STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ISLAND COUNTY DEPUTY SHERIFF'S GUILD, Complainant, vs. ISLAND COUNTY, Respondent.	CASE 25133-U-12 DECISION 12584 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

James M. Cline, Attorney at Law, and *Jordan L. Jones*, Attorney at Law, Cline & Casillas, for the Island County Deputy Sheriff's Guild.

Deborah A. Boe, Special Deputy Prosecuting Attorney, Island County Prosecuting Attorney Gregory M. Banks, for Island County.

The Island County Deputy Sheriff's Guild (union) represents a bargaining unit of commissioned law enforcement officers through the rank of lieutenant. On September 14 and October 16, 2012, the union filed a complaint and an amended complaint with the Public Employment Relations Commission alleging Island County (employer) refused to bargain by unilaterally changing compensation for bargaining unit employees who were on leave due to workplace injuries. The Commission issued a preliminary ruling and deferral inquiry on October 24, 2012, and on November 15, 2012, granted the employer's deferral request. The Commission revoked the deferral on August 26, 2015, after confirming the parties showed no progress toward arbitrating a grievance of the dispute. The case was then assigned to Examiner Jamie L. Siegel who held a hearing on January 7, 2016. The parties submitted briefs on March 7, 2016.

ISSUE

The issue, as framed by the preliminary ruling, is whether the employer refused to bargain in violation of RCW 41.56.140(4) and RCW 41.56.140(1) by unilaterally changing how it

compensated employees on leave due to workplace injuries, without providing an opportunity for bargaining.[1]

The union failed to prove the employer unilaterally changed how it compensated employees on leave due to workplace injuries. The evidence establishes that the employer maintained a longtime past practice of paying employees 100 percent of their regular wages and the employees submitting the temporary total disability payments to the employer. The union failed to establish a past practice or new status quo in which employees had the option of retaining the temporary total disability payments and receiving 100 percent of their regular wages.

BACKGROUND

This case involves the payment of bargaining unit employees who suffer workplace injuries and receive temporary total disability payments (L&I payments) from the State of Washington under RCW 51.32.090.

When commissioned law enforcement officers employed by certain public employers suffer workplace injuries and receive L&I payments, they are also entitled to receive a disability leave supplement from their employer. RCW 41.04.500. The disability leave supplement when combined with L&I payments equals the same regular pay the employee would have received for full-time service. RCW 41.04.505. The supplement begins on the sixth calendar day from the date of injury. RCW 41.04.510. One-half of the supplement is charged against the employee's accrued paid leave, if available, and one-half is paid by the employer. *Id.* Nothing in the law precludes employers from providing greater benefits. RCW 41.04.535.

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[1] The union's brief argues a second issue—that the employer unilaterally changed the parties' dispute resolution process. That issue was not raised in the union's complaint or amended complaint. As a result, the preliminary ruling did not identify it as an issue and it is not before me. *King County*, Decision 9075-A (PECB, 2007).

The union's brief also includes a section arguing its complaint was timely. The employer's brief does not address the timeliness issue. Because I am dismissing the union's amended complaint on other grounds, this decision does not address the timeliness issue.

In this case, the union argues the relevant status quo is that employees have the option of keeping the L&I payments while also receiving 100 percent of their regular wages, paid in part by accrued leave and in part by the supplement described above. This would result in employees receiving approximately 160 percent of their regular wages when they are out of work due to workplace injuries.

Policies, Practices, and Collective Bargaining Agreement

The employer introduced evidence showing that since at least in 2004 it has maintained the same practice for compensating bargaining unit employees who suffer workplace injuries: the employees receive their regular wages through use of their accrued sick leave or, if they have exhausted their sick leave, through a special sick leave bank addressed in the parties' collective bargaining agreement (CBA). After they begin receiving L&I payments, employees submit the L&I payments to the employer and those funds are used to replenish the proportionate amount of the sick leave used. The practice allows employees to receive 100 percent of their regular wages; approximately 60 percent is funded by the L&I payments, 20 percent is funded by the employees' accrued leave, and 20 percent is funded by the employer.

