STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Complainant, vs. FRANKLIN COUNTY, Respondent.	CASE 128555-U-16 DECISION 12794 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On November 15, 2016, the Washington State Council of County and City Employees (union) filed with the Public Employment Relations Commission a complaint alleging unfair labor practices against Franklin County (employer or county). The Commission's unfair labor practice manager issued a preliminary ruling under WAC 391-45-110 on December 6, 2016, finding causes of action existed. Examiner Page Todd Garcia held a hearing on July 11, 2017. The parties filed post-hearing briefs on August 22, 2017, to complete the record.

ISSUES

The issues framed in the preliminary ruling are as follows:

1. Did the employer refuse to bargain in violation of RCW 41.56.140(4) since June 30, 2016, by breaching its good faith bargaining obligations and presenting the union with a draft of the 2016–2018 collective bargaining agreement (CBA) for review and signature, which

contained reductions and unilateral changes to employee insurance (Article 24) that were not agreed to by the union in bargaining?

2. Did the employer refuse to bargain in violation of RCW 41.56.140(4) since June 30, 2016, by its unilateral changes and reductions to employee insurance (Article 24) that were not agreed to by the union in bargaining, when it presented the union with a draft of the 2016–2018 CBA for review and signature?

Based on the totality of the record, the Examiner finds that the employer breached its good faith bargaining obligations in violation of RCW 41.56.140(4) by presenting the union with a draft for review and signature that contained reductions and unilateral changes to employee insurance that were not previously ratified by the union. In turn, the employer also committed a derivative interference violation under RCW 41.56.140(1). The Examiner also finds that while the employer made unilateral changes and reductions to employee insurance that were not agreed to in bargaining, the union waived its right to bargain those changes by its inaction.

BACKGROUND

The employer and union are parties to a collective bargaining agreement (CBA) effective January 1, 2016, through December 31, 2018. The union represents a bargaining unit of all regular full-time and regular part-time employees of the County Roads and Motor Vehicle Divisions. Tom Cash is the union staff representative who has represented the bargaining unit since April 2011. Kevin Wesley is the employer's labor relations consultant. When Cash began representing the bargaining unit, the parties' 2009–2011 CBA was in effect. Cash has negotiated the successor CBAs on behalf of the union since 2011.

The Parties' Collective Bargaining Agreements Since 2009

The 2009–2011 CBA provided for the following insurance provision:

> ARTICLE 24 – INSURANCE COVERAGE
>
> 24.1 County Benefits. Effective January 1, 2009, the County will contribute up to a maximum of seven hundred twenty-seven dollars and no cents/100 Dollars

> ($727.00) towards the medical, dental, vision, and life insurance plans made available by the County for Employee and dependent coverage, in amounts set forth below. *For the years 2010 and 2011 coverage and plan design and the amounts of County and employee payments of premium shall be bargained based on ability to pay, COLA [cost of living adjustment], and other appropriate factors.*
>
> The difference between the premiums for plans selected by the employee and the amount of County contribution, if greater, shall be paid to the employee's VEBA [voluntary employee benefits association] account. For the 2009 year, the County shall offer the following insurance, or plans with substantially the same range of benefits:
>
> Medical, premium up to $649.01
> Dental, premium up to $59.90
> Vision, premium up to $13.53
> Life Insurance, premium up to $4.56
>
> 24.2 Co-payment Premiums. Any amounts in excess of the County's maximum contribution, as established above, necessary to pay the medical premium for the employee and/or dependent medical plan shall be the sole responsibility of the employee by payroll deduction.

(emphasis added).

The parties' 2013–2015 CBA provided for a monthly deposit of $45.28 into employees' VEBA accounts effective January 1, 2013, through December 31, 2013. This contribution was in lieu of a wage adjustment for 2013. Effective January 1, 2014, the employer's monthly benefit contribution reverted to $727.00. The 2013–2015 CBA contemplated contract reopeners for 2014 and 2015 for "*coverage and plan design and the amounts of County and employee payments of premium* [to] be bargained based on *ability to pay, COLA, and other appropriate factors.*" (emphasis added).

The first reopener under the 2013–2015 CBA resulted in the parties entering into a Memorandum of Agreement (MOA) effective January 1, 2014. That MOA provided for employer contributions for all coverage types (medical, dental, vision, life, and long term disability/Employee Assistance

Program coverage) under Article 24.1[1] totaling $729.42 per month. The MOA also provided for wage COLA adjustments under Article 16.1.a, as per the 2013–2015 CBA.

The second reopener under the 2013–2015 CBA resulted in the parties entering into a MOA effective January 1, 2015, which provided for employer contributions for all coverage types under Article 24.1 totaling $1,030.00 per month. The 2015 MOA indicated there were no changes to the salary matrix (i.e., no COLA adjustments) for 2015.

The fully executed 2016–2018 CBA, discussed herein, contains the following provisions for Articles 16 and 24:

> ARTICLE 16 – WAGES AND PAY PRACTICES
>
> 16.1 Wages. The parties agree to adopt the 2016 Local 874 Salary Matrix as presented in Appendix A effective July 1, 2016.
>
> Effective January 1, 2017, the 2016 Salary Matrix will be increased by two percent (2%) to create the 2017 Local 874 Salary Matrix.
>
> Effective January 1, 2018, the 2017 Salary Matrix will be increased by two percent (2%) to create the 2017 Local 874 Salary Matrix.
>
> ARTICLE 24 – INSURANCE COVERAGE
>
> 24.1 County Benefits. The County will contribute a maximum of one thousand thirty dollars and zero cents ($1030.00) toward medical, dental, vision, basic life insurance, long term disability and employee assistance program premiums.
>
> The difference between the premiums for plans selected by the employee and the amount of County contribution, if greater, shall be paid to the employee's VEBA account.

Article 16.1 in the 2016–2018 CBA omitted the reopener language based on the employer's ability to pay and the CPI [consumer price index]-W-West-B/C (West Coast cities). Article 24.1 omitted

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[1] The record reflects that the parties' interchanged usage of Article 24 and Article 24.1 in their proposals and exchanges. This decision reflects the parties' usage as indicated by the admitted evidence.

the reopener language for insurance coverage based on the employer's ability to pay, COLA, and other appropriate factors.

Bargaining for the Successor 2016–2018 CBA

On October 13, 2015, the union submitted a proposal to the employer which contemplated the following:

- Effective dates of January 1, 2016, to December 31, 2018;[2]
- Maintaining all current contract language as in the 2013–2015 CBA, with the exception of Articles 16 and 24;
- For 2016 wages, proposing a two pay grade increase for all employees recognized by Article 1.1 of the CBA, effective January 1, 2016;
- For 2017 and 2018 wages, effective January 1 of each year, increasing the wages in effect on December 31 of the preceding year by 100 percent of the CPI-W All US Cities Average Wage Earners average change for the period from July through June of the preceding year(s). Further, proposing a minimum COLA of 2 percent and a maximum COLA of 5 percent.
- For 2016 employer insurance coverage contributions, keeping the employer's contribution for all coverage types equal to the amount contributed in December 2015. For 2017 and 2018, increasing the employer's contribution by $50.00 over the amount contributed in December 2016 and December 2017, respectively.
- For the term of the CBA, proposing changes to the medical plan in accordance with recommendations made by the insurance committee.

