STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 839, Complainant, vs. BENTON COUNTY, Respondent.	CASE 129697-U-17 DECISION 12920 - PECB CASE 129698-U-17 DECISION 12921 - PECB CASE 129699-U-17 DECISION 12922 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
TEAMSTERS LOCAL 839, Complainant, vs. BENTON-FRANKLIN COUNTY, Respondent.	CASE 129700-U-17 DECISION 12923 - PECB CASE 129701-U-17 DECISION 12924 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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Stephen J. Hallstrom, Senior Deputy Prosecuting Attorney, Benton County Prosecuting Attorney Andy Miller, for Benton County.

Jennifer L. Johnson, Chief Civil Deputy Prosecuting Attorney, Franklin County Prosecuting Attorney Shawn Sant, for Franklin County.

On September 19, 2017, Teamsters Local 839 (union) filed five unfair labor practice complaints with the Public Employment Relations Commission (Commission), alleging that Benton County and Benton-Franklin County (employer) refused to bargain in violation of RCW 41.56.140(4) and (1)

by breaching its good faith bargaining obligations regarding deferred compensation. The Commission's unfair labor practice manager reviewed the complaints and issued a preliminary ruling on October 17, 2017, finding a cause of action to exist. On October 19, 2017, the five cases were consolidated and assigned to an examiner to conduct a hearing. On January 25, 2018, the cases were reassigned to Examiner Stephen W. Irvin. On June 13, 2018, the employer submitted a motion to dismiss the complaints, arguing that summary judgment was appropriate because there were no material facts at issue. I denied the employer's motion on June 18, 2018, and conducted a hearing on June 27, 2018. The parties filed post-hearing briefs on August 24, 2018, to complete the record.

ISSUE

Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by breaching its good faith bargaining obligations regarding deferred compensation?

The union met its burden of proving that the employer refused to bargain by breaching its good faith bargaining obligations regarding proposed changes to deferred compensation, a mandatory subject of bargaining. The union demonstrated that it requested negotiations on an issue that was a mandatory subject of bargaining and further demonstrated that the employer failed to provide available dates for bargaining in order to engage in full and frank discussions regarding the disputed issue.

BACKGROUND

The union is the exclusive bargaining representative for three separate bargaining units of road department employees, sheriff's office clerical employees, and corrections officers employed by Benton County, and for two separate bargaining units of juvenile detention employees and superior court bailiffs jointly employed by Benton and Franklin counties. Employees who are jointly employed by Benton and Franklin counties are subject to Benton County's personnel and payroll policies and procedures. These employees receive Benton County health and welfare benefits and are eligible to purchase optional insurance and financial retirement products. Four of the five

bargaining units in the instant case had expired collective bargaining agreements (CBA) at the time of the hearing.[1]

Bargaining unit employees have access to deferred compensation plans through ICMA Retirement Corporation (ICMA-RC) and Nationwide Retirement Solutions, Inc. Employees voluntarily participate in the plans, which allow employees to set aside pretax wages for later use in accordance with Section 457 of the United States Internal Revenue Code. The employer began offering the ICMA-RC plan in the mid-1980s and added the Nationwide plan as an option in the mid- to late 1990s.

The employer's original decision to offer access to deferred compensation plans was made without bargaining, and there is no reference to deferred compensation in the parties' CBAs. The employer does not match employee contributions to the plans. The plan providers can alter the plan unilaterally or following negotiations with the employer.

On February 6, 2017, the employer sent an e-mail to employees who contributed to the Nationwide plan. The e-mail informed employees that the employer had been successful in its efforts to reduce the costs charged to employees participating in the ICMA-RC plan. The e-mail also noted that participants in the ICMA-RC plan paid no plan administration fees while participants in the Nationwide plan were charged plan administration fees. Benton County Deputy Administrator Loretta Smith Kelty testified that Benton County Personnel Manager Lexi Wingfield engaged in discussions with Nationwide but was unable to secure fee concessions similar to those provided by ICMA-RC.[2]

On August 23, 2017, Wingfield sent individual e-mails notifying union secretary-treasurer Russell Shjerven and representatives of the employer's other union-represented employees that the employer planned to freeze contributions to the Nationwide plan. Smith Kelty, Benton County

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[1] The CBAs for the Benton County road department employees, sheriff's office clerical employees, and the Benton-Franklin County juvenile detention employees expired on December 31, 2016. The Benton County corrections officers' CBA expired on December 31, 2017, and the Benton-Franklin County Superior Court bailiffs' CBA expires on December 31, 2018.

[2] Wingfield did not testify at hearing.