The employer's policy and the parties' CBA describe some parts of the process for paying employees who are receiving L&I payments. The employer's policy, which has been in place since at least 1994 and applies to all employees, provides that employees will be paid sick leave in the amount of the difference between their regular pay and the L&I payments as follows:

> Any employee who is eligible for state industrial compensation for time off because of an on-the-job injury shall be paid sick leave in the amount of the difference between his regular pay and that paid by state industrial, after the first three (3) days off the job. Full amount of sick leave shall be paid the first three (3) days. Should an employee be later paid by state industrial for the first three (3) days absence, the amount paid the employee by state industrial for the three (3) days shall be credited to Island County from the money due the employee in the next payroll period. The pro rata part of sick leave, as determined by the ratio of regular sick leave and state industrial compensation, shall be charged to the employee for time off the job.

County Policy 2.01.027.

County Policy 2.01.041 further provides, "Any employee injured on the job and using sick leave shall buy back such sick leave from payments made by the Department of Labor and Industries."

The union and employer were parties to a CBA at all times pertinent to this matter. Section 10.8 of the CBA describes a bank of sick leave hours available to employees who have exhausted their regular sick leave and that is designed to supplement the L&I payments as follows:

> All LEOFF II regular employee's [sic] who have been employed through Civil Service examination shall be provided with two hundred forty (240) hours special sick leave, which shall be used only to supplement the employee's industrial insurance benefit should the employee be injured on the job during his or her first calendar year on the job. . . . for all succeeding years, these employees shall be provided with one hundred sixty (160) hours special sick leave which shall only be utilized in the circumstances as herein described.

Additionally, Section 10.12.2 of the CBA addresses a wage supplement and states:

> And when sick leave is so used [to make up any deficiency in full straight time earnings] the required supplemental amount shall be charged against the officer's sick leave account only on the basis of ½ of the amount required for the wage supplement for work related disability or illness.

While this subsection of the CBA appears on its face to apply to employees on light duty, the evidence demonstrates that the parties have interpreted the subsection more broadly and have applied it to situations where an employee is on leave due to a workplace injury and is not on light duty.

The 2008-2009 Negotiations and Davis Agreement

The record shows that in 2008 and 2009, the union unsuccessfully tried to modify the practice and sections of the CBA addressing how employees are compensated when they are on leave due to workplace injuries. In 2008 and 2009 the parties negotiated a successor CBA. During negotiations, the union proposed to allow bargaining unit employees to keep the L&I payments and receive 100 percent of their regular wages with the following proposed language: "Employees receiving time loss insurance payments from Labor and Industries shall have the option of buying back sick leave with those payments or may chose [sic] to keep the time loss payments. Time loss

payments from Labor and Industries shall not be considered income by the Employer." Ultimately, the union withdrew its proposal and the CBA language remained unchanged.

During the same general time period, bargaining unit employee Scott Davis filed a grievance about his compensation while he received L&I payments. In part, he alleged he should have been able to retain the L&I payments and use accrued leave. While processing the grievance, the employer gathered information showing that from 2003 through 2007, at least 10 employees, including four bargaining unit employees, followed the practice that included submitting the L&I payments to the employer to "buy back" their sick leave. Robert Braun, the employer's labor negotiator, credibly testified that the union shared no information with the employer contradicting this practice.

On May 12, 2009, the parties signed an agreement settling Davis's grievance. The pertinent terms of the settlement agreement included a provision that the employer would not pursue recovery of the L&I payments made to Davis as well as the following:

1. This Grievance Settlement shall apply to all three of the Guild Bargaining Units.

   . . .

4. The Guild agrees that this settlement is singular in nature, does not establish and [sic] precedent for any future claim of compensation from multiple sources where an employee could receive income in excess of the CBA stated straight-time wages as setout in the wage table of hourly wages/salary.

5. The Guild agrees that County policy PPPM Section 2.01.027 (or its successor), combined with Section 10.12.2 (or its successor section) of the CBA are the governing terms and conditions of employment regarding any desire by any employee to receive "top-up" compensation while in a time loss situation and that in no event shall any employee be eligible to receive any income from all cumulative sources funded or partly funded by the County where such employee income would result in income in excess of 100% of the employee's regular straight-time weekly/monthly CBA income of the subject employee. In the event of any occurrence of payments, by mistake or otherwise, violative of the foregoing the County shall have the right to a recovery of all amounts overpaid from any amounts yet to be paid to the overpaid employee as provided by law.

