STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ISSAQUAH POLICE SUPPORT SERVICES ASSOCIATION, Complainant, vs. CITY OF ISSAQUAH, Respondent.	CASE 128721-U-17 DECISION 12963 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On January 31, 2017, the Issaquah Police Support Services Association (union) filed an unfair labor practice complaint against the City of Issaquah (employer). The preliminary ruling issued on February 10, 2017, found a cause of action for employer refusal to bargain by unilaterally changing bargaining unit employee's health insurance benefits and failing to respond to the union's demand to bargain. On July 19 and 20, 2018, Examiner Andrew G. Lukes held a hearing.[1] The parties submitted post-hearing briefs on September 21, 2018. On October 11, 2018, the employer filed a motion to strike, and on October 19, 2018, the union filed a response to complete the record.

ISSUES

Issue 1: Did the employer refuse to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation RCW 41.56.140(1)] by:

[1] Because Examiner Lukes' final day with the agency was September 31, 2018, this decision is signed by Dianne Ramerman.

1. Since August 2, 2016, unilaterally changing health insurance benefits for bargaining unit employees, without providing the union with an opportunity for bargaining.

2. Since November 11, 2016, failing to respond to the union's demand to bargain over changes to the 2017 health insurance coverage for bargaining unit employees.

Issue 2: Should portions of the union's post-hearing brief be stricken because they are based on facts that occurred outside the six-month statute of limitations?

The employer both (1) failed to bargain the impacts of Swedish's decision to leave the Prime network, and (2) unilaterally changed health insurance benefits when it expanded preventative care coverage to cover the Swedish network of providers at in-network rates. The relevant status quo was the Prime network as it existed in 2016, which included the existing preventative care coinsurance arrangement and the Swedish network of providers. Both the preventative care coinsurance arrangement and the Swedish network of providers are mandatory subjects of bargaining because they predominantly relate to wages. The employer is excused from bargaining Swedish's decision as a valid business necessity defense existed. However, it needed to bargain the impacts of that departure as well as its own decision to expand preventative care coverage. Nevertheless, the employer was not open to bargaining the impacts of Swedish's departure from the Prime network. The employer presented its decision to mitigate the change to the plan design by expanding preventative care coverage as a *fait accompli*. Actual changes occurred to the medical plan design: Swedish network providers departed impacting service payments, and the employer unilaterally expanded preventative care coverage. Portions of the union's post-hearing brief will not be stricken from the record but will serve as background information.

FACTS

The employer is a municipality that employs about 250 people with more than half represented by four unions. The union is the exclusive bargaining representative for all full time and regular, part-time non-uniformed employees of the employer within the Issaquah Police Department,

excluding confidential and supervisory employees. The unit includes approximately 27 records clerks, dispatchers, and correctional officers.

The parties' last collective bargaining agreement (CBA) was effective from January 1, 2015, through December 31, 2016. As of the date of the filing of this unfair labor practice complaint, the parties had not reached agreement on a successor contract. The parties' CBA contains the following relevant language:

> Article 12: Health and Welfare Insurance Benefits
>
> 12.1 Medical and Dental Insurance Premiums.
>
> 12.1.1 Medical:
>
> The Employer will maintain all medical plans and monthly premium share charges at the same percentage level for 2015 and 2016 as provided in Appendix C. The Employee shall select one of the above plans as set forth in Appendix C. The different medical plan specifications are provided and included as part of this Agreement.

Appendix C is titled "Premium Sharing" and lays out employee contribution rates for three Premera plan options.[2]

Article 12, Section 1.1 also states the purpose and mission of the Issaquah Health Advisory Committee (IHAC). It mandates that the parties communicate about health insurance issues. The IHAC is composed of representatives from the employer bargaining groups as well as non-represented employees. The IHAC "make[s] recommendations to the Employer with regard to plan design changes for the following plan year."

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2 It also references a Group Health plan option which is not relevant to this case.

Background

Beginning in 2013, the employer began self-funding health insurance benefits for employees.[3] Insurance consultant Douglas Evans advises the employer on its self-funded plan and the administration of the plan. He also presents information at IHAC meetings to educate employees and answer questions.

Since at least 2015, the employer has contracted with Premera to be its third-party medical plan administrator. Among other functions, Premera processes claims, provides customer service, and produces plan documents. Premera offers at least two insurance-based medical plans with different networks of providers: the Premera Heritage Plus Network and the Premera Heritage Prime Network. Premera contracts with various medical providers who agree to be "in-network" and subject to one level of coinsurance or "out-of-network" and subject to a different level of coinsurance.

In 2015, the employer provided coverage to employees under the Plus network. On January 1, 2016, the employer changed from the Plus network to the Prime network, which was a new network to cut costs. The move caused no change in benefits to employees, but did "reduce medical claim reimbursement rates" due to network discounts. At the time, the Swedish network of providers was still part of the Prime network. The union did not demand to bargain this change.

Current Dispute

Human resources director Lori Brown testified that she and Evans had a conversation with Premera representatives in June 2016, in anticipation of Swedish's departure from the Prime network, to see if "Premera [would] cover Swedish for just our employees and we would pay additional." The employer was told that was not an option.