The parties first met for bargaining over the successor 2016–2018 CBA on November 5, 2015. They discussed bargaining ground rules, including that all tentative agreements (TAs) were to be honored and that there would be no press releases unless mutually agreed. Cash testified that the

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[2] Subsequent proposals indicated the parties included the term of the agreement, and both sides maintained the January 1, 2016, to December 31, 2018, effective dates. For purposes of analyzing the substantive disputes, the term dates are not included in the background or analysis of this decision.

parties also discussed the rationale for the union's October 13, 2015, proposal. Wesley did not testify on behalf of the employer. It is not clear if the parties' 2016–2018 bargaining ground rules were verbally exchanged or written. Aside from Cash's testimony, neither party supplied evidence of the parties' ground rules. While ground rules are not necessarily a requirement in bargaining, they can assist with interpretation of the parties' bargaining process. Since the parties' dispute ultimately involved disagreement over what "current contract language," "obsolete language," and "date cleanup" meant to the parties, additional ground rules may have assisted in interpreting the parties' respective understandings of those terms.

On January 12, 2016, the employer proposed changes to the following provisions: Article 1 (Recognition), Article 2 (Definitions), Article 10 (Grievance Procedure), Article 15 (Hours of Work – Overtime – Rest Periods), Article 16 (Wages and Pay Practices), Article 23 (Conditions of General Application), Article 24 (Insurance Coverage), and Appendix F (Position Classification Review Policy). The employer's proposal recommended the removal of Article 16.1.b in its entirety as "obsolete language." Article 16.1.b of the parties' 2013–2015 CBA was a "one-time only" benefit of 40 hours of contractual leave for "*the year 2013 only* . . . [to] be used no later than 365 days from the date of" ratification of the 2013–2015 CBA. (emphasis added).

Contemporaneous bargaining notes taken by Cash on January 12, 2016, indicated that the employer "[would] have [a] proposal next time" for its "finance package." The employer's proposal with regard to Article 24 read, "Open for negotiations including for matters related to the Affordable Care Act (ACA) and the pending excise tax application. Such discussions to include the VEBA contribution including as addressed in article 18.8, 20.5 and 24.1."

The employer's January 12, 2016, proposal also contained the following two provisions on the first page directly under the header and date:

> All items not addressed to remain as per current contract except date clean up necessary to reflect the new term of agreement.
>
> The County reserves the exclusive right to add to, modify and/or delete these proposal [sic] at its sole discretion in order to reach settlement.

On January 28, 2016, the employer proposed its financial package addressing Articles 16 and 24:

> ARTICLE 16–WAGES AND PAY PRACTICES
>
> 1-1-2016 – Continue with 2015 wage rates
> 1-1-2017 – Open for negotiations
> 1-1-2018 – Open for negotiations
>
> ARTICLE 24 – INSURANCE COVERAGE
>
> 1-1-2016 – CCL [current contract language] with exception of negotiation over the VEBA contribution including as tied to 18.8, 20.5 and 24.1.
>
> 1-1-2017 – Open for negotiations
> 1-1-2018 – Open for negotiations

The parties delayed further successor CBA negotiations pending the receipt of the union's internal salary study and budget review of the employer. Cash testified that the union's financial analysis of the employer was provided to the employer at the April 19, 2016, meeting.

On May 10, 2016, the employer made a proposal to the union addressing Articles 16 and 24:

> ARTICLE 16–WAGES AND PAY PRACTICES
>
> 7-1-2016 – 1%
> 1-1-2017 – Open for negotiations
> 1-1-2018 – Open for negotiations
>
> ARTICLE 24–INSURANCE COVERAGE
>
> 1-1-2016 – CCL with exception of negotiation over the VEBA contribution including as tied to 18.8, 20.5 and 24.1.
>
> 1-1-2017 – Open for negotiations
> 1-1-2018 – Open for negotiations

The employer's May 10 proposal also contained nearly the same two provisions as its January 28, 2016, proposal on the first page directly under the header and date:

> All items not addressed to remain as per current contract and/or the County proposal except date clean up necessary to reflect the new term of agreement.
>
> The County reserves the exclusive right to add to, modify and/or delete these proposal [sic] at its sole discretion in order to reach settlement.

On May 11, 2016, Cash e-mailed Franklin County Human Resources Director Carlee Nave a "what-if" counterproposal. Cash's e-mail began, "The Union is submitting the following 'what-if' counter proposal as discussed yesterday during the caucus between myself and Mr. Wesley for the County's consideration." The union's proposal addressed Articles 16 and 24 as follows:

> Article 16- Wages and Pay Practices-
> 2016- Effective 7/1/2016- 1.75%
> 2017- Opener for negotiations; COLA negotiated based on the County's ability to pay
> 2018- Opener for negotiations; COLA negotiated based on the County's ability to pay
>
> Article 24- Insurance-
> 1/1/2016- CCL
> 1/1/2017- Open for negotiations
> 1/1/2018- Open for negotiations

Cash's May 11 e-mail further identified changes to Articles 1, 2, 16.1.b, and Appendix F as tentatively agreed upon based on the employer's January 12, 2016, proposal. The May 11 e-mail also agreed to the employer's proposed withdrawal of Articles 10, 15, and 23. Of note, Cash wrote of Article 16.1.b, "Agree to *deletion of obsolete language* TA 5/10/16." (emphasis added).

On May 18, 2016, Wesley e-mailed Cash a "concept" counterproposal with a courtesy copy to Nave. Wesley's e-mail addressed Articles 16 and 24:

> Article 16- Wages and Pay Practices-
> 2016- Effective 7/1/2016- 1.5%
> 2017- Open for negotiations;
> 2018- Open for negotiations;
>
> Article 24- Insurance-
> 1/1/2016- CCL

1/1/2017- Open for negotiations
1/1/2018- Open for negotiations

The employer's May 18 concept proposal acknowledged the parties' tentative agreement on Articles 1, 2, 16.1.b, and Appendix F and agreed to withdraw its own proposals pertaining to Articles 10, 15, and 23. Of note, Wesley maintained Cash's verbiage from the union's May 11 proposal regarding Article 16.1.b: "Agree to *deletion of obsolete language* TA 5/10/16." (emphasis added).

On June 8, 2016, Cash e-mailed Nave the following:

> I was thinking about the seemingly unending negotiation process in Franklin County and would like to offer the following "what-if" concept:
>
> 7/1/2016- 2%
> 1/1/2017- 2%
> 1/1/2018- 2%
>
> Items to date tentatively agreed to during negotiations remain TA'd.
>
> Let me know if this offer might be acceptable.

On June 16, 2016, Nave e-mailed Cash, stating, "I met with the Board [of County Commissioners] yesterday and attached is a vote document for you to take to your group. I believe I've captured everything, but please let me know if you have any questions or concerns."

Article 1 (Recognition) and Article 2 (Definitions) of the June 16, 2016, vote document were in legislative format, with lines through deleted language and different color ink for the changes. Article 16 (Wages and Pay Practices), Article 20 (Sick Leave), Article 29 (Term of Agreement), and Appendix F of the vote document were in short form, only indicating the 2 percent COLA increases effective July 1, 2016, January 1, 2017, and January 1, 2018; deletion of Article 16.1.b, Article 20.2.g, and Appendix F; and the term of the agreement as January 1, 2016, through December 31, 2018.

Article 24 (Insurance Coverage) was not included in the June 16 vote document. The vote document also did not make reference to articles previously tentatively agreed to by the parties or other provisions remaining as current contract language.

Later on June 16, 2016, Cash e-mailed Nave, stating that the employees had met and "voted to accept the County's offer." Nave responded that she would put together a draft CBA for Cash's review and would ask the auditor's office to prepare the adjusted pay matrices. After that, Nave explained, the document would need to go through legal review prior to signature.

On June 21, 2016, Nave e-mailed Cash and attached a first draft of the CBA for his content review, but the pay matrices had not yet been received from the auditor's office. Article 24.1 in the employer's June 21 draft contained the same language as that article in the fully executed 2016–2018 CBA. On June 30, 2016, Cash replied, "Looks good. Please forward the current pay matrix along with the amended copies once available."