Senior Deputy Prosecuting Attorney Stephen Hallstrom, and Benton County Chief Deputy Prosecuting Attorney Ryan Brown were copied on the e-mails, which read, in relevant part:[3]

> The Nationwide plan provides the County the right to stop (freeze) all future contributions to its plan. This plan also provides the County with the additional right to terminate the plan entirely, in which case all account balances would need to be transferred.
>
> To assist County employees in obtaining the best investment options as [sic] the lowest expenses, the County will return to a one investment option through deferred compensation plans, and commence steps to wind down and eventually terminate its Nationwide plan. To this end, effective January 1, 2018, the County will initially exercise its right to freeze additional contributions to prevent further funds being added to accounts and incurring Nationwide fees, as well as permitting employees time to make long term planning decisions for their retirement accounts.

Wingfield's e-mail sought "comments or input, if any" by September 30, 2017. Shjerven replied to Wingfield's August 23, 2017, e-mail in less than an hour, demanding to bargain the proposed changes and asking for available dates to bargain. Shjerven copied Smith Kelty, Hallstrom, and Brown on his response. The employer did not respond until August 30, 2017, when Wingfield wrote, "Thank you for your comment."

Shjerven responded to Wingfield's e-mail on August 30, 2017, asking if the employer was refusing to bargain. After he did not receive a response from the employer, Shjerven e-mailed Wingfield again on September 1, 2017, stating in part, "I need to know if you are refusing to bargain an [sic] unilateral change to the working conditions of my members or not. If you refuse to bargain, I will have no option other than to file an Unfair Labor Practice Charge." Wingfield forwarded Shjerven's September 1, 2017, e-mail to Smith Kelty and Hallstrom later that day.

On September 7, 2017, Smith Kelty responded to Shjerven via an e-mail and sent copies to Hallstrom and Wingfield.

> Russell: Employees deferring a portion of their salary to either company, NACo or ICMA, is not a form of compensation, therefore eliminating the availability of a

[3] At the time of the events in question, Hallstrom was the lead negotiator for the employer's collective bargaining team, which included Smith Kelty. Wingfield also attended bargaining sessions on occasion.

> non-competitive financial product would not be considered a working condition, let alone a change in working conditions, requiring negotiation.
>
> Also Benton County is neither required to permit a company to offer a deferred comp plan to current and former employees, let alone permit multiple companies to offer deferred comp plans.
>
> Please send Mr. Hallstrom whatever authority you might have to support your position and it will be reviewed. If it is determined to be a change in working conditions, available dates to bargain the impacts and effects will be circulated.

Shjerven responded to Smith Kelty that day, stating via e-mail that the employer was statutorily obligated to bargain the "impacts and effects" of the proposed changes. Union attorney David Ballew sent Hallstrom an e-mail later that day in which he disputed Smith Kelty's assertion, provided Commission precedent for deferred compensation being a mandatory subject of bargaining, and clarified that the union sought to bargain "both the decision and effects of any change."

Nothing in the record indicates that the employer provided the union with potential dates for bargaining after either of the union's requests to bargain. In addition, nothing in the record demonstrates that the employer has implemented changes to represented employees' deferred compensation options.

ANALYSIS

Applicable Legal Standards

Duty to Bargain

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). 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. *City of Mountlake Terrace*, Decision 11831-A, *citing University of Washington*, Decision 11414-A (PSRA, 2013).

In order to resolve their contractual differences through negotiations, parties to the collective bargaining agreement must meet in a timely fashion. *Seattle School District*, Decision 10732-A (PECB, 2012), *citing Morton General Hospital*, Decision 2217 (PECB, 1985). To prove a failure to meet, the complainant must demonstrate that it requested negotiations on a collective bargaining agreement or issue that was a mandatory subject of bargaining and demonstrate that the other party either failed or refused to meet with the complainant, or imposed unreasonable conditions or limitations which frustrated the collective bargaining process. *City of Mountlake Terrace*, Decision 11831-A, *citing State – Washington State Patrol*, Decision 10314-A (PECB, 2010). A case-by-case analysis is necessary to prove a violation. If not properly justified under existing precedent, a failure to timely respond to requests for bargaining is an unfair labor practice. *City of Mountlake Terrace*, Decision 11831-A.

In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *City of Mountlake Terrace*, Decision 11831-A; *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). A party that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1); RCW 41.56.150(4) and (1). A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *City of Mountlake Terrace*, Decision 11831-A; *see also Spokane School District*, Decision 310-B (EDUC, 1978). What may be reasonable conduct in one case may not be reasonable in another. *City of Mountlake Terrace*, Decision 11831-A, *citing City of Clarkston* (*International Association of Fire Fighters, Local 2299*), Decision 3246 (PECB, 1989).

