STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE 1199NW, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 22340-U-09-5695 DECISION 10608-A - PSRA DECISION OF COMMISSION

Douglas Drachler McKey & Gilbrough, LLP, by *Paul Drachler*, Attorney at Law, and *Martha Barron*, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Mark K. Yamashita*, Assistant Attorney General, for the employer.

On March 18, 2009, Service Employees International Union Healthcare 1199NW (union) filed a complaint alleging that the University of Washington (employer) committed an unfair labor practice by unilaterally suspending and failing to implement a bargained-for employee wage increase. Examiner Starr Knutson issued a decision holding that the employer did not commit an unfair labor practice by unilaterally withdrawing from the "tentative agreement" it reached with the union, but did commit an unfair labor practice by failing to immediately request bargaining with the union once it announced its intent to withdraw from the agreement. In reaching these conclusions, the Examiner relied upon the standards announced in *State – Office of the Governor*, Decision 10353 (PSRA, 2009).[1]

The employer filed a timely notice of appeal seeking review of the Examiner's conclusion that the employer committed an unfair labor practice by failing to immediately request bargaining.

[1] *University of Washington*, Decision 10608 (PSRA, 2009).

The union filed a timely notice of cross-appeal that challenged the Examiner's conclusion that the employer was entitled to withdraw from the wage agreement it reached with the union. In the union's opinion, the facts of this case are distinguishable from *State – Office of the Gover*nor.

For the reasons set forth below, we reverse the Examiner's decision finding the employer was entitled to withdraw from its wage agreement with the union. The facts of this case demonstrate that the parties agreed that the employees' market adjustment wage increase would be implemented starting January 1, 2009, and it was implemented on that date. Absent providing notice to the union of the employer's intent to withdraw the wage increase and providing an opportunity to bargain, the employer was not entitled to withdraw the agreed-upon wage increase it had already implemented.

DISCUSSION

The parties stipulated to certain facts[2] applicable to this case which are accurately described in the Examiner's decision and we provide a brief synopsis to provide context. The union is the exclusive bargaining representative for several bargaining units at the employer's Harborview Medical Center. The employer and union were parties to a collective bargaining agreement negotiated under the provisions of Chapter 41.80 RCW, with a term of July 1, 2007 through June 30, 2009. In the summer and fall of 2008, the employer and union commenced bargaining for a successor agreement that would run from July 1, 2009 through June 30, 2011. On September 16, 2008, the parties reached a tentative agreement for a successor contract. The agreement included a provision for a "Market Adjustment Increase," which was a wage increase effective January 1, 2009 for certain employee classifications.

On November 14, 2008, Lisa Jacobs, the union's chief negotiator, received an e-mail from Daniel Kraus, the employer's chief negotiator, confirming that the market adjustment wage increase would be implemented on January 1, 2009. On January 15, 2009, Jacobs had a telephone conversation with Kraus confirming the market adjustment increases were being implemented.

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[2] Exhibit 1.

On December 18, 2008, the Director of the Office of Financial Management (OFM) issued a letter under the authority of RCW 41.80.010(3) informing exclusive bargaining representatives that the agreements recently negotiated on behalf of state employees for the 2009 - 2011 biennium were not financially feasible for the state and therefore would not be included in the Governor's budget request to the Legislature. The letter did not address the effect that the decision had on the negotiated market adjustment increase that the parties had agreed upon and implemented.

On January 23, 2009, Johnese Spisso, the employer's Vice-President for Medical Affairs and Clinical Operations for UW Medicine, announced through an e-mail to all bargaining unit employees that the market adjustment increase were being suspended. Lou Pisano, the employer's Assistant Vice President of Labor Relations, sent a letter that same day to the union notifying it of the employer's decision. The employer had not previously notified the union of its intent to rescind the market adjustment increase.

Applicable Legal Standards

In 2002, the Legislature enacted the Personnel System Reform Act of 2002 (PSRA) which substantially restructured both the collective bargaining rights of most state employees and the administration of the collective bargaining process. *Western Washington University*, Decision 9309-A (PSRA, 2008), *citing University of Washington*, Decision 9410 (PSRA, 2006). These new rights permitted employees covered by the Act the opportunity to select an exclusive bargaining representative and bargain collectively all matters affecting employee wages, hours, and working conditions. RCW 41.80.010(3); *see also Western Washington University*, Decision 9309-A.