On July 11, 2016, Nave e-mailed Cash and attached a copy of the second draft of the CBA with the new pay matrices added. This copy had been sent to the employer's attorney for review, but the review had not been completed by that date. Article 24.1 in the employer's July 11 draft also contained the same language as that article in the fully executed 2016–2018 CBA. The employer's June 21 and July 11 legislatively drafted versions of the 2016–2018 CBA were offered and admitted into the record.

On July 20, 2016, Nave e-mailed Cash and attached a copy of the third draft of the CBA from legal review. Nave asked that Cash sign, scan, and return the signature page so she could make it available for the union's bargaining team to sign. The employer's July 20 legislatively drafted CBA was not offered into evidence at the hearing.

On July 27, 2016, Cash e-mailed Nave about the union's intent to maintain the CBA's language for determining future COLAs based on the employer's "ability to pay" and CPI in Article 16. Cash wrote, "I reviewed the pay scales and other language changes that were agreed to during

negotiations for accuracy however based on the assumption the language contained in Article 16 (excluding the COLA for 16, 17 and 18) would remain the same I failed to scrutinize that article for language changes."

Cash testified that he was just asking for clarification of the absence of "ability to pay" and CPI language in Article 16. He could not recall the employer's explanation for the deletion of those provisions. When asked why he signed the contract if he felt that language should not have been deleted, he responded,

> Because the COLA language was what it was, it was a 2-2-2. And I don't know. I don't know why. That's the best I can say. I would have anticipated that language going back in on a 2-2-2 closed agreement or opener to—it was the intent or the wish to get that language back in for subsequent years, but if it didn't happen, it didn't happen, I guess, is the best explanation.

The parties fully executed the successor 2016–2018 CBA on August 17, 2016.

Ralph Salazar, a county employee who has served as the union president for approximately 10 years, testified that he did not become aware of the omitted language in Article 24 until he discovered a three-tier Aetna Insurance plan in the crew room. He wondered at that time why he had not been notified that the insurance committee was gathering to start "putting together a new insurance policy."

On November 9, 2016, Wesley and Cash exchanged several e-mails regarding Article 24. Of particular concern to the union was the absence of the reopener language for insurance benefits in the latter two years of the CBA, 2017 and 2018. Wesley indicated the employer's intent to tie wage reopeners to insurance reopeners. Wesley explained, "[T]he language that was removed from the insurance article was obsolete as it referenced past years. There was never any discussion or agreement to modify such language to include an opener for 2017 and 2018."

In his November 9 e-mails, Cash pointed out that the parties had agreed to the deletion of obsolete language in Article 16.1.b and asked why the parties then did not agree to the deletion of obsolete

language in Article 24 during negotiations. Cash also highlighted that the employer had made a proposal early in the negotiations to change Article 24 as it related to VEBA but then withdrew that proposal and did not offer any other proposals on VEBA. Cash stated, "The Union is requesting that the 'current' contract language be appended into the 2016-2018 agreement."

Wesley's last e-mail to Cash on November 9, 2016, with a courtesy copy to Nave, read:

> Your statement that obsolete language relating to insurance openers for previous years should remain in the contract is nonsensical. Openers specifically referencing 2014 and 2015 have no force, effect or application in a contract that runs 2016 through 2018.
>
> The contract was prepared by the county, sent to your office for review and subsequently signed by both parties. Therefore it is in full force and effect as written.

Upon cross-examination of Nave regarding the employer's intent surrounding Article 24, the following exchange occurred:

> Q: . . . Now, did you tell the Union that wages and insurance benefits would be tied together in these proposals?
>
> A: I don't recall.
>
> . . .
>
> Q: . . . [W]hen the County accepted the proposal that was presented by the Union in Employer [Exhibit] 10, which is the wages two, two, and two for three years, and then all other TA'd items, did the County inform the Union that in accepting that proposal, that it would eliminate openers in the Article 24 insurance article?
>
> A: The County accepted the proposal as written. All other items are current contract language.
>
> Q: And this proposal doesn't state anything about eliminating openers in the insurance article, isn't that correct?
>
> A: This proposal doesn't address insurance.

ANALYSIS

Applicable Legal Standards

Duty to Bargain

"Collective bargaining" is defined as

> the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.030(4). A public employer's duty to bargain is enforced through RCW 41.56.140(4), and unfair labor practice complaints are processed by the Commission under RCW 41.56.160 and Chapter 391-45 WAC. A complainant has the burden of proof to show, by a preponderance of the evidence, that a respondent has committed the complained-of unfair labor practice. *Seattle School District*, Decision 9355-C (EDUC, 2010), WAC 391-45-270(1)(a). A respondent is responsible for the presentation of its defense and shall have the burden of proof as to any affirmative defenses. WAC 391-45-270(1)(b).

Three types of bargaining subjects exist between an employer and union: mandatory, permissive, and illegal. *Kitsap County*, Decision 8292-B (PECB, 2007). Those subjects indicated in RCW 41.56.030(4)—wages, hours, and working conditions—are mandatory subjects of bargaining. Permissive subjects are matters considered to be remote from employee wages, hours, and working conditions, including matters which are regarded as prerogatives of employers or of unions. Illegal subjects are matters where an agreement between a union and an employer would contravene other statutes or court decisions. *Kitsap County*, Decision 8292-B.

The determination as to whether a subject is mandatory or permissive is a question of law and fact for the Commission to decide and is not subject to waiver by the parties by their action or inaction.

WAC 391-45-550. When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 203 (1989) (*City of Richland*); *Snohomish County*, Decision 9770-A (PECB, 2008).

A balance must be struck to reflect the natural tension between the parties' obligations to bargain in good faith and the statutory admonition that parties are not required to make concessions or reach an agreement. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017), *citing Walla Walla County*, Decision 2932-A (PECB, 1988), *and City of Snohomish*, Decision 1661-A (PECB, 1984).

The duty to bargain imposes a duty to give notice and provide an opportunity for good faith bargaining prior to implementing any change to past practices concerning the wages, hours, and working conditions of bargaining unit employees. *Kitsap County*, Decision 8292-B, *citing Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990).

Distinguishing between good faith and bad faith bargaining can be difficult. *Mansfield School District*, Decision 4552-B (EDUC, 1995); *Spokane County*, Decision 2167-A (PECB, 1985). A party may violate its duty to bargain in good faith by one per se violation, such as refusing to meet at reasonable times and places or refusing to make counterproposals. *Snohomish County*, Decision 9834-B (PECB, 2008). A party may also violate its duty to bargain in good faith through a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining but none of which by themselves would be per se violations. *Id.* When analyzing conduct during negotiations, the Commission examines the totality of the circumstances to determine whether an unfair labor practice has occurred. *Shelton School District*, Decision 579-B (EDUC, 1984).

Good faith is inconsistent with a predetermined resolve not to budge from an initial position. However, a party may stand firm on a position, and an adamant insistence on a bargaining position

is not, by itself, a refusal to bargain. *Mansfield School District*, Decision 4552-B, *citing Atlanta Hilton and Tower*, 271 NLRB 1600 (1984).

Unilateral Change

The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or terms of a collective bargaining agreement. *King County*, Decision 12451-A, *citing City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd, City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B. A complainant alleging a unilateral change must establish the existence of a relevant status quo or past practice and that a meaningful change to a mandatory subject of bargaining occurred. *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. For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). 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., citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

Application of Standards

The language at issue in this case was contained in Article 24 of the parties' 2013–2015 CBA and read, "For the years 2014 and 2015 coverage and plan design and the amounts of County and employee payments of premium shall be bargained based on ability to pay, COLA, and other appropriate factors." This language was also included in the 2009–2011 CBA and provided that the latter two contract years, 2010 and 2011, could be reopened each year and bargained by the parties. Further, the status quo had been that members of the insurance committee gathered input from bargaining unit employees and shared that input with the committee. Salazar testified that the insurance committee "participate[s] in the building of insurance plans," including the possible contribution amounts.