Employer Errors and Employee Refusals

During parts of 2011, the employer's department administering pay and the department administering L&I payments were not effectively communicating and coordinating with each other. As a result, in early 2011, the employer did not promptly know that two bargaining unit employees, Harry Uncapher and Leif Haugen, who were receiving 100 percent of their pay through the use of accrued leave had received L&I payments and failed to submit them to the employer.

In early to mid-2011, another bargaining unit employee, Rick Norrie, began receiving L&I payments that he did not submit to the employer. When asked to submit the payments to the employer, Norrie refused. As a result, the employer withheld some of Norrie's pay to offset some of the L&I payments he failed to submit. The employer used the funds to replenish the proportionate amount of sick leave Norrie used. The union filed a grievance concerning the employer's actions, which it eventually withdrew. During this same time period, the employer learned that Uncapher and Haugen also kept the L&I payments while receiving 100 percent of their regular wages. The employer sought repayment from Uncapher and Haugen.

In the fall of 2011, bargaining unit employee Brian Legasse was injured on the job and started receiving L&I payments while also receiving 100 percent of his regular wages through use of accrued leave. The employer requested that Legasse submit the L&I payments to the employer; he refused. In response to the employer's efforts to recover the funds from Legasse that it considered to be overpayments, Legasse, Norrie, Haugen, Uncapher, and the union hired attorney Christon Skinner to contest the employer's actions. Skinner sent a detailed letter dated December 23, 2011, to one of the employer's prosecutors, David Jamieson. In the letter, Skinner claimed the employer's actions were unlawful and requested the employer's written agreement "to not take any further action to enforce this policy or to discipline any employee for failure to adhere to the policy, until this issue is resolved (whether by agreement or litigation if that becomes necessary)."

The employer, through Jamieson, agreed to further research the union's assertions. Jamieson agreed the employer would temporarily suspend its request for Legasse to submit the L&I payments to the employer or reimburse the employer while the employer researched the issue. As

a result, the union agreed to hold off going to court to challenge the employer's actions. Jamieson documented the temporary nature of the suspension in an e-mail to Skinner dated January 12, 2012:

> In response to your request, Island County is willing to temporarily suspend its demand that Brian Legasse turn over L & I time-loss benefit checks he now has in his possession (or receives hereafter) to buy back the pro-rata portion of the sick leave he was or is being paid covering the same period of time while the County works on its substantive response to your letter. Of course, the County's substantive response to come may or may not then demand turn over of those amounts.

By letter dated February 15, 2012, Elizabeth McIntyre, an attorney acting on behalf of the employer, responded to Skinner's letter in detail. She reviewed the employer's practices, explained her disagreement with the union's analysis and conclusions, and articulated that the union's recourse was through the CBA's grievance procedure.

By e-mail dated March 12, 2012, the employer's human resources director informed Legasse his next paycheck would account for the L&I payments he received from February 16 through 28, 2012, and had not submitted to the employer. Legasse and Skinner objected, arguing there was an agreement with Jamieson preventing such recovery of funds. By e-mail, Skinner asked Jamieson to intervene.

In response, Jamieson e-mailed Skinner on March 14, 2012, and identified the grievance process as the avenue for the union to pursue concerns with the employer's actions. The e-mail reminded Skinner that Jamieson's prior e-mail "only applied temporarily while the county worked on its substantive response to [Skinner's] letter."

ANALYSIS

Applicable Legal Standards

Chapter 41.56 RCW requires a public employer to bargain with the exclusive bargaining representative of its employees. The duty to bargain extends to mandatory subjects of bargaining, including wages, hours, and working conditions. RCW 41.56.030(4). The law limits the scope of mandatory subjects to those matters of direct concern to employees. *International Association of*

Fire Fighters, Local 1052 v. Public Employment Relations Commission, 113 Wn.2d 197, 200 (1989). Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer must give a union sufficient notice of possible changes affecting mandatory subjects of bargaining and, upon union request, bargain in good faith until reaching agreement or impasse. *Wapato School District*, Decision 10743-A (PECB, 2011).