On August 4, 2016, at an IHAC meeting, the employer told the union treasurer, Felicia Moore, that although Premera and Swedish were still in negotiations it was unlikely that the Swedish

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[3] The employer sets its own rates and essentially pays these rates to itself, setting the money aside to pay future medical claims.

network of providers would remain part of the Prime network on January 1, 2017.[4] The IHAC agenda and the union's meeting minutes stated that "Swedish . . . [is] out of Prime as of January 1st." The employer's minutes stated that if the network change occurs it "will make a change to its plan to cover Out-of-Network Preventative benefits the same as In-Network . . . to mitigate some of this impact."

The employer's open enrollment period began October 1, 2016, and continued through October 31, 2016. At the October 3, 2016, IHAC meeting, the employer announced that Premera and Swedish had reached an agreement for the Plus network to maintain the Swedish network but not the Prime network.

The Open Enrollment Announcement e-mailed on October 4, 2016, notified all employees that as of January 1, 2017, the Swedish network of providers would no longer be part of the Prime network. The announcement also stated that "[p]reventative care will now be covered at the same rate whether it is received in or out-of-network" to "mitigate the impacts of these providers leaving the network." And, it told users that they could seek care from Swedish providers at out-of-network benefit levels for non-preventative care.

Another e-mail was sent to all employees on October 14, 2016, similarly informing them of changes to their health insurance coverage.

On November 3, 2016, the parties met for the first time to negotiate a successor contract. The employer and union set goals and ground rules. One of the union's goals was to address medical insurance. The employer's notes reference the switch from the Plus network to the Prime network and state that it already happened. The employer also indicated its desire to not change the medical plan in 2017.

On November 18, 2016, a third employee newsletter was e-mailed to employees. It, too, informed employees of changes beginning January 1, 2017. However, it also advised employees of Premera's offer to temporarily provide continuity of care. Employees were told that "[i]f you

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[4] Other networks, such as Franciscan, also withdrew from the Prime network beginning January 1, 2017; however, the union's brief and the evidence presented in relevant part focus on the Swedish network.

qualify and apply, this benefit will cover care with your current healthcare provider at in-network levels for a limited period of time," typically limited to 90 days.

After looking into the issue and talking to its members, the union realized there would be impacts on its members from the Swedish network leaving the Prime network. In an e-mail dated November 25, 2016, the union executive board, through Moore, demanded to "bargain the decision relating to changes to the healthcare network and all associated impacts and effects of the change." Moore requested that the employer "immediately begin reviewing other health care plans that are substantially similar to what is currently being offered by the [employer]."

The parties met for a second time on December 5, 2016, to negotiate a successor contract. The issues of "medical," the Health Reimbursement Account (HRA), the network change as well as how to mitigate that change, and spousal coverage are reflected in the employer's notes. The union made an opening proposal that included Article 12, Section 1.1 as "open." The union also proposed increasing the employer's contribution to individuals' HRAs from $550 to $750 annually, and it requested changing how spousal coverage is managed due to the financial costs.

On December 21, 2016, the parties met for a third time. The topics of the IHAC and the continuation of the HRA are reflected in the employer's notes. Independent human resources consultant Cabot Dow, the employer's lead negotiator, testified, "that we didn't really drill down very deep on the health issue at this meeting." The employer presented the union with its contract proposal that did not include changes to Article 12, Section 1.1 or Appendix C.

Beginning January 1, 2017, the employer continued to maintain the Prime network for employees, but without Swedish providers included in that network. And, the employer expanded preventative care coverage to include the Swedish network of providers at in-network rates with 100 percent coverage.

On January 4, 2017, the parties met for a fourth time. The parties discussed Swedish leaving the Prime network and options to mitigate the departure. Union attorney Erica Shelley Nelson asked about looking at an option of another medical plan. The employer stated that it had not changed the plan design: "out-of-pocket [maximum] has not changed" and [preventative] @ 100%." Dow

testified that "[t]he financial impact for the out-of-network to an employee was recognized that there is some financial impact. So if we're going to talk about mitigation we need to get that information." Nelson wanted to see if the employer could "quantify the financial hit." Dow testified that the employer did provide the union with the financial information Nelson requested but he did not know when, did not know what form it was in, and had never seen it.

On January 31, 2017, the complaint in this case was filed. On the same day, city administrator Bob Harrison responded to the union's November 25, 2016 demand to bargain e-mail. He stated that the employer's position was that it did not have a mandatory duty to bargain Swedish's decision to leave the Prime network "as the structure of the benefit and the provider network has not changed" and "[m]edical benefits continue to be provided at the same level as they were in 2016." He added, "we are aware of the potential inconvenience of not having Swedish in the network. To mitigate impacts, preventative care was expanded for 2017 and is now covered fully . . . ."

Nelson responded to Harrison on February 2, 2017. The letter reiterated the union's previous demand to bargain both the change in network and the employer's decision to mitigate that change. Nelson cited the economic impact on employees and stated that they now have to pay more money out-of-pocket for medical services until the out-of-pocket maximum is reached. Nelson also asserted that the employer has a duty to maintain the status quo.

On February 7, 2017, Harrison responded to Nelson reiterating the employer's earlier position that "medical benefits continue to be provided at the same level as they were in 2016."

The next day, on February 8, 2017, the parties had their fifth bargaining session. The employer's notes state that the employer's plan for the meeting was to set aside the unfair labor practice network issue for determination by the Commission.

