STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 839, Complainant, vs. BENTON COUNTY, Respondent.	CASE 128595-U-16 DECISION 12790 - PECB CASE 128900-U-17 DECISION 12791 - PECB ORDER ON MOTIONS FOR SUMMARY JUDGMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On December 5, 2016, Teamsters Local 839 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission. The complaint alleged that Benton County (employer) refused to bargain and derivatively interfered in violation of RCW 41.56.140(4) and (1). Specifically, the union's allegations concerned the employer's failure to bargain over how bargaining unit employees would repay the employer for recent wage overpayments. On January 3, 2017, the Commission's unfair labor practice manager issued a preliminary ruling stating causes of action existed. I, Sean A. Bratner, was appointed as the examiner on January 10, 2017. On January 25, 2017, the employer filed its answer.

From February 27 through March 21, 2017, the union and the employer filed cross motions for summary judgment, cross responses in opposition to the other party's motion, and cross replies.

On April 13, 2017, the union filed a second complaint. This complaint similarly alleged employer refusal to bargain and derivative interference in violation of RCW 41.56.140(4) and (1). On

May 15, 2017, the unfair labor practice manager issued a preliminary ruling stating a cause of action existed. The cases were subsequently consolidated because of the similar nature of the allegations. In response to the May 15 preliminary ruling, the parties made written submissions through August 16, 2017.

ISSUES

1. Are there genuine issues of material fact in dispute preventing summary judgment?

2. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and, if so, derivatively interfere in violation of RCW 41.56.140(1) by refusing the union's request to bargain over how employees would repay the wage overpayments and by circumventing the union in regard to repayment options?

3. By acting in accordance with Chapter 49.48 RCW, was the employer relieved of its duty to bargain over how employees would repay wage overpayments?

4. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and, if so, derivatively interfere in violation of RCW 41.56.140(1) by unilaterally applying wage deductions and accrued leave cash outs to collect employee repayment, without first providing the union with an opportunity for bargaining?

After considering all of the submissions in this matter, I grant the union's motion for summary judgment and deny the employer's motion for summary judgment. There are no genuine issues of material fact. The employer refused to bargain in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1) when it denied the union's request to bargain over how employees would repay the wage overpayments and when it circumvented the union regarding repayment options. Acting in accordance with Chapter 49.48 RCW did not relieve the employer of its duty to bargain. The employer also committed an impermissible unilateral change when it applied wage deductions and accrued leave cash outs to collect employee repayment without providing the union with an opportunity to bargain.

The dispute in this case is not about whether overpayments were made or whether overpayments should be paid back. Rather, the dispute is about whether the employer had a duty to bargain with the union regarding how the employees would repay the wage overpayments caused by an accounting software error. The union argues the employer failed to fulfill its duty to bargain, while the employer argues no duty to bargain existed. As the analysis below will detail, the employer did have a duty to bargain. Additionally, because the bargaining unit is interest arbitration eligible, the employer had a duty to bargain to agreement or to impasse and obtain an award through interest arbitration before making a change to a mandatory subject of bargaining. The employer failed to fulfill this duty.

BACKGROUND

The union represents a bargaining unit of all full-time and regular part-time corrections officers working for the employer in the Benton County Sheriff's Office. The bargaining unit is eligible for interest arbitration. The employer and union are parties to a collective bargaining agreement effective from January 1, 2013, through December 31, 2017.

On or about November 1, 2016, the Benton County Auditor's Office discovered that an accounting software error had caused the employer to overpay 85 corrections officers in the June through September 2016 pay periods. Whenever hours were entered into the accounting system under the kelly time used (KTU) pay code, the software error caused an improper increase in compensation. The employer decided to recover the overpayments through deductions from subsequent wage payments as provided in Chapter 49.48 RCW.

On November 3, 2016, the sheriff's office e-mailed the affected employees a memorandum from Benton County Auditor Brenda Chilton, which informed employees of the wage overpayments and explained the employer's decision regarding how overpayment recovery would occur.