When a union alleges an employer made a unilateral change, the union bears the burden of establishing that the dispute involves a mandatory subject of bargaining and that the employer made a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). The union must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

A past practice is a course of conduct between the parties, over an extended period of time, which the parties have acknowledged. A past practice may be so well understood between the parties that they consider it unnecessary to include the practice in a collective bargaining agreement. *Whatcom County*, Decision 7288-A. Parties may use their past practices to construe ambiguous provisions of a collective bargaining agreement or to define an issue in which the agreement is silent. *Kitsap County*, Decision 8292-B. Where the parties' course of conduct with respect to a mandatory subject of bargaining is so well established that it constitutes a past practice, a party commits an unfair labor practice if it unilaterally changes that practice without fulfilling its bargaining obligation. *Id.*

To establish a past practice, a party must prove the following two basic elements: (1) a prior course of conduct and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *Id.* To establish these elements, "[i]t must . . . be shown that the [prior course of]

conduct was known and mutually accepted by the parties." *Id.* The party claiming a past practice bears the burden of proof. WAC 391-45-270(1)(a).

Application of Standards

The parties agree, and I find, that payment to employees injured on the job is a form of wages and, therefore, a mandatory subject of bargaining.

The parties disagree about what constitutes the relevant status quo and whether the employer unilaterally changed it. As described in more detail below, the evidence demonstrates the relevant status quo is the past practice as described by the employer; that is, employees on leave due to workplace injuries submit the L&I payments to the employer and receive 100 percent of their regular wages (approximately 60 percent is funded by the L&I payments, 20 percent is funded by the employees' accrued leave, and 20 percent is funded by the employer).

Bargaining History, Davis Agreement, and Union President Confirm the Past Practice

The union's amended complaint alleges that until 2011, the past practice had been for employees to receive their regular wages while retaining the L&I payments. In 2011, according to the union's amended complaint, the employer

> no longer wanted to adhere to the past practice of paying employees their regular pay funded by sick leave. The County insisted, contrary to an explicit RCW provision, that it could compel employees, upon threat of discharge, to sign their Labor & Industries checks over to the County and credit those checks against the County's sick leave obligations.

As detailed below, the union failed to prove its allegations. The record includes no evidence supporting the union's complaint that prior to 2011 the past practice was for employees to keep the L&I payments and receive 100 percent of their regular wages.

In 2008 and 2009, while the parties negotiated a successor CBA, the union proposed to modify the CBA language to state that employees may choose to keep the L&I payments while also maintaining their regular wages. The proposal reflects what the union now asserts is the relevant

status quo. Eventually, the union withdrew its proposal and the CBA language remained unchanged.

During the processing of the Davis grievance, the employer documented that from 2003 through 2007, at least 10 employees, including four bargaining unit employees, submitted the L&I payments to the employer to "buy back" their sick leave. The union offered no evidence to contradict this practice.

At hearing the union tried to distance itself from the Davis agreement, suggesting that the union's attorney at the time lacked authority to enter into the agreement. In its brief, the union argues its attorney at the time lacked authority to amend the CBA through the Davis agreement.[2]

The Davis agreement did not amend the CBA. Instead, the Davis agreement helps interpret the CBA. The agreement allowed Davis to avoid the employer's recovery of the L&I payments, while requiring the three bargaining units represented by the union to acknowledge the employer's interpretation of the employer's policies and the CBA. In a key term of the agreement, the union agreed the employer's policies and the CBA govern, and employees receive no more than 100 percent of their regular wages when on time loss. The union also agreed the employer could recover any overpayments as provided by law. Read in context, the Davis agreement's "singular in nature" reference indicated that the union would not use Davis's receipt of more than 100 percent of his wages as precedent for others to do so.

The Davis agreement helps to frame the practices for compensating employees injured in the workplace. While requiring employees to submit the L&I payments to the employer was not the approach favored by the union, it reflected the practices of the past and the practices moving forward. Union president Darren Crownover was asked about the Davis agreement on cross

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[2] Credible evidence indicates the union's attorney had the union's authorization to enter the Davis agreement. Additionally, the evidence reveals the union president was actively engaged in ensuring the agreement was delivered to the employer and implemented. Any suggestion that the union president was misinformed or misled about the agreement lacks credibility.

examination. He agreed the employer's practice was the same before and after the Davis agreement and that the employer's position has never changed:[3]

> Q. . . . So this—in your mind this [Davis agreement] did not change the practice the county had before?
>
> A. Correct. It just basically left things status quo; it didn't change anything.
>
> Q. And was the county's position, before, during and after this, that it has the right to require employees to turn over their L&I checks?
>
> A. It is.
>
> Q. And has the county's position ever changed on that?
>
> A. No, it hasn't.

