Kitsap Transit, Decision 11098-A (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1384, Complainant, vs. KITSAP TRANSIT, Respondent.	CASE 23945-U-11-6123 DECISION 11098-A - PECB CASE 23946-U-11-6124 DECISION 11099-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cline & Associates, by *Christopher J. Casillas and Kelly Turner,* Attorneys at Law, for the union.

Summit Law Group, by *Shannon Phillips,* Attorney at Law, for the employer.

On April 7, 2011, Amalgamated Transit Union, Local 1384 (ATU or union) filed unfair labor practice complaints with the Public Employment Relations Commission alleging that Kitsap Transit (employer) breached its good faith bargaining obligations by implementing unilateral changes in mandatory subjects of bargaining and negotiating directly with employees. The union represents two bargaining units of bus drivers. One bargaining unit is comprised of routed service drivers (routed unit) and the other bargaining unit is comprised of ACCESS service drivers (ACCESS unit). The employees in these two bargaining units are collectively referred to as bargaining unit employees in this decision.

A deficiency notice was issued on May 11, 2011, and the union filed an amended complaint on June 3, 2011. A preliminary ruling was issued and Examiner Jessica J. Bradley held a hearing on December 14 and 15, 2011, and February 14, 2012. At the hearing, the union filed a motion to conform the pleadings to the facts and the motion was granted. The parties filed post-hearing briefs.

ISSUES

1. Did the employer unilaterally change mandatory subjects of bargaining by providing employees a financial incentive payment to move to the Group Health HMO health plan and/or by paying 100 percent of employees' Group Health premiums in 2011?

By unilaterally implementing a financial incentive payment to encourage bargaining unit employees to switch to the Group Health HMO plan and unilaterally eliminating employee premiums for the Group Health HMO plan in 2011, the employer refused to bargain in violation of 41.56.140(4).

2. Did the employer unilaterally remove the Premera PPO health insurance plan option for bargaining unit employees?

The employer committed an additional refusal to bargain violation when it unilaterally stopped offering the Premera PPO insurance plan or a substantially equivalent plan to bargaining unit employees in the 2011 benefit year.

3. Did the employer engage in direct dealing with bargaining unit employees over health insurance options and/or incentives?

The employer did not unlawfully circumvent the union and engage indirect dealing by giving bargaining unit employees a memo that announced the unilateral changes it was making to health insurance in 2011. The letters to employees announce unlawful unilateral changes to health benefits, but do not constitute an independent direct dealing violation.

4. Did the employer unilaterally change past practice by redacting customer's names and addresses from copies of customer complaints filed against bargaining unit members?

The employer did not have a past practice of providing the union with un-redacted customer complaints, prior to arbitration or other litigation. The employer did not unilaterally change past

practice by redacting the complainant's name and address from a customer complaint against a bargaining unit employee, when that complaint or related discipline was not scheduled for arbitration or other litigation.

APPLICABLE LEGAL STANDARDS

Bargaining Obligation

A public employer covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). 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. *Seattle School District*, Decision 10983-A (PECB, 2012); *citing Wapato School District*, Decision 10743-A (PECB, 2011). In accordance with RCW 41.56.492, when a transit employer and union are unable to agree on changes to a mandatory subject, the employer may not unilaterally implement the change; instead, the parties may proceed to mediation and, if still at impasse, to interest arbitration. *See City of Tukwila*, Decision 9691-A (PECB, 2008).

An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1). In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988). A party asserting an unfair labor practice complaint bears the burden of proving its case. WAC 391-45-270(1)(a).

Status Quo and Past Practice

"The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in

conformity with the collective bargaining obligation or the terms of a collective bargaining agreement." *City of Edmonds*, Decision 8798-A (PECB, 2005) citing *City of Yakima*, Decision 3503-A (PECB, 1998), *aff'd,* 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

The status quo is defined both by the parties' collective bargaining agreement and by established past practice. As the Commission explained in *Kitsap County*, Decision 8893-A (PECB, 2007):

> Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may reasonably be considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002), citing *City of Pasco*, Decision 4197-A (PECB, 1994).

"For a 'past practice' to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances." *City of Pasco*, Decision 9181-A, citing *Whatcom County*, Decision 7288-A.

Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or impasse concerning any mandatory subjects of bargaining. *King County*, Decision 10547-A (PECB, 2010), citing *Skagit County*, Decision 8746-A (PECB, 2006). Therefore, an employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligation. *Seattle School District*, Decision 10732-A (PECB, 2012).

For employees who are eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but rather must obtain an

award through interest arbitration. *King County*, Decision 10547-A *citing Snohomish County*, Decision 9770-A (PECB, 2008). The interest arbitration requirements are also applicable to situations where an employer desires to make a mid-term change to terms and conditions of employment. *See City of Yakima*, Decision 9062-A (PECB, 2006).

Fait Accompli

It is also an unfair labor practice for the employer to present a change to a mandatory subject of bargaining as a predetermined decision, or *fait accompli*. In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole. *City of Edmonds*, Decision 8798-A, *quoting Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

Direct Dealing

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning one or more mandatory subjects of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

However, Chapter 41.59 RCW does not preclude direct communications between employers and their union-represented employees. *See University of Washington*, Decision 10490-C (PSRA, 2011), *citing City of Seattle*, Decision 3566-A. Employers maintain the right to communicate directly with employees who are represented, provided the communication does not amount to bargaining or other unlawful activity, including making statements that tend to undermine a union's status as the exclusive bargaining representative of the employees. *University of Washington*, Decision 10490-C.

ISSUE 1: FINANCIAL INCENTIVES TO MOVE TO THE GROUP HEALTH HMO PLAN

BACKGROUND

Kitsap Transit is a public transportation organization serving Kitsap County, Washington and is overseen by a nine-member board. Jeff Cartwright (Cartwright) is the employer's Human Resources Director and was the lead negotiator for the collective bargaining agreements with the three unions representing the employer's staff; Machinists, Teamsters, and ATU.

The ATU and employer have separate collective bargaining agreements (CBAs) for the routed and ACCESS bargaining units. The routed bargaining unit CBA was effective from February 16, 2005, through February 15, 2008. The ACCESS bargaining unit CBA was effective from May 1, 2004, through April 30, 2007. In accordance with RCW 41.56, the ATU bargaining units in this case are eligible for interest arbitration. In 2010, the time the events at issue in this complaint took place, the parties were waiting to receive an interest arbitration decision to resolve terms of their successor CBAs for the routed and ACCESS bargaining units.

On December 8, 2010, the parties received the interest arbitration award for the routed and ACCESS unit's CBA's from February 16, 2008, through February 15, 2011. The interest arbitration award did not address any changes to health care.

Up until the time interest arbitration awards were issued, or agreements were reached with the union, the employer had an obligation to maintain the terms and conditions of employment under the parties expired collective bargaining agreements. Once the arbitration award was issued the employer was bound by the language in the 2008-2011 CBAs. The language on health insurance in the 2008-2011 CBAs was exactly the same as the language in the expired agreements.

The 2005-2008 routed CBA contained the following language concerning health benefits (Exhibit 1):

ARTICLE 17 - INSURANCE BENEFITS

Section 1. Medical Benefits

A. The Employer shall pay the following premium amounts for medical insurance provided by Premera Blue Cross, Group Health and Vision Service Plan.

1. Full-time and Extra-board Operators - Employer shall pay 92.3% of monthly premium amounts for Operators and dependents.

2. Part-time A board Operators - Employer shall pay 92.3% of monthly premium amounts for the Operator and two (2) dependents beginning the seventh (7th) month of employment.

3. Part-time B board Operators - The Employer shall pay 50% of the monthly premium for the Operator only beginning the seventh (7th) month of employment.

B. Insurance coverage will begin the first of the following month an Operator is eligible.

C. Full-time, Extra-board and Part-time A board Operators shall contribute 7.7% of the premium costs per month. No additional contribution by part-time B board Operators is required.

