STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, Complainant, vs. WASHINGTON STATE FERRIES, Respondent.	CASE 26885-U-14 DECISION 12466 - MRNE CASE 26886-U-14 DECISION 12467 - MRNE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On December 1, 2014, the International Organization of Masters, Mates and Pilots (union) filed two unfair labor practice complaints with the Public Employment Relations Commission against Washington State Ferries (employer). The complaints, which involved two separate bargaining units subject to identical contract language, alleged that the employer violated Chapter 47.64 RCW by making a unilateral change to employee sick leave buy back, without providing an opportunity to bargain. On December 11, 2014, Unfair Labor Practice Manager Jessica J. Bradley issued a preliminary ruling finding a cause of action existed and consolidating the complaints for processing. The matter was assigned to Examiner Karyl Elinski. The parties waived their right to a hearing and instead filed a joint stipulation of facts and exhibits on May 8, 2015. The parties filed post-hearing briefs and reply briefs to complete the record.

ISSUE

Did the employer make a unilateral change to a mandatory subject of bargaining by ceasing payments to employees under the sick leave buy back provisions in the parties' collective bargaining agreement (CBA), without providing an opportunity to bargain?

The employer made a unilateral change to a mandatory subject of bargaining by ceasing payments to employees under the sick leave buy back provisions in the parties' CBA. However, the employer did not have an obligation to bargain the change because the provisions concerning sick leave buy back in the CBA are preempted by statute. The employer did not commit an unfair labor practice, and the union's complaints are dismissed.

BACKGROUND

The union represents employees in both the Masters and Mates bargaining units. At the time of the events in question the employer and union were parties to a CBA in effect from July 1, 2013, through June 30, 2015. Rule 14.12 of the parties' CBA addresses sick leave buy back and, in general, allows bargaining unit employees to be compensated at full value (on a one-to-one ratio) for up to three days of sick leave per each calendar quarter. The quarters are defined as January 1 to March 31, April 1 to June 30, July 1 to September 30, and October 1 to December 31. In regard to the buy-back ratio, CBA Rule 14.12 provides:

> A. Employees with four hundred eighty (480) hours of accrued sick leave at the beginning of a quarter may receive a cash payment of one (1) day (eight [8] hours at one hundred percent [100%]) of sick leave that was accrued during that calendar quarter provided the employee worked as scheduled in the calendar quarter, excluding the use of compensatory time off and vacation leave.
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> B. Employees with seven hundred twenty (720) hours of accrued sick leave at the beginning of a quarter may receive a cash payment of two (2) days (sixteen [16] hours at one hundred percent [100%]) of sick leave that was accrued during that calendar quarter provided the employee worked as scheduled during that calendar quarter, excluding the use of compensatory time off and vacation leave.
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> C. Employees with nine hundred sixty (960) hours of accrued sick leave at the beginning of the quarter may receive a cash payment of three (3) days (twenty-four [24] hours at one hundred percent [100%]) of sick leave that was accrued during that calendar quarter provided the employee worked as scheduled in the calendar quarter, excluding the use of compensatory time off and vacation leave.

Under this language, bargaining unit employees are eligible to receive up to 12 days (96 hours) cash payment for sick leave in a calendar year. This language has existed in the parties' CBA since at least July 1, 2005.[1]

On July 1, 2014, employer labor relations specialist Jerry Holder notified the union by letter that the employer believed CBA Rule 14.12 was in violation of RCW 41.04.340, which sets forth the state's employee attendance incentive program. RCW 41.04.340, enacted by the Legislature in 1979, applies to all eligible employees, defined as "any employee of the state." RCW 41.04.340(1). In terms of the sick leave buy back benefit, the statute specifically provides:

> In January of the year following any year in which a minimum of sixty days of sick leave is accrued, and each January thereafter, any eligible employee may receive remuneration for unused sick leave accumulated in the previous year at a rate equal to one day's monetary compensation of the employee for each four full days of accrued sick leave in excess of sixty days. Sick leave for which compensation has been received shall be deducted from accrued sick leave at the rate of four days for every one day's monetary compensation.

