STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFF'S GUILD, Complainant, vs. KITSAP COUNTY, Respondent.	CASE 132943-U-20 DECISION 13306 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Mark A. Anderson, Attorney at Law, Cline & Associates, for the Kitsap County Deputy Sheriff's Guild.

Jacquelyn M. Aufderheide, Chief Civil Deputy Prosecuting Attorney, Kitsap County Prosecuting Attorney Chad M. Enright, for Kitsap County.

On July 30, 2020, the Kitsap County Deputy Sheriff's Guild (Guild) filed this unfair labor practice complaint against Kitsap County (County). The Guild alleges that the County made an unlawful unilateral change when it changed its rule relating to the number of names that are provided from the County Civil Service Commission to the Sheriff, when filling vacancies in the Sheriff's office. The change was from three names (Rule of Three) to five names (Rule of Five).

On August 10, 2020, the unfair labor practice administrator issued a preliminary ruling finding a cause of action. Prior to hearing, both parties filed 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 January 27, 2021.

ISSUE

Did the employer refuse to bargain in violation of RCW 41.56.140(4) by unilaterally changing the Rule of Three practice, without providing the union an opportunity for bargaining?

The County changed the Rule of Three to a Rule of Five because a recently amended state civil service law required such a change. The amended civil service statute does not allow the County to use anything other than a Rule of Five. The issue is preempted by state law and is an illegal, nonmandatory subject of bargaining. The complaint is dismissed.

BACKGROUND

Prior Rule of Three Policy

The Guild represents a bargaining unit that includes uniformed Deputy Sheriffs, Corporals, and Sergeants.

Under a longstanding past practice, when the Sheriff wished to fill a vacancy in the bargaining unit, the County's Civil Service Commission would provide the Sheriff with the names of the top three candidates, based on civil service test scores. This practice was codified in the Civil Service Commission's Rule 9.3, and is known as a "Rule of Three."

This was consistent with the state civil service law for Sheriffs as it existed at the time. Both RCW 41.14.060(7) and RCW 41.14.130 dealt with the filling of vacancies in Sheriffs' offices. Since 1979, these statutes had provided for a Rule of Three.[1]

RCW 41.14.060(7) provided that it "shall be the duty of the civil service commission . . . to certify to the appointing authority, when a vacant position is to be filled . . . the names of the three persons highest on the eligible list for the class." Former RCW 41.14.060(7), 1979 ex. s. c 153 § 2.

RCW 41.14.070 similarly stated, "[w]henever a position in the classified service becomes vacant . . . [t]he commission shall certify the names of the three persons highest on the eligible list for the

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[1] From the law's initial passage by initiative in 1959 until 1979, the law provided for a "rule of one" – a sheriff filling a vacancy was only provided "the name of the person highest on the eligible list for the class." Former RCW 41.14.060(7) and 41.14.130, 1959 c 1 §§ 6, 13 (Initiative Measure No. 23, approved November 4, 1958).

class to which the vacant position has been allocated . . . .” Former RCW 41.14.130, 1979 ex. s. c 153 § 4.

House Bill 1750

In 2020, the Legislature passed HB 1750, which changed the statutory Rule of Three to a Rule of Five. 2020 c 14 §§ 1-2.

RCW 41.14.060(7) now states, in pertinent part:

> It shall be the duty of the civil service commission . . . to certify to the appointing authority, when a vacant position is to be filled, on written request, the names of the five persons highest on the eligible list for the class.

RCW 41.14.130 now provides, in pertinent part:

> Whenever a position in the classified service becomes vacant, the appointing power, if it desires to fill the vacancy, shall requisition the commission for the names and addresses of persons eligible for appointment thereto . . . . The commission shall certify the names of the five persons highest on the eligible list for the class to which the vacant position has been allocated, who are willing to accept employment . . . . The appointing power shall forthwith appoint a person from those certified to the vacant position.

HB 1750 unanimously passed the House and Senate on February 12 and February 26, 2020, respectively, and was approved by the Governor on March 18, 2020. Laws of 2020 c 14.

Civil Service Commission Amends its Rules, and the Guild Demands to Bargain

On April 28, 2020, the Guild’s President, Jason Hedstrom, sent an email to the County’s Labor Relations Director, Kate Cummings, and the Civil Service Commission’s Chief Examiner, Carol Mackie. Hedstrom stated that he learned that the Civil Service Commission was going to vote to amend its rules in accordance with HB 1750, changing the Rule of Three to the Rule of Five. Hedstrom demanded to bargain the change.

