3,000, plus co-pays. The true cost, therefore, being $5,500 ($500 + $2,000 + $3,000) plus any additional co-pays. Due to federal health care reform, per Masalonis, under the 2014-2015 plan, each of those costs are folded into the $3,000 total out-of-pocket cost, so $3,000 is the individual employee's final true cost, not $5,500.

of the replacement plan. Rather, the union believes the employer presented the change in benefits as a *fait accompli.*

While the employer agrees that health care benefits are mandatory subjects of bargaining and that there is a general prohibition on unilaterally changing mandatory subjects of bargaining, the employer asserts that it had both a legal and business necessity to make the change. Such necessities in this case, argues the employer, relieve the employer of its bargaining obligation.

The Examiner applies the *Val Vue* analysis as follows:

Existence of a relevant status quo or past practice

The first step is to determine the relevant status quo. Where a new bargaining unit is concerned, the relevant status quo is determined as of the date of the filing of the union's petition for representation. *Central Washington University*, Decision 10967-A, *citing Val Vue Sewer District*, Decision 8963. Here, the union filed the representation petition on October 7, 2013.

The Personnel Manual, Chapter 4.1, provides for medical, dental, and vision health insurance for all regular full-time employees. Chapter 4.1 indicates that cost sharing is determined annually at the sole discretion of the employer. The health care benefits offered at the time the union filed the representation petition was the 2013-2014 Regence plan as described above. Therefore, the 2013-2014 Regence plan was the relevant status quo.

The relevant status quo or past practice was a mandatory subject of bargaining

Health insurance benefits, as in this case, are a mandatory subject of bargaining, akin to wages. *Spokane County*, Decision 11627, *citing City of Tukwila*, Decision 9691-A. Applying the *City of Richland* balancing test and taking into consideration that the changes from the 2013-2014 plan to the 2014-2015 plan impacted the level of benefits and employee costs, the Examiner finds that the health insurance benefits and changes to the plan in this case are a mandatory subject of bargaining.

Notice and an opportunity to bargain the proposed change was not given or notice was given but an opportunity to bargain was not afforded and/or the change was a *fait accompli*

The employer met the notice requirement for the mandatory subject of health insurance benefits when it sent the February 28, 2014 e-mail to Ashbach. However, when the health insurance benefits changes were presented to the union, they were presented as an irrevocable decision, or *fait accompli.* The February 28, 2014 e-mail indicated that the broker found a "nearly identical plan with Regence," and the employer "would like to meet briefly [with the union] about this issue so we can *come to understanding on these changes.*" (Emphasis added). Testimony reflects that open enrollment for employees was sometime in March 2014. The March 25, 2014 e-mail further solidifies that the employer's decision to change to the 2014-2015 Regence plan had already been made, acknowledging that as soon as the employer became aware "of these changes," it notified the union.

Regarding the March 13, 2014 meeting, Herrick testified that "we went over the plan changes." Brownfield and Herrick both testified that historically an annual e-mail is sent to all employees advising them of any medical benefits changes as soon as the employer becomes aware of those changes. Neither party submitted evidence of such a 2014 e-mail. However, Herrick testified a mandatory benefits meeting with all employees was held prior to the April 1, 2014 implementation. The exact date of the mandatory benefits meeting was not offered into evidence.

Based on the totality of the evidence presented, the Examiner finds the employer presented the union with the change in health care benefits as a *fait accompli*. The employer's decision to choose the Regence Innova 2014-2015 plan was made *before* the employer provided the February 28, 2014 notice to the union, and *at the very least*, by the time the parties met on March 13, 2014.

Was there a change to the status quo for health insurance benefits?

The union argues that the employer was required to maintain the current level of benefits and was required to bargain with the union over changes that might need to be implemented. The employer points to its personnel manual which requires the employer to provide all regular full-

time employees with medical, dental, and vision health insurance. The employer further asserts that the personnel manual does not require the employer to provide its employees with any specific level of benefits.

In order for there to be a "unilateral change" giving rise to a duty to bargain, there must be some change in the status quo. *Washington Public Power Supply System*, Decision 6058-A. The relevant status quo in this case, the 2013-2014 Regence plan, changed in its offering of benefits to bargaining unit employees. A change to that status quo, regardless of whether construed as beneficial or not, is still a change to the relevant status quo.