On February 15, 2017, the parties met again. Evans presented what the employer saw as the financial impacts of Swedish's departure: the employer saw no significant change because the plan capped out-of-pocket expenses at $1,000. Nelson asked what the parties could do to offset the financial impact for members who seek treatment from Swedish out-of-network providers. Dow

encouraged the union to participate in "plan design change . . . in a sort of [Labor Management Committee] style process" with other bargaining units of the employer. The parties discussed mitigation options such as the employer picking up the difference between the cost of in-network and out-of-network services, keeping and/or increasing HRAs, and expanding spousal coverage.

The parties also met in negotiations on March 9, 2017. The union made a proposal on medical that included adjusting spousal coverage, promoting wellness, and increasing the HRA balance to $1,000. The employer did not agree to the proposal.

ANALYSIS

Applicable Legal Standards

Duty to Bargain

The Public Employees' Collective Bargaining Act (PECBA), Chapter 41.56 RCW, governs the relationship between the union and the employer. The duty to engage in good faith negotiations over mandatory subjects is enforced through the unfair labor practice provisions in RCW 41.56.140 and .150 and Chapter 391-45 WAC.

A public employer has a duty to bargain with the exclusive representative of its employees concerning mandatory subjects of bargaining. RCW 41.56.030(4). As a general rule, an employer must 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. *King County*, Decision 12451-A (PECB, 2016).

For mandatory subjects of bargaining, the parties have a duty to bargain over the decision and the effects of that decision. *Central Washington University*, Decision 10413-A (PSRA, 2011); *King County*, Decision 10547-A (PECB, 2010); *Kitsap County*, Decision 8402-B (PECB, 2007). For permissive subjects of bargaining, the parties only have a duty to bargain the mandatory impacts of the decision. *Central Washington University*, Decision 10413-A; *King County*, Decision 10547-A; *Kitsap County*, Decision 8402-B. For permissive subjects, an employer is not required

to put its decision on hold while it negotiates effects. *Central Washington University*, Decision 10413-A.

The Commission focuses on the circumstances as a whole to determine whether an opportunity for meaningful bargaining existed. *King County*, Decision 12451-A, *citing 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. *King County*, Decision 12451-A. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining that 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 Washington Public Power Supply System*, Decision 6058-A.

Unilateral Change

An employer is prohibited from unilaterally changing mandatory subjects of bargaining except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, *City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991). To prevail on a claim of unilateral change, the union must prove four elements:

1. The existence of a relevant status quo or past practice.

2. That the relevant status quo or past practice was a mandatory subject of bargaining.

3. That notice and an opportunity to bargain the proposed change was not given, or that notice was given but an opportunity to bargain was not afforded or the change was a *fait accompli*.

4. That there was an actual change to the status quo or past practice.

City of Tukwila, Decision 10536-A (PECB, 2010).

Derivative Interference

The Commission generally finds that any employer refusal to bargain violation under RCW 41.56.140(4) inherently interferes with the rights of bargaining unit employees. Thus, the Commission routinely finds a derivative interference violation under RCW 41.56.140(1). *Skagit County*, Decision 8746-A (PECB, 2006).

Burden of Proof

Where an unfair labor practice is alleged, the complainant bears the burden of proof and must prove by a preponderance of the evidence that the complained-of allegation occurred. WAC 391-45-270(1)(a); *Cowlitz County*, Decision 7007-A (PECB, 2000). The respondent is responsible for the presentation of its defense and bears the burden of proof as to affirmative defenses. WAC 391-45-270(1)(b); *Whatcom County*, Decision 8512-A (PECB, 2005).

Application of Standards

Issue 1: The employer is excused from bargaining Swedish's decision to leave the Prime network by the business necessity defense but not from bargaining the impacts of that decision. The employer also committed a unilateral change violation when it expanded preventative care coverage.

Although the union was not successful in proving that the employer needed to maintain the Swedish network of providers as an in-network option in 2017 based on the business necessity defense, it did prove all four elements of the unilateral change analysis regarding the employer's failure to bargain both the impacts of Swedish's departure and also the employer's unilateral decision to expand preventative care coverage:

Element 1: The relevant status quo was the 2016 Prime network that included the Swedish network of providers and the 2016 preventative care coinsurance arrangement.

The statute's collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining. Chapter 41.56 RCW. RCW 41.56.123(1) states that all terms and conditions of a collective bargaining agreement shall remain in effect until a successor agreement is reached, not to exceed one year from the collective bargaining agreement's expiration. The status quo is the existing wages, hours, and terms and conditions of employment.

Val Vue Sewer District, Decision 8963 (PECB, 2005). The status quo obligation depends on how the parties craft the language in their collective bargaining agreement. *Kitsap County*, Decision 10836-A (PECB, 2011).

The union argues that the employer could have chosen to offer the Plus network along with the Prime network, or move to the Plus network in 2017 to keep Swedish providers in the network. The union claims that the status quo includes the Swedish network of providers. Conversely, the employer asserts that the status quo is the Prime network as offered by Premera, which for 2017 means without the Swedish network of providers.

In this case, the parties' agreement to their 2015–16 contract set the status quo for plan specifications for 2016 that needed to be carried over into 2017 absent a successor agreement. To maintain the status quo, the employer needed to "maintain all medical plans." Dow testified that "medical plans" in Section 1.1 means "plan designs." Dow testified that plan design includes elements such as deductibles, copays, stop loss, prescription copays, and formularies. The contract also states that "[t]he different medical plan specifications are provided and included as part of this Agreement." Neither Appendix C, other appendixes, nor the body of the CBA defines the terms "medical plans," "plan specifications" or "plan design." In Appendix C, the relevant medical plan options are simply titled "Premera." There is no mention of either the "Plus" or "Prime" networks anywhere in the contract.