RCW 41.04.340(2).[2]

The employer requested that all sick leave buy back requests be held in abeyance until the parties had an opportunity to discuss the issue. On or about July 1, 2014, union representative Tim Saffle informed Holder that the union believed the sick leave buy back provisions were mandatory subjects of bargaining and that, in the event the provisions were invalid, replacement provisions must be negotiated pursuant to Rule 30 of the parties' CBA. Following this exchange the employer proposed language that mirrored the statutory provisions of RCW 41.04.340. The union did not agree to the employer's proposal. On July 7, 2014, the employer sent a fleet-wide e-mail informing bargaining unit employees that it would no longer apply the sick leave buy back provisions in CBA Rule 14.12.

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[1] The language is currently in the CBA as a "placeholder," but the parties have not agreed to any sick leave buy back provisions pending the outcome of these unfair labor practice proceedings.

[2] CBA Rule 14.12 provides sick leave cash payment benefits in terms of hours, whereas the statute provides remunerations in terms of days. For the sake of comparison, 60 days (at eight hours per day) are equivalent to 480 hours.

LEGISLATIVE HISTORY

In 1979 the Legislature first adopted a sick leave incentive program applicable to all state employees providing remuneration for unused sick leave. RCW 41.04.340. In 1980 the Legislature adopted severability provisions providing that if it revoked "any remuneration or benefits granted under this section, no affected employee shall be entitled thereafter to receive such benefits as a matter of contractual right." RCW 41.04.340(6). The legislation also provides that "[n]o employee may receive compensation under this section for any portion of sick leave accumulated at a rate in excess of one day per month." RCW 41.04.340(1). Over the years, the Legislature has amended this statute several times to reflect current issues affecting state employees.

In 2006 the Legislature adopted RCW 47.64.120(5), which provides that a provision of a collective bargaining agreement which conflicts with a statute is "valid and unenforceable."

APPLICABLE LEGAL STANDARDS

Bargaining Obligation

RCW 47.64.120(1) requires the parties to "meet at reasonable times to negotiate in good faith with respect to wages, hours, working conditions, and insurance, and other matters mutually agreed upon." Therefore, it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of its employees." RCW 47.64.130(1)(e). An employer who refuses to bargain commits a derivative violation of RCW 47.64.130(1)(a), which states that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter."

The existence of a bargaining obligation depends on whether the subject of bargaining is mandatory, permissive, or illegal. Whether a particular subject is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *Washington State Ferries (Inlandboatmen's Union of the Pacific)*,

Decision 12134-A (MRNE, 2015), *citing International Association of Fire Fighters, Local 1052 v. PERC (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

While the balancing test calls upon the Commission and its examiners to balance these two principal considerations, the test is more nuanced and is not a strict black-and-white application. Subjects of bargaining fall along a continuum. *Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134-A. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours and working conditions . . . ." RCW 41.56.030(4). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives. *International Association of Fire Fighters, Local 1052 v. PERC (City of Richland)*, 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of the case. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive.

If a subject is not a mandatory subject of bargaining, then it is either a permissive or illegal subject of bargaining. Permissive subjects of bargaining are those subjects that are considered to be remote from terms and conditions of employment, or those which are regarded as prerogatives of employers or unions. *City of Seattle*, Decision 4687-B (PECB, 1997). Illegal or prohibited subjects of bargaining are matters which neither the employer nor union have the authority to negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes, court decisions, or constitutional prohibitions. *Id.*