Crownover's testimony, along with the record as a whole, establishes the prior course of conduct between the parties necessary to prove the past practice. Although requiring employees to submit the L&I payments to the employer was not the approach the union advocated for in bargaining, Crownover nonetheless acknowledged that employees on leave due to workplace injuries would receive no more than 100 percent of their regular wages and would be expected to submit the L&I payments to the employer.

Employer Errors Did Not Change the Past Practice or Relevant Status Quo

As described in the background section of this decision, in early 2011 Uncapher and Haugen failed to turn in the L&I payments, kept the payments, and received 100 percent of their regular wages. These errors were a result of the employer's department administering pay and the department administering L&I payments not effectively communicating and coordinating with each other. The union does not allege these errors established a new practice or status quo.[4] Even if the union alleged the mistakes created a new status quo, the allegation would fail.

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[3] Tr. 140:7-16.

[4] The union's amended complaint alleges that until 2011, the practice had been for employees to retain their regular wages while keeping the L&I payments.

The instances when Uncapher and Haugen failed to turn in the L&I payments do not constitute a change in past practice or a new status quo. Braun credibly testified that the employer made mistakes in 2011 due to the lack of communication between the employer's departments and that those events did not represent an intent to change the employer's practices. Crownover testified that the employer sought repayment from Uncapher and Haugen and acknowledged that the employer did not acquiesce to them keeping the L&I payments and 100 percent of their regular wages.[5]

The record demonstrates another mistake the employer made during a portion of this time period: the employer failed to pay its part of the LEOFF II supplement. The evidence demonstrates that when the union informed the employer of the error, the employer promptly corrected it. The union did not allege that this error, or the correction of the error, constituted a unilateral change.

Agreement Between Skinner and Jamieson Did Not Create a New Status Quo

The union argues that Skinner and Jamieson reached an agreement that created a new status quo. It alleges the employer unilaterally changed that status quo when the employer informed Legasse his next paycheck would account for L&I payments received during a specified period of time. The union's brief states, "The terms of the status quo that the parties adopted, established that litigation would be frozen, and the County would not act unilaterally until the parties implemented a process to resolve any remaining disputes." The union's brief further argues, "The County unfairly blindsided the Guild, which had foregone its rights to obtain a Superior Court restraining order in exchange for a commitment to a stand down." The union failed to prove its assertion that the parties created a new status quo.

Through Skinner, the union tried to convince the employer that the employer's requirement that employees submit the L&I payments to the employer and receive only 100 percent of their regular wages was erroneous and unlawful. The employer agreed that while it researched the legal issues, it would temporarily suspend its planned actions to require Legasse to submit the L&I payments to the employer and to take deductions from his pay. Once the employer received and shared with

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[5] Tr. 124:2-12.

the union McIntyre's legal opinion that did not support the union's position, the employer lifted the temporary suspension and announced its plan to take action. While Skinner testified that he considered McIntyre's letter the employer's "opening salvo," the record demonstrates the employer agreed to nothing more than a short-term stay of the employer's practice. Jamieson's e-mails are clear. The agreement between Jamieson and Skinner did not create a new status quo.

The Characterization of L&I Payments for Tax Purposes is Not Relevant

At hearing the union identified how L&I payments are characterized for tax purposes as a relevant issue and cited RCW 41.04.505, which states:

> The disability leave supplement shall be an amount which, when added to the amount payable under RCW 51.32.090 will result in the employee receiving the same pay he or she would have received for full time active service, taking into account that industrial insurance payments are not subject to federal income or social security taxes.

As the examiner in this case, my role is to determine whether the employer violated the Washington State Public Employees' Collective Bargaining Act. Whether and how the parties take into account the characterization of L&I payments for tax purposes is not before me. The union failed to establish that the characterization of L&I payments was part of any relevant status quo and that the characterization was unilaterally changed.

CONCLUSION

The union failed to prove the employer unilaterally changed how it compensated employees on leave due to workplace injuries. The evidence establishes that the employer maintained a longtime past practice of paying employees 100 percent of their regular wages and the employees submitting the L&I payments to the employer. The union failed to establish a past practice or new status quo in which employees had the option of retaining the L&I payments and receiving 100 percent of their regular wages.