With no successor agreement, beginning January 1, 2017, under the parties' expired CBA and applying the "123" rule, the employer needed to maintain the 2016 Premera network and the 2016 medical plan specifications or design. In 2016, the status quo medical plan was the Premera Prime network and the Swedish network of providers that was included in the 2016 medical plan design.[5] The status quo was not the Premera Plus network because the Prime network was the Premera choice offered to union members under the CBA in 2016.

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[5] *See Kitsap Transit*, Decision 11098-A (PECB, 2012) (referring to plan design as including the network of providers); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006) (assuming that the plan design included the provider network); *Doctor's Hospital of Michigan*, 362 NLRB No. 149 (2015) (stating that among the plan design changes were increased employee deductibles, changes to the network of providers and employee copays).

Similarly, the 2016 preventative care coinsurance arrangement is also part of the status quo as it was part of the medical plan design in 2016. Maintaining the status quo in 2017 meant that just as in 2016, the employer needed to pay 100 percent of the services for preventative care from in-network providers and 70 percent from out-of-network providers.

Element 2: The Swedish network of providers is a mandatory subject; although a business necessity defense excused the employer from bargaining over Swedish's departure, it did not excuse the employer from bargaining over the effects of Swedish's decision. Moreover, the employer's decision to expand preventative care coverage is also a mandatory subject.

The Commission has long held that medical benefits are a form of wages and thus a mandatory subject of bargaining. *Spokane County*, Decision 2167-A (PECB, 1985); *City of Edmonds*, Decision 8798-A (PECB, 2005). Specifically, medical plan design, also called plan specifications, has been found to be a mandatory subject of bargaining. *See Yakima County*, Decision 9338 (PECB, 2006); *Cowlitz County*, Decision 7007 (PECB, 2000), *aff'd*, Decision 7007-A. This is because plan design is about what the employer and employees pay for medical benefits. Plan design may include provider networks. However, not all matters related to health insurance benefits are mandatory subjects of bargaining unless contemplated changes would impact the level of benefits or employee costs. *Spokane County*, Decision 11627 (PECB, 2013), *citing University of Washington*, Decision 10771 (PECB, 2010).

The Commission determines, as a matter of law and fact, whether a particular subject is a mandatory or permissive subject of bargaining. WAC 391-45-550. In reaching these determinations, the Commission applies a balancing test on a case-by-case basis. The Commission balances the relationship the subject bears to employee wages, hours, and working conditions and the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative. The decision focuses on which characteristic predominates. *City of Seattle*, Decision 12060-A (PECB, 2014), *citing International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989).

The 2016 Swedish network of providers is a mandatory subject.

Considering applicable case law and applying the *City of Richland* balancing test, I find that under the circumstances of this case the 2016 Swedish provider network is a mandatory subject of bargaining. It predominantly relates to wages because coinsurance for services are paid for with the wages earned by employees. The loss of the Swedish network impacted employee costs in that those providers were no longer considered "in-network" when paying for services. On the other hand, the Swedish network of providers in a medical plan maintained by a third-party administrator in this case is not something that lies at the core of entrepreneurial control or is a management prerogative.

A business necessity defense exists, excusing the employer from bargaining Swedish's departure but not the impacts of that decision.

A business or legal necessity is an affirmative defense that the respondent bears the burden of establishing. *Cowlitz County*, Decision 7007-A. An employer can raise a business necessity defense when compelling practical or legal circumstances necessitate a unilateral change of employee wages, hours, or working conditions, but an employer continues to be obligated to bargain the effects of the unilateral change. *Kitsap Transit*, Decision 11098-B (PECB, 2013), *rev'd on remedy Kitsap Transit*, Decision 11098-C (PECB, 2016); *Cowlitz County*, Decision 7007-A. An employer claiming a defense of business necessity to a unilateral change must prove that: (1) a business necessity existed; (2) the respondent provided adequate notice of the proposed change; and (3) bargaining over the effects of the change did, in fact, occur or the complainant waived bargaining over the effects of the change. *See Skagit County*, Decision 8886-A (PECB, 2007); *Spokane County*, Decision 2167 (PECB, 1985), *aff'd*, Decision 2167-A (PECB, 1985). The Commission examines all relevant facts and circumstances surrounding the particular event before ruling on the legality of a decision to implement a unilateral change without satisfying the collective bargaining obligation. *Skagit County*, Decision 8746-A (PECB, 2006).

The union argues that the employer should have, beginning in 2017, continued to include Swedish providers as "in-network." The employer argues that if it is determined that Swedish's departure is a mandatory subject of bargaining, maintaining the network of providers would be excused by the business necessity defense. The employer asserts that Swedish's departure was outside the

employer's control, and it needed to maintain the 2016 Prime network which was the status quo. The employer cites *Cowlitz County*, Decision 7007, *aff'd*, Decision 7007-A, where the Commission determined that the employer had no duty to bargain a trust's elimination of a certain medical plan for the proposition that it had no duty to bargain Swedish's departure.