On April 29, 2020, the Civil Service Commission changed its corresponding rule, Rule 9.3, to provide for a Rule of Five instead of a Rule of Three.

Subsequent to the Civil Service Commission's action, Cummings, Hedstrom, and the Guild's Attorney, Jim Cline, exchanged emails. The County took the position that the change was an illegal subject of bargaining. The Guild believed it was a mandatory subject, and wanted to retain a Rule of Three. Cline asserted that the parties could also agree to a "Rule of One," and that the County had to maintain the Rule of Three until a different rule was bargained. The parties met and discussed the issue on May 11, 2020, but evidently did not reach agreement.

On July 30, 2020, the Guild filed its unfair labor practice complaint alleging that the County had unlawfully unilaterally changed the Rule of Three to a Rule of Five.

On December 24, 2020, the County filed a motion for summary judgment. On January 11, 2021, the Guild responded to the County's motion, and filed its own motion for summary judgment. On January 25, 2021, the County filed a response to the Guild's motion. On January 26, 2021, the Guild filed a further reply. On January 27, 2021, the County filed an additional reply.

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; *Spokane Airport Board*, Decision 7889-A (PECB, 2003). "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)).

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 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 Edmonds*, Decision 8798-A (PECB, 2005).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *SNOPAC*, Decision 12342-A (PECB, 2016) (citing *Kitsap County*, Decision 8292-B (PECB, 2007)). A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Id.* (citing *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990)). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Id.* (citing *Kitsap County*, Decision 8893-A (PECB, 2007)).

The analysis of whether an issue is a mandatory or permissive subject of bargaining is a fact-specific analysis, balancing the employer's and union's interests. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017), *aff'd, City of Everett v. Public Employment Relations Commission*, 11 Wn. App. 2d 1 (2019); WAC 391-45-550. If a subject is permissive, then no bargaining on the decision is required. *Id.*

Illegal Subjects of Bargaining

Even if a subject could otherwise be mandatory in nature, it can be preempted by statute. *See City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd, International Association of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235 (1998), *review denied*, 137 Wn.2d 1035 (1999). "Illegal subjects of bargaining are matters which neither the employer nor the union have the authority to

negotiate, because their implementation of an agreement on the subject matter would contravene applicable statutes or court decisions." *Id.*, *see also Snohomish County*, Decision 8733-C (PECB, 2006); *Whatcom County*, Decision 7244-B (PECB, 2004).

Whether an issue is an illegal subject of bargaining because of statutory preemption is a legal inquiry that does not require an evidentiary hearing. *City of Seattle*, Decision 4687-B (affirming summary judgment based on finding of statutory preemption).

Collective bargaining laws are remedial in nature and liberally construed to effectuate their purpose. *See Nucleonics Alliance, Local 1-369 v. Washington Public Power Supply System*, 101 Wn.2d 24, 29 (1984). Accordingly, exceptions to the laws are narrowly confined. *Id*.

The words used within a statute must be given the full effect intended by the legislature. *State – Transportation*, Decision 8317-B (PSRA, 2005). A statute's subject matter and the context in which a word is used must also be considered. *Id*.; *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 217 (1995). Statutes must be interpreted and construed so that all the language used is given effect and no portion is rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537 (1996). Absent a specific definition, contrary legislative intent, or ambiguity, words in statutes are accorded their plain and ordinary meaning. *State v. Gonzalez*, 168 Wn.2d 256, (2010); *Dennis v. Department of Labor and Industries*, 109 Wn.2d 476, 479 (1987); *see also Skagit County*, Decision 8886-A (PECB, 2007). Statutes are not ambiguous merely because different interpretations are conceivable. *State – Transportation*, Decision 8317-B.

Application of Standards

The Question of Whether the Civil Service Commission's Rule Change Was a Mandatory Subject of Bargaining Is Properly Before Me for Summary Judgment

In its motion for summary judgment, the Guild argues that there is no dispute of material fact that the Rule of Three was past practice. The Guild argues that there is no dispute of material fact that the Civil Service Commission changed its Rule of Three without bargaining. The Guild argues that this change was a mandatory subject of bargaining.

The Guild's theory of the case, in its complaint and summary judgment motion, is that a unilateral change occurred when the Civil Service Commission amended its Rule 9.3 to change the Rule of Three to the Rule of Five. A dispositive issue in the Guild's case is whether the Civil Service Commission's rule change was a mandatory subject of bargaining.