Commencing on November 15, 2016, the sheriff's office served the affected employees with a November 14, 2016, "Notice – Wage Overpayment Repayment Demand" letter from Chilton. This

letter notified each affected employee that he or she had received wage overpayments, informed the employee of his or her overpayment amount, explained the software error which caused the wage overpayments, and provided the entire text of RCW 49.48.200.

The letter stated that "the County" had commenced the statutory process for overpayment recovery and requested that the employee indicate his or her "preferred deduction amount" and sign the letter. Each employee was given three options for the preferred deduction amount: (1) deduct the full overpayment amount from the employee's next paycheck, (2) deduct an employee-specified amount from future paychecks, or (3) deduct an amount that would not exceed 5 percent of the employee's disposable earnings in a pay period from future paychecks. If the employee did not respond "within twenty (20) days of delivery or, the overpayments and/or amounts [were] not disputed," the employer would begin withholding the statutory 5 percent of disposable earnings, beginning with the employee's January 2017 paycheck. The employer did not send a copy of the November 14 letter to the union.

Subsequent to the November 14 letter, the employer amended its previously offered repayment options. On November 28, 2016, the sheriff's office forwarded the affected employees a November 23, 2016, e-mail from Chilton stating accrued leave cash out options were also available. The e-mail stated that if an employee did not select a repayment option by December 20, 2016, the default 5 percent of disposable earnings would be withheld from future paychecks.

The "Repayment of Overpayment Option" form attached to the November 23 e-mail prompted employees choosing an accrued leave cash out option to indicate how many floating holiday hours, annual leave hours, or compensatory time off hours the employer should process from their January 5, 2017, paychecks to repay the entirety of their overpayments. By signing this form, employees agreed that the overpayment occurred; agreed they knowingly, voluntarily, and without coercion waived their right to dispute the occurrence and/or amount of the overpayment; and agreed the accrued leave cash out option was not precedent setting. This repayment option was "offered by Benton County" as a "one-time only offer, based on the unique facts and circumstances resulting in the overpayment." The employer did not send the November 23 e-mail to the union.

On or about November 30, 2016, the union sent a demand to bargain letter to Benton County Sheriff Steven Keane. The letter stated that if wage overpayments were made, the union was in total agreement that employees should repay the overpayment amount, but "the [u]nion must be allowed to bargain how this [would be] done." On December 1, 2016, the union sent an e-mail entitled "Demand to Bargain Letter" to Keane, Chilton, and others. The union stated it was "available to bargain anytime and eager to get the overpayment of wages issue(s) resolved as soon as possible" and requested dates Keane would be available to bargain.

Keane responded to the union by e-mail on December 1, 2016, stating he was willing to meet and discuss his role and limited authority in the matter but that he was "not able to negotiate or bargain the authority of the Auditor's office and their statutory responsibilities for recouping overpayments." Keane acknowledged the union had made it clear to him that "failure to bargain the recoupment of overpayments" would result in the filing of an unfair labor practice complaint. Among others, Chilton was also sent Keane's e-mail.

In January 2017, the employer began deducting wages from paychecks and hours from accrued leave banks. These deductions occurred without union bargaining or agreement. The union presented uncontested evidence that two employees had involuntary wage deductions from their January paychecks in the amounts of $257.98 and $267.82, respectively. As of August 8, 2017, all 85 corrections officers have repaid the wage overpayments in full.

ANALYSIS

Where an unfair labor practice violation is alleged, the complainant has the burden of proof. WAC 391-45-270(1)(a); *Cowlitz County*, Decision 7007-A (PECB, 2000). The respondent is responsible for the presentation of its defense and has the burden of proof as to affirmative defenses. WAC 391-45-270(1)(b). In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *Skagit County*, Decision 8886-A (PECB, 2007).

ISSUE 1: Summary judgment is appropriate.