Employer's Request for Attorney Fees

The employer seeks an order requiring the union to pay the employer's attorney fees due to what it describes as the union's "egregious conduct and self-help over the last seven years" as well as the union presenting "an altered exhibit and misleading testimony." In developing orders and remedies, my authority stems from RCW 41.56.160. The law authorizes remedial orders to prevent unfair labor practices. There is no complaint before me alleging that the union committed an unfair labor practice. As a result, I lack authority to award the requested remedy. *Anacortes School District*, Decision 2464-A (EDUC, 1986).

FINDINGS OF FACT

1. Island County is a public employer within the meaning of RCW 41.56.030(12).

2. The Island County Deputy Sheriff's Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents commissioned law enforcement officers through the rank of lieutenant.

3. The union and employer were parties to a collective bargaining agreement (CBA) at all times pertinent to this matter.

4. Payment to employees injured on the job is a form of wages and, therefore, a mandatory subject of bargaining.

5. Since at least 2004, the employer has maintained the same practice for compensating bargaining unit employees who suffer workplace injuries: the employees receive their regular wages through use of their accrued sick leave or, if they have exhausted their sick leave, through a special sick leave bank addressed in the parties' CBA. After they begin receiving L&I payments, employees submit the L&I payments to the employer and those funds are used to replenish the proportionate amount of the sick leave used. The practice allows employees to receive 100 percent of their regular wages; approximately 60 percent

is funded by the L&I payments, 20 percent is funded by the employees' accrued leave, and 20 percent is funded by the employer.

6. The employer's policy and the parties' CBA describe some parts of the process for paying employees who are receiving L&I payments. The employer's policy, which has been in place since at least 1994 and applies to all employees, provides that employees will be paid sick leave in the amount of the difference between their regular pay and the L&I payments.

7. County Policy 2.01.041 further provides, "Any employee injured on the job and using sick leave shall buy back such sick leave from payments made by the Department of Labor and Industries."

8. Section 10.8 of the CBA describes a bank of sick leave hours available to employees who have exhausted their regular sick leave and that is designed to supplement the L&I payments.

9. Additionally, Section 10.12.2 of the CBA addresses a wage supplement the parties have applied to situations where an employee is on leave due to a workplace injury and is not on light duty.

10. In 2008 and 2009, while the parties negotiated a successor CBA, the union proposed to modify the CBA language to state that employees may choose to keep the L&I payments while also maintaining their regular wages. Eventually, the union withdrew its proposal and the CBA language remained unchanged.

11. Also in 2008, bargaining unit employee Scott Davis filed a grievance about his compensation while he received L&I payments. In part, he alleged he should have been able to retain the L&I payments and use accrued leave. While processing the grievance, the employer gathered information showing that from 2003 through 2007, at least 10 employees, including four bargaining unit employees, followed the practice that included submitting the L&I payments to the employer to "buy back" their sick leave. Robert Braun,

the employer's labor negotiator, credibly testified that the union shared no information with the employer contradicting this practice.

12. On May 12, 2009, the parties signed an agreement settling Davis's grievance.

13. The agreement allowed Davis to avoid the employer's recovery of the L&I payments while requiring the three bargaining units represented by the union to acknowledge the employer's interpretation of the employer's policies and the CBA. In a key term of the agreement, the union agreed the employer's policies and the CBA govern, and employees receive no more than 100 percent of their regular wages when on time loss. The union also agreed the employer could recover any overpayments as provided by law. Read in context, the Davis agreement's "singular in nature" reference indicated that the union would not use Davis's receipt of more than 100 percent of his wages as precedent for others to do so.

14. The Davis agreement helps to frame the practices for compensating employees injured in the workplace. While requiring employees to submit the L&I payments to the employer was not the approach favored by the union, it reflected the practices of the past and the practices moving forward. Union president Darren Crownover agreed the employer's practice was the same before and after the Davis agreement and that the employer's position—that it has the right to require employees to submit the L&I payments to the employer—has never changed.

15. Crownover's testimony, along with the record as a whole, establishes the prior course of conduct between the parties necessary to prove the past practice. Although requiring employees to submit the L&I payments to the employer was not the approach the union advocated for in bargaining, Crownover nonetheless acknowledged that employees on leave due to workplace injuries would receive no more than 100 percent of their regular wages and would be expected to submit the L&I payments to the employer.