Unilateral Change

Unless the union clearly waives its right to bargain, an employer must give the union sufficient notice of possible changes affecting mandatory subjects of bargaining and bargain in good faith, upon union request, to agreement or impasse. *Washington State Ferries*, Decision 11825 (MRNE, 2013), *aff'd*, Decision 11825-A (MRNE, 2014). Therefore, an employer violates RCW 47.64.130(1)(e) and (a) if it implements a unilateral change on a mandatory subject of bargaining without fulfilling its bargaining obligations. *Id.*

Preemption by Statute

Preemption occurs when the Legislature states its intention, either expressly or by necessary implication, to preempt a field. *City of Seattle*, Decision 4687-B, *citing Brown v. City of Yakima*, 116 Wn.2d 556 (1991). If the Legislature is silent as to its intent to occupy a given field, resort must be had to the purposes of the legislative enactment and to the facts and circumstances upon which the enactment was intended to operate. *City of Seattle*, Decision 4687-B, *citing Lenci v. Seattle*, 63 Wn.2d 664 (1964); *Petstel, Inc. v. King County*, 77 Wn.2d 144 (1969).

ANALYSIS

Unilateral Change

The parties do not dispute that the employer's cessation of the current sick leave buy back program described in CBA Rule 14.12 resulted in a unilateral change to an established past practice. Moreover, the parties do not dispute that the change could have a materially adverse effect on the wages of employees, who have the potential to receive more remuneration under CBA Rule 14.12 than under RCW 41.04.340. On July 7, 2014, the employer provided the union with notice of its intent to cease payments to employees under CBA Rule 14.12, and the issue thus concerns whether the employer had an obligation to bargain with the union over the sick leave buy back program.

Bargaining Obligation Over Sick Leave Buy Back

RCW 47.64.120(1) requires the parties to "meet at reasonable times to negotiate in good faith with respect to wages, hours, working conditions, and insurance, and other matters mutually agreed upon." As the Commission has found that sick leave benefits are mandatory subjects of bargaining,[3] it would initially appear that the bargaining obligation extends to changes made to the sick leave buy back provisions in CBA Rule 14.12. However, because RCW 41.04.340 preempts CBA Rule 14.12, and RCW 47.64.120(5) invalidates and renders unenforceable CBA Rule 14.12, the employer did not have an obligation to bargain the change.[4]

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[3] *Green River Community College*, Decision 4008-A (CCOL, 1993); *City of Wenatchee*, Decision 6517-A (PECB, 1999).

[4] The union in the present case argues that in addition to operating as a sick leave incentive program, CBA Rule 14.12 concurrently operates as a salary enhancement program. It thus concludes that Rule 14.12 is not subject to the limitations of RCW 41.04.340. Such an argument is specious at best, as it would place the Legislature in a position of specifying all possible misuses for each of its benefits programs, when the statutory scheme is already clear as to purpose and intent.

Preemption and Conflict With the Statute

By enacting a statute regarding sick leave buy back that is applicable to all state employees, the Legislature preempted the authority of the employer to bargain over the issue. The Legislature could not have been more clear as to its intent in the enactment of the provisions of RCW 41.04.340 as the sole source of sick leave buy back remunerations.

First, RCW 41.04.340 clearly sets forth the process and substance by which an employee is to be compensated for any accrued, yet unused, sick leave. The legislation explicitly limits sick leave buy back to no more than 12 days per year. While an employee *may* request to cash out his or her sick leave benefits, he or she can only do so in January following any year in which he or she accrued a minimum of 60 days of sick leave. In contrast, under CBA Rule 14.12, an employee may request to cash out sick leave once every quarter. Moreover, under RCW 41.04.340, an employee requesting compensation for unused sick leave under the statute is entitled to one day of pay for every *four* days of unused sick leave. The Legislature's use of the mandatory word "shall" in RCW 41.04.340(2) makes it very clear that there should be no deviation from this one-to-four buy back ratio. Yet, under CBA Rule 14.12, an employee is entitled to one day of compensation for every one day of unused sick leave, or a one-to-one ratio of compensation to sick leave reduction.