Does the dispute involve a mandatory subject of bargaining?

The Commission has consistently held that health insurance benefits, representing a form of wages, are mandatory subjects of bargaining. *Spokane County*, Decision 11627 (PECB, 2013), *citing City of Tukwila*, Decision 9691-A (PECB, 2008). However, not all matters related to health insurance benefits are mandatory subjects of bargaining. For example, an employer's decision to change its insurance broker or carriers is not a mandatory subject of bargaining unless any contemplated changes would impact the level of benefits or employee costs. *Spokane County*, Decision 11627, *citing University of Washington*, Decision 10771 (PECB, 2010).

Neither party presented arguments as to whether Article 24's provision regarding bargaining of coverage and plan design based on ability to pay, COLA, and other appropriate factors is a mandatory subject of bargaining. Nor did either party raise whether the insurance committee is a

mandatory subject of bargaining. Regardless, a case-by-case analysis and a weighing of the parties' respective interests is required. *City of Richland*, 113 Wn.2d at 203.

Salazar testified that he had been on the union's negotiation team since he became the union president. Salazar also testified that he and another employee had served on an insurance committee comprised of "members from different groups of the County" to bargain and participate in the building of insurance plans. Along with the choices of insurance plans, the committee would discuss employee contribution amounts. When asked whether he thought the changes to Article 24 were substantial, Salazar responded,

> They might not be substantial to the County on a piece of paper, but to the individuals that end up with that . . . . So when an insurance policy is made with nobody's input on the road crew, I think that's a big hurt because we have no part of it, we don't have no choice in it.

Salazar testified to receiving input from bargaining unit employees on topics such as prescription costs and the three-tier insurance premium amounts, which he would take back to the insurance committee for consideration.

Nave testified that the employer's intent in removing the wage and insurance benefits reopener language from the 2016–2018 contract was to avoid "negotiation fatigue" and that being in perpetual negotiations was "really taking a toll on labor relations at the County." Further, at the time negotiations began for the 2016–2018 CBA, the employer had an interest in avoiding the speculated Cadillac Tax under the ACA. Per Nave, the employer also had financial considerations regarding pending litigation in federal court.

Weighing the interests of the affected employees versus the management prerogatives in this case, I find that Article 24's provision regarding bargaining of coverage and plan design based on ability to pay, COLA, and other appropriate factors is a mandatory subject of bargaining. Further, by the removal of this provision, the insurance committee was rendered moot. The insurance committee, while not specifically addressed in the CBA, was part of the status quo for bargaining health

insurance coverage and plan design. The employer did not present evidence to refute that the existence of or input from the insurance committee was the status quo.

ISSUE 1: Did the employer refuse to bargain in violation of RCW 41.56.140(4) since June 30, 2016, by breaching its good faith bargaining obligations and presenting the union with a draft of the 2016–2018 CBA for review and signature, which contained reductions and unilateral changes to employee insurance (Article 24) that were not agreed to by the union in bargaining?

The Commission has repeatedly emphasized the importance of communication in management and labor relations. *Washington State University*, Decision 11498-A (PSRA, 2013), *modified on other grounds upon remand from superior court*, Decision 11498-B (PSRA, 2014) ("It is incumbent on the parties to a collective bargaining agreement to communicate."); *State – Adult Family Home Providers*, Decision 12345-A (PECB, 2015) ("The requirement that a party communicate its position during negotiations and/or mediation allows an opportunity for discussion and, if possible, a revision of the proposal."); *City of Puyallup*, Decision 5460-A (PECB, 1996) ("Healthy employer-union relations depend upon communication between the parties."). In this case, the parties failed to fully and effectively communicate for the sake of management and labor relations.

No Meeting of the Minds

The parties did not share a meeting of the minds as to what "current contract language," "obsolete language," or "date cleanup" meant. The record is nearly absent of communication at the bargaining table with regard to the parties' intentions in tying Articles 16 and 24 together for the purpose of maintaining or deleting the reopener language.

The employer asserts that the deletion or maintenance of the reopener language in Articles 16 and 24 for the latter two CBA years, 2017 and 2018, were tied together. The employer maintains that if the reopener language remained in Article 16, it would also remain in Article 24; if deleted from Article 16, then it would also be deleted from Article 24. The employer characterizes the deletion of the reopener language—and hence, the insurance committee—as "date cleanup" and the

removal of "obsolete language." Nave testified that as it pertained to Article 24, "current contract language" only meant the employer would contribute $1,030.00 per month toward employee benefits. According to Nave, reopeners for Articles 16 and 24 would not have been automatically included in the 2016–2018 language. She testified that there was no discussion with the board about insurance reopeners.

The union asserts that the employer did not consciously deliver its "deal" to give up the reopeners for insurance plan design and contributions in 2017 and 2018 in exchange for the union's acceptance of the Article 16 wage adjustments (2 percent each year). Rather, the union maintains that when the employer made its latter proposals and sent the union the vote document, which did not contain Article 24, the union assumed that Article 24 would remain current contract language. Based on earlier proposals identifying Article 24 as "CCL," Cash testified he understood "CCL" to mean the 2015 level of employer contribution of $1,030.00 would remain the same in 2016 and that the parties would reopen the CBA in 2017 and 2018. As Article 24 was absent from the vote document, Cash testified that the vote document did not raise a red flag that Article 24 was going to be changed.

Nave's discussions with the board of commissioners examined how the board wanted to "lock in contracts for three years" and "yielded an openness to look at . . . potentially accepting offers from the union that . . . closed contracts for three years." According to Nave, the board wanted offers brought from the union that it could consider. Nave reached out to Wesley to get ahold of Cash, which prompted an "off the record" conversation and, ultimately, Cash submitting the June 8, 2016, proposal. Nave testified that the board accepted the union's June 8, 2016, proposal "to close the contract for the three-year term." The record failed to produce evidence that the board's intentions, as indicated by Nave, were communicated to the union by any employer representative.

The employer attempted to draw an analogy on cross-examination between the deletion of the "obsolete language" in Article 16.1.b and the deletion of the reopener language for the latter two years of the CBA. The language in Article 16.1.b read, in part, "For the year 2013 *only*, benefited bargaining employees of this group shall be provided a one-time entitlement of Contractual

Leave." (emphasis added). The record reflects that *both* parties fully understood the implications of Article 16.1.b as being a one-time benefit for the 2013 year of the 2013–2015 CBA, and they had a tentative agreement to delete the language. In contrast, the parties did not have a tentative agreement to delete the reopener language in Article 24. Nor does the record reflect that the union shared the employer's understanding that the reopener language in Article 24 for contract years 2017 and 2018 was "obsolete" in the same manner as Article 16.1.b.

Cash testified that at the time of the union's 2 percent COLA increase proposal with all TAs as previously agreed, the parties had not discussed health care in approximately one month. Further, he testified that he and Wesley had had a phone conversation in which Wesley shared the employer "[had] money" and was "ready to move." This phone call precipitated the union's June 8, 2016, concept proposal. On cross-examination, Cash clarified that at that point the parties did *not* have a TA on Article 24. Further on cross-examination, Cash was asked if the union at any time during the bargaining process had explained to the employer or provided a written statement of the union's understanding of what "current contract language" meant in reference to Article 24. Cash replied, "No. However, we did receive, I believe, from the County that the cleanup would entail somewhere—it was like, basically, cleanup would include date cleanup, et cetera, et cetera."

Salazar corroborated Cash's testimony, stating that he believed the vote document was about voting for the money and that Article 24 would "[s]tay the same," with "[o]peners at '17, '18." He assumed that because nothing was discussed about Article 24, "that's what the old contract state[d], and that's what [the parties] were going by."

