STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHATCOM COUNTY DEPUTY SHERIFF'S GUILD, Complainant, vs. WHATCOM COUNTY Respondent.	CASE 131286-U-19 DECISION 13082 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On February 1, 2019, the Whatcom County Deputy Sheriff's Guild (Guild) filed this unfair labor practice complaint against Whatcom County (County). The Guild alleges that the County made a unilateral change when it began deducting premiums from employees' paychecks to pay a portion of the premium for the new paid family medical leave benefit created by Washington State law.

On February 8, 2019, the unfair labor practice administrator issued a preliminary ruling finding a cause of action. Prior to hearing, both parties filed motions for summary judgment and submitted briefs in support of their motions and in opposition to the other party's motion, the last of which was received on August 2, 2019.

ISSUE

Did the employer refuse to bargain in violation of RCW 41.56.140(4) by unilaterally implementing employee payroll deductions for paid family medical leave premiums, without providing the Guild an opportunity for bargaining?

The law creating the paid family medical leave benefit provides for a premium sharing apportionment defining the employee and employer portions of the premium. That apportionment became the status quo. Because the parties did not agree to change the status quo and did not receive an interest arbitration award altering the status quo, the County did not make a unilateral change when it began deducting the employee share of the premium in January 2019. The complaint is dismissed.

BACKGROUND

This case is about the collective bargaining impacts related to the implementation of Washington State's paid family medical leave (PFML) premiums. The PFML law went into effect on October 19, 2017, and creates a state-run benefit providing for partial paid leave to employees when certain life events occur, such as the birth of a child or a serious health condition.

To fund this new benefit, the law required, with limited exceptions not relevant here, that premiums start being paid in January 2019. The premium amount is tied to employees' wages. For 2019 and 2020 it is set as four-tenths of one percent of employees' wages. The law includes a premium sharing apportionment that specifically defines the employee and employer portions of the PFML premium and allows the employer to pick up the employee share. In relevant part, the law provides as follows:

> (3)(a) Beginning January 1, 2019, and ending December 31, 2020, the total premium rate shall be four-tenths of one percent of the individual's wages subject to subsection (4) of this section.
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> (b) For family leave premiums, an employer may deduct from the wages of each employee up to the full amount of the premium required.
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> (c) For medical leave premiums, an employer may deduct from the wages of each employee up to forty-five percent of the full amount of the premium required.
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> (d) An employer may elect to pay all or any portion of the employee's share of the premium for family leave or medical leave benefits, or both.[1]

[1] RCW 50A.10.030(3)(a)(b)(c)(d).

When the PFML law went into effect on October 19, 2017, the parties were bargaining their successor collective bargaining agreement (CBA). The successor CBA was finalized on December 5, 2017, over a month after the PFML law went into effect.

Even though the PFML law had gone into effect, the parties did not discuss the PFML premium sharing apportionment while bargaining their current CBA in autumn 2017. As a result, they did not reach agreement on how the premium would be shared between the County and employees. Their current CBA is silent on the issue.

On November 9, 2018, nearly a year after their current CBA was finalized, the County emailed its employees, including those represented by the Guild, informing them that the employee share of the PFML premium would be deducted from their paychecks in January 2019. On November 11, 2018, the Guild informed the County that it objected to the deduction of the employee share of the premium from paychecks and demanded to bargain the issue.

The parties discussed the premium issue on November 27, 2018, but did not come to agreement. The County proposed that employees pay the employee share of the apportionment as outlined in the law. The Guild in turn proposed that the County should pay the premium in full.

In January 2019 the County proceeded to deduct the employee share of the premium. The Guild subsequently filed this unfair labor practice complaint alleging that the County unilaterally reduced Guild members' wages by deducting the PFML premium from their paychecks.

In its motion for summary judgment, the County argues that the status quo is the premium apportionment set forth in the law. The Guild in turn argues that the status quo is that employees do not pay any premium for PFML because they have never paid the premium.