Duty to Bargain in Good Faith

RCW 41.80.005(2) defines collective bargaining as "the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020." RCW 41.80.005(2) also states that the collective bargaining obligation "does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter."

A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees.

The Status Quo Must be Maintained

The *status quo ante* must be maintained regarding all mandatory subjects of bargaining, except where changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, *City of Yakima v. IAFF 469*, 117 Wn.2d 655. A complainant alleging a "unilateral change" must establish the relevant status quo. *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1989). An employer commits an unfair labor practice under RCW 41.80.110(1)(e) if it imposes a new term or condition of employment, or changes an existing term or condition of employment, upon its represented employees without having exhausted its bargaining obligation under Chapter 41.80 RCW. *See City of Tacoma*, Decision 4539-A (PECB, 1994). An employer also violates RCW 41.80.110(1)(e) if it presents an exclusive bargaining representative with a *fait accompli*, or if it fails to bargain in good faith, upon request. *Federal Way School District*, Decision 232-A (EDUC, 1977).

Application of Standard

Here, the analysis is straight forward. There is no question that wages are a mandatory subject of bargaining. *Federal Way School District*, Decision 232-A. When the market adjustment increase became effective on January 1, 2009, a new status quo was created that the employer was required to maintain. After January 1, 2009, if the employer wanted any changes to the market adjustment increase, it was required to first notify the union of its intent and give an opportunity for the union to request bargaining. As late as January 15, 2009, the employer told the union that the market adjustment increase was being implemented. It is of no significance to the facts presented here that the salary increase had not been fully realized by employees through their paychecks.

Thus, when the employer notified the union through the January 23, 2009 e-mails from Spisso and Pisano that the market adjustment increase was being rescinded, the employer presented its decision to change employee wages as a *fait accompli*, and committed an unfair labor practice when it unilaterally changed a term and condition of employment without first satisfying its collective bargaining obligation. A status quo ante remedy is appropriate.

The *State – Office of the Governor* Decision is Inapplicable to the Facts Presented

The Examiner held that financial circumstances permitted the employer to withdraw from what she concluded was a tentative agreement. In reaching this conclusion, the Examiner relied upon *State – Office of the Governor* as standing for the proposition that an employer may withdraw from a tentative agreement provided it articulates legitimate reasons for doing so and requests additional bargaining.

The employer argues that the *State – Office of the Governor* case provides a blueprint for allowing an employer to withdraw from a tentative agreement, particularly in light of the fact that the *State – Office of the Governor* decision was decided under Chapter 41.80 RCW. In the employer's opinion, it would be illogical to allow the state to withdraw from a tentative agreement with general government bargaining units and not afford higher education employers the same rights.

In *State – Office of the Governor*, the Office of the Governor, as the employer of state employees who collectively bargain under Chapter 41.80 RCW, negotiated a tentative agreement with this union's general government employees by October 1, 2008, as required by RCW 41.80.010(3)(a). On December 18, 2008, the Director of the Office of Financial Management (OFM) issued the letter informing this union and other exclusive bargaining representatives that the negotiated agreement would not be certified as financially feasible for the state. This union filed a complaint on behalf of its general government bargaining units alleging that the Governor committed an unfair labor practice by failing to submit to the Legislature a request for funds to implement the compensation and fringe benefit provisions of the agreement. *State – Office of the Governor*, Decision 10353.

In ruling on the complaint, the Commission found that the unique statutory structure of Chapter 41.80 RCW permitted the Governor to withdraw from a previously negotiated tentative agreement if the Director of OFM failed to certify that agreement as financially feasible. Therefore, the act of withdrawing from the tentative agreement was not by itself an unfair labor practice under the facts presented. It is important to stress, however, that the *State – Office of the Governor* decision expressly stated that the facts surrounding that case were unique, and that "it would be unwise to extrapolate from . . . specific circumstances that would permit a party to withdraw from a tentative agreement." *State – Office of the Governor*, Decision 10353, note 4.

In the case before us, the Examiner concluded that the market adjustment increase was part of the parties' tentative agreement. However, it is undisputed that the parties' agreement provided that the employees would receive the market adjustment increase as of January 1, 2009. This fact cannot be overstated. Once January 1, 2009 passed, the parties' agreement was no longer tentative, it was implemented, as it is legally impossible for a bargained-for term or condition of employment to be both tentative and implemented at the same time. As the *State – Office of the Governor* case only concerned tentative agreements, that decision is inapplicable to the facts presented here.