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; *City of Seattle*, Decision 12060-A (PECB, 2014). 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." *City of Seattle*, Decision 12060-A, *citing 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.*

While the balancing test calls upon the Commission and its examiners to balance these two principal considerations, the test is more nuanced and is not a strict black and white application. Subjects of bargaining fall along a continuum. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours and working conditions," also known as mandatory subjects of bargaining. RCW 41.56.030(4); *City of Seattle*, Decision 12060-A. At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives. *City of Seattle*, Decision 12060-A, *citing International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission* (*City of Richland*), 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of the case. One case may result in a finding that a subject is a mandatory subject of bargaining while the same subject, under different facts, may be considered permissive.

Application of Standards

The union argues that deferred compensation is a mandatory subject of bargaining because it is an alternative form of wages, citing *Snohomish County* (*Snohomish County Deputy Sheriff's Association*), Decision 8733-A (PECB, 2005), *aff'd*, Decision 8733-B (PECB, 2006) for support of its argument. The union contends that the employer's expressed desire to freeze contributions to the Nationwide deferred compensation plan triggered a duty to bargain. The union further asserts that the employer did not fulfill its duty to bargain after the union properly communicated a demand to bargain the proposed change.

The employer counters that a proposed decision to freeze contributions to the Nationwide deferred compensation plan is not a mandatory subject of bargaining. It also maintains that the implementation and subsequent changes to the deferred compensation plans were never collectively bargained. Furthermore, the employer states that there is no evidence that the Benton County Board of Commissioners planned or took any action regarding deferred compensation changes and that the union prematurely filed its unfair labor practice complaint before the end of the employer's deadline for input on the proposed freeze.

As stated in *Snohomish County*, Decision 8733-A, "[B]y its very nature, the term 'deferred compensation' implies that 'wages' (a mandatory subject of bargaining) are to be paid at some time in the future . . . so as to logically constitute a mandatory subject of bargaining." Going beyond that decision, the balancing test leads to the conclusion that deferred compensation in the instant case is a mandatory subject of bargaining.

Since the turn of the century, the employer has offered access to ICMA-RC and Nationwide deferred compensation plans to employees wishing to invest wages earned for future use. Any and all fees for plan administration or fund investment are borne by employees through payroll deductions, and the employer has neither provided matching contributions nor experienced any other financial impact from employees' deferred compensation decisions. While the employer's agreement with Nationwide gives it the right to freeze contributions, the employer's proposed exercise of that right would affect employees' options for managing the investment of their wages. The employees' interest in flexibility in investing wages via deferred compensation outweighs what appears to be a paternal interest of the employer to protect its employees from spending more on those investments.

In analyzing the totality of the circumstances, I find that the union met its burden to prove that it requested negotiations on an issue that was a mandatory subject of bargaining when it demanded to bargain proposed changes to deferred compensation on August 23, 2017, and again on September 7, 2017. The record shows that the employer did not honor the union's requests to bargain either the decision or the effects of the proposed change. Nor did the employer provide available dates for bargaining after either request.

The employer's first substantive response to the union's request was Smith Kelty's September 7, 2017, e-mail in which the employer indicated that it did not consider the proposed change to deferred compensation to be a mandatory subject of bargaining. The e-mail further stated that until the union provided the employer with convincing support for its position, the employer would not provide available bargaining dates.

The union's counsel provided the employer's lead negotiator with the requested legal authority for deferred compensation being a mandatory subject of bargaining and again requested to bargain on

September 7, 2017. Nothing in the record demonstrates that the employer provided available dates to bargain or otherwise engaged with the union in a way designed to reach a mutually agreeable solution on the matter.

CONCLUSION

The union met its burden of proving that the employer refused to bargain by breaching its good faith bargaining obligations regarding proposed changes to deferred compensation, a mandatory subject of bargaining. The union demonstrated that it requested negotiations on an issue that was a mandatory subject of bargaining, and it further demonstrated that the employer failed to provide available dates for bargaining in order to engage in full and frank discussions regarding the disputed issue.

FINDINGS OF FACT

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

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

3. Teamsters Local 839 (union) is a bargaining representative within the meaning of RCW 41.56.030(2). The union represents three separate bargaining units of road department employees, sheriff's office clerical employees, and corrections officers employed by Benton County, in addition to two separate bargaining units of juvenile detention employees and superior court bailiffs jointly employed by Benton and Franklin counties.

4. Employees who are jointly employed by Benton and Franklin counties are subject to Benton County's personnel and payroll policies and procedures. These employees receive Benton County health and welfare benefits and are eligible to purchase optional insurance and financial retirement products.