D. Part-time Operators may self-pay medical premiums for dependents who are not covered by the Employer. This provision applies only if the Operator regularly works twenty (20) hours a week.

E. The Employer shall reimburse the second $100 of the deductible costs per person, up to a maximum of $300 per family per year for eligible Operators enrolled in Premera Blue Cross.

. . . .

Section 5. Maintenance of Insurance Benefits

A. The Employer agrees to maintain medical and dental insurance for the duration of this Agreement. However, the Employer may select other carriers when it believes such selection is in its best interests, provided the benefit levels shall not be diminished.

The 2004-2007 ACCESS CBA contained the following language concerning health benefits (Exhibit 3):

ARTICLE 19 - INSURANCE BENEFITS.

Section 1 - Medical Benefits

A. The Employer shall pay the following premium amounts for medical insurance.

1. Full-time and Extra-board Operators - The employer shall pay 92.3% of monthly

2. Part-time A board Operators - The employer shall pay 92.3% of monthly premium amounts for the Operator and two (2) dependents only beginning the seventh (7th) month of employment.

3. Part-time B board Operators- The employer shall pay 50% of the monthly premium for the Operator only beginning the seventh (7th) month of employment.

B. Insurance coverage will begin the first of the following month an Operator is eligible.

C. Full-time and Extra-board Operators shall contribute 7.7% of the premium costs per month. Part-time A Board Operators shall contribute 7.7% of the premium costs per month for the Operator and two (2) dependents only. Part-time B Board Operators shall contribute 50% of the premium costs per month for the Operator only.

D. Part-time Operators may self-pay 100% of the premium costs per month for dependents who are not covered by the Employer. This provision applies only if the Operator regularly works twenty (20) hours a week.

E. The employer shall reimburse the second $100 of the deductible costs per person, up to a maximum of $300 per family per year, for eligible Operators enrolled in Premera Blue Cross.

. . . .

Section 5 - Maintenance of Insurance Benefits.

The Employer reserves the right to determine insurance carriers for life and disability benefits, provided the benefit levels are maintained.

During the 2010 benefit year ATU employees in both bargaining units could choose between: 1) Premera Blue Cross, preferred provider option (PPO) plan; 2) Group Health Cooperative, health maintenance organization (HMO) plan; or 3) no health insurance. Amongst bargaining unit

employees who utilized the employer's health insurance in 2010, approximately half chose Premera PPO and half chose Group Health HMO.

In 2010 the Premera PPO plan was more expensive than the Group Health HMO plan, which translated to a higher out of pocket premium cost for employees and a higher cost to the employer. Some employees chose the more expensive Premera PPO plan because it had a wider network of preferred provider doctors that patients could choose from. Premera PPO patients were not restricted to see doctors by geographic area which made it convenient for employees and dependents to see doctors near where they live. Under the Group Health HMO plan patients receive care at their nearest Group Health Medical Facility from a Group Health doctor. The geographic area covered by Group Health clinics is more limited than the area covered by Premera PPO. Another distinction between the plan designs is the ability to see a specialist. Under the Premera PPO plan patients were able to see specialist doctors without a referral from a primary care doctor. Under the Group Health HMO plan patients are required to obtain a referral from their primary care doctor in order to see certain types of specialists.

In or around March 2010, Cartwright began working with John Wallen (Wallen), Insurance Broker, to find a less expensive alternative to the employer's existing health benefit plans. Wallen has served as the employer's insurance broker since 1990. On March 31, 2010, Cartwright explained to Wallen, "We think we are well out of bounds with our peer groups." (Ex. 6) The employer hoped to find a plan that offered equivalent benefits at a lower cost. The employer explained it hoped to find equivalent coverage so it could change plans in 2012 without having to bargain with the union.

From May 2010 through September 2010 the employer primarily explored a contract with Group Health Options to replace the Premera plan and engaged in negotiations with Premera to attempt to lower costs. In an e-mail exchange between Cartwright and Wallen on August 10, 2010, the employer outlined a long-term strategy to have all health benefits provided by a single source while in the short term offering two different Group Health Plans: Group Health HMO and Group Health Options. (Exhibit 13).

On September 16, 2010, Wallen informed Cartwright that neither Premera nor Group Health Options offered a PPO plan within the cost parameters provided by the employer. (Exhibit 15).

On September 20, 2010, Cartwright e-mailed Wallen informing him that the employer would begin negotiations with the Machinists union and Teamsters union, in a joint session, the following week. The Machinists union and Teamsters union represent other bargaining units of Kitsap Transit employees. Cartwright explained that the employer would discuss offering the Teamsters health plan instead of the PPO.

On September 27th, Wallen e-mailed Cartwright informing him that finding a plan for only ATU employees was going to be more difficult than finding a plan under the previously discussed constraints if the Machinists and Teamsters were to be covered in a separate plan. Wallen explained that getting a bid would be especially challenging because whatever plan was offered would be competing against the Group Health HMO. In describing attempts to get a bid from Premera Wallen stated, "So, potentially, we may not be able to get a quote at all. Should that occur, we can try Regence, Aetna (there would be a small provider change there of KPS [Kaiser Permanente System]) but they may have the same concerns with the high GHC participation." (Exhibit 19).

On September 29th, Wallen forwarded Cartwright a rejection from Premera informing him that Premera's underwriters would not agree to insure only ATU bargaining unit employees, because the group was too small in light of the Group Health option that was also offered. In an e-mail Wallen explained (Exhibit 20):

> This is not good news! Premera has declined to offer a bid on the remaining ATU group per my conversation with Lesley Miller and her subsequent e-mail confirming that decision. At this point, I will remarket to Regence, Aetna and KPS (I guess, we'll see) but I'm not particularly optimistic about their response being any different than Premera's.

Cartwright responded by e-mail the same day stating, "Don't kill yourself... we may just move the ATU folks to whatever other plan we come up with, pay the difference out of pocket to make them whole and negotiate from there." (Emphasis added) (Exhibit 20).

On October 6th and 7th, Cartwright and Wallen exchanged e-mails about trying to find any PPO plan for approximately 50 people. Wallen asked Cartwright which 50 employees would need to be covered, as this information would be required by the plans themselves in order to make a bid. Cartwright responded (Exhibit 21):

> It will be either a mix of non-reps and ATU, or just non-reps that are currently on the Premera plan. It will be difficult to rely on the experience and demo information, as we may offer an incentive for people to switch to the AWC plan [existing Group Health HMO], and there is no way we can predict who will do that and the [sic] who will be left.

In an e-mail exchange on October 20th and 21st between Cartwright and Wallen, Cartwright informed Wallen (Exhibit 23):

> Tomorrow, I will negotiate with the M&T [Machinists and Teamsters] groups. We will offer incentives to move them off of Premera to the AWC GH plan and ask that they make available to the M&T groups the Teamsters plan A to anyone of them not wishing to move to GH, even with the incentives. I believe we will be successful in that endeavor.

Cartwright also e-mailed Wallen a series of questions about finding a PPO plan to which Wallen responded that he was pessimistic about finding any PPO.

Sometime in late October or early November, 2010, the bargaining units represented by the Machinists and Teamsters unions reached a tentative agreement with the employer. The Machinists and Teamsters bargaining units agreed to have the employer provide the Machinists health plan in place of offering the Premera PPO plan to employees in the Machinists and Teamsters bargaining units. This resulted in a significantly smaller employee pool than the employer had when Premera made its initial 2011 plan renew bid. The employer's agreement to move the Machinists and Teamsters bargaining units to a different health plan caused the employer to become ineligible to renew the Premera PPO plan in 2011 because of the reduced size of its eligible participant pool.