Second, the Legislature clearly articulated its intent for the statute to be the employer's sole authority for granting sick leave buy back to employees. RCW 41.04.340(6) unequivocally states:

> Should the legislature revoke any remuneration or benefits granted under this section, no affected employee shall be entitled thereafter to receive such benefits as a matter of contractual right.

In this section, the Legislature indicates that it has the sole authority to grant remuneration for sick leave buy back and, should that authority be revoked by the Legislature, no further contractual right to the remuneration or benefits remains. The statutory scheme granting sick leave buy out is comprehensive and has had regular amendments to reflect issues related to state employees (e.g., addressing the application of this statute for temporary salary reductions for state employees from July 1, 2011, through June 29, 2013 [RCW 41.04.340(2) and (3)]; permitting agencies to adopt policies granting employees an equivalent medical expense reimbursement plan in lieu of sick leave cash out [RCW 41.04.340(7), (8), and (9)].

In addition, RCW 47.64.120(5), first enacted in 2006, provides:

> Except as otherwise provided in this chapter, if a conflict exists between an executive order, administrative rule, or agency policy relating to wages, hours, and terms of conditions of employment and a collective bargaining agreement negotiated under this chapter, the collective bargaining agreement shall prevail. *A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.* (emphasis added).

This language perfectly mirrors the language in RCW 41.80.020(6), which applies to all state employees with some exceptions not relevant to this discussion. In *Western Washington University*, Decision 9309-A (PSRA, 2008), the Commission explained that "RCW 41.80.020(6) makes it patently clear that collective bargaining provisions prevail . . . unless the collective bargaining provision conflicts with a statute." In that case, the employer failed to identify any statute that would prohibit the employer or the union from bargaining annual leave or holidays.[5] Since the provisions in RCW 41.80.020(6) are identical to those in RCW 47.64.120(5), the reasoning in *Western Washington University* is appropriate in this matter.

In the present case, the employer has adequately identified RCW 41.04.340 as the statute against which CBA Rule 14.12 conflicts because it allows an employee to request compensation for unused sick leave more frequently and at a higher ratio than allowed by the statute. Given that RCW 41.04.340(6) expresses the Legislative intent to be the sole and exclusive authority on granting sick leave buy back, no allowance for bargaining these provisions has existed since RCW 47.64.120(5) became effective.

Timing of the Employer's Claim on Invalidity

The provisions of CBA Rule 14.12 have existed since at least the 2005-2007 collective bargaining agreement. Once RCW 47.64.120 was amended to include the language in subsection (5) in 2006, the provisions in CBA Rule 14.12 became invalid by operation of law. The parties continued to apply CBA Rule 14.12 until July 7, 2014, despite the existence of this statutory invalidation. The employer could have recognized the conflict and notified the union eight years prior. The employer failed to timely notify the union of this provision and ratified successor agreements

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[5] The Commission and the Examiner also noted that RCW 1.16.050 expressly permitted collective bargaining regarding holidays.

containing this language.[6] Despite the employer's lack of diligence, RCW 47.64.120(5) and RCW 41.04.340 invalidate CBA Rule 14.12.

Although the employer did not commit an unfair labor practice in its refusal to bargain the specific provisions of CBA Rule 14.12, under extensive precedent, the employer retains an obligation to bargain the effects of the changes. In addition, the employer's unclean hands may be taken into account should there be future litigation in other forums regarding sick leave buy back.

CONCLUSION

The parties are subject to a CBA that allows employees to request, on a quarterly basis, compensation for unused sick leave of up to three days on a one-to-one ratio. The employer notified the union that it believed the provisions of the CBA were invalid and was unwilling to agree to any replacement provisions on sick leave buy back that did not mirror the statutory mandate. On July 7, 2014, and thereafter, the employer ceased honoring sick leave buy back requests pending the outcome of these unfair labor practice proceedings. Given that the sick leave buy back provisions are preempted and controlled by statute, the employer was under no obligation to bargain and, therefore, did not commit an unfair labor practice when it ceased cashing out unused sick leave under CBA Rule 14.12.