Based on the evidence presented, I find the parties did not engage in meaningful dialogue about the underlying intentions and interests before or during bargaining. As discussed, the Commission emphasizes the importance of continued communication between the parties. If attempts at good faith communications and bargaining proved challenging, the parties could have sought the assistance of a third party mediator or facilitator.

Conditional Versus Unconditional Proposals

The parties were operating under conditional proposals from May 10, 2016, to June 8, 2016. A conditional offer is usually made in a "what-if" mode in mediation or as part of a package proposal. *Asotin County*, Decision 4568-C (PECB, 1996). While a party retains the right to change its position if a conditional offer does not produce agreement, the same is not true for unconditional offers. A party who makes an unconditional offer cannot diminish that offer unless "intervening circumstances . . . justify the change in position." *City of Wenatchee*, Decision 8898 (PECB, 2005), *aff'd*, Decision 8898-A (PECB, 2006), *citing Asotin County*, Decision 4568-C.

Aside from the union's and employer's initial proposals on October 13, 2015, and January 12, 2016, respectively, all other proposals prior to the employer's June 16, 2016, vote document were "conditional" proposals. Some were even labeled "concept" or "what-if" proposals.

The employer's June 16 vote document, however, was an "unconditional" offer. It was not labeled a "concept" or "what-if" proposal, nor did it elaborate on any other contingencies to CBA settlement. When Nave sent the vote document to Cash, the content of her e-mail indicated it was produced after she met with the board of commissioners. The employer did not indicate to the union that by voting to ratify the vote document, the bargaining unit employees were voting for the fixed $1,030.00 per month employer contribution to health insurance premiums each year of the CBA without reopeners or the insurance committee's recommendations.

As an unconditional offer, the vote document should not have been diminished by the employer absent intervening circumstances to justify the change in position. *City of Wenatchee*, Decision 8898, *aff'd*, Decision 8898-A. The record does not reflect any intervening circumstances between the employer's June 16, 2016, vote document and the employer's three legislatively formatted draft CBAs provided to the union on June 21, July 11, and July 20, 2016.

Parties making conditional offers must clearly communicate the proposals that they wish the other party to consider. Conditional offers must be clearly expressed and must not be ambiguous. If asked to do so, the party making the conditional offer must explain to the other party the conditions

and implications of a failure to satisfy those conditions. *City of Redmond*, Decision 8879-A (PECB, 2006).

When asked during cross-examination whether the employer told the union that wages and insurance benefits (Articles 16 and 24) would be tied together, Nave responded, "I don't recall." When asked whether the employer, in accepting the union's June 8, 2016, proposal, informed the union that it would eliminate the reopeners in Article 24, Nave responded, "The county accepted the proposal as written. All other items are current contract language." If the employer intended through the course of negotiations and conditional offers that Articles 16 and 24 be tied together—either through closed CBAs with no reopeners, or determinative wages and premium contributions in the first year of the CBA with reopeners in the latter two years—its intentions should have been unambiguously expressed. *Id.*

The record indicates that the union's June 8, 2016, offer of 2 percent COLAs each year of the CBA was prompted by a phone call Cash had received from Wesley. Cash testified that during that conversation, Wesley advised him that the board of commissioners had discussed wages with Wesley and Nave. Wesley also advised Cash during the call "that if the union were to submit [a] 2-2-2 proposal . . . the county would be inclined to support that—or to agree to that proposal." Nothing in the record refutes Cash's recollection of the precipitating phone call with Wesley leading up to the June 8 offer. Wesley's phone call to Cash, which prompted the union to make its June 8, 2016, offer, was a conditional offer. The union's June 8 offer was a conditional offer.

In *South Columbia Basin Irrigation District*, Decision 1404-A (PECB, 1982), the Commission did not accept the employer's rationale that the omission of agreed-upon current contract language in the successor agreement should have been realized by the union. The parties in that case had signed a "Principles of Agreement" document incorporating the amendments to the expired CBA before they realized the omitted wage language in dispute. The "Principles of Agreement" document set out provisions to be incorporated into the expired agreement, without reciting the provisions of the expired CBA that were to be preserved or deleted. The Commission upheld the examiner's findings that as the employer failed to clarify its position on wage language, even after

specific inquiry by the union, the employer committed an unfair labor practice. *South Columbia Basin Irrigation District*, Decision 1404-A.

In *Bremerton School District*, Decision 1589 (PECB, 1983), both parties ratified the agreement reached without having first produced a final written document incorporating the specific language to be included in the new CBA. The final draft of the CBA was prepared by the employer after the ratification vote and included changes not specifically agreed to at the bargaining table. The examiner in *Bremerton School District* found that the employer failed to bargain in good faith by its conduct, stating, "The party who undertakes the responsibility to prepare the final written agreement between the parties must submit a complete and accurate document reflecting the final unconditional understanding reached in collective bargaining."

The employer argues that Cash should have realized the changes made in Article 24 when he received the legislatively drafted CBAs from the employer after the vote document was ratified. Similar to the employers in *South Columbia Basin Irrigation District* and *Bremerton School District*, the employer in this case made changes to Article 24, despite those changes not being included in the June 16, 2016, vote document. The burden was on the employer to reflect the "final unconditional understanding" reached in bargaining. *Bremerton School District*, Decision 1589.

Cash testified that Article 24 was not tentatively agreed to at the time of the vote document. Because the parties did not have a mutual understanding of "date cleanup," "obsolete language," or "current contract language," as those terms applied to Article 24, the parties had not reached a final unconditional understanding on Article 24. The absence of a final unconditional understanding reached in collective bargaining is a factor in finding the employer failed to bargain in good faith in this case.

When Cash contacted Nave on July 27, 2016, prior to the full execution of the CBA, and inquired about the deletion of the reopener language in Article 16, the employer had the opportunity to ensure that both parties had a meeting of the minds on the absence of the reopener language in

both Articles 16 and 24. The employer failed to clear up the misunderstanding upon the union's inquiry as it related to reopener language. Such conduct is a contributing factor in finding the employer failed to bargain in good faith. *South Columbia Basin Irrigation District*, Decision 1404-A.

Conclusion for Failure to Bargain in Good Faith Allegation

The employer failed to express its intentions to the union regarding the conditional offers of tying Articles 16 and 24 together during bargaining. The employer prompted the union to make its June 8, 2016, offer and then provided the union and bargaining unit employees with a vote document for ratification that was completely void of reference to Article 24. After the union voted to ratify the vote document, the employer sent the union legislatively drafted CBAs that changed the language of Article 24 and failed to cure misunderstandings over the deletion of the reopener language upon the union's inquiry. Based on the totality of these circumstances, the employer failed to bargain in good faith and therefore committed an unfair labor practice under RCW 41.56.140(4) and (1).

ISSUE 2: Did the employer refuse to bargain in violation of RCW 41.56.140(4) since June 30, 2016, by its unilateral changes and reductions to employee insurance (Article 24) that were not agreed to by the union in bargaining, when it presented the union with a draft of the 2016–2018 CBA for review and signature?

The union argues that deleting the reopener provisions of Article 24 after the vote document was ratified was a unilateral substantial change to a mandatory subject of bargaining. The union cites *City of Vancouver*, Decision 10616 (PECB, 2009), which stated that such a game of "'[g]otcha' has no place in labor relations, and is not conducive to the public interest in stable employment relationships."

The employer argues that the union's position to apply 2013–2015 CBA Article 24 language to the 2016–2018 CBA is a "nonsensical outcome" and that the bargaining unit employees "have suffered no harm or deprivation of benefits due to the language clean up." (emphasis omitted).

The employer further asserts that the union could not exercise a 2014 or 2015 wage or insurance reopener in 2017 or 2018.