On October 25th, Cartwright e-mailed Rita DiIenno (DiIenno), union president, informing her that the employer would like to offer ATU members an incentive to move from Premera to Group Health, an incentive they had already offered to the Machinists, Teamsters, and non-represented employees. Cartwright stated (Exhibit 25): "At this time, we are uncertain if there will be any impact to the current PPO benefit level, with or without this incentive. However, if there is an impact to the current PPO benefit level, we will contact you with such."

Cartwright asked DiIenno to respond by October 29th. DiIenno responded that she would discuss the incentive with the union's executive board on November 3rd. On November 4th, DiIenno e-mailed Cartwright with a series of questions about the incentive generated during the ATU board meeting. Also on November 4th, Wallen e-mailed Cartwright informing him that no insurance plan was interested in offering a PPO plan to the remaining ATU group. Wallen summarized the search they had undertaken to find a new PPO plan.

On November 5, 2010, Cartwright e-mailed DiIenno informing her that Wallen had notified him that the employer would not be able to offer a PPO option to its employees in 2011. Cartwright explained (Exhibit 30):

> At this point, it appears that we have run out of options in trying to purchase any PPO plan for Kitsap Transit. The carriers have simply refused to quote a bid. Open enrollment is slated to start in mid-November and last through mid-December. As the issue of no PPO option impacts the ATU members, I am seeking your suggestions on what to do at this point.

This November 5, 2010, e-mail from Cartwright constituted the first notice from the employer to the ATU regarding the employer's loss of the bid from Premera for the PPO plan and inability to find comparable coverage for 2011.

On November 10th Cartwright e-mailed DiIenno a draft of an employer memorandum to bargaining unit employees. The draft memorandum informed employees of the lack of a PPO plan option for 2011, an economic incentive to switch to Group Health HMO and a one year elimination of the employee premium contribution towards the Group Health HMO plan. DiIenno responded that same day stating (Exhibit 35):

> Jeff, at this time it is not ok to distribute this material to [ATU] members, or conduct meetings with them. The employer's unilateral change to the provision of no diminished benefit of medical is unacceptable. The ATU demands to bargain any change in the medical specifically the PPO. We expect the status quo on benefits until such time as we mutually reach any agreement to change medical or until an interest arbitrator makes such a determination if we are unable to reach an agreement.

On November 18, 2010, DiIenno met with Cartwright to discuss health care options for 2011. The parties did not reach agreement over the elimination of the Premera PPO plan in 2011.

On November 18, 2010, over DiIenno's clear objections, Cartwright sent a memo to all bargaining unit employees titled "Health Insurance Update" Cartwright informed the membership that the employer was unable to continue offering Premera or obtain a PPO plan for the following year, though they would continue searching, and that the employer was offering an incentive, or transitional allowance, to switch to the Group Health plan. The memo described the allowance (Exhibit 8):

> Employees that are currently on Premera that switch to Group Health will receive a one-time lump sum payment equal to three (3) months of the employer savings in premiums between the plans. The amount of the incentive you receive will be determined by your coverage level on Premera as of December 31, 2010. Additionally, all GH premiums for all employees signed-up for GH will be paid for by Kitsap Transit for 2011. This includes those of you that are currently on GH and wish to remain on GH.

On November 18, 2010, at 6:51 P.M. DiIenno sent Cartwright and e-mail expressing the union's frustration and disagreement with Cartwright's decision to send out a memo to employees making changes to health benefits without agreement from the union.

ANALYSIS

The Commission has long held that medical benefits are a form of wages and are mandatory subjects of bargaining. *See Snohomish County*, Decision 9834-B (PECB, 2008); *City of Seattle*, Decision 651 (PECB, 1979). This case is no exception. If the employer wishes to make changes to a mandatory subject of bargaining such as health insurance, it is obligated to provide its

employees' exclusive bargaining representative with an opportunity to bargain the decision and the effects of the decision. *King County*, Decision 10547-A (PECB, 2010). Once notice has been provided, the parties must bargain in good faith to agreement or impasse unless the union waives its right to bargain. When the union represents employees who are eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but must obtain an award through interest arbitration. *See Snohomish County*, Decision 9770-A (PECB, 2008).

The employer's November 18, 2010, memo informed employees that the Premera PPO health plan was being eliminated and no replacement PPO plan was available. This resulted in employees being told they would need to change to a Group Health HMO plan or not have health insurance. The employer described its proposal to the union which included the payment incentive it offered to employees who choose to move from Premera PPO to Group Health HMO. The reality was that employees no longer had a choice of plans. Employees on Premera PPO were forced to accept the incentive payment and choose Group Health if they wanted health insurance.

From January 2011 through the time these complaints were filed on April 25, 2011, Cartwright and DiIenno continued to discuss possible options to replace the PPO plan, including self-insurance, but were not able to reach an agreement. The employer had not resumed providing a PPO option or any other replacement for the Premera PPO plan to ATU members at the time the complaint was filed.

The parties have contract language addressing health benefits. The routed and ACCESS CBAs both require employees to pay a percentage of health insurance premiums, although the exact percentage varies depending on position and length of service. Under the routed and ACCESS contracts no employees received health insurance that is paid in-full by the employer. The employer announced a unilateral change on November 18, 2010, when it informed bargaining unit employees that "premiums for all employees signed-up for GH[Group Health] will be paid for by Kitsap Transit for 2011."

The employers November 18, 2010, memo also offered bargaining unit employees on the Premera PPO additional economic incentive payments to choose Group Health insurance for 2011. These incentive payments and premium reductions were a form of wages and constituted a mandatory subject of bargaining. The employer had entered into preliminary negotiations with the union about the incentives to choose Group Health but did not reach an agreement. In fact, DiIenno clearly voiced the union's objection to a draft of Cartwright's letter and explained the union was not in agreement. Even if the parties had reached impasse regarding the creation of incentive payments, the employer would have been obligated to maintain the status quo while the parties pursued interest arbitration.

CONCLUSION

The employer's November 18, 2010, letter offering bargaining unit employees economic incentives to switch to Group Health and eliminating employees premiums contributions for the Group Health plan in 2011 unilateraly changed a mandatory subject of bargaining. The employer violated RCW 41.56.140(4) by unilaterally offering economic incentives for employees on the Premera PPO plan to switch to the Group Health HMO plan and by temporarily eliminating the employee premiums for the Group Health HMO plan in 2011 without fulfilling its bargaining obligations.

ISSUE 2: ELIMINATION OF PREMERA PPO HEALTH INSURANCE PLAN

ANALYSIS

The parties have contract language that specifically addresses health benefits. The routed unit's contract specifies medical plan offerings and states:

ARTICLE 17 - INSURANCE BENEFITS

Section 1. Medical Benefits

A. The Employer shall pay the following premium amounts for medical insurance provided by Premera Blue Cross, Group Health and Vision Service Plan.

. . . .

E. The employer shall reimburse the second $100 of the deductible costs per person, up to a maximum of $300 per family per year, for eligible Operators enrolled in' Premera Blue Cross.

The routed unit's contract langue is clear that the employer will offer two health plans, Premera Blue Cross and Group Health. The Premera plan option deductable is addressed specifically in Article 17 Section 1. E.

Article 17 of the routed CBA goes on to state:

Section 5. Maintenance of Insurance Benefits

A. The Employer agrees to maintain medical and dental insurance for the duration of this Agreement. However, the Employer may select other carriers when it believes such selection is in its best interests, provided the benefit levels shall not be diminished.

The 2004-2007 ACCESS CBA contained the following language concerning health benefits:

ARTICLE 19 - INSURANCE BENEFITS

Section 1 - Medical Benefits

A. The Employer shall pay the following premium amount's for medical insurance.

. . . .

E. The employer shall reimburse the second $100 of the deductible costs per person, up to a maximum of $300 per family per year, for eligible Operators enrolled in' Premera Blue Cross.

. . . .