However, the County's motion for summary judgment did not focus on this issue. The County argues that the Civil Service Commission was legally required to change the Rule of Three to avoid inconsistency with the Legislature's amendment to RCW 41.14.060(7) and RCW 41.14.130. However, instead of directly countering the Guild's position, and arguing that this means the change was not a mandatory subject of bargaining, the County instead argues that the Civil Service Commission is legally independent from the Sheriff. The County then argues that the Sheriff, as the legal employer of the Guild's members, had not changed *his* practice with respect to the Rule of Three, so there could be no legally cognizable unilateral change. The County argues that the Sheriff is not bound to implement the Rule of Five.[2] The County also argues that it had offered to

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[2] Paradoxically, it appears that in a meeting with the County prior to the filing of its unfair labor practice complaint, the Guild may have previously taken a position similar to what the County argues now - that even if the Civil Service Commission was required to change its Rule of Three to conform to the state statutes, the Sheriff's implementation (deciding how many of the five names he would actually *consider*) was a distinct act. The Guild did not pursue this argument in its complaint, its motion for summary judgment, or in its response to the County's motion.

The argument that the Sheriff, distinct from the Civil Service Commission, is not bound by the statutes, seems disingenuous and likely incorrect.

The legislative purpose behind the amendment was presumably that the Sheriffs be given greater choice when filling vacancies, by being able to consider five names when filling vacancies instead of only three. Accord, *Fezzey v. Dodge*, 33 Wn. App. 247, 251 fn. 1 (1982), *rev. denied*, 99 Wn.2d 1006 (1983) (finding that when the statute was amended to provide for three names instead of only one, intent was to "give the sheriff a greater choice"). When the Legislature mandated that the Civil Service Commission provide the Sheriff with five names, it follows that the Legislature expected that the Sheriff would consider the five names. The argument that the Sheriff cannot consider five names without bargaining and obtaining the union's agreement or an interest arbitration award, conflicts with the statutes' purpose in providing the Sheriff with five names. In interpreting statutes, it must be presumed that the Legislature did not intend a nullity. *See State – Transportation*, Decision 8317-A (PSRA, 2004); *Groves v. Meyers*, 35 Wn.2d 403, 213 P.2d 483 (1950).

In *Fezzey*, the Court of Appeals also found that the sheriff's office civil service statute "affords applicants the fundamental right to fair competition and fair consideration for employment opportunities." *Id*., 33 Wn. App. at 250. The fundamental rights of some of the employees certified by the Civil Service Commission to fair competition and fair consideration would be nullified if the Sheriff was prevented from considering them, and could agree (or be compelled in interest arbitration) to ignore them.

bargain the Sheriff's implementation of the change to the Rule of Three, and the Guild did not respond to its offer.

The County, in its motion for summary judgment, attempted to shift the inquiry to whether the *Sheriff* made a unilateral change (independent of any action taken by the Civil Service Commission), but the Guild's theory of the case is that an unlawful unilateral change occurred when the *Civil Service Commission* changed the Rule of Three. The case must be analyzed based on the theory asserted by the complainant. *See Grays Harbor County*, Decision 8043-A (PECB, 2004); *Port of Seattle (ILWU Local 9)*, Decision 3294-B (PECB, 1992); *Central Washington University*, Decision 12588-C (PSRA, 2017). The Guild's theory of its case put the mandatory nature of the *Civil Service Commission's* rule change squarely at issue.

It is necessary to determine whether the Civil Service Commission's rule change is a mandatory subject of bargaining, even though the County's argument on the mandatory/nonmandatory nature of the Civil Service Commission's action was almost completely absent. The County did assert that the Civil Service Commission was required by HB 1750 to make the change, essentially contending that the subject was illegal.[3] Moreover, WAC 391-45-550 provides that the determination as to whether a particular subject is mandatory or nonmandatory is "not subject to waiver by the parties by their action or inaction", so it is necessary to analyze whether the rule change is mandatory, even though the County essentially failed to properly argue and brief the

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[3] Although the County did not specifically use the term "illegal subject" in its summary judgment motion, the County said, "the [Civil Service] Commission was legally required to amend Rule 9.3 to avoid inconsistency with amendments to RCW 41.14.060(7) and RCW 41.14.130"; "the amendment of Rule 9.3 by the Commission was not subject to bargaining"; and "[t]he Commission had no discretion in amending Rule 9.3 to be consistent with the changes in the statutes." In its prior correspondence with the Guild (which was quoted in, and attached to, its motion for summary judgment), the County did specifically state that the issue was an "illegal subject of bargaining." The County also asserted "illegal subject" in its answer.