Applicable Legal Standards

An examiner may grant a motion for summary judgment "if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135; *State – General Administration*, Decision 8087-B (PSRA, 2004). The courts and the Commission define a material fact as one upon which the outcome of the litigation depends. *State – General Administration*, Decision 8087-B, *citing Clements v. Travelers Indem. Co.*, 121 Wn.2d 243 (1993). Summary judgment is only appropriate when the party responding to the motion cannot or does not deny any material facts alleged by the party making the motion. *State – General Administration*, Decision 8087-B. Civil Rule 56(e) specifically states,

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Granting a motion for summary judgment should not be taken lightly, since doing so involves making a final determination without the benefit of a full evidentiary hearing and record. *State – General Administration*, Decision 8087-B. In ruling on a motion for summary judgment, the examiner must consider the material evidence and all reasonable inferences most favorably to the nonmoving party and deny the motion if reasonable people might reach different conclusions regarding the facts. *City of Seattle (Seattle Police Management Association)*, Decision 12091 (PECB, 2014), *aff'd*, Decision 12091-A (PECB, 2014).

Application of Standards

Both parties filed a motion for summary judgment, and the appropriateness of summary judgment in this case is a threshold issue. If there is no genuine issue as to any material fact, there would be no reason to hold a hearing; the examiner can simply rule on the law. *Spokane Airport Board*, Decision 7889-A (PECB, 2003). I find no genuine issue of material fact exists. Rather than dispute

the material facts, the parties in this case dispute the interpretation of applicable law. Summary judgment is appropriate.

ISSUE 2: The employer refused the union's request to bargain and circumvented the union.

Applicable Legal Standards

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). Whether a particular item is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission* (*City of Richland*), 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.* The Supreme Court held in *City of Richland* that "[t]he scope of mandatory bargaining thus is limited to matters of direct concern to employees" and that "[m]anagerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are classified as nonmandatory subjects." *Id.* at 200.

Refusal to Bargain

The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *Vancouver School District*, Decision 11791-A (PECB, 2013). 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). If an employer refuses to bargain, it also derivatively interferes with employee rights guaranteed by Chapter 41.56 RCW. RCW 41.56.140(1).

Circumvention

Where employees have exercised their right to organize for purposes of collective bargaining, the employer is obligated to deal only with the designated exclusive bargaining representative on matters of wages, hours, and working conditions. RCW 41.56.100; RCW 41.56.030(4); *Skagit Regional Health*, Decision 12616-A (PECB, 2016). An employer retains the right to communicate directly with its represented employees; however, communications may not undermine an exclusive bargaining representative. *Skagit Regional Health*, Decision 12616-A. It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees over mandatory subjects of bargaining. *City of Renton*, Decision 12563-A (PECB, 2016).

Application of Standards

By refusing the union's request to bargain the employer's decision and by dealing directly with employees, the employer through its total conduct displayed a refusal to bargain in good faith. The union's motion for summary judgment regarding this issue is granted.

The employer's decision regarding how employees would repay wage overpayments is a mandatory subject.

To determine whether the employer's decision is a mandatory subject, the *City of Richland* balancing test weighs the employees' interest in wages against the extent that the employer's decision is a management prerogative. Wages are unquestionably a mandatory subject of bargaining. *University of Washington*, Decision 10608-A (PSRA, 2011); RCW 41.56.030(4). Employees have a strong interest in subjects related to wages, such as the employer's decision in this case. The decision is directly related to wages because it concerns implementing employee wage deductions and accrued leave cash outs to recover money which the employees originally received as wages. Accrued leave is a form of "wages." *City of Yakima*, Decision 3564-A (PECB, 1991).

The employer's decision is not, to any substantial extent, a management prerogative. The employer correctly argues it has an obligatory interest in collecting repayment for any wage

overpayments. However, this interest in repayment does not equate with an interest in deciding how that repayment is made. As evidenced by this case, multiple repayment options could satisfy the employer's interest in collecting repayment, and this fact weighs against an argument that the employer has a strong interest in deciding the specific repayment method used.

Balancing the employees' and employer's interests in the decision, the employees' interest in wages outweighs the extent that the decision is a management prerogative. The decision's relationship to employee wages is therefore the predominant characteristic under the *City of Richland* balancing test, making the decision a mandatory subject which the employer had a duty to bargain.