In this case, the employer had no control over Swedish's departure from the Prime network in 2017. The key is the lack of any meaningful employer contribution to the decision by the third party. *See Kitsap Transit*, Decision 11098-B, *citing Cowlitz County*, Decision 7007-A. Multiple employer witnesses testified that the employer had no control over which providers are in or out-of-network in the sense that the employer does not directly negotiate the contract with Swedish, rather Premera does; thus a business necessity existed. Although the employer provided adequate notice, it could not and was therefore not obligated to bargain with the union over Swedish's departure from the network. However, it was obligated to bargain the impacts of Swedish's decision. *See Island County Fire District 1*, Decision 9867 (PECB, 2007) (holding that where medical plan was discontinued by plan administrator the employer was obligated to bargain). The impacts included higher service costs for employees seeking preventative and non-preventative care from Swedish providers. The business necessity defense did not excuse the employer from bargaining over these impacts.

The decision to expand preventative care coverage is a mandatory subject.

The Commission has found employee copayments on health insurance benefits and employee copayments on prescription drug benefits to be mandatory subjects of bargaining. *City of Edmonds*, Decision 8798 (PECB, 2004), *aff'd*, Decision 8798-A. Payment for preventative and non-preventative care fall within the umbrella of health insurance benefits and are analogous to copayments on prescription drug benefits. *See City of Edmonds*, Decision 8798-A.

Here, the employer sought to mitigate the effects of Swedish's departure by expanding the existing preventative care coinsurance arrangement. As of January 1, 2017, if employees access Swedish providers for non-preventative care under the Prime network, they will have to pay higher medical costs than they did in 2016, and thus such use predominantly relates to wages under the *City of Richland* balancing test. Without the employer's unilateral expansion of preventative care benefits

to Swedish providers in 2017, employees would be paying more for these services as well. The employer's unilateral expansion of fully paid preventative care services to include Swedish providers in 2017 shows the employer's acknowledgement of an economic impact on employees.[6] In conclusion, the employer needed to bargain both the impacts of Swedish's decision and its own decision to expand preventative care coverage.

Element 3: The employer was not open to bargaining the impacts of Swedish's departure from the Prime network and also presented its decision to mitigate those impacts by expanding preventative care coverage as a fait accompli.

In general, the employer's collective bargaining obligation requires giving the union notice and an opportunity to bargain any unilateral change. Formal notice is not required if it can be shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A; *City of Edmonds*, Decision 8798-A.

It is an unfair labor practice for the employer to present a change to a mandatory subject of bargaining as a predetermined decision, or *fait accompli*. In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole. *City of Edmonds*, Decision 8798-A; *Washington Public Power Supply System*, Decision 6058-A. If the employer's action has already occurred when the employer notifies the union (*a fait accompli)*, the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A. 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. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

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[6] The fact that the employer was adding additional coverage does not excuse it from bargaining over these changes as discussed below.

In this case, although the employer gave notice of Swedish's departure from the Prime network, it was not timely because the employer also presented its decision to address the impacts of Swedish's departure with expanded preventative care coverage as a done deal. On August 4, 2016, the employer notified the union that it was unlikely that the Swedish network of providers would remain part of the Prime network beginning January 1, 2017. The IHAC agenda and the union's meeting minutes stated that "Swedish . . . [is] out of Prime as of January 1st." The employer's minutes stated that if the network change occurred, it "*will make a change* to its plan to cover Out-of-Network Preventative benefits the same as In-Network . . . to mitigate some of this impact." (emphasis added).

Similarly, in the employer's Open Enrollment Announcement for the period that began October 1, 2016, all employees were told:

> - Preventative care *will now be covered* at the same rate whether it is received in- or out-of-network
>
> - As of January 1, 2017, Swedish . . . *will no longer be part of* the . . . Prime Network – agreements will be in place that will allow members to seek care from these providers at the out-of-network benefit level . . . . The changes to preventative care (mentioned above) *will mitigate the impacts* of these providers leaving the Network.

(emphasis added). The employer also sent e-mails to all employees on October 4, 2016, October 14, 2016, and November 18, 2016, likewise informing them that Swedish would no longer be part of the Prime network on January 1, 2017, but that the employer would expand preventative care coinsurance to cover the Swedish network of providers at in-network rates. During this same time period, the parties met in negotiations for a successor contract on November 3, 2016, December 5, 2016, and December 21, 2016. Medical was a stated topic at all three meetings.

On January 1, 2017, the employer implemented the Prime network absent the Swedish network and expanded preventative care. Despite the employer's acknowledgement on January 4 that there was some financial impact and that the parties needed financial information *if* they were going to discuss mitigation as well as the union's request for information that same day, soon after on January 31 Harrison stated the employer's previously articulated position. In response to the

union's demand letter, Harrison wrote that the employer did not have a duty to bargain Swedish's decision and that it had already mitigated the impacts of that decision by expanding preventative care. No negotiation sessions occurred between January 4 and 31. The employer's statements and actions do not seem consistent with a willingness to bargain.

Although the parties continued to sit in negotiations after the announced departure and discussed the issue, looking at the preponderance of the evidence it is apparent the employer believed that by expanding preventative care it had mitigated the impacts of Swedish's departure, leaving no need to engage in good faith bargaining with the union on the topic. By definition, once presented with a *fait accompli* subsequent bargaining is not in good faith. The phrasing and tone of the employer's statements were clear: it was not open to bargaining the impacts of Swedish's decision or its own decision to expand preventative care coverage, both of which it had an obligation to do.

Element 4: Material changes occurred to the medical plan design: Swedish network providers departed, impacting service payments, and the employer expanded preventative care coverage.