In its cross-motion for summary judgment and response to the County's motion, the Guild recognized that the County was asserting that the change was an illegal subject of bargaining ("[t]he County's position, on the other hand, is that these changes are permissive or perhaps even illegal") ("the County's position is that it was mandated by the legislature's passage of HB 1750 to change its rule of 3 to a rule of 5 and that failure to do so would have been illegal") ("Ms. Cummings' assertion that bargaining the rule of 3 would have been 'illegal' is erroneous as a matter of law").

issue. *See Kittitas Public Hospital District 1*, Decision 11992 (PECB, 2014) (under WAC 391-45-550, examiner needed to analyze whether issue was a mandatory subject, even though employer's brief did not dispute that the issue was mandatory); *State – Employment Security*, Decision 11962 (PSRA, 2013) (same). *See also State – Office of the Governor*, Decision 10948-A (PSRA, 2011) (Commission found the examiner properly dismissed a skimming allegation although employer's motion did not specifically address it, observing, "[w]hen a complainant or respondent file a motion for summary judgment, they are inviting an examiner to make a ruling").

An essential element of the Guild's complaint is that the decision at issue (the Civil Service Commission's rule change) must be a mandatory subject of bargaining. *SNOPAC*, Decision 12342-A (mandatory subject is an essential element of a "unilateral change" case). This issue is dispositive, and it is not necessary to address the Guild or the County's other arguments. Even assuming that the Guild is correct that the Civil Service Commission is a single employer with the County, that the County did in fact change the status quo in way that had a material and substantial impact on the terms and conditions of employment, and that the County failed to bargain the change, still, if the change is a nonmandatory, illegal subject, then the Guild's case must be dismissed. If the Guild cannot establish an essential element of its case, all other facts are rendered immaterial, and summary judgement for the County is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Repin v. State*, 198 Wn. App. 243, 262 (2017).

Statues Require a Rule of Five

I agree with the Guild that in most cases, procedures relating to promotions are mandatory subjects of bargaining. However, for the reasons stated below, I find that RCW 41.14.060 and RCW 41.14.130 preempt bargaining of the rule change in this case. The parties may not agree to anything other than the statutory Rule of Five because "their implementation of an agreement on the subject matter would contravene applicable statutes." *City of Seattle*, Decision 4687-B; *Snohomish County*, Decision 8733-C. The Civil Service Commission's change to the Rule of Five is an illegal, nonmandatory subject of bargaining.

Exceptions to the general bargaining obligation are narrowly confined, *Nucleonics Alliance, Local 1-369*, and the Commission has been rightly skeptical of claims that otherwise mandatory issues are exempt from bargaining because of other statutes. However, there have been times where the Commission has found other statutes preempt the duty to bargain. Neither the Guild nor the County did justice to the complexity of this issue in their motions. I have carefully examined this issue, and will discuss how the present case aligns with the Commission's precedent below.

RCW 41.14.060 provides, "it *shall be the duty* of the civil service commission . . . [t]o certify . . . the names of the five persons highest on the eligible list . . . ." (emphasis added). RCW 41.14.130 similarly provides, "[t]he commission *shall certify the names of the five persons* highest on the eligible list . . . ." (emphasis added).

The plain language of the statutes make it clear that the Civil Service Commission is *required* to submit five names to the Sheriff. "It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty. The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *Erection Company v. Department of Labor and Industries*, 121 Wn.2d 513 (1993); *State – Office of the Governor*, Decision 10313 (PECB, 2009), *aff'd*, Decision 10313-A (PECB, 2009). Accordingly, the Court of Appeals noted that when the statutes were amended in 1979, they "now require[]" a Rule of Three. *Fezzey v. Dodge*, 33 Wn. App. 247, 251 fn. 1 and 2 (1982), *rev. denied*, 99 Wn.2d 1006 (1983).

The Guild, by contrast, argues that the Civil Service Commission is required to provide only three names to the Sheriff, and is prohibited from providing five names, until the County obtains agreement or goes through interest arbitration.[4] The Guild also argues that the County could agree to a different number of names (the Guild wanted to retain a Rule of Three). This argument runs counter to the plain meaning of the statutes, which require a Rule of Five.

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[4] This being a uniformed bargaining unit, if the issue was a mandatory subject of bargaining, the county would either have to reach agreement with the union or bargain to impasse and go to interest arbitration to obtain any change to the rule of three. *Snohomish County*, Decision 9770-A (PECB, 2008).