The level of benefits provided at the time the union filed its petition as the sole bargaining representative, and later, at the time the union was certified by this agency were those provided in the 2013-2014 Regence plan. That plan contained an individual employee out-of-pocket expense cap ($2,000), and a cap on the annual limit of what the plan paid ($2,000,000). As such, the 2014-2015 increase in the out-of-pocket expense cap for individual employees from $2,000 to $3,000, and the 2014-2015 removal of the $2,000,000 annual limit, were changes to the status quo for health insurance benefits offered to the bargaining unit employees.

Affirmative Defenses

Even where an employer presents its decision to change a mandatory subject of bargaining as a *fait accompli*, the employer may still be relieved of its bargaining obligation through any affirmative defenses it asserted. *City of Vancouver*, Decision 11276 (PECB, 2012). The employer bears the burden of proof as to any affirmative defense. WAC 391-45-270(1)(b).

The Employer's answer to the underlying complaint raised the affirmative defenses of business and legal necessity. The employer's post-hearing brief asserts it was faced with more than a compelling need to accept a change in the employer's medical insurance as a direct result of federal law requirements. The union's post-hearing brief argued that the employer did not support any of its affirmative defenses by evidence and only offered vague, generalized assertions.

The Commission has explained the necessity defense as:

> Necessity, either business or legal, is an affirmative defense which the respondent bears the burden of establishing. A respondent claiming a defense of legal necessity to a unilateral change must prove that: (1) a legal necessity existed; (2) the respondent provided adequate notice of the proposed change; and (3) bargaining over the effects of the change did, in fact, occur or the complainant waived bargaining over the effects of the change.

City of Vancouver, Decision 11276, *citing Skagit County*, Decision 8886-A (PECB, 2007).

The Commission rejected a business necessity defense where a letter from an insurance carrier was discredited to support the defense. In that case, the conclusion reached was that the employer itself had solicited the change announced in the carrier's letter. *City of Omak,* Decision 5579-A (PECB, 1997), *citing Spokane County*, Decision 2167-A (PECB, 1985).

This case is more similar to the Commission's findings in *Cowlitz County,* Decision 7007-A (PECB, 2000). In that case, the employer became aware that the employees' medical insurance would lapse if it did not take the initiative to provide insurance to bargaining unit members. The employer was found to be faced with a business necessity to provide different insurance coverage, or the coverage would lapse. Here, the employer provided testimony that the 2013-2014 Regence Innova plan could not be continued due to changes in federal health care reform, or the ACA. The union did not refute the employer's repeated citation to the ACA, nor did it supply any evidence to the contrary. Both the union's and employer's testimony support that the health benefits plan in effect in 2013-2014 could not be continued.

The employer provided notice to the union of the changes in health insurance benefits over a month before the change was implemented. The employer's correspondence with the union prior to the April 1, 2014 implementation reflected a willingness to meet and bargain the effects of the changes from the 2013-2014 plan to the 2014-2015 plan. The parties in fact met and discussed the effects prior to the April 1, 2014 implementation and the employer's March 25, 2014 e-mail reflected a willingness to continue the discussion of effects bargaining in the forthcoming contract negotiations. The union's post-hearing brief pointed to Ashbach's undated letter, where

the union offered that the health care issue would be considered negotiated in exchange for the payment of $500 to each bargaining unit member, as both a proposal and a request to bargain over the change in plans. However, a party's collective bargaining obligation under RCW 41.56.030(4) does not compel them to agree to proposals or make concessions. *Snohomish County*, Decision 9834-B (PECB, 2008), *citing Mason County*, Decision 3706-A (PECB, 1991). Further, neither the union's undated letter, nor the testimony regarding the nature of the meetings held between February 28, 2014, and the initial CBA negotiations sessions in April 2014, indicate that the union specifically requested effects bargaining regarding the health insurance benefits.

Based on the totality of the evidence, the employer met its burden of proof to support its affirmative defense of business necessity.