An employer commits an unfair labor practice, if it imposes a new term or condition of employment, or changes an existing term or condition of employment upon its represented employees, without having exhausted its bargaining obligation under Chapter 41.56 RCW. *City of Tacoma*, Decision 4539-A (PECB, 1994). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *King County*, Decision 12451-A. When employees incur an increase in out-of-pocket expenses, the change is material. *Yakima County*, Decision 9338.

In this case, there was an actual material change in what employees needed to pay out of pocket for services from Swedish providers. The employer, in an effort to mitigate "some" of the loss of the Swedish network, unilaterally expanded full preventative care coverage to include the Swedish network. Thus, the employer acknowledged there were actual impacts and recognized the tangible loss of Swedish providers when it offered services at in-network rates for preventative care.

The employer claims that because it expanded preventative care to encompass full coverage for Swedish providers there was no actual change, or that at least the change was not material or

substantial. However, it does not matter if the change is detrimental or even perceived as an enhancement, just that it is unilateral. *See Cowlitz County*, Decision 7007, *aff'd*, Decision 7007-A. The employer does not get to choose the form of mitigation of the economic impact of a change involving a mandatory subject and then claim no bargaining was required because employees received a benefit; the parties need to bargain such changes.

The employer argues that because the out-of-pocket maximum did not change (and once reached, non-preventative services would have been covered fully, whether received in-network or out-of-network), Swedish's decision to leave the Prime network had little to no impact on employees. The union counters that many members did not reach their caps because they managed their costs by choosing in-network providers. With Swedish's departure, members' ability to manage their costs has been impacted. Members no longer have the ability to access Swedish providers at in-network rates for non-preventative services, meaning that members now do actually have to pay more for non-preventative care up to $1,000. Here, the union presented testimony from two employees who received out-of-network, non-preventative care from Swedish providers to show the actual impact on employees: one received care for pregnancy and the other for breast cancer.[7] Furthermore, but for the employer's unilateral act of expanding preventative care coverage, employees would also have to pay more for preventative care services from Swedish providers in 2017 up to the out-of-pocket maximum.

Additionally, the employer asserts and submitted evidence that there was no material impact because the 2017 Prime network remains robust even without Swedish providers. Regardless, that is not the test. Whether or not the network continues to be robust, Swedish's departure impacted members' service payments for preventative and non-preventative care.

Conclusion

The employer both (1) failed to bargain the impacts of Swedish's decision to leave the Prime network, and (2) unilaterally changed health insurance benefits when it expanded preventative care coverage to cover the Swedish network of providers at in-network rates.

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[7] The employer asserts employees could have applied for continuity of care through Premera. However, if granted, this typically only covers costs for 90 days.

Issue 2: Portions of the union's post-hearing brief will not be stricken but will serve as background information.

The employer filed a motion to strike portions of the union's post-hearing brief on the basis that the union's argument is based on facts that occurred outside the six-month statute of limitations. Although the employer did not object to facts the union introduced at hearing related to the medical plan change in 2015 as background information, the employer argues that "[it] must now object to the [union]'s attempt to make this a case about an alleged unfair labor practice that may or may not have occurred in 2015." The employer asks that certain references to the 2015 change in medical plans be stricken. The union counters that the motion to strike should be denied. It presented evidence that was rooted in background information to support its current claim and that such information is relevant as to remedy.

"[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission . . . ." RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bellingham*, Decision 10907-A (PECB, 2012), *citing City of Bellevue*, Decision 9343-A (PECB, 2007). Evidence of events occurring more than six months prior to the filing of the complaint has been admitted as background information. *City of Bellingham*, Decision 10907-A.

Portions of the union's post-hearing brief will not be stricken from the record but will serve as background information. In the instant case, the union had actual notice of the change from the Plus network to the Prime network in at least January 2016. During the relevant six-month statute of limitations, the union did not file an unfair labor practice complaint to challenge this change. The preliminary ruling in this case clearly focuses on actions since August 2, 2016, and since November 11, 2016. Once an examiner is assigned to hold an evidentiary hearing, the examiner can rule only upon the issues framed by the preliminary ruling. *King County*, Decision 9075-A (PECB, 2007), *citing King County*, Decision 6994-B (PECB, 2002). Thus, this examiner is confined to ruling on the causes of actions set out in the context of the preliminary ruling. *See King County*, Decision 9075-A.

REMEDY

The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change, making the employees whole for any loss of wages, benefits, or working conditions as a result of the employer's unlawful act, posting a notice of the violation, and reading that notice into the record at a public meeting of the employer's governing body. *City of Anacortes*, Decision 6863-B (PECB, 2001), *citing Seattle School District*, Decision 5733-A (PECB, 1997). The typical order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining unless the employer first provides the union with notice of proposed changes and the opportunity to bargain over the proposed changes. The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and gaining an unlawful advantage at the bargaining table. *Lewis County*, Decision 10571-A (PECB, 2011). However, in *Lewis County*, Decision 10571-A, the Commission held that in certain cases where a unilateral change violation has been found, the factual circumstances may dictate a remedial order different from the regular status quo remedy in order to effectuate the purposes of the statute.

A status quo ante remedy is inappropriate where an employer has only failed to bargain the effects of a decision. *Central Washington University*, Decision 10413-A (PSRA, 2011), *citing State – Social and Health Services*, Decision 9690-A (PSRA, 2008), *and City of Bellevue*, Decision 3343-A (PECB, 1990).