ANALYSIS

Applicable Legal Standards

Summary Judgment

An examiner may grant a motion for summary judgment "if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135; *State – Office of the Governor*, Decision 10948 (PSRA, 2010). "A material fact is one upon which the outcome of the litigation depends." *State – General Administration*, Decision 8087-B (PSRA, 2004), *citing Clements v. Travelers Indem. Co.*, 121 Wn.2d 243 (1993). Summary judgment is only appropriate when the party responding to the motion cannot or does not deny any material facts alleged by the party making the motion. *State – General Administration*, Decision 8087-B.

Duty to Bargain

The Public Employees' Collective Bargaining Act, chapter 41.56 RCW, governs the relationship between the union and the employer. RCW 41.56.030(4) defines collective bargaining and requires parties to engage in good faith negotiations over mandatory subjects of bargaining. 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.

Unilateral Change

The parties' collective bargaining obligation requires 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 a term 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); *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 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).

Unilateral Change

To prevail on a claim of unilateral change, a complainant 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).

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

The parties in this case do not dispute that the deduction of PFML premiums impacts wages and is a mandatory subject of bargaining. The County also concedes that it has a duty to bargain the impacts of the implementation of the PFML premium. Instead, the dispute focuses on what constitutes the relevant status quo regarding the payment of PFML premiums in January 2019 when the County began deducting the PFML premiums from employees' paychecks.

In the Guild's view, because employees never paid PFML premiums, their nonpayment of those premiums is the status quo and the employer made a unilateral change by deducting the premiums

without bargaining to agreement or interest arbitration first. In the County's view, the PFML law created the status quo regarding premiums when it was passed in October 2017, and because the parties did not agree to a change and did not receive an interest arbitration award ordering a change, it did not make a unilateral change when deducting the premiums from employees' paychecks.

When the PFML law passed, it included provisions that required premiums to be paid for the new benefit and set forth the apportionment for how the premium would be shared between employers and employees. That premium apportionment set the expectation for how premiums would be shared absent alteration through agreement or interest arbitration.

Although not in operation until January 2019, the expectation of the premium sharing apportionment specifically outlined in the PFML law became part of the status quo between the parties.

The PFML law takes into account collective bargaining relationships and provides flexibility in how premiums would be shared between employers and employees, thus making the issue bargainable. Consistent with that consideration, the law provides parties to collective bargaining agreements the opportunity to bargain the premium before the PFML law applies to them:

> Nothing in this title requires any party to a collective bargaining agreement in existence on October 19, 2017, to reopen negotiations of the agreement or to apply any of the rights and responsibilities under this title unless and until the existing agreement is reopened or renegotiated by the parties or expires.[2]

In this case, the County and the Guild were not parties to a collective bargaining agreement in existence on October 19, 2017. Instead, at that time the parties were bargaining a successor collective bargaining agreement that would be in effect through 2019, after the PFML premium was set to be collected. The period of time between the passage of the law on October 19, 2017, and the finalization of their new collective bargaining agreement provided the parties an opportunity to bargain how the new PFML benefit would apply to them. If they wanted a different outcome than the premium sharing apportionment outlined in the law, they had the opportunity to

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2 RCW 50A.05.090.

bargain that issue at that time. They did not. Therefore the apportionment outlined in the law became the status quo.

I acknowledge the practical reality that the parties had a limited opportunity to bargain the premium sharing apportionment while negotiating their 2017–19 collective bargaining agreement. It is likely that the issue was not fully on their radar since the law had just gone into effect and the premium would not be paid until 2019. It is also likely that adding the PFML premium sharing issue to their negotiations would have delayed the resolution of that CBA. Even so, the fact remains that the parties had the opportunity to bargain the issue and did not.[3]

The Guild cites two cases to support the idea that an employer cannot reflexively rely on external law to avoid bargaining over mandatory subjects of bargaining. In *Yakima Valley Community College*, Decision 11326-A (PECB, 2013), the legislature reduced the employer's budget by three percent. After limited discussions with the union, the employer unilaterally implemented a commiserate wage reduction. This decision was found to be an unfair labor practice because the legislature gave the employer latitude in how to achieve the budget reductions and therefore the employer had a duty to bargain to agreement or impasse before implementing a wage reduction as part of those reductions. In *Benton County*, Decision 12790 (PECB, 2017), *aff'd*, Decision 12790-A (PECB, 2018),[4] the employer was found to have committed an unfair labor practice when it utilized a provision in state law to recoup wage overpayments from employees' paychecks without giving notice and bargaining with the union.