CONCLUSION

From the time the representation petition was filed with the Commission, the employer was obligated to maintain the parties' status quo regarding mandatory subjects of bargaining, including health insurance benefits. The status quo at the time of the petition regarding health insurance benefits was the 2013-2014 Regence Innova Plan. The employer failed to maintain the status quo by changing the health insurance benefits offered to bargaining unit employees. The employer presented the change in health insurance benefits as a *fait accompli*. However, based on the totality of the evidence, the employer met its burden of proof to support its defense of business necessity. The employer also continued to meet with the union and bargain the effects of the changes to health insurance benefits. As such, the complaint for a unilateral change to health insurance benefits for bargaining unit members, without providing an opportunity for bargaining, is dismissed.

FINDINGS OF FACT

1. The Port of Anacortes is a public employer within the meaning of RCW 53.18.010.

2. International Longshore and Warehouse Union, Local 25, is an employee organization within the meaning of RCW 53.18.010. The union represents a bargaining unit of approximately five facilities and maintenance services employees for the purposes of collective bargaining.

3. Port districts and their employees shall be covered by the provisions of Chapter 41.56 RCW except as otherwise provided in Chapter 53.18 RCW. RCW 53.18.015.

4. The union filed a representation petition with the Commission under Chapter 391-25 WAC on October 7, 2013.

5. The bargaining unit certified by this agency on December 3, 2013, is described as: "All full time employees of the Port of Anacortes performing facilities and maintenance services, excluding seasonal employees, supervisors, confidential employees, and all other employees." *Port of Anacortes*, Decision 11942 (PORT, 2013).

6. The health care benefits offered at the time of the union's representation petition and agency certification was the 2013-2014 Regence plan and as such, was the relevant status quo.

7. Applying the *City of Richland* balancing test and taking into consideration that the changes from the 2013-2014 plan to the 2014-2015 plan impacted the level of benefits or employee costs, the Examiner finds that the health insurance benefits and changes to the plan in this case are a mandatory subject of bargaining.

8. On February 28, 2014, the employer e-mailed the union's business agent, Tyler Ashbach, to advise that the current Regence plan "will no longer be available due to Federal regulations. In an effort to maintain the status quo, our Broker has found a nearly identical plan with Regence." The employer's e-mail offered to meet briefly with Ashbach in order to "come to understanding on these changes," which the employer indicated would affect open enrollment in March and finalize on April 1, 2014.

9. The 2014-2015 increase in the out-of-pocket expense cap for individual employees from $2,000 to $3,000, and the 2014-2015 removal of the $2,000,000 annual limit, were changes to the status quo for health insurance benefits offered to the bargaining unit employees.

10. The employer presented the union with the change in health care benefits as a *fait accompli*. The employer's decision to choose the Regence Innova 2014-2015 plan was made *before* the employer provided the February 28, 2014 notice to the union, and *at the very least*, by the time the parties met on March 13, 2014.

11. The employer provided testimony that the 2013-2014 Regence Innova plan could not be continued due to changes in federal health care reform, or the Affordable Care Act (ACA). The union did not refute the employer's repeated citation to the ACA, nor did it supply any evidence to the contrary.

12. Both the union's and employer's testimony support that the health benefits plan in effect in 2013-2014 could not be continued.

13. Tammy Masalonis, Independent Health Producer with MacGregor Benefits, has assisted the employer in choosing health care benefits for its employees since 2009. Masalonis indicated that the employer is of such a small size that they have to "take what the insurance carriers give them, they're not of the size where they can negotiate the benefits."

14. The Examiner credits Masalonis testimony as a third-party resource, based on her knowledge of the evidence admitted via her testimony, her time working with the employer, and her general industry experience working with other insurance carriers.

15. The employer provided notice to the union of the changes in health insurance benefits over a month before the change was implemented. The employer's correspondence with

the union prior to the April 1, 2014 implementation reflected a willingness to meet and bargain the effects of the changes from the 2013-2014 plan to the 2014-2015 plan.

16. Neither the union's undated letter, nor the testimony regarding the nature of the meetings held between February 28, 2014, and the initial CBA negotiations sessions in April, 2014, indicate that the union specifically requested effects bargaining regarding the health insurance benefits.

17. Based on the totality of the evidence, the employer met its burden of proof to support its affirmative defense of business necessity.

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. Based on Findings of Fact 6 through 17, the employer did not refuse to bargain or violate RCW 41.56.140(4) or (1).

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 24th day of December, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAGE A. GARCIA, 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.