16. During parts of 2011, the employer's department administering pay and the department administering L&I payments were not effectively communicating and coordinating with

each other. As a result, in early 2011, the employer did not promptly know that two bargaining unit employees, Harry Uncapher and Leif Haugen, who were receiving 100 percent of their pay through the use of accrued leave had received L&I payments and failed to submit them to the employer. The employer sought repayment from Uncapher and Haugen. These instances do not constitute a change in past practice or a new status quo. The employer's mistakes did not represent an intent to change the employer's practices. The employer did not acquiesce to Uncapher and Haugen keeping the L&I payments and 100 percent of their regular wages.

17. In early to mid-2011, another bargaining unit employee, Rick Norrie, began receiving L&I payments that he did not submit to the employer. When asked to submit the payments to the employer, Norrie refused. As a result, the employer withheld some of Norrie's pay to offset some of the L&I payments he failed to submit. The employer used the funds to replenish the proportionate amount of sick leave Norrie used. The union filed a grievance concerning the employer's actions, which it eventually withdrew.

18. In the fall of 2011, bargaining unit employee Brian Legasse was injured on the job and started receiving L&I payments while also receiving 100 percent of his regular wages through use of accrued leave. The employer requested that Legasse submit the L&I payments to the employer; he refused. In response to the employer's efforts to recover the funds from Legasse that it considered to be overpayments, Legasse, Norrie, Haugen, Uncapher, and the union hired attorney Christon Skinner to contest the employer's actions.

19. Skinner sent a detailed letter dated December 23, 2011, to one of the employer's prosecutors, David Jamieson. In the letter, Skinner claimed the employer's actions were unlawful and requested the employer's written agreement "to not take any further action to enforce this policy or to discipline any employee for failure to adhere to the policy, until this issue is resolved (whether by agreement or litigation if that becomes necessary)."

20. The employer, through Jamieson, agreed to further research the union's assertions. Jamieson agreed the employer would temporarily suspend its request for Legasse to submit

the L&I payments to the employer or reimburse the employer while the employer researched the issue. As a result, the union agreed to hold off going to court to challenge the employer's actions. Jamieson documented the temporary nature of the suspension in an e-mail to Skinner dated January 12, 2012.

21. By letter dated February 15, 2012, Elizabeth McIntyre, an attorney acting on behalf of the employer, responded to Skinner's letter in detail. She reviewed the employer's practices, explained her disagreement with the union's analysis and conclusions, and articulated that the union's recourse was through the bargaining agreement's grievance procedure.

22. By e-mail dated March 12, 2012, the employer's human resources director informed Legasse his next paycheck would account for the L&I payments he received from February 16 through 28, 2012, and had not submitted to the employer. Legasse and Skinner objected, arguing there was an agreement with Jamieson preventing such recovery of funds. By e-mail, Skinner asked Jamieson to intervene.

23. In response, Jamieson e-mailed Skinner on March 14, 2012, and identified the grievance process as the avenue for the union to pursue concerns with the employer's actions. The e-mail reminded Skinner that Jamieson's prior e-mail "only applied temporarily while the county worked on its substantive response to [Skinner's] letter."

24. Once the employer received and shared with the union McIntyre's legal opinion that did not support the union's position, the employer lifted the temporary suspension and announced its plan to take action. While Skinner testified that he considered McIntyre's letter the employer's "opening salvo," the record demonstrates the employer agreed to nothing more than a short-term stay of the employer's practice. Jamieson's e-mails are clear. The agreement between Jamieson and Skinner did not create a new status quo.

25. The employer maintained a longtime past practice of paying employees on leave due to workplace injuries 100 percent of their regular wages and the employees submitting the L&I payments to the employer. That is the relevant status quo. The union failed to

establish a past practice or new status quo in which employees had the option of retaining the L&I payments and receiving 100 percent of their regular wages.

26. The union failed to establish that the characterization of L&I payments was part of any relevant status quo and that the characterization was unilaterally changed.

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. By its actions described in Findings of Fact 16 through 18 and 21 through 25, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and RCW 41.56.140(1) by unilaterally changing how it compensated employees on leave due to workplace injuries, without providing an opportunity for bargaining.

ORDER

The amended complaint charging an unfair labor practice filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 6th day of June, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jamie Siegel

JAMIE L. SIEGEL, Examiner

This order will be the final order of the agency unless a notice of appeal is filed

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 06/6/2016

DECISION 12584 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBER: 25133-U-12

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