Section 5 - Maintenance of Insurance Benefits

The Employer reserves the right to determine insurance carriers for life and disability benefits, provided the benefit levels are maintained.

The Access contract does not contain clear plan references like those found in the routed contract. The ACCESS contract does however address the Premera PPO plan option in Article 19 section 1.A where it describes deductible reimbursement specifically for the Premera HMO plan.

In this case the status quo medical benefits, which are addressed in contract language and are established by past practice, include a choice between the Premera PPO plan and the Group Health HMO plan. The routed barging units' CBA explicitly gives the employer the right to "select other carriers when it believes such selection is in its best interests, provided the benefit levels shall not be diminished." Under this language the employer would be able to change health carriers without bargaining, provided the benefit levels were not diminished. The ACCESS bargaining unit's CBA does not specifically address the employer's ability to select a different health insurance carrier.

The employer's November 18, 2010, memo informed employees that the Premera PPO health plan was being eliminated and no replacement PPO plan was available. The employer argues that moving employees to Group Health PPO did not result in a reduction of benefits or harm employees. Cartwright testified that from his perspective the benefits under the Group Health HMO plan were richer than those provided by the previous Premera PPO plan. It is important to note that a diminishment of benefits cannot be judged solely on the amount of money an employee will pay out of pocket. The Premera PPO provided employees a different plan design, a more geographically broad selection of doctors, and the ability to be treated by a specialist without needing prior approval from an HMO. For Premera PPO customers the employer's announcement meant changing doctors and service providers. The change in coverage disrupted some patients care and caused delays in office visits, surgeries, and procedures. (Tr. 264).

In its November 18, 2010 memo to employees the employer acknowledged that most employees who were on Premera PPO would have to switch doctors and explained that the financial incentive was being provided to ease the transition:

> Under GH, employees are able to select a primary care doctor. We have found that, in at least a few cases, some Premera doctors are on the GH provider list. So, some of you switching to GH from Premera will be able to keep your same doctor. Most, though, will not. Since we are aware that this switch in plans will require the need for most of you that currently use Premera to find another primary care doctor for you and your family members, we have offered the above incentives to ease this transition. (Emphisis added)

The change in the network of providers also caused at least one employee's college age child to lose access to care because she was attending college in southern Oregon, an area that is not covered by a Group Health facility. Under the Premera PPO plan the employee's dependent had been able to see doctors in southern Oregon where she attended college. (Tr. 276).

The parties did not reach agreement over the elimination of the Premera PPO plan. The employer testified that it has been, and continues to be, prepared to bargain in good faith with the union over options to replace the plan. There was no testimony or evidence to indicate that the employer had proposed any replacement health care plans, other than solely using the Group Health HMO. By ceasing to offer the Premera PPO or a comparable option to employees, the employer changed a mandatory subject of collective bargaining.

Employer's Business Necessity Defense

The employer argues is that it had to cease offering the Premera PPO option because Premera withdrew its renewal bid. The employer argues that it was not able to provide a comparable plan because no insurance provider would offer it an equivalent PPO plan, as evidenced by its testimony from Wallen, the employer's insurance broker, and applications to multiple plans.

Necessity, either business or legal, is an affirmative defense which the respondent bears the burden of establishing. *Cowlitz County*, Decision 7007-A (PECB, 2000).

The respondent has the burden of proof for affirmative defenses. WAC 391-45-270(1)(b). In very limited circumstances, the Commission excuses an employer from making a change without fulfilling its full bargaining obligation. Specifically, an employer may implement a unilateral change of employee wages, hours or working conditions without satisfying its obligation to bargain the decision when necessitated by compelling practical or legal circumstances. *City of Tukwila*, Decision 9691-A. An employer claiming such a business necessity defense must prove that: (1) a business necessity existed; (2) it provided adequate notice to the union of the proposed change; and (3) the parties bargained over the effects of the change or the union waived bargaining. *Skagit County*, Decision 8886-A (PECB, 2007).

When evaluating a business necessity defense, the Commission "examines all of the relevant facts and circumstances surrounding the particular event." *Cowlitz County*, Decision 7007-A (PECB, 2000). Even when an employer meets the burden of establishing a business necessity defense, the employer must still bargain the effects the decision has on mandatory subjects of bargaining.

Cartwright received clear warnings from Wallen that the actions he was taking regarding health insurance would likely make it extremely difficult and expensive, if not impossible, to continue offering an equivalent PPO health plan to bargaining unit employees. The employer made several conscious decisions that led to the elimination of the PPO plan. First, the employer instructed its insurance broker to only consider plans that were less costly than its Premera PPO plan. To maintain its existing Premera PPO coverage for 2012 the employer would have had to pay five percent more than in 2011. Then the employer decided to offer a third benefit plan, through the Machinists union, to employees in bargaining units represented by the Teamsters and Machinists unions. Removing these employees from the PPO plan option decreased the size of the employee pool and caused the remaining group of employees to become smaller and less attractive for potential insurers. Cartwright's insurance broker informed him that by allowing the Machinists and Teamsters to leave the employer's health insurance plan it was likely that the employer might "not be able to get a quote at all." The employer had the right to negotiate a separate plan for the Machinists' and Teamsters' bargaining units, but it needed to recognize that doing so would likely drive up the cost and difficulty of maintaining benefits for employees in the ATU bargaining units, which it had a legal obligation to maintain.

Wallen informed the employer that if he were able to locate a PPO plan to the remaining pool of employees, ATU members and non-represented employees, it would be more expensive than the previous Premera PPO plan due to the option of another, cheaper plan (Group Health HMO) and the small pool of employees. The employer knew that maintaining the size of the remaining employee pool was important if it wanted to find a comparable PPO plan.

The employer took further action to reduce the size of the employees in the pool for a PPO plan by unilaterally offering economic incentive payments to employees on Premera PPO to switch to Group Health HMO plan and by waiving employee premium contributions for Group Health in

2011. The employer implemented these economic incentives unilaterally, over the ATU's clear objections. By offering these incentives to bargaining unit employees the employer further reduced the pool of employees in the PPO plan. The employer offered the economic incentive knowing that the incentives would harm its ability to obtain and find a comparable PPO plan option.

The employer took actions that made providing a PPO plan less and less desirable to insurance underwriters by decreasing the insurable employee pool of employees, offering multiple plan options, and incentivizing employees to choose the cheaper plan. The employer undertook these actions in order to save money on health insurance expenditures. Cartwright knew that these actions could cause the employer to be in a position where it could not obtain a comparable PPO plan that would fall within the cost parameters it had given its benefits consultant. The employer ultimately made an economic decision to reduce it health plan expenditures without bargaining.

In attempting to identify places the employer could save money to make up for budget reductions Cartwright explained: "All directors were asked to go through certain areas to see what more we could do to prevent further service cuts and layoffs." Cartwright testified (Tr.548):

> The first thing I noticed was this huge disparity between the cost of the Premera [PPO] plan and the cost of the Group Health [HMO] plan that we purchased through AWC. Disparity was one million dollars for the two plans. So in essence, we did have about a 50/50 enrollment base, 50 percent of the employees were on Group Health, 50 percent of the employees were on Premera. And for the Premera plan we were paying approximately one million dollars more . . . per year. . . .

Cartwright went on to explain:

> Early in 2010, when I noticed this great disparity, I called John [Wallen] and I started to brainstorm a couple of things. First one is why is it that we're paying a million dollars more for Premera when my cursory overview is the benefits were about the same [as Group Health]. And secondly, it looks like it's time that the agency addressed this disparity of a million dollars and would John be willing to come in and talk to the employees, represented employees and perhaps non-reps in a kind of an employee community, if you will. (Tr. 549)

In an e-mail to Wallen on March 31, 2010, Cartwright explained (Exhibit 6):

> I will have Nancy send you a comparable we put together regarding our premiums. We think we are well out of bounds with our peer groups. We are interested in discussing how we can approach Premera with it, use it to get a better premium cost and, if need be, switch to KPS[Kaiser Permanente System], Regence or some other carrier with the same plan/benefits that would cost us less (and this time every dollar counts), as we think the overall negotiation process and change in views necessary to make the needed changes could take up to 2 years.