The employer refused the union's request to bargain the employer's decision.

The employer failed to fulfill its duty to bargain when it refused the union's request to bargain how repayment would occur. The request was made in the November 30, 2016, letter and December 1, 2016, e-mail to Keane. The employer refused the union's request to bargain in Keane's December 1, 2016, e-mail response. Chilton, who Keane implied in his e-mail had authority regarding the recoupment of overpayments, was also sent the union's and Keane's e-mails. With receipt of these e-mails, Chilton received notice of the union's request to bargain, yet the employer still did not engage in bargaining.

Contrary to the distinctions argued by the employer, there is no distinction between the employer and its officials for purposes of this case. The employer's own November 14, 2016, letter sent to employees stated "the County"—not an official—had commenced the process for overpayment recovery. Further, RCW 41.56.030(12) states that a "public employer" is "any officer, board, commission, council, or other person or body acting on behalf of any public body governed by this chapter, or any subdivision of such public body." A public employer is treated in its entirety, and the subdivisions of a public employer are not treated as distinct entities under Chapter 41.56 RCW. *City of Seattle*, Decision 12060-A (PECB, 2014). Thus, the employer is responsible for the unfair labor practices committed by its elected officials, and the employer is the only necessary party who must be named in this unfair labor practice case. *See Pierce County*, Decision 10636 (PECB,

2010); *City of Wenatchee*, Decision 6517-A (PECB, 1999); *Lewis County*, Decision 644-A (PECB, 1979), *aff'd*, *Lewis County v. Public Employment Relations Commission*, 31 Wn. App. 853 (1982), *review denied*, 97 Wn.2d 1034 (1982).

The employer circumvented the union by dealing directly with employees.

By sending notices, e-mails, and forms directly to employees, the employer circumvented the union. Presenting employees with several repayment options, soliciting responses regarding each employee's preferred option, and then asking the employees to waive rights in exchange for their preferred options constituted direct dealing with employees over how repayment would occur. In *University of Washington*, Decision 11600-A (PSRA, 2013), employer communications with employees did not constitute direct dealing because no evidence indicated that employee feedback was used to make an employer decision, and therefore the communications were not negotiations. The case here is distinguished from *University of Washington* because employee feedback was solicited with the intent of determining repayment specifics, and this constituted negotiations over a mandatory subject of bargaining. Because these negotiations were had with employees instead of the union, the employer impermissibly circumvented the union.

ISSUE 3: Acting in accordance with Chapter 49.48 RCW did not relieve the employer of its duty to bargain.

Applicable Legal Standards

Chapter 49.48 RCW addresses the overpayment of wages and subsequent employer recovery. RCW 49.48.200 provides the following:

> (1) Debts due the state or a county or city for the overpayment of wages to their respective employees may be recovered by the employer by deductions from subsequent wage payments as provided in RCW 49.48.210, or by civil action. If the overpayment is recovered by deduction from the employee's subsequent wages, each deduction shall not exceed: (a) Five percent of the employee's disposable earnings in a pay period other than the final pay period; or (b) the amount still outstanding from the employee's disposable earnings in the final pay period. The deductions from wages shall continue until the overpayment is fully recouped.
>
> (2) Nothing in this section or RCW 49.48.210 or 49.48.220 prevents: (a) An employee from making payments in excess of the amount specified in subsection

> (1)(a) of this section to an employer; or (b) an employer and employee from agreeing to a different overpayment amount than that specified in the notice in RCW 49.48.210(1) or to a method other than a deduction from wages for repayment of the overpayment amount.

RCW 49.48.200 references RCW 49.48.210, which contains the following provision:

> (10) When an employer determines that an employee covered by a collective bargaining agreement was overpaid wages, the employer shall provide written notice to the employee. The notice shall include the amount of the overpayment, the basis for the claim, and the rights of the employee under the collective bargaining agreement. Any dispute relating to the occurrence or amount of the overpayment shall be resolved using the grievance procedures contained in the collective bargaining agreement.