The reopener language in Article 24, as it relates to the COLA, ability to pay, and other factors, is a mandatory subject of bargaining. The employer in this case decided to change Article 24's language by eliminating the reopener provisions for 2017 and 2018, which had been in at least two prior CBAs for the latter two years of the contract terms. This, in effect, also eliminated the insurance committee, which provided input on health insurance plans for bargaining unit employees. These changes had a material and substantial impact on the bargaining unit employees' terms and conditions of employment. The employer made unilateral changes to mandatory subjects of bargaining when it sent the June 21, July 11, and July 20, 2016, legislatively drafted CBAs which changed Article 24 and the related past practice of the insurance committee. The employer made these changes after the June 16, 2016, vote document was ratified by the union and without bargaining to an agreement or to a good faith impasse.

Waiver by Inaction

The employer's post-hearing brief appears to raise a "waiver by inaction" defense. The employer's brief highlights that after the union ratified the vote document, the union received updated legislative drafts of the CBA on June 21, July 11, and July 20, 2016.

The "waiver by inaction" defense is apt where appropriate notice of a proposed change was given and the party receiving notice did not request bargaining in a timely manner. *City of Edmonds*, Decision 8798-A (PECB, 2005), *citing City of Yakima*, Decision 1124-A (PECB, 1981) (finding the union responded to notice of a bargaining opportunity with a public information campaign, but never requested bargaining); *Lake Washington Technical College*, Decision 4721-A (finding the union filed a grievance under a collective bargaining agreement but never requested bargaining). The key ingredient in finding a waiver by inaction by a union is

> a finding that the employer gave adequate notice to the union. Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. If the employer's action has

> already occurred when the union is given notice, the notice would not be considered timely and the union will be excused from the need to demand bargaining on a *fait accompli*.

City of Edmonds, Decision 8798-A, *citing Washington Public Power Supply System*, Decision 6058-A.

Formal notice is not required. In the absence of formal notice, however, it must be shown that the union had actual, timely knowledge of the contemplated change. The Commission's focus should be on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A.

Over the course of nearly two months—between June 21, 2016, when the employer provided its initial legislatively drafted CBA, and August 17, 2016, the date the CBA was fully executed—the union had opportunities to review three legislatively drafted versions of the CBA. The employer points out that not until late July 2016 did the union raise concern about the deletion of the reopener language, and, even then, it only did so with regard to Article 16. During cross-examination, Cash admitted he "screwed up" and missed the parts of Article 24 that had been deleted. He discovered that Article 16 no longer contained the reopener language, based on CPI and ability to pay, in late July and e-mailed Nave. However, at no point did he raise concerns over the deletion of the reopener language in Article 24.

The union had timely notice of the changes to Article 24 (albeit changes not made in good faith by the employer) before the CBA was fully executed in August. Had the union diligently reviewed the three legislatively drafted CBAs, the union could have requested further bargaining based on the changes to Article 24, even after the vote document was ratified by the union. If the employer refused to bargain further, or gave indication that meaningful bargaining was unlikely, the union could have filed an unfair labor practice complaint at that time.

Conclusion for Unilateral Change Allegation

By its failure to act on the changes to Article 24 in the June 21, July 11, and July 20, 2016, legislatively drafted CBAs over a two-month period, the union waived its right to bargain by

inaction. Therefore, the employer successfully argued its affirmative defense and did not commit a refusal to bargain unfair labor practice.

CONCLUSION

The employer failed to express its intentions to the union regarding the conditional offers of tying Articles 16 and 24 together during bargaining. The employer prompted the union to make its June 8, 2016, offer and then provided the union and bargaining unit employees with a vote document that was completely void of reference to Article 24. After the union voted to ratify the vote document, the employer sent the union legislatively drafted CBAs that changed the language of Article 24 and failed to cure misunderstandings over the deletion of the reopener language upon the union's inquiry. Based on the totality of these circumstances, the employer failed to bargain in good faith and therefore committed an unfair labor practice under RCW 41.56.140(4) and (1).

The employer made unilateral changes to mandatory subjects of bargaining—health insurance coverage and the insurance committee—without bargaining in good faith to agreement or impasse. However, by failing to act on the changes to Article 24 in the employer's June 21, July 11, and July 20, 2016, legislatively drafted CBAs over a two-month period, the union waived its right to bargain by inaction. Thus, the employer did not commit a refusal to bargain unfair labor practice.

REMEDY

Fashioning remedies is a discretionary act of the Commission. *University of Washington*, Decision 11499-A (PSRA, 2013), *citing Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989); *State – Department of Corrections*, Decision 11060-A (PSRA, 2012). The statutes the Commission administers are remedial in nature, and the provisions of those statutes should be liberally construed to effect their purposes. *See Local Union No. 469, International Association of Fire Fighters v. City of Yakima*, 91 Wn.2d 101, 109 (1978).

The Commission's authority to fashion remedial orders has included awards of attorney fees and interest arbitration. *Municipality of Metropolitan Seattle v. Public Employment Relations*

Commission, 118 Wn.2d 621, 633 (1992). "Agencies enjoy substantial freedom in developing remedies." *Id.* at 634. The Commission has authority to issue appropriate orders that, in its expertise, the Commission "believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful." *Id.* at 634–35. *See also Snohomish County*, Decision 9834-B.

"Appropriate remedial orders" are those necessary to effectuate the purposes of the applicable statutes and to make the Commission's lawful orders effective. *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d at 633. The standard remedy for an unfair labor practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the status quo; make employees whole; post notice of the violation; publicly read the notice; and order the parties to bargain from the status quo. *State – Department of Corrections*, Decision 11060-A; *City of Anacortes*, Decision 6863-B (PECB, 2001). Requiring an employer to read a copy of the notice at a meeting of its governing body has become part of the standard remedy in an unfair labor practice proceeding. *Seattle School District*, Decision 5542-C (PECB, 1997); *University of Washington*, Decision 11414 (PSRA, 2012), *aff'd*, Decision 11414-A (PSRA, 2013); *City of Yakima*, Decision 10270-A (PECB, 2011). Deviation from the standard remedy, including not ordering a portion of the standard remedy, is an extraordinary remedy.

The standard remedy is appropriate in this case. The employer shall be ordered to cease and desist from failing to bargain to good faith, to restore the status quo ante, make employees whole, post the notice of the violation, publicly read the notice at the employer's regularly scheduled board meeting, and return to the bargaining table with the union to bargain Article 24 from the 2013–2015 status quo. Such status quo shall include the Article 24 reopener language from the 2013–2015 CBA; the $1,030.00 per month employer premium contribution from 2015; and the union's participation on the insurance committee, input on health insurance coverage and premiums, and employer consideration of the insurance committee's input.

FINDINGS OF FACT

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

2. The Washington State Council of County and City Employees (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents all regular full-time and regular part-time employees of the County Roads and Motor Vehicle Divisions.

3. Tom Cash is the union staff representative who has represented the bargaining unit since April 2011.

4. When Cash began representing the bargaining unit, the parties' 2009–2011 CBA was in effect.

5. Cash has negotiated the successor CBAs on behalf of the union since 2011.

6. Kevin Wesley is the employer's labor relations consultant.

7. Wesley did not testify on behalf of the employer.

8. Carlee Nave is the employer's human resources director.

9. Ralph Salazar has served as the union president for approximately 10 years and is a county employee.

10. The 2009–2011 CBA provided for the following insurance provision:

> ARTICLE 24 – INSURANCE COVERAGE
>
> 24.1 County Benefits. Effective January 1, 2009, the County will contribute up to a maximum of seven hundred twenty-seven dollars and no cents/100 Dollars ($727.00) towards the medical, dental, vision, and life insurance plans made available by the County for Employee and dependent coverage, in amounts set forth below. *For the years 2010 and 2011*

coverage and plan design and the amounts of County and employee payments of premium shall be bargained based on ability to pay, COLA [cost of living adjustment], and other appropriate factors.