Ultimately the employer decided not to wait and complete the negotiation process with ATU before making changes to health care. As Cartwright explained in a September 29, 2010, e-mail to Wallen, the employer knew that it would it might have to "move the ATU folks to whatever other plan we come up with, pay the difference out of pocket to make them whole and negotiate from there." (Ex. 20). The statements in Cartwright's e-mails indicate that the employer knew it might have to make bargaining unit employees whole for the losses they suffered from losing the PPO health plan option.

In its brief the employer offered two PERC decisions that it contends support its assertion that the business necessity defense is applicable to the current set of facts. I find these cases distinguishable.

In *Skagit County*, Decision 8886-A (PECB, 2007), the County implemented a mandatory deduction from employee salary for industrial insurance in accordance with statute. The Commission found that the employer was relieved of its obligation to negotiate the decision, not the effects, due to legal necessity.[1] The key difference between *Skagit County* and the instant case is that the deduction was a requirement made by a third party, a decision which was *completely* outside the employer's control. In the present case the employer's own actions created the situation that the employer finds itself in.

In *Cowlitz County*, Decision 7007-A (PECB, 2000), a group of employees had recently ended their association with the Teamsters to form a guild. Accordingly the employees were no longer

---

[1] The test for "legal necessity" is very similar to the test for "business necessity."

eligible to continue in the Oregon Teamsters Employers Trust plan as participation is contingent on union membership. The Commission found that the employer did not commit an unfair labor practice when it no longer offered the Teamsters plan due to business necessity. As in the case above, the distinguishing characteristic between this case and the instant circumstances is the lack of any meaningful employer contribution to the decision by the third party. The employees, not the employer, made the decision that resulted in the change in health care plans.

A more applicable case is *Spokane County*, Decision 2167-A (PECB, 1985). In *Spokane County* the employer approached its existing insurance provider with the request to provide a third plan option for employees to choose from. As a condition of this plan provision, the provider required that one of the two existing plans would be removed. The union agreed with the creation of the third plan but never agreed with the removal of one of the existing plans. (The union agreed that if the new plan did not achieve a requisite number of subscribers that this new plan, not one of the original plans, would be discontinued.) Later, when the carrier discontinued one of the previous plans, the employer defended against the resulting unilateral change allegation by claiming a business necessity defense as the carrier, not the employer, decided to terminate the plan. The Commission found that, under these circumstances, the defense was untenable and that the employer had committed a refusal to bargain violation.

The facts in *Spokane County* are different than the case at hand, but the Commission's examination of the role the employer played in creating the business necessity is instructive. The Commission stated that, "[w]e agree with the union and the examiner that the carrier's action in dropping the regular plan was of the employer's own doing; therefore the business necessity defense is inapplicable. *City of Seattle*, Decision 651 (PECB, 1979)."

In *Spokane County*, the employer took steps that it knew would result in a change to a mandatory subject that was not agreed to by the union. In the present case, the employer took steps that it knew, or reasonably should have known, would result in a change to a mandatory subject that was not agreed to by the union, namely ceasing to offer a PPO plan. It is not logical to conclude that an employer's business necessity defense stands when it had a significant role impacting the situation.

In the present case, despite clear warnings from its longtime insurance consultant about the possible repercussions of its actions, the employer negotiated the removal of some bargaining units out of the PPO insurance pool. On face this is not a violation. The employer had the right to negotiate different benefits for different bargaining units. However, the employer knew that removing the Teamsters and Machinists units from the group insurance pool would make it more difficult and expensive to insure the ATU bargaining unit employees on a PPO plan. At this critical point the employer acted to further shrink the pool of employees in a PPO plan by unilaterally offering bargaining unit employees economic incentive payments to move to the less expensive Group Health HMO plan. These incentives and the reduction in the Group Health premium to zero employee contribution in 2011 ultimately made it so that no insurance carrier would even bid on providing a PPO for the remaining group of employees.

An employer cannot take actions to directly cause itself to be disqualified from being able to maintain status quo benefits (in this case the more expensive PPO health plan) and then claim business necessity as a way to avoid its bargaining obligations. The Commission has long held that the affirmative defense of business necessity should be narrowly construed. The facts in this case do not meet this standard. In this case the employer unilaterally offered economic incentives and changed the premium structure to disqualify itself from being able to offer the Premera PPO or to obtain a comparable PPO plan option.

As discussed above, when an employer and a union representing employees who are eligible for interest arbitration under RCW 41.56.492 cannot reach agreement they must seek the services of an interest arbitrator. After reaching impasse, and until the arbitrator issues his or her award, the parties must maintain the status quo.

The employer asserts, both in its communications with the union and at the hearing, that the union's demand to maintain the status quo was impossible. At this point in time it may be true that the employer cannot restore the same Premera PPO plan. However, this does not alleviate the employer from taking responsibility for the unlawful unilateral changes it made to health care benefits for bargaining unit employees. Although the employer eventually was disqualified from maintaining the Premera PPO health plan option, the employer knowingly took actions that led to its disqualification from the PPO plan. The fact that the employer was disqualified from

maintaining the Premera PPO plan, or obtaining a comparable plan because it unilaterally implemented incentives and altered employee premiums to motivate employees to switch to the Group Health HMO plan, and actively worked to decreases the number of employees in the pool, does not absolve the employer of its responsibility to maintain the agreed to benefit levels in the CBA. The Premera PPO plan is referenced in the routed and ACCESS CBAs. Offering the Premera PPO plan, or an equivalent plan in the case of the routed unit, was part of the status quo which the employer had an obligation to maintain.

The issues of business necessity and employer choice were recently addressed by the Commission in *King County*, Decision 10547-A (PECB, 2010). In that case the county negotiated with a coalition of unions to close certain offices as part of an agreed to furlough plan; the complainant in that case, the Amalgamated Transit Union, Local 587, was not part of the coalition. The offices to be closed would impact sixty-five ATU-represented employees. The county and ATU subsequently entered negotiations about possible furloughs but did not reach an agreement. The employer continued with its planned office closures which resulted in furlough days for the ATU members that had not been agreed to. The Commission found that "although outside forces may have impacted the employer's budget, no outside force compelled the employer to choose furloughs as the means by which to reduce its budget." (This same language was echoed in a subsequent decision by the Commission, *King County*, Decision 10576-A (PECB, 2010).

Similarly, in this case the employer needed to make spending reductions to balance its budget, but no outside force compelled the employer to save money on health insurance and move employees to the Group Health PPO plan. The employer chose not to provide another plan offering comparable benefits to what had been offered by the Premera PPO. As a result of its actions the employer estimates that it saved a half of a million dollars from reduced insurance premium expenditures for bargaining unit and non-bargaining unit employees.

CONCLUSION

The employer unilaterally implemented a change to the status quo its health benefits when it eliminated the Premera PPO plan for ATU represented employees and did not replace it with a

comparable plan. The employer's actions cannot be excused due to business necessity because the employer played a significant role in making itself ineligible for PPO coverage. The employer took these actions because it thought the Premera PPO plan had become too expensive and the employer was looking to save money. In this situation the employer's desire to achieve economic savings does not take precedence over the employer's obligation to negotiate over changes in mandatory subjects of bargaining and maintain the status quo of terms and conditions of employment for its represented employees. The employer was required to maintain the status quo health benefits until it reached an agreement with the union or received a decision from an interest arbitrator. I find that the employer violated RCW 41.56.140(4) by unilaterally eliminating the Premera PPO health plan option without fulfilling its bargaining obligations.