Benton County and *Yakima Valley Community College* are similar to this case in that the respective external laws provided discretion in how to apply their impacts. Because those impacts were mandatory subjects of bargaining, the employers were required to bargain in good faith as to how they were applied. But the laws in those cases did not provide a specific provision that would go into effect in the absence of agreement. In contrast, the PFML law explicitly takes the collective bargaining obligations of the parties into account by ensuring that the parties had an opportunity

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[3] However, it should be noted that nothing in this decision prohibits the parties from raising the premium sharing issue in future bargaining.

[4] This case is currently pending in Court of Appeals, Div. III, docket no. 18-2-00861-9.

to bargain before the premium share allocations set forth in the law went into effect. If, as here, the parties do not bargain otherwise, the law governs by defining the status quo on that issue.

CONCLUSION

The County did not make a unilateral change to employees' wages when it deducted the employee share of the PFML premiums in January 2019. The PFML law created the status quo regarding PFML premium sharing when it was passed on October 19, 2017. Because the parties had the opportunity to bargain the issue and did not agree to a different method for sharing the premium, and because they did not pursue the issue to interest arbitration, the County did not make a unilateral change to the status quo when it deducted the employee share of the premium in January 2019. The County's motion for summary judgment is granted and the complaint is dismissed.

FINDINGS OF FACT

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

2. Whatcom County Deputy Sheriff's Guild is a bargaining representative within the meaning of RCW 41.56.030(2). The Guild represents a bargaining unit of all fully commissioned law enforcement officers up through the rank of sergeant who are employed by Whatcom County.

3. Whatcom County and the Guild are parties to a collective bargaining agreement that went into effect on December 5, 2017, and expires December 31, 2019.

4. On October 19, 2017, the law creating the new paid family medical leave benefit went into effect. In part, the law requires premiums for the paid family medical leave benefit to start being paid in January 2019. The premium amount is tied to employees' wages. For 2019 and 2020 it is set as four-tenths of one percent of employees' wages. The law includes a premium sharing apportionment that specifically defines the employee and employer portions of the PFML premium and allows the employer to pick up the employee share.

5. When the law went into effect, the parties were bargaining their successor collective bargaining agreement. The successor collective bargaining agreement was finalized on December 5, 2017.

6. The parties did not discuss the paid family medical leave premium while bargaining their collective bargaining agreement in autumn 2017. They did not reach agreement on how the premium would be shared between the County and employees. Their current collective bargaining agreement is silent on the issue.

7. On November 9, 2018, the County emailed its employees, including those represented by the Guild, informing them that the employee share of the paid family medical leave premium would be deducted from their paychecks in January 2019. The Guild informed the County that it objected to the deduction of the employee share of the premium from paychecks and demanded to bargain the issue.

8. The parties discussed the premium issue on November 27, 2018, but did not come to agreement. The County proposed that employees pay the employee share of the apportionment as outlined in the law. The Guild in turn proposed that the County should pay the premium in full. Both parties communicated to the other that its proposal also represented its view of the status quo on the premium sharing issue.

9. In January 2019 the County proceeded to deduct the employee share of the premium.

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. As described in findings of fact 4 through 9 Whatcom County did not refuse to bargain or violate RCW 41.56.140(4) and (1) when it deducted paid family medical leave premiums from employees' paychecks in January 2019.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 15th day of October, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

E. MATTHEW GREER, 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 10/15/2019

DECISION 13082 - 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 131286-U-19

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