The difference between the premiums for plans selected by the employee and the amount of County contribution, if greater, shall be paid to the employee's VEBA [voluntary employee benefits association] account. For the 2009 year, the County shall offer the following insurance, or plans with substantially the same range of benefits:

Medical, premium up to $649.01
Dental, premium up to $59.90
Vision, premium up to $13.53
Life Insurance, premium up to $4.56

11. The 2013–2015 CBA contemplated contract reopeners for 2014 and 2015 for "*coverage and plan design and the amounts of County and employee payments of premium* [to] be bargained based on *ability to pay, COLA, and other appropriate factors*." (emphasis added).

12. The fully executed 2016–2018 CBA contains the following provisions for Articles 16 and 24:

ARTICLE 16 – WAGES AND PAY PRACTICES

16.1 Wages. The parties agree to adopt the 2016 Local 874 Salary Matrix as presented in Appendix A effective July 1, 2016.

Effective January 1, 2017, the 2016 Salary Matrix will be increased by two percent (2%) to create the 2017 Local 874 Salary Matrix.

Effective January 1, 2018, the 2017 Salary Matrix will be increased by two percent (2%) to create the 2017 Local 874 Salary Matrix.

ARTICLE 24 – INSURANCE COVERAGE

24.1 County Benefits. The County will contribute a maximum of one thousand thirty dollars and zero cents ($1030.00) toward medical, dental, vision, basic life insurance, long term disability and employee assistance program premiums.

> The difference between the premiums for plans selected by the employee and the amount of County contribution, if greater, shall be paid to the employee's VEBA account.

13. Article 16.1 in the 2016–2018 CBA omitted the reopener language based on the employer's ability to pay and the CPI [consumer price index]-W-West-B/C (West Coast cities). Article 24.1 omitted the reopener language for insurance coverage based on the employer's ability to pay, COLA, and other appropriate factors.

14. On October 13, 2015, the union submitted a proposal to the employer which contemplated the following:

- Effective dates of January 1, 2016, to December 31, 2018;
- Maintaining all current contract language as in the 2013–2015 CBA, with the exception of Articles 16 and 24;
- For 2016 wages, proposing a two pay grade increase for all employees recognized by Article 1.1 of the CBA, effective January 1, 2016;
- For 2017 and 2018 wages, effective January 1 of each year, increasing the wages in effect on December 31 of the preceding year by 100 percent of the CPI-W All US Cities Average Wage Earners average change for the period from July through June of the preceding year(s). Further, proposing a minimum COLA of 2 percent and a maximum COLA of 5 percent.
- For 2016 employer insurance coverage contributions, keeping the employer's contribution for all coverage types equal to the amount contributed in December 2015. For 2017 and 2018, increasing the employer's contribution by $50.00 over the amount contributed in December 2016 and December 2017, respectively.
- For the term of the CBA, proposing changes to the medical plan in accordance with recommendations made by the insurance committee.

15. The parties first met for bargaining over the successor 2016–2018 CBA on November 5, 2015.

16. On January 12, 2016, the employer proposed changes to the following provisions: Article 1 (Recognition), Article 2 (Definitions), Article 10 (Grievance Procedure), Article 15 (Hours of Work – Overtime – Rest Periods), Article 16 (Wages and Pay Practices), Article 23 (Conditions of General Application), Article 24 (Insurance Coverage), and Appendix F (Position Classification Review Policy). The employer's proposal recommended the removal of Article 16.1.b in its entirety as "obsolete language." Article 16.1.b of the parties' 2013–2015 CBA was a "one-time only" benefit of 40 hours of contractual leave for "*the year 2013 only* . . . [to] be used no later than 365 days from the date of" ratification of the 2013–2015 CBA. (emphasis added).

17. On January 28, 2016, the employer proposed its financial package addressing Articles 16 and 24:

> ARTICLE 16–WAGES AND PAY PRACTICES
>
> 1-1-2016 – Continue with 2015 wage rates
> 1-1-2017 – Open for negotiations
> 1-1-2018 – Open for negotiations
>
> ARTICLE 24 – INSURANCE COVERAGE
>
> 1-1-2016 – CCL [current contract language] with exception of negotiation over the VEBA contribution including as tied to 18.8, 20.5 and 24.1.
>
> 1-1-2017 – Open for negotiations
> 1-1-2018 – Open for negotiations

18. The union's financial analysis of the employer was provided to the employer at the April 19, 2016, meeting.

19. On May 10, 2016, the employer made a proposal to the union addressing Articles 16 and 24:

ARTICLE 16–WAGES AND PAY PRACTICES

7-1-2016 – 1%
1-1-2017 – Open for negotiations
1-1-2018 – Open for negotiations

ARTICLE 24–INSURANCE COVERAGE

1-1-2016 – CCL with exception of negotiation over the VEBA contribution including as tied to 18.8, 20.5 and 24.1.

1-1-2017 – Open for negotiations
1-1-2018 – Open for negotiations

20. On May 11, 2016, Cash e-mailed Nave a "what-if" counterproposal. Cash's e-mail began, "The Union is submitting the following 'what-if' counter proposal as discussed yesterday during the caucus between myself and Mr. Wesley for the County's consideration." The union's proposal addressed Articles 16 and 24 as follows:

Article 16- Wages and Pay Practices-
2016- Effective 7/1/2016- 1.75%
2017- Opener for negotiations; COLA negotiated based on the County's ability to pay
2018- Opener for negotiations; COLA negotiated based on the County's ability to pay

Article 24- Insurance-
1/1/2016- CCL
1/1/2017- Open for negotiations
1/1/2018- Open for negotiations

21. Cash's May 11 e-mail further identified changes to Articles 1, 2, 16.1.b, and Appendix F as tentatively agreed upon based on the employer's January 12, 2016, proposal. The May 11 e-mail also agreed to the employer's proposed withdrawal of Articles 10, 15, and 23. Of note, Cash wrote of Article 16.1.b, "Agree to *deletion of obsolete language* TA 5/10/16." (emphasis added).

22. On May 18, 2016, Wesley e-mailed Cash a "concept" counterproposal with a courtesy copy to Nave. Wesley's e-mail addressed Articles 16 and 24:

> Article 16- Wages and Pay Practices-
> 2016- Effective 7/1/2016- 1.5%
> 2017- Open for negotiations;
> 2018- Open for negotiations;
>
> Article 24- Insurance-
> 1/1/2016- CCL
> 1/1/2017- Open for negotiations
> 1/1/2018- Open for negotiations

23. The employer's May 18 concept proposal acknowledged the parties' tentative agreement on Articles 1, 2, 16.1.b, and Appendix F and agreed to withdraw its own proposals pertaining to Articles 10, 15, and 23. Of note, Wesley maintained Cash's verbiage from the union's May 11 proposal regarding Article 16.1.b: "Agree to *deletion of obsolete language* TA 5/10/16." (emphasis added).

24. On June 8, 2016, Cash e-mailed Nave the following:

> I was thinking about the seemingly unending negotiation process in Franklin County and would like to offer the following "what-if" concept:
>
> 7/1/2016- 2%
> 1/1/2017- 2%
> 1/1/2018- 2%
>
> Items to date tentatively agreed to during negotiations remain TA'd.
>
> Let me know if this offer might be acceptable.

25. On June 16, 2016, Nave e-mailed Cash, stating, "I met with the Board [of County Commissioners] yesterday and attached is a vote document for you to take to your group. I believe I've captured everything, but please let me know if you have any questions or concerns."

26. Article 24 (Insurance Coverage) was not included in the June 16 vote document. The vote document also did not make reference to articles previously tentatively agreed to by the parties or other provisions remaining as current contract language.

27. Later on June 16, 2016, Cash e-mailed Nave, stating that the employees had met and "voted to accept the County's offer." Nave responded that she would put together a draft CBA for Cash's review and would ask the auditor's office to prepare the adjusted pay matrices.