Absent a specific definition, contrary legislative intent, or ambiguity, statutes are accorded their plain and ordinary meaning. *Skagit County*, Decision 8886-A, *citing Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 479–80 (1987).

Application of Standards

A statute which permits wage deductions to recover overpayments does not relieve the employer of its duty to bargain the multiple repayment options.

Chapter 49.48 RCW does not exempt the employer from Chapter 41.56 RCW.

The employer does not dispute that it did not bargain with the union before deciding how employees would repay the KTU wage overpayments. Instead, the employer argues it had no duty to bargain because a decision to recover wage overpayments through deductions from subsequent wages, as expressly provided in Chapter 49.48 RCW, is not a mandatory subject of bargaining. The employer argues it was merely following Chapter 49.48 RCW when recovering overpayments and thus union involvement was not required. However, the employer offers no authority establishing that an employer is exempted from collective bargaining under Chapter 41.56 RCW if it acts in accordance with Chapter 49.48 RCW.

RCW 41.56.905 requires employers to comply with their bargaining obligation under Chapter 41.56 RCW when exercising statutory authority. *Griffin School District*, Decision 10489-A

(PECB, 2010), *citing City of Bellevue*, Decision 3156-A (PECB, 1990). In *Griffin School District*, the Commission found that although the employer had the right to determine the work year calendar, the employer still had to satisfy its Chapter 41.56 RCW collective bargaining obligation prior to changing existing terms and conditions of employment. Similarly here, while the employer may have the statutory authority under Chapter 49.48 RCW to utilize wage deductions or other methods to recover wage overpayments, the employer must satisfy its Chapter 41.56 RCW bargaining obligation when exercising that authority because such deductions impact wages. Statutory authority to take action does not automatically relieve a statutory duty to bargain.

Multiple repayment options were possible.

With multiple repayment options possible, bargaining should have occurred. The union does not dispute that overpayments should be repaid but instead argues that the repayment options offered to employees required bargaining. The plain language of RCW 49.48.200(2) contemplates repayment methods other than deductions from subsequent wage payments. Thus, the union appropriately argues that the options offered to employees should have been bargained.[1]

ISSUE 4: The employer unilaterally changed a mandatory subject of bargaining.

Applicable Legal Standards

Unilateral Change

An employer violates RCW 41.56.140(4) and (1) if it unilaterally changes a mandatory subject of bargaining without having fulfilled its bargaining obligation. To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there

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[1] The plain and ordinary meaning of RCW 49.48.210(10) does not statutorily limit the scope of overpayment recovery disputes to the occurrence and amount of the overpayment. The union's failure to grieve the occurrence or the amounts of the overpayments does not waive remedies in this case, where the occurrence or the amounts of the overpayments are not disputed issues. The union's November 4, 2016, grievance does not estop the issues or claims in this case under the doctrines of res judicata and collateral estoppel. *See State – Ecology*, Decision 9034-B (PSRA, 2005). Finally, waiver by contract is not applicable in this case, as the management rights clause in the collective bargaining agreement contains no clear and unmistakable waiver regarding the actions alleged here. *See Yakima County*, Decision 11621-A (PECB, 2013).

was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990).

A past practice may occur where, in the 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. *Snohomish County*, Decision 8852-A (PECB, 2007). For a past practice to exist, two basic elements are required: (1) a prior course of conduct and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *Id.*

An employer considering changes that would affect a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making a decision. *Kitsap County*, Decision 11610-A (PECB, 2013), *citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995). Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Kitsap County*, Decision 11610-A, *citing Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Kitsap County*, Decision 11610-A.

If the employer's action has already occurred when the employer notifies the union (a *fait accompli)*, the notice would not be considered timely, and the union would be excused from the need to demand bargaining. *Id.* If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Id.*

Interest Arbitration Eligible Groups

When a bargaining unit is eligible for interest arbitration and an employer desires to make a midterm change to a mandatory subject of bargaining, the employer may not unilaterally implement its desired change without bargaining to impasse and obtaining an award through interest arbitration. C*ity of Walla Walla*, Decision 12348-A (PECB, 2015).