ISSUE 3: DIRECT DEALING OVER HEALTH INSURANCE

ANALYSIS

On November 18, 2010, Cartwright sent a memo entitled "Health Insurance Update" to all ATU members. In this memo Cartwright informed the membership that the employer was unable to obtain a PPO for the 2011 benefit year, though they would continue searching, and that the employer was offering an incentive, or transitional allowance, to switch to the Group Health plan. The memo described the allowance as (Exhibit 8):

> Employees that are currently on Premera that switch to Group Health will receive a one-time lump sum payment equal to three (3) months of the employer savings in premiums between the plans. The amount of the incentive you receive will be determined by your coverage level on Premera as of December 31, 2010. Additionally, all GH premiums for all employees signed-up for GH will be paid for by Kitsap Transit for 2011. This includes those of you that are currently on GH and wish to remain on GH.

The memo also stated: "we remain committed to working with the union and continue to look at all our options. . . . We have met with your union on two occasions and have set two more additional dates."

On November 10th, prior to issuing this memo, Cartwright had e-mailed a draft of the memo to DiIenno and asked her to respond with any questions or concerns. DiIenno responded a few

hours later stating that it was not acceptable with the union to distribute the memo to bargaining unit employees.

After the November 10 e-mail exchange, Cartwright and DiIenno continued to discuss the memo and insurance incentive proposal but did not reach any agreement. When Cartwright distributed the memo to bargaining unit employees on November 18, DiIenno responded immediately voicing her objection to the distribution of the memo because the union had not agreed to the changes the employer was announcing.

The employer's memo informed bargaining unit employees of a change the employer was implementing. The memo was not an attempt to negotiate directly with bargaining unit employees. The law does not completely preclude direct communications between employers and their union-represented employees. *City of Seattle*, Decision 3566-A. "Employers maintain the right to communicate directly with their employees who are represented, provided the communication does not amount to bargaining or other unlawful activity." *State - Social and Health Services*, Decision 9690-A (PSRA, 2008).

CONCLUSION

The employer's November 18, 2010, memo announced a unilateral change, which was unlawful and is addressed under Issues 1 and 2 in this decision. The employer did not use the memo to offer to negotiate with individual bargaining unit employees. In fact, in the memo the employer stated it would work with the union to find a new PPO. The employer did not circumvent the union and negotiate directly with represented employees. The union failed to establish facts to support a *prima facie* case of direct dealing. Accordingly, the union's circumvention allegation is dismissed.

ISSUE 4: REDACTING INFORMATION FROM CUSTOMER COMPLAINTS

BACKGROUND

On December 10, 2010, DiIenno, e-mailed a Transit Operations Director requesting an un-redacted copy of a customer complaint that had been filed against a union member. The union

had previously received a redacted copy of the complaint that had the complainant's name and contact information blacked out in response to an information request. On December 14, 2010, the employer informed DiIenno that in accordance with the employer's policy it would not provide the union with an un-redacted copy of the customer complaint. (Exhibit 67). The union alleged that this was a change in past practice and asserted that DiIenno had received un-redacted copies of customer complaints from the employer in the past.

ANALYSIS

In order to prove a unilateral change the union must prove: 1) that the employer had an established practice concerning a mandatory subject of bargaining, and 2) that the employer announced and/or implemented a change of that mandatory subject of bargaining without providing the union notice an opportunity to bargain or without bargaining in good faith to agreement or impasse.

DiIenno testified that in her role as a union representative she regularly sought and received un-redacted copies of customer complaints. (Tr. 151). When asked to name a specific instance of the union receiving an un-redacted customer complaint from the employer, DiIenno was unable to describe or produce any specific examples. (Tr. 190). The employer put forth several witnesses familiar with the employer's customer complaint investigation process who testified that the employer's policy and practice was to provide only redacted copies of customer complaints to the union prior to arbitration or other litigation. I find the testimony of the employer's witnesses to be credible due to their consistency and specificity.

The record revealed that there had been occasional times when the union became aware of what individual issued a complaint, *e.g.* when an operator could identify the individual from the facts of the complaint. Additionally, in one instance the union was informed that a complaint could be verified because Cartwright witnessed the complaint. In that instance, Cartwright was the complainant however he was only identified as a witness and his personal contact information was not provided to the union.

The Commission has long held that an isolated act of deviation from an established practice does not rise to the level of a unilateral change in policy. *King County*, Decision 4258-A (PECB, 1994). In this situation the established practice was that prior to the selection of an arbitrator and scheduling of the arbitration hearing, the employer provided the union with copies customer complaints that redacted the contact information for the customer. The employer had a past practice of only providing the union with un-redacted customer complaints in situations when an arbitrator had been selected and the matter was scheduled for arbitration or other litigation. In this situation the record did not contain any evidence to show that the matter in which that the union was seeking the un-redacted customer complaint was scheduled for arbitration or other litigation.

CONCLUSION

The union failed to establish that the employer's refusal to provide an un-redacted customer complaint constituted a change in past practice and thus failed to show that the employer made a unilateral change in working conditions. Accordingly, this portion of the union's complaint is dismissed.

REMEDIES

The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change, making employees whole for any loss of wages, benefits, or working conditions as a result of the employer's unlawful act, posting a notice of the violation, and reading that notice into the record at a public meeting of the employer's governing body. *City of Anacortes*, Decision 6863-B (PECB, 2001), *citing Seattle School District*, Decision 5733-A (PECB, 1997). The typical order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining. The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and gaining an unlawful advantage at the bargaining table. *Lewis County*, Decision 10571-A. In *Lewis County*, the Commission held that in certain cases where a unilateral change violation has been found, the factual circumstances may dictate a remedial order different from the regular status quo remedy in order to effectuate the purposes of statute.

The National Labor Relations Board (NLRB) has held that it will not order the revocation of an unlawfully granted unilateral wage increase, unless revocation of the wage increase is requested by the exclusive bargaining representative. *See Herman Sausage Co.*, 122 NLRB 168 (1958). The NLRB reasoned that if questions exist as to whether an unlawful unilateral change adversely affected employees, the exclusive bargaining representative is in the best position to determine whether a complete return to the preexisting status quo is appropriate to ensure that there will be no dissatisfaction on the part of the affected employees as a result of enforcement of the statute. *Herman Sausage Co.*, 122 NLRB 168, 173 (1958). The principles announced by the NLRB are applicable to Chapter 41.56 RCW. *Lewis County*, Decision 10571-A (PECB, 2011).

The Commission does not order remedies that would adversely impact employees, effectively punishing them for the employer's unlawful conduct. In *Lewis County*, the Commission looked at how to remedy unilateral changes to health benefits and explicitly stated "if any employee affected by this order benefitted from the employer's unilateral change by contributing less than what was required by the status quo ante, that employee shall not be required to reimburse the employer for the benefit received." In this case employees who normally selected the Group Health PPO plan benefited economically from the employer's unilateral decision to pay 100 percent of Group Health premiums for 2011. Employees do not have to repay the 2011 Group Health Premiums that they would have paid if the employer had maintained status quo health benefits or repay the incentive payments for switching to Group Health PPO.

Bargaining unit employees who were on the Premera PPO plan or were intending to switch to the Premera PPO plan in 2011 were uniquely impacted by the employer's actions and decision to stop offering a PPO plan. These employees should be made whole for losses they suffered as a result of the employer's unlawful unilateral change in benefits. In order to make the employees whole I am ordering the employer to pay employees who were on the Premera PPO plan in 2010[2] or documented their intent to switch to the Premera PPO plan in 2011[3] for the premium savings (difference in cost of the Premera PPO based on the original 2011 renewal bid rates and Group Health HMO 2011 rates, minus employee contribution rates as described in the collective

---

[2] As documented in Exhibit 57.