28. On June 21, 2016, Nave e-mailed Cash and attached a first draft of the CBA for his content review, but the pay matrices had not yet been received from the auditor's office. Article 24.1 in the employer's June 21 draft contained the same language as that article in the fully executed 2016–2018 CBA.

29. On June 30, 2016, Cash replied, "Looks good. Please forward the current pay matrix along with the amended copies once available."

30. On July 11, 2016, Nave e-mailed Cash and attached a copy of the second draft of the CBA with the new pay matrices added. Article 24.1 in the employer's July 11 draft also contained the same language as that article in the fully executed 2016–2018 CBA.

31. On July 20, 2016, Nave e-mailed Cash and attached a copy of the third draft of the CBA from legal review. Nave asked that Cash sign, scan, and return the signature page so she could make it available for the union's bargaining team to sign.

32. On July 27, 2016, Cash e-mailed Nave about the union's intent to maintain the CBA's language for determining future COLAs based on the employer's "ability to pay" and CPI in Article 16. Cash wrote, "I reviewed the pay scales and other language changes that were agreed to during negotiations for accuracy however based on the assumption the language contained in Article 16 (excluding the COLA for 16, 17 and 18) would remain the same I failed to scrutinize the article for language changes."

33. The parties fully executed the successor 2016–2018 CBA on August 17, 2016.

34. Salazar did not become aware of the omitted language in Article 24 until he discovered a three-tier Aetna Insurance plan in the crew room. He wondered at that time why he had not been notified that the insurance committee was gathering to start "putting together a new insurance policy."

35. Nave offered the following testimony in regard to the employer's intent surrounding Article 24:

> Q: . . . Now, did you tell the Union that wages and insurance benefits would be tied together in these proposals?
>
> A: I don't recall.
>
> . . .
>
> Q: . . . [W]hen the County accepted the proposal that was presented by the Union in Employer [Exhibit] 10, which is the wages two, two, and two for three years, and then all other TA'd items, did the County inform the Union that in accepting that proposal, that it would eliminate openers in the Article 24 insurance article?
>
> A: The County accepted the proposal as written. All other items are current contract language.
>
> Q: And this proposal doesn't state anything about eliminating openers in the insurance article, isn't that correct?
>
> A: This proposal doesn't address insurance.

36. The parties did not share a meeting of the minds as to what "current contract language," "obsolete language," or "date cleanup" meant.

37. Nave believed that as it pertained to Article 24, "current contract language" only meant the employer would contribute $1,030.00 per month toward employee benefits. According to

Nave, reopeners for Articles 16 and 24 would not have been automatically included in the 2016-2018 language.

38. Nave's discussions with the board of commissioners examined how the board wanted to "lock in contracts for three years" and "yielded an openness to look at . . . potentially accepting offers from the union that . . . closed contracts for three years." According to Nave, the board wanted offers brought from the union that it could consider.

39. Nave reached out to Wesley to get ahold of Cash, which prompted an "off the record" conversation and, ultimately, Cash submitting the June 8, 2016, proposal.

40. Based on earlier proposals identifying Article 24 as "CCL," Cash testified he understood "CCL" to mean the 2015 level of employer contribution of $1,030.00 would remain the same in 2016 and that the parties would reopen the CBA in 2017 and 2018. As Article 24 was absent from the vote document, Cash testified that the vote document did not raise a red flag that Article 24 was going to be changed.

41. *Both* parties fully understood the implications of Article 16.1.b as being a one-time benefit for the 2013 year of the 2013–2015 CBA, and they had a tentative agreement to delete the language.

42. The union did not share the employer's understanding that the reopener language in Article 24 for contract years 2017 and 2018 was "obsolete" in the same manner as Article 16.1.b.

43. Prior to the union's June 8, 2016, concept offer, Wesley and Cash had a conversation in which Wesley shared the employer "[had] money" and was "ready to move."

44. The union's June 8, 2016, offer of 2 percent COLAs each year of the CBA was prompted by a phone call Cash received from Wesley. Cash stated that during that conversation, Wesley advised him that the board of commissioners had discussed wages with Wesley and Nave. Wesley also advised Cash during the call "that if the union were to submit [a]

2-2-2 proposal . . . the county would be inclined to support that—or to agree to that proposal."

45. The board accepted the union's June 8, 2016, proposal "to close the contract for the three-year term." Nave testified that there was no discussion with the board about insurance reopeners.

46. Salazar corroborated Cash's testimony, stating that he believed the vote document was about voting for the money and that Article 24 would "[s]tay the same," with "[o]peners at '17, '18." He assumed that because nothing was discussed about Article 24, "that's what the old contract state[d], and that's what [the parties] were going by."

47. Aside from the union's and employer's initial proposals on October 13, 2015, and January 12, 2016, respectively, all other proposals prior to the employer's June 16, 2016, vote document were "conditional" proposals.

48. The employer's June 16 vote document was an "unconditional" offer.

49. The record does not reflect any intervening circumstances between the employer's June 16, 2016, vote document and the employer's three legislatively formatted draft CBAs provided to the union on June 21, July 11, and July 20, 2016.

50. Over the course of nearly two months—between June 21, 2016, when the employer provided its initial legislatively drafted CBA, and August 17, 2016, the date the CBA was fully executed—the union had opportunities to review three legislatively drafted versions of the CBA.

51. Cash admitted he "screwed up" and missed the parts of Article 24 that had been deleted. He discovered that Article 16 no longer contained the reopener language, based on CPI and ability to pay, in late July and e-mailed Nave. However, at no point did he raise concerns over the deletion of the reopener language in Article 24.

52. The union had timely notice of the changes to Article 24 before the CBA was fully executed in August.

CONCLUSIONS OF LAW

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

2. Based upon Findings of Fact 3 and 5 through 49, the employer failed to bargain in good faith, derivatively interfered with collective bargaining rights, and violated RCW 41.56.140(4) and (1).

3. Based upon Findings of Fact 3 and 5 through 52, the employer made unilateral changes to mandatory subjects of bargaining—health insurance coverage and the insurance committee—without bargaining in good faith to agreement or impasse, and the union waived its right to bargain by inaction. Therefore, the employer did not commit a refusal to bargain unfair labor practice under RCW 41.56.140(4) and (1).

ORDER

Franklin County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practice of failing to bargain in good faith:

1. CEASE AND DESIST from:

   a. Failing or refusing to bargain in good faith.

   b. 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. Negotiate in good faith with the union to bargain Article 24 of the parties' 2016–2018 CBA based on the 2013–2015 status quo, inclusive of the insurance committee with bargaining unit employee participation and input.

b. Restore the status quo ante.

c. Make the affected employees whole.

d. 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 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 Commissioners of Franklin County, 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, 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 her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 21st day of November, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Page T Garcia

PAGE TODD GARCIA, 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 128555-U-16
DECISION 12794 - 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 STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING, RULED THAT *FRANKLIN COUNTY* COMMITTED AN UNFAIR LABOR PRACTICE, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to bargain by presenting the union with a draft of the 2016–2018 CBA for review and signature that contained reductions and unilateral changes in health insurance coverage (Article 24) that were not agreed to or ratified by the union.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL negotiate in good faith with the union to bargain Article 24 of the parties' 2016–2018 CBA based on the 2013–2015 status quo, inclusive of the Article 24 reopener language from the 2013–2015 CBA; the $1,030.00 per month employer premium contribution from 2015; and the union's participation on the insurance committee, input on health insurance coverage and premiums, and employer consideration of the insurance committee's input.

WE WILL restore the status quo ante.

WE WILL make affected employees whole.

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

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

RECORD OF SERVICE - ISSUED 11/21/2017

DECISION 12794 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 128555-U-16

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