5. Four of the five bargaining units had expired collective bargaining agreements (CBA) at the time of the hearing. The CBAs for the Benton County road department employees, sheriff's office clerical employees, and the Benton-Franklin County juvenile detention employees expired on December 31, 2016. The Benton County corrections officers' CBA expired on December 31, 2017, and the Benton-Franklin County Superior Court bailiffs' CBA expires on December 31, 2018.

6. Bargaining unit employees have access to deferred compensation plans through ICMA Retirement Corporation (ICMA-RC) and Nationwide Retirement Solutions, Inc. Employees voluntarily participate in the plans, which allow employees to set aside pretax wages for later use in accordance with Section 457 of the United States Internal Revenue Code. The employer began offering the ICMA-RC plan in the mid-1980s, and added the Nationwide plan as an option in the mid- to late 1990s.

7. The employer's original decision to offer access to deferred compensation plans was made without bargaining, and there is no reference to deferred compensation in the parties' CBAs. The employer does not match employee contributions to the plans. The plan providers can alter the plan unilaterally or following negotiations with the employer.

8. On August 23, 2017, Benton County Personnel Manager Lexi Wingfield sent an e-mail notifying union secretary-treasurer Russell Shjerven that the employer planned to freeze contributions to the Nationwide plan effective January 1, 2018, and eventually terminate the plan.

9. Benton County Deputy Administrator Loretta Smith Kelty, Benton County Senior Deputy Prosecuting Attorney Stephen Hallstrom, and Benton County Chief Deputy Prosecuting Attorney Ryan Brown were copied on the e-mail, which sought "comments or input, if any" by September 30, 2017. Hallstrom was the employer's lead negotiator in contract negotiations with the union, and Smith Kelty was a member of the employer's bargaining team.

10. Shjerven replied to Wingfield's August 23, 2017, e-mail in less than an hour, demanding to bargain the proposed changes and asking for available dates to bargain. Shjerven copied Smith Kelty, Hallstrom, and Brown on his response.

11. The employer did not respond until August 30, 2017, when Wingfield wrote, "Thank you for your comment."

12. Shjerven responded to Wingfield's e-mail on August 30, 2017, asking if the employer was refusing to bargain, and he asked again on September 1, 2017, after he did not receive a response from the employer. Wingfield forwarded Shjerven's September 1, 2017, e-mail to Smith Kelty and Hallstrom later that day.

13. On September 7, 2017, Smith Kelty responded to Shjerven via an e-mail and sent copies to Hallstrom and Wingfield. Smith Kelty wrote that the proposed change to deferred compensation was not a change in working conditions that required negotiation. In the e-mail, Smith Kelty asked Shjerven to send Hallstrom the authority for the union's position that the proposed change required negotiation and stated that available dates to bargain would be provided if the proposed change was determined to be a change in working conditions.

14. Shjerven responded to Smith Kelty that day, stating via e-mail that the employer was statutorily obligated to bargain the "impacts and effects" of the proposed changes. Union attorney David Ballew sent Hallstrom an e-mail later that day in which he disputed Smith Kelty's assertion, provided Commission precedent for deferred compensation being a mandatory subject of bargaining, and clarified that the union sought to bargain "both the decision and effects of any change."

15. The employer did not provide the union potential dates for bargaining after either of the union's requests to bargain.

CONCLUSIONS OF LAW

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

2. As described in findings of fact 8 through 15, Benton County and Franklin County unlawfully refused to bargain by breaching its good faith bargaining obligations regarding proposed changes to deferred compensation, a mandatory subject of bargaining.

ORDER

BENTON COUNTY AND FRANKLIN 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 regarding proposed changes to deferred compensation.

   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. Give notice to, and upon request, negotiate in good faith with Teamsters Local 839 regarding proposed changes to deferred compensation.

   b. Contact a 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.

c. Read the notice provided by the compliance officer into the record at regular public meetings of the Board of County Commissioners of Benton and Franklin counties, and permanently append a copy of the notice to the official minutes of the meetings where the notice is read as required by this paragraph.

d. 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.

e. 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 the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 10th day of October, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEPHEN W. IRVIN, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

RECORD OF SERVICE - ISSUED 10/10/2018

DECISIONS 12923 - PECB and 12924 - PECB have been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: AMY RIGGS

CASE NUMBERS: 129700-U-17, 129701-U-17

EMPLOYER: BENTON-FRANKLIN COUNTY

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BY: AMY RIGGS

CASE NUMBERS: 129697-U-17, 129698-U-17, 129699-U-17

EMPLOYER: BENTON COUNTY

REP BY:

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