[3] As documented in Exhibit 58.

bargaining agreement) from the time the employer terminated the Premera PPO plan on January 1, 2011, until the time that the employer either: 1) restores a comparable PPO plan option, 2) reaches a negotiated agreement with the union on health benefit plans, or 3) implements health benefits as determined by an interest arbitration award that specifically addresses the elimination of the Premera PPO plan. The employer calculated the difference in cost between the Premera PPO plan and the Group Health HMO plan when it unilaterally paid employees on Premera PPO plan incentive payments for three months of the premium savings for switching to the Group Health plan. The three months of payment in premium difference that the employer paid to employees that had been on the Premera PPO in 2010 may be deducted from the total amount of back pay owed to that employee.

Requiring the employer to pay employees for the loss of the Premera PPO health benefits is necessary to ensure that the purpose of the statue is carried out. An employer should not be permitted to profit from its unilateral actions at the expense of its represented employees. If the employer were not required to pay employees back for the health benefit savings it achieved though implementing unlawful unilateral changes to mandatory subjects of bargaining there would be no incentive for employers to comply with the law and negotiate changes to benefits. These payments are the most practical way to make employees whole for the loss in benefits they have suffered, given that the employer is not able to actually restore the Premera PPO plan option. The remedial payments to employees who were on Premera in 2010 or submitted documentation to the union indicating their desire to enroll in the Premera PPO option in 2011 are necessary to make employees whole for their loss of health benefits and carry out the intent of the statue.

The union presented testimony from individual employees who experienced pain and suffering from having to delay surgery and other health care as a result of being forced to leave the Premera PPO health plan and switch to the Group Health HMO. The Commission does not have the authority to address claims of personal damages for pain and suffering of individual employees. Compensation for pain and suffering that resulted from being forced to change health plans and doctors would need to be raised in different venue and is not addressed in this decision.

FINDINGS OF FACT

1. Kitsap Transit (employer) is a public employer within the meaning of RCW 41.56.030(13).

2. Amalgamated Transit Union, Local 1384 (ATU or union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. Kitsap Transit is a public transportation organization serving Kitsap County, Washington and is overseen by a nine-member board.

4. The parties (union and employer) had separate collective bargaining agreements (CBA) for the routed and ACCESS bargaining units. The routed bargaining unit CBA was effective from February 16, 2005, through February 15, 2008. The ACCESS bargaining unit CBA was effective from May 1, 2004, through April 30, 2007.

5. In accordance with RCW 41.56, the ATU bargaining units in this case are eligible for interest arbitration.

6. For most of 2010, the parties were waiting to receive an interest arbitration decision to resolve terms of their successor CBAs for the routed and ACCESS bargaining units and were operating under the terms of their expired CBAs.

7. On December 8, 2010, an arbitrator issued the interest arbitration award for the routed and ACCESS unit's CBA's from February 16, 2008, through February 15, 2011. The interest arbitration award did not address any changes to health care.

8. The language on health insurance in the 2008-2011 CBAs for the routed and ACCESS bargaining units was exactly the same as the language in the expired CBAs described in Finding of Fact 4.

9. Jeff Cartwright (Cartwright) is the employer's Human Resources Director. At all material times Cartwright was an agent of employer.

10. Rita DiIenno (DiIenno) was the president and business agent for the union during the time period at issue in the complaint. At all material times DiIenno was an agent of the union.

11. In or around March 2010, the employer began working with John Wallen (Wallen), an insurance broker and consultant, to try to find a less expensive alternative to the employer's existing Premera PPO health plan.

12. The status quo medical benefits for ATU employees are addressed in contract language and established by past practice. They include a choice between: 1) Premera Blue Cross, preferred provider option (PPO) plan; 2) Group Health Cooperative, health maintenance organization (HMO) plan; or 3) no health insurance.

13. Amongst bargaining unit employees who utilized the employer's health insurance in 2010, approximately half chose Premera PPO and half chose Group Health HMO.

14. On September 16, 2010, Wallen informed the employer that neither Premera nor Group Health Options offered a PPO plan within the cost parameters provided by the employer.

15. On September 20, 2010, the employer e-mailed Wallen informing him that the employer would begin negotiations with the Machinists union and Teamsters union, in a joint session, the following week and attempt to get them off the Premera PPO plan on to a Teamsters' sponsored plan.

16. On September 27, 2010, Wallen e-mailed the employer and explained that finding a plan for only ATU employees was going to be more difficult than finding a plan under the previously discussed constraints, if Machinists and Teamsters were to be covered in a separate plan.

17. On September 29, 2010, Wallen forwarded the employer a rejection from Premera and explained that Premera's underwriters would not agree to insure only ATU bargaining unit employees, because the group was too small and in light of the Group Health HMO option that was also offered.

18. The employer responded to Wallen's September 29 e-mail the same day stating, "Don't kill yourself. . . we may just move the ATU folks to whatever other plan we come up with, pay the difference out of pocket to make them whole and negotiate from there."

19. On October 6 and 7, 2010, the employer and Wallen exchanged e-mails about trying to find any PPO plan for approximately 50 people. Wallen asked the employer which 50 employees would need to be covered, as this information would be required by the plans themselves in order to make a bid. The employer responded:

> It will be either a mix of non-reps and ATU, or just non-reps that are currently on the Premera plan. It will be difficult to rely on the experience and demo information, as we may offer an incentive for people to switch to the AWC plan [existing Group Health HMO], and there is no way we can predict who will do that and the [sic] who will be left.

20. On October 25, 2010, the employer e-mailed the union and explained that the employer would like to offer ATU members an incentive to move from Premera to Group Health, and asked the union to to respond by October 29, 2010. The union responded that it would get back to Cartwright after discussing the employers proposal with the union's executive board on November 3, 2010.

21. Sometime in late October or early November 2010, the Machinists and Teamsters units agreed to move off of the Premera PPO plan, which resulted in a significantly smaller employee pool than the employer had when Premera made its initial 2011 plan renew bid. The employer's agreement to move the Machinists and Teamsters bargaining units to a different health plan caused the employer to be ineligible to renew the Premera PPO plan in 2011 because the employee pool had become to small under plan eligibility guidelines.

22. On November 4, 2010, Wallen informed the employer by e-mail that he not could find an insurance plan that would offer a PPO plan comparable to the Premera PPO for a group comprised solely of ATU bargaining unit employees.

23. On November 5, 2010, the employer e-mailed the union and explained that its insurance broker had just notified the employer that it would not be able to offer a PPO option to its employees in 2011 because the carriers refused to quote a bid and requested suggestions on what to do at that point. This e-mail constituted the first notice from the employer to the union regarding the employer's loss of the bid from Premera for the PPO plan and inability to find comparable coverage for 2011.

24. On November 10, 2010, the employer e-mailed the union a draft of an employer memorandum to bargaining unit employees. The draft memorandum informed employees of the lack of a PPO plan option for 2011, an economic incentive to switch to Group Health HMO and a one year elimination of the employee premium contribution towards the Group Health HMO plan.

25. On November 10, 2010, the union responded to the employer's e-mail described in Finding of Fact 24 and stated it was not acceptable to distribute the memorandum to ATU members or conduct meetings with them.

26. On November 18, 2010, the union met with the employer to discuss health care options for 2011. The parties did not reach agreement over the elimination of the Premera PPO plan in 2011 or economic incentives to move employees to the Group Health HMO plan.

27. On November 18, 2010, the employer sent a memo to all bargaining unit employees titled "Health Insurance Update." The employer informed bargaining unit employees that the employer was unable to continue offering Premera or obtain a PPO for the following year, though it would continue searching, and that the employer was providing an incentive payment, or transitional allowance, to switch to the Group Health plan. The memo also announced that the employer would pay all Group Health premiums in 2011. The memo stated "we remain committed to working with the union and continue to look

at all our options. . . . We have met with your union on two occasions and have set two more additional dates.