Furthermore, the facts of this case demonstrate that the parties intended to bargain outside of the RCW 41.80.010(3) oversights.[3] Unlike the *State – Office of the Governor* case, where the negotiated compensation and fringe benefit provisions required the Governor to request funds for implementation subject to RCW 41.80.010(3), the evidence and testimony in this case demonstrate that it was not necessary for the employer to ask the Governor to request funds to implement the market adjustment increase, and it is clear the employer intended to use other funds to implement the wage increase. Finally, there is no evidence that the parties predicated the market adjustment increase on legislative approval.

Taken as a whole, the factual situation demonstrates that the parties intended the market adjustment to be treated differently than the typical agreement negotiated under Chapter 41.80

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[3] Chapter 41.80 RCW is silent as to whether a college or university may negotiate a separate agreement to raise the compensation of bargaining unit employees that does not require the Governor to submit a budget request for necessary funding and thereby avoiding the Director of OFM oversight. The legality of the parties' agreement at the time they entered into it is not before us.

RCW. Having determined that *State – Office of the Governor* does not apply here, we next turn to the remedial aspects of the employer's decision to rescind the market adjustment increase.

Remedy

The record demonstrates that the employer eventually implemented the market adjustment increase retroactive to January 1, 2009. However, the employer refused the union's request to pay interest on the monies that the employer unlawfully withheld. If an unfair labor practice is found to have been committed, WAC 391-45-410(3) provides that monies due shall be subject to interest. Here, although the employer has restored the status quo ante by reinstituting the market adjustment increase effective January 1, 2009, it is still required to pay employees interest at the legal rate on the money for the amount of time it was unlawfully withheld.

NOW, THEREFORE, it is

ORDERED

I. The Findings of Fact, Conclusions of Law, and Order issued by Examiner Starr Knutson are VACATED.

II. The Commission issues the following:

FINDINGS OF FACT

1. The University of Washington is an institution of higher education within the meaning of RCW 41.80.005(10).

2. Service Employees International Union Healthcare 1199NW is a bargaining representative within the meaning of RCW 41.80.005(9).

3. The employer and union are parties to a collective bargaining agreement with a term of July 1, 2007 through June 30, 2009.

4. In the summer and fall of 2008, the employer and union commenced bargaining for a successor agreement that would run from July 1, 2009 through June 30, 2011.

5. On September 16, 2008, the employer and union reached a tentative agreement for the successor agreement.

6. The agreement included a provision for a market adjustment increase that would raise the salaries of employees in certain job classifications. The market adjustment increase was negotiated to become effective January 1, 2009.

7. The employer assured the union on January 15, 2009, that the market adjustment increase was being implemented.

8. On January 23, 2009, the employer sent an e-mail to bargaining unit employees informing them that the market adjustment increases were being suspended. The employer also sent a letter to the union that same day informing it of the decision.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW.

2. By unilaterally suspending the market adjustment increase without first providing notice to the union and an opportunity to bargain any change, as described in Findings of Fact 6, 7, and 8 the employer violated RCW 41.80.110(1)(a) and (e).

ORDER

1. The University of Washington, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   a. CEASE AND DESIST from:

i. Refusing to bargain with Service Employees International Union Healthcare 1199NW over the market adjustment increase.

ii. In any other manner, interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

i. Restore the *status quo ante* by paying affected employees interest at the legal rate on the monies that were unlawfully withheld from January 1, 2009, until the date it paid employees the amount owed under the market adjustment increase.

ii. Give notice to and, upon request, negotiate in good faith with Service Employees International Union Healthcare 1199NW before changing negotiated employee market adjustment increases.

iii. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

iv. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of Trustees of the University of Washington, and permanently append a copy of the notice to the official

minutes of the meeting where the notice is read as required by this paragraph.

v. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

vi. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice.

ISSUED at Olympia, Washington, this 18th day of November, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	22340-U-09-05695	FILED:	03/18/2009	FILED BY:	PARTY 2
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BAR UNIT:	ALL EMPLOYEES				
DETAILS:	Harborview Medical Center				
COMMENTS:					

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