Application of Standards

The employer committed a unilateral change in violation of RCW 41.56.140(4) and (1) when it meaningfully changed the status quo regarding wages and accrued leave without having fulfilled its bargaining obligation. The union is entitled to summary judgment on this issue.

There was a relevant status quo and a meaningful change to a mandatory subject occurred.

In the instant case, the relevant status quo was that employees would receive wages and accrued leave without deductions related to the KTU wage overpayments. The employer changed the status quo when, after discovering the KTU wage overpayments, it began applying new wage deductions and accrued leave cash outs. These actions meaningfully changed the wages available to employees in paychecks and accrued leave banks, which are mandatory subjects.

No meaningful opportunity for bargaining existed.

The employer failed to fulfill its bargaining obligation before unilaterally changing wages and accrued leave as described above. With no meaningful opportunity for the union to bargain and influence the employer's planned course of action, the employer presented its decision to implement wage deductions and accrued leave cash outs as a *fait accompli* and then refused the union's request to bargain before they were implemented. Before making these unilateral changes, the employer was required to bargain with this interest arbitration eligible group to agreement or to impasse and obtain an award through interest arbitration.

The employer unpersuasively argues that the union waived its right to bargain because there is a past practice of deducting wages from paychecks. Specifically, the employer identifies routine "end of month adjustments" and wage garnishments as examples of a past practice. However, the

deductions in the employer's examples are different from the deductions at issue here for two reasons. First, the deductions in this case were implemented as a result of the KTU accounting software error. Second, unlike the circumstances in the employer's examples, the employees were given multiple repayment options to choose from. The employer admitted the KTU wage overpayments were different for these reasons when it characterized the accrued leave cash out option as "a one-time only offer, based on the unique facts and circumstances resulting in the overpayment." Thus, the wage deductions used to address these unique overpayments are distinguishable from the routine month end adjustments and garnishments. No applicable past practice which would constitute a waiver exists.

CONCLUSION

After considering all of the submissions in this matter, I grant the union's motion for summary judgment and deny the employer's motion for summary judgment. There are no genuine issues of material fact. The employer refused to bargain in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1) when it denied the union's request to bargain over how employees would repay the wage overpayments and when it circumvented the union regarding repayment options. Acting in accordance with Chapter 49.48 RCW did not relieve the employer of its duty to bargain. The employer also committed an impermissible unilateral change when it applied wage deductions and accrued leave cash outs to collect employee repayment without providing the union with an opportunity to bargain. Because the bargaining unit is interest arbitration eligible, the employer had a duty to bargain to agreement or to impasse and obtain an award through interest arbitration before making a change to a mandatory subject of bargaining. The employer failed to fulfill this duty.

REMEDY

The standard remedy for a unilateral change violation is restoring the status quo ante; 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. *Kitsap County*, Decision 10836-A (PECB,

2011), *citing City of Anacortes*, Decision 6863-A (PECB, 2000). The typical order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining without first providing the union with notice of proposed changes and an opportunity to bargain over the proposed changes. *Kitsap County*, Decision 10836-A. 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 (PECB, 2011).

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 the statute. The case here presents such factual circumstances.

As of August 8, 2017, all 85 affected corrections officers have repaid the employer for the KTU wage overpayments. A full restoration of the status quo ante would require that all wages and accrued leave collected by the employer for the repayment of these overpayments be returned, plus interest. To best remedy this unusual situation, this order leaves it to the union to determine whether it wishes to request a full restoration of the status quo ante and have the employer return wages or accrued leave to the affected employees, knowing that the employees will remain liable for repayment of the wage overpayments. Regardless of whether the union requests restoration of the status quo ante, the bargaining obligation over the repayment will be ongoing and will continue until an agreement or impasse is reached and an award is obtained through interest arbitration.

FINDINGS OF FACT

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

2. Teamsters Local 839 (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of all full-time and regular part-time

corrections officers working for the employer in the Benton County Sheriff's Office. The bargaining unit is eligible for interest arbitration.