28. On November 18, 2010, at 6:51 P.M. the union sent the employer an e-mail expressing the union's frustration and disagreement with the employer's decision to send out a memo to employees announcing changes to health benefits without agreement from the union.

29. The employer did not offer the Premera PPO plan or any other PPO plan to bargaining unit members in the 2011 open enrolment period.

30. The parties did not reach agreement over the elimination of the Premera PPO plan in 2011.

31. Under the routed and ACCESS contracts no employees received health insurance that is paid in-full by the employer.

32. The Premera PPO provided employees a different plan design, a more geographically broad selection of doctors, and the ability to be treated by a specialist without needing prior approval from an HMO. For Premera PPO customers the employer's announcement described in Finding of Fact 27 meant changing doctors and service providers. The change in coverage disrupted some patients care and caused delays in office visits, surgeries and procedures. The change in the network of providers also caused at least one employee's college age child to lose access to care.

33. On December 10, 2010, the union e-mailed the employer an information request seeking an un-redacted copy of a customer complaint that had been filed against a union member.

34. On December 14, 2010, the employer informed the union that in accordance with the employer's policy it would not provide the union with an un-redacted copy of the customer complaint.

35. The employer's past practice was to only provide the union with un-redacted customer complaints in situations when an arbitrator had been selected and the matter was scheduled for arbitration or other litigation.

36. There is no evidence that the employee matter in which that the union was seeking the un-redacted customer complaint, described in Findings of Fact 33 and 34, was scheduled for arbitration or other litigation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. As described in Findings of Fact 4, 8, 12, and 24 through 32 the employer unilaterally implemented a financial incentive payment to encourage bargaining unit employees to switch to the Group Health HMO plan and unilaterally eliminated employee premiums for the Group Health HMO plan in 2011 in violation of RCW 41.56.140(4) and (1).

3. As described in Findings of Fact 4, 8, 12, 16 through 19, 21 through 30, and 32, the employer committed a refusal to bargain violation when it unilaterally stopped offering the Premera PPO insurance plan, or a substantially equivalent plan, to bargaining unit employees in the 2011 benefit year in violation of RCW 41.56.140(4) and (1).

4. As described in Finding of Fact 27, the employer did not unlawfully circumvent the union or engage in direct dealing in violation of RCW 41.56.140(4) by giving bargaining unit employees a memo that announced the unilateral changes it was making to health insurance.

5. As described in Findings of Fact 33 through 36, the employer did not unilaterally change its past practice in violation of RCW 41.56.140(4) and (1) by providing the union with redacted customer complaints, prior to arbitration or other litigation.

ORDER

Kitsap Transit its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing and/or refusing to bargain in good faith over decisions to change mandatory subjects of bargaining, including wages and work hours.

   b. Implementing changes to terms and conditions of employment of its represented employees without first reaching agreement or reaching impasse and seeking the assistance of an interest arbitrator in bargaining with its employees' exclusive bargaining representative.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Restore the *status quo ante* by reinstating a health insurance plan with benefit levels substantially equivalent to the December 31, 2010 Premera PPO plan or implementing another plan option as agreed upon by the union.

   b. Make bargaining unit employees who were on the Premera PPO plan in 2010 or who documented their desire to switch to the Premera PPO plan in 2011 whole by paying these employees the premium savings (difference in cost of the 2011 Premera and Group Health plans, minus employee contribution rates as described in the collective bargaining agreement), plus interest, from the time the employer

terminated the Premera PPO plan on January 1, 2011, until the time that the employer either: 1) restores a comparable PPO plan option, 2) reaches a negotiated agreement with the union on health benefit plans, or 3) implements health benefits as determined by an interest arbitration award.

c. Give notice to and, upon request, negotiate in good faith with Amalgamated Transit Union, Local 1384 before changing health insurance options available to bargaining unit employees, adjusting employee premiums, or providing other economic incentives to influence plan selection.

d. 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.

e. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of Directors of Kitsap Transit, 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.

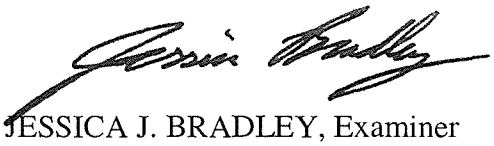
f. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

g. 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 23rd day of July, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, 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.

CASE 23945-U-11-6123
DECISION 11098-A - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *KITSAP TRANSIT* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY changed mandatory subjects of bargaining by providing employees a financial incentive payment to move to the Group Health HMO health plan and by paying 100 percent of employees Group Health premiums in 2011 without first obtaining agreement from your union.

WE UNLAWFULLY eliminated the Premera PPO health insurance plan option in 2011 without obtaining agreement from your union.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL make bargaining unit employees who were on the Premera PPO plan in 2010 or documented their intent to switch to the Premera PPO plan in 2011 whole by paying these employees the premium savings (difference in cost of the Premera and Group Health plans, minus employee contribution rates as described in the collective bargaining agreement), plus interest, from the time the employer terminated the Premera PPO plan on January 1, 2011 until the time that the employer either: 1) restores a comparable PPO plan option, 2) reaches a negotiated agreement with the union on health benefit plans, or 3) implements health benefits as determined by an interest arbitration award that addresses health plan options.

WE WILL bargain in good faith with your union over any proposed changes to your benefits and terms and conditions of employment.

WE WILL maintain status quo terms of conditions of employment until we reach an agreement or receive a decision from an interest arbitrator.

WE WILL reinstate a health insurance plan with benefit levels equivalent to the Premera PPO on December 31, 2010, or pay you for the cost difference, plus interest, until an equivalent or better plan can be found.

WE WILL NOT unilaterally implement changes to your health insurance.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.
AN OFFICIAL NOTICE FOR POSTING AND READING
WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

RECORD OF SERVICE - ISSUED 07/23/2012

The attached document identified as: DECISION 11098-A - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23945-U-11-06123	FILED:	04/25/2011	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	TRANSIT BUS				
DETAILS:	Routed				
COMMENTS:					

EMPLOYER: KITSAP TRANSIT
ATTN: JOHN CLAUSON
60 WASHINGTON AVE STE 200
BREMERTON, WA 98337
Ph1: 360-479-6962 Ph2: 360-478-6230

REP BY: SHANNON PHILLIPS
SUMMIT LAW GROUP
315 5TH AVE S STE 1000
SEATTLE, WA 98104-2679
Ph1: 206-676-7092 Ph2: 206-676-7000

PARTY 2: ATU LOCAL 1384
ATTN: GREGORY SANDERS
1700 SE MILE HILL DR STE 213
PORT ORCHARD, WA 98366
Ph1: 360-710-9077 Ph2: 360-895-1384

REP BY: CHRISTOPHER CASILLAS
CLINE AND ASSOCIATES
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770 Ph2: 607-379-1828

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

RECORD OF SERVICE - ISSUED 07/23/2012

The attached document identified as: DECISION 11099-A - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23946-U-11-06124	FILED:	04/25/2011	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	TRANSIT BUS				
DETAILS:	Access				
COMMENTS:					

EMPLOYER: KITSAP TRANSIT
ATTN: JOHN CLAUSON
60 WASHINGTON AVE STE 200
BREMERTON, WA 98337
Ph1: 360-479-6962 Ph2: 360-478-6230

REP BY: SHANNON PHILLIPS
SUMMIT LAW GROUP
315 5TH AVE S STE 1000
SEATTLE, WA 98104-2679
Ph1: 206-676-7092 Ph2: 206-676-7000

PARTY 2: ATU LOCAL 1384
ATTN: GREGORY SANDERS
1700 SE MILE HILL DR STE 213
PORT ORCHARD, WA 98366
Ph1: 360-710-9077 Ph2: 360-895-1384

REP BY: CHRISTOPHER CASILLAS
CLINE AND ASSOCIATES
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770 Ph2: 607-379-1828