FINDINGS OF FACT

1. The Washington State Ferries is an "employer" within the meaning of RCW 47.64.011(4).

2. The International Organization of Masters, Mates and Pilots (union) represents bargaining units of Masters and Mates employed by Washington State Ferries and is a "ferry employee organization" within the meaning of RCW 47.64.011(7).

3. The parties were subject to a collective bargaining agreement (CBA) in effect from 2013 through 2015.

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[6] The union's position that the Legislature has allowed this language to exist in the last several contracts is well-taken. There is no evidence, however, that the Legislature addressed the specific provisions at issue. In fact, under RCW 47.64.170(9), the statutory scheme provides that the Governor only submits a request for funds necessary to implement a collective bargaining agreement, and the Legislature shall only approve or reject such a request.

4. The 2013-2015 CBA contained Rule 14.12, which allowed employees to request sick leave buy back compensation up to four times per year, at the rate of one day of pay for every one day of unused sick leave.

5. RCW 41.04.340 applies to all state employees and mandates that an employee can only cash out his or her sick leave benefits once per year in January following any year in which he or she accrued a minimum of 60 days of sick leave. An employee requesting compensation for unused sick leave is entitled to one day of pay for every four days of unused sick leave.

6. RCW 41.04.340(6) allows the Legislature to revoke any sick leave buy back remuneration and eliminates any contractual rights a state employee would have in such remuneration.

7. RCW 47.64.120(5) invalidates and renders unenforceable any contractual provision that is in conflict with a statute.

8. In July 2014 the employer notified the union of its intent to cease cashing out sick leave under CBA Rule 14.12 because the employer believed it was invalid under state law. The employer requested that the CBA's sick leave buy back provisions be held in abeyance until the parties had an opportunity to discuss the issue.

9. On or about July 1, 2014, the union informed the employer it believed the sick leave buy back provisions were mandatory subjects of bargaining and that, in the event the provisions were invalid, replacement provisions must be negotiated pursuant to Rule 30 of the parties' CBA.

10. The employer offered to place sick leave buy back provisions in the parties' CBA that mirrored the statutory provisions of RCW 41.04.340, but the union rejected this proposal.

11. On July 7, 2014, the employer sent a fleet-wide e-mail informing bargaining unit employees that it would no longer apply the sick leave buy back provisions in CBA Rule 14.12.

12. The parties allowed the current Rule 14.12 provisions to remain in the CBA pending the outcome of these unfair labor practice proceedings.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 47.64 RCW.

2. Sick leave buy back is a mandatory subject of bargaining.

3. As described in Findings of Fact 4 through 7, the sick leave buy back provisions of CBA Rule 14.12 are preempted and conflict with the statutory provisions of RCW 41.04.340(2).

4. Given the conflict and the statutory preemption, the employer was under no obligation to bargain concerning its decision to suspend the sick leave buy back program set forth in the CBA.

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are dismissed.

ISSUED at Olympia, Washington, this 18th day of November, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 11/18/2015

DECISION 12466 - MRNE has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 26885-U-14

EMPLOYER:	WASHINGTON STATE FERRIES
ATTN:	FRANKLIN PLAISTOWE 2ND FL RAAD BLDG 128 10TH AVE SW PO BOX 47500 OLYMPIA, WA 98504 labor.relations@ofm.wa.gov (360) 407-4140
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RECORD OF SERVICE - ISSUED 11/18/2015

DECISION 12467 - MRNE has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 26886-U-14

EMPLOYER:	WASHINGTON STATE FERRIES
ATTN:	FRANKLIN PLAISTOWE 2ND FL RAAD BLDG 128 10TH AVE SW PO BOX 47500 OLYMPIA, WA 98504 labor.relations@ofm.wa.gov (360) 407-4140
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