The status quo medical plan for 2017 is the 2016 Prime network. The employer is ordered to bargain with the union over the impacts of the Swedish network's decision to leave the Prime network and its own decision to expand preventative care coverage. Because the factual circumstances dictate a different remedial order than a return to the status quo, the employer is not ordered to undo its decision and remove expanded preventative care coverage for employees, until and unless warranted when the parties complete bargaining. Removing this unilateral change could cause employees to be harmed by paying increased service payments for preventative care without the benefits of bargaining. The employer is not ordered to make employees whole for service payments paid to Swedish providers for non-preventative care at out-of-network rates as

the employer was only obligated to bargain the effects of Swedish's decision. The employer also is ordered to post a notice of the violation, read the notice into the record at a public meeting of the employer's governing body, and cease and desist from making unilateral changes to mandatory subjects of bargaining without first satisfying its bargaining obligations.

FINDINGS OF FACT

1. The City of Issaquah (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. The Issaquah Police Support Services Association (union), a bargaining representative within the meaning of RCW 41.56.030(2), is the exclusive bargaining representative for all full-time and regular, part-time employees of the employer within the Issaquah Police Department, excluding confidential and supervisory employees. The union includes records clerks, dispatchers, and correctional officers.

3. The most recent collective bargaining agreement between the parties was effective from January 1, 2015, through December 31, 2016. As of the date of the filing of this unfair labor practice complaint, the parties had not reached agreement on a successor contract.

4. The parties' collective bargaining agreement contains the following relevant language in Article 12, Section 1.1 Medical: The Employer will maintain all medical plans and monthly premium share charges at the same percentage level for 2015 and 2016 as provided in Appendix C. The Employee shall select one of the above plans as set forth in Appendix C. The different medical plan specifications are provided and included as part of this Agreement.

5. Neither Appendix C, other appendixes, nor the body of the CBA defines the terms "medical plans," "plan specifications" or "plan design." In Appendix C, the relevant medical plan options are simply titled "Premera." There is no mention of either the "Plus" or "Prime" networks anywhere in the contract.

6. Since at least 2015, the employer has contracted with Premera to be its third-party medical plan administrator. Premera offers at least two insurance-based medical plans with different networks of providers: the Premera Heritage Plus Network and the Premera Heritage Prime Network. Premera contracts with various medical providers who agree to be "in-network" and subject to one level of coinsurance or "out-of-network" and subject to a different level of coinsurance.

7. As of January 1, 2016, the employer provided medical coverage to employees under the Prime network and the Swedish network of providers was considered in-network.

8. The 2016 preventative care coinsurance arrangement included the employer paying 100 percent of the services for preventative care from in-network providers and 70 percent for out-of-network providers.

9. On August 4, 2016, at an Issaquah Health Advisory Committee meeting, the employer told the union treasurer, Felicia Moore, that although Premera and Swedish were still in negotiations it was unlikely that the Swedish network of providers would remain part of the Prime network on January 1, 2017. The IHAC agenda and the union's meeting minutes stated that "Swedish . . . [is] out of Prime as of January 1st." The employer's minutes stated that if the network change occurs it "will make a change to its plan to cover Out-of-Network Preventative benefits the same as In-Network . . . to mitigate some of this impact."

10. The employer's open enrollment period began October 1, 2016, and continued through October 31, 2016.

11. At the October 3, 2016, IHAC meeting, the employer announced that Premera and Swedish had reached an agreement for the Plus network to maintain the Swedish network but not the Prime network.

12. The Open Enrollment Announcement e-mailed on October 4, 2016, notified all employees that as of January 1, 2017, the Swedish network of providers would no longer be part of

the Prime network. The announcement also stated that "[p]reventative care will now be covered at the same rate whether it is received in or out-of-network" to "mitigate the impacts of these providers leaving the network." And, it told users that they could seek care from Swedish providers at out-of-network benefit levels for non-preventative care.

13. Another e-mail was sent to all employees on October 14, 2016, similarly informing them of changes to their health insurance coverage.

14. On November 3, 2016, the parties met for the first time to negotiate a successor contract. The employer and union set goals and ground rules. One of the union's goals was to address medical insurance. The employer's notes reference the switch from the Plus network to the Prime network and state that it already happened. The employer also indicated its desire to not change the medical plan in 2017.

15. On November 18, 2016, a third employee newsletter was e-mailed to employees. It, too, informed employees of changes beginning January 1, 2017. However, it also advised employees of Premera's offer to temporarily provide continuity of care. Employees were told that "[i]f you qualify and apply, this benefit will cover care with your current healthcare provider at in-network levels for a limited period of time," typically limited to 90 days.

16. After looking into the issue and talking to its members, the union realized there would be impacts on its members from the Swedish network leaving the Prime network. In an e-mail dated November 25, 2016, the union executive board, through Moore, demanded to "bargain the decision relating to changes to the healthcare network and all associated impacts and effects of the change." Moore requested that the employer "immediately begin reviewing other health care plans that are substantially similar to what is currently being offered by the [employer]."

17. The parties met for a second time on December 5, 2016, to negotiate a successor contract. The issues of "medical," the Health Reimbursement Account (HRA), the network change as well as how to mitigate that change, and spousal coverage are reflected in the employer's

notes. The union made an opening proposal that included Article 12, Section 1.1 as "open." The union also proposed increasing the employer's contribution to individuals' HRAs from $550 to $750 annually, and it requested changing how spousal coverage is managed due to the financial costs.