3. The employer and union are parties to a collective bargaining agreement effective from January 1, 2013, through December 31, 2017.

4. On or about November 1, 2016, the Benton County Auditor's Office discovered that an accounting software error had caused the employer to overpay 85 corrections officers in the June through September 2016 pay periods. Whenever hours were entered into the accounting system under the kelly time used (KTU) pay code, the software error caused an improper increase in compensation. The employer decided to recover the overpayments through deductions from subsequent wage payments as provided in Chapter 49.48 RCW.

5. On November 3, 2016, the sheriff's office e-mailed the affected employees a memorandum from Benton County Auditor Brenda Chilton, which informed employees of the wage overpayments and explained the employer's decision regarding how overpayment recovery would occur.

6. Commencing on November 15, 2016, the sheriff's office served the affected employees with a November 14, 2016, "Notice – Wage Overpayment Repayment Demand" letter from Chilton. This letter notified each affected employee that he or she had received wage overpayments, informed the employee of his or her overpayment amount, explained the software error which caused the wage overpayments, and provided the entire text of RCW 49.48.200.

7. The letter stated that "the County" had commenced the statutory process for overpayment recovery and requested that the employee indicate his or her "preferred deduction amount" and sign the letter. Each employee was given three options for the preferred deduction amount: (1) deduct the full overpayment amount from the employee's next paycheck, (2) deduct an employee-specified amount from future paychecks, or (3) deduct an amount that would not exceed 5 percent of the employee's disposable earnings in a pay period from

future paychecks. If the employee did not respond "within twenty (20) days of delivery or, the overpayments and/or amounts [were] not disputed," the employer would begin withholding the statutory 5 percent of disposable earnings, beginning with the employee's January 2017 paycheck. The employer did not send a copy of the November 14 letter to the union.

8. Subsequent to the November 14 letter, the employer amended its previously offered repayment options. On November 28, 2016, the sheriff's office forwarded the affected employees a November 23, 2016, e-mail from Chilton stating accrued leave cash out options were also available. The e-mail stated that if an employee did not select a repayment option by December 20, 2016, the default 5 percent of disposable earnings would be withheld from future paychecks.

9. The "Repayment of Overpayment Option" form attached to the November 23 e-mail prompted employees choosing an accrued leave cash out option to indicate how many floating holiday hours, annual leave hours, or compensatory time off hours the employer should process from their January 5, 2017, paychecks to repay the entirety of their overpayments. By signing this form, employees agreed that the overpayment occurred; agreed they knowingly, voluntarily, and without coercion waived their right to dispute the occurrence and/or amount of the overpayment; and agreed the accrued leave cash out option was not precedent setting. This repayment option was "offered by Benton County" as a "one-time only offer, based on the unique facts and circumstances resulting in the overpayment." The employer did not send the November 23 e-mail to the union.

10. On or about November 30, 2016, the union sent a demand to bargain letter to Benton County Sheriff Steven Keane. The letter stated that if wage overpayments were made, the union was in total agreement that employees should repay the overpayment amount, but "the [u]nion must be allowed to bargain how this [would be] done." On December 1, 2016, the union sent an e-mail entitled "Demand to Bargain Letter" to Keane, Chilton, and others. The union stated it was "available to bargain anytime and eager to get the overpayment of

wages issue(s) resolved as soon as possible" and requested dates Keane would be available to bargain.

11. Keane responded to the union by e-mail on December 1, 2016, stating he was willing to meet and discuss his role and limited authority in the matter but that he was "not able to negotiate or bargain the authority of the Auditor's office and their statutory responsibilities for recouping overpayments." Keane acknowledged the union had made it clear to him that "failure to bargain the recoupment of overpayments" would result in the filing of an unfair labor practice complaint. Among others, Chilton was also sent Keane's e-mail.

12. In January 2017, the employer began deducting wages from paychecks and hours from accrued leave banks. These deductions occurred without union bargaining or agreement. The union presented uncontested evidence that two employees had involuntary wage deductions from their January paychecks in the amounts of $257.98 and $267.82, respectively.

13. As of August 8, 2017, all 85 corrections officers have repaid the wage overpayments in full.

CONCLUSIONS OF LAW

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

2. Based on Findings of Fact 4 through 12, no genuine issues of material fact exist under WAC 10-08-135. Accordingly, summary judgment is appropriate in this case.

3. Based on Findings of Fact 4 through 12, the employer refused to bargain in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1) by refusing the union's request to bargain over how employees would repay the wage overpayments and by circumventing the union in regard to repayment options.

4. Based on Findings of Fact 4 through 12, the employer refused to bargain in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1) by unilaterally applying wage deductions and accrued leave cash outs to collect employee repayment without first providing the union with notice and an opportunity for bargaining.

ORDER

BENTON COUNTY, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices.

1. CEASE AND DESIST from:

   a. Failing or refusing to bargain in good faith with Teamsters Local 839 over how employees will repay the employer for wage overpayments caused by the KTU accounting software error, which occurred between the June 2016 and September 2016 pay periods.

   b. Circumventing Teamsters Local 839 by dealing directly with bargaining unit employees regarding repayment options for the 2016 wage overpayments caused by the KTU accounting software error.

   c. Unilaterally applying repayment methods for the 2016 wage overpayments caused by the KTU accounting software error, without bargaining with Teamsters Local 839 to agreement or to impasse and receiving an award through interest arbitration.

   d. 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.

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

a. At Teamsters Local 839's request, restore the status quo ante by returning to bargaining unit employees all wages and accrued leave collected by the employer through the unilateral actions found unlawful in this order, plus interest.

b. Give notice to and, upon request, negotiate in good faith with Teamsters Local 839 regarding repayment of the 2016 wage overpayments caused by the KTU accounting software error.

c. Within 20 days of the date this order becomes final, contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer 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 employer and shall remain posted for 60 consecutive days from the date of initial posting. The employer shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Benton County Board of Commissioners, 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. Provide a copy of the meeting minutes to Teamsters Local 839 and the Compliance Officer.

e. Notify Teamsters Local 839, in writing, within 20 days following the date this order becomes final as to what steps have been taken to comply with this order and, at

the same time, provide Teamsters Local 839 with a signed copy of the notice provided by the Compliance Officer.

f. Notify the Compliance Officer, in writing, within 20 days following the date this order becomes final 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 provided by the Compliance Officer.

ISSUED at Olympia, Washington, this 3rd day of November, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN A. BRATNER, 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 128595-U-16 and 128900-U-17
DECISIONS 12790 and 12791 - PECB

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

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 STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING, RULED THAT *BENTON COUNTY* COMMITTED AN UNFAIR LABOR PRACTICE, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to bargain with Teamsters Local 839 (union) over how employees in the corrections officer bargaining unit would repay wage overpayments caused by the KTU accounting software error in 2016.

WE UNLAWFULLY circumvented the union by dealing directly with bargaining unit employees regarding their repayment options for the 2016 wage overpayments.

WE UNLAWFULLY required employees to choose between wage deductions and accrued leave cash outs as methods of repayment for the 2016 wage overpayments without providing the union with notice and an opportunity to bargain.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL, at the union's request, return all wages and accrued leave collected from bargaining unit employees for repayment of the 2016 wage overpayments, plus interest.

WE WILL give notice to and, upon request, negotiate in good faith with the union before deciding how employees will repay the 2016 wage overpayments.

WE WILL NOT refuse to bargain with the union over how employees will repay the 2016 wage overpayments.

WE WILL NOT circumvent the union by dealing directly with bargaining unit employees regarding repayment options for the 2016 wage overpayments.

WE WILL NOT collect repayment for the 2016 wage overpayments without providing the union with notice and an opportunity to bargain. If the union requests bargaining, WE WILL bargain to agreement or to impasse and receive an award through interest arbitration.

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.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 11/03/2017

DECISION 12790 - PECB and DECISION 12791 - PECB have been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 128595-U-16 and 128900-U-17

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PARTY 2: TEAMSTERS LOCAL 839

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