18. On December 21, 2016, the parties met for a third time. The topics of the IHAC and the continuation of the HRA are reflected in the employer's notes. Independent human resources consultant Cabot Dow, the employer's lead negotiator, testified, "that we didn't really drill down very deep on the health issue at this meeting." The employer presented the union with its contract proposal that did not include changes to Article 12, Section 1.1 or Appendix C.

19. Beginning January 1, 2017, the employer continued to maintain the Prime network for employees, but without Swedish providers included in that network. And, the employer expanded preventative care coverage to include the Swedish network of providers at in-network rates with 100 percent coverage.

20. On January 4, 2017, the parties met for a fourth time. The parties discussed Swedish leaving the Prime network and options to mitigate the departure. Union attorney Erica Shelley Nelson asked about looking at an option of another medical plan. The employer stated that it had not changed the plan design: "out-of-pocket [maximum] has not changed" and [preventative] @ 100%." Dow testified that "[t]he financial impact for the out-of-network to an employee was recognized that there is some financial impact. So if we're going to talk about mitigation we need to get that information." Nelson wanted to see if the employer could "quantify the financial hit." Dow testified that the employer did provide the union with the financial information Nelson requested but he did not know when, did not know what form it was in, and had never seen it.

21. On January 31, 2017, the complaint in this case was filed. On the same day, city administrator Bob Harrison responded to the union's November 25, 2016 demand to bargain e-mail. He stated that the employer's position was that it did not have a mandatory duty to bargain Swedish's decision to leave the Prime network "as the structure of the

benefit and the provider network has not changed" and "[m]edical benefits continue to be provided at the same level as they were in 2016." He added, "we are aware of the potential inconvenience of not having Swedish in the network. To mitigate impacts, preventative care was expanded for 2017 and is now covered fully . . . ."

22. Nelson responded to Harrison on February 2, 2017. The letter reiterated the union's previous demand to bargain both the change in network and the employer's decision to mitigate that change. Nelson cited the economic impact on employees and stated that they now have to pay more money out-of-pocket for medical services until the out-of-pocket maximum is reached. Nelson also asserted that the employer has a duty to maintain the status quo.

23. On February 7, 2017, Harrison responded to Nelson reiterating the employer's earlier position that "medical benefits continue to be provided at the same level as they were in 2016."

24. The next day, on February 8, 2017, the parties had their fifth bargaining session. The employer's notes state that the employer's plan for the meeting was to set aside the unfair labor practice network issue for determination by the Commission.

25. On February 15, 2017, the parties met again. Evans presented what the employer saw as the financial impacts of Swedish's departure: the employer saw no significant change because the plan capped out-of-pocket expenses at $1,000. Nelson asked what the parties could do to offset the financial impact for members who seek treatment from Swedish out-of-network providers. Dow encouraged the union to participate in "plan design change . . . in a sort of [Labor Management Committee] style process" with other bargaining units of the employer. The parties discussed mitigation options such as the employer picking up the difference between the cost of in-network and out-of-network services, keeping and/or increasing HRAs, and expanding spousal coverage.

26. The parties also met in negotiations on March 9, 2017. The union made a proposal on medical that included adjusting spousal coverage, promoting wellness, and increasing the HRA balance to $1,000. The employer did not agree to the proposal.

27. The relevant status quo was the 2016 Prime network that included the Swedish network of providers and the 2016 preventative care coinsurance arrangement.

28. The Swedish network of providers is a mandatory subject. However, multiple employer witnesses testified that the employer had no control over which providers are in or out-of-network in the sense that the employer does not directly negotiate the contract with Swedish, rather Premera does. Thus, although a business necessity defense excused the employer from bargaining over Swedish's departure, it did not excuse the employer from bargaining over the effects of Swedish's decision.

29. The employer's decision to expand preventative care coverage is a mandatory subject that the employer needed to bargain.

30. The employer was not open to bargaining the impacts of Swedish's departure from the Prime network and presented its decision to mitigate those impacts by expanding preventative care coverage as a *fait accompli*.

31. Material changes occurred to the medical plan design: Swedish network providers departed, impacting service payments, and the employer expanded preventative care coverage.

CONCLUSIONS OF LAW

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

2. According to findings of fact 3 through 31, the employer refused to bargain in violation of RCW 41.56.140(4) and (1) when it failed to bargain the impacts of the Swedish network's

decision to leave the Prime network, and unilaterally expanded preventative care coverage to fully cover Swedish providers at in-network rates.

3. Portions of the union's brief addressing the medical plan change from the Premera Plus network to the Premera Prime network that was announced in 2015 and occurred at the beginning of 2016 will not be stricken from the brief but will serve as background information.

ORDER

The City of Issaquah, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing to bargain with the union over the impacts of the Swedish network's decision to leave the Prime network.

   b. Making unilateral decisions in an effort to mitigate the impacts of the Swedish network's decision to leave the Prime network.

   c. 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 the Issaquah Police Support Services Association before attempting to mitigate the impacts of the Swedish network of providers' departure from the Premera Prime network and unilaterally changing the costs of medical services provided to employees.

b. 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.

c. Read the notice provided by the compliance officer into the record at a regular public meeting of the Issaquah City Council of the City of Issaquah, 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.

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 18th day of January, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Dianne Ramerman

DIANNE RAMERMAN, Field Services Manager

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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 01/18/2019

DECISION 12963 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 128721-U-17

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