Under Prior PERC Precedent, Implementation of a Statutory Requirement Is Not a Mandatory Subject of Bargaining

Where a state statute requires a particular action, the Commission has found that the employer does not need to bargain in order to follow the statute. These cases are distinguished from cases where statutes provide employers with discretion in how to act; in those situations, the Commission has required the employer to bargain over how its discretion will be implemented.

City of Seattle

In *City of Seattle,* Decision 4687-B, the union proposed that supplemental pension benefits be provided for bargaining unit members, and sought to advance the issue to interest arbitration. The Examiner found that the Legislature preempted the authority of the employer to act on pension benefits for firefighters, so that the union's proposals for supplemental pension benefits were not mandatory subjects of bargaining. The Commission affirmed.

The statutes establishing the LEOFF system stated, *inter alia*, "all fire fighters and law enforcement officers . . . shall be members of the retirement system established by this chapter;" *City of Seattle,* Decision 4687-B (citing RCW 41.26.040(1)); and "[a]ny employee serving as a law enforcement officer or fire fighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter." *Id.* (citing RCW 41.26.040(2)).

The Commission agreed with the Examiner's finding that the LEOFF statute "occupies the field of fire fighter pensions, so that this employer cannot legally bargain over the union's proposal." In reaching this conclusion, the Commission examined the legislative history and found that the LEOFF system was intended to be exclusive, uniform, and all-inclusive. *Id.*

The Commission noted that "*[t]he duty to bargain only exists as to matters over which the employer may lawfully exercise discretion*. Any agreement reached between the parties must contain provisions which the employer is authorized to enact, and cannot contain matters which neither the employer nor the union have the authority to negotiate." *Id.*, (citing *Zylstra v. Piva*. 85 Wn.2d 743 (1975)) (emphasis added).

The union in *City of Seattle* argued that "an otherwise mandatory subject cannot be preempted from a public employer's collective bargaining obligations, except by an express exception to the provisions of Chapter 41.56 RCW", citing RCW 41.56.905, which provides:

> The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

The Commission found that RCW 41.56.905 did not override the LEOFF statute and require bargaining, because "[r]ather than presenting a conflict of laws, the Legislature's action to entirely occupy the field leaves no room for mandatory collective bargaining at the local level." *City of Seattle.* The Commission explained,

> RCW 41.56.100 specifically confers authority on public employers to engage in collective bargaining, but the employer aptly points out that Chapter 41.56 RCW is not an enabling statute for public employers to exercise other types of authority. *Any bargaining must be done within the bounds of substantive authority granted elsewhere*.

Id. (emphasis added).

City of Seattle is important because the Commission recognized that a legislative mandate will be followed and is not subject to bargaining, notwithstanding the seemingly all-encompassing scope of RCW 41.56.905. The Commission found that when the Legislature "occupies the field" on an issue, employers no longer have authority to bargain the issue under chapter 41.56 RCW, and therefore RCW 41.56.905's rule about resolving "conflicts with any other statute" does not even apply.

In the present case, RCW 41.14.060(7) and RCW 41.14.130 specifically require a Rule of Five. The Legislature has occupied the field regarding the number of names provided to the Sheriff by

the Civil Service Commission when filling vacancies.[5] The County does not have the authority to implement a different rule, and so is not required to bargain the issue.

Skagit County

In *Skagit County*, Decision 8886-A (PECB, 2007), statutes relating to industrial insurance provided, in pertinent part, "[e]very employer who is not a self-insurer shall deduct from the pay of each of his or her workers one-half of the amount he or she is required to pay, for medical benefits within each risk classification;" *Id.* (citing RCW 51.16.140(1)), and "each employer shall retain from the earnings of each worker that amount as shall be fixed from time to time by the director, the basis for measuring said amount to be determined by the director." *Id.* (citing RCW 51.32.073(1)).

When the employer began deducting the industrial insurance premiums from employees' pay, the union alleged an unlawful unilateral change, arguing that employer could bargain to deduct a lesser amount. The Commission found, "[t]he industrial insurance statutory scheme required the employer to deduct the employees' share of the premiums" and bargaining on the subject was not required.[6]

The Commission emphasized that the plain meaning of the statute was determinative:

> Evidence provided by the union fails to demonstrate a legislative intent to administer the statute as a permissive "may." . . . Recognizing that this Commission is not the agency charged with enforcing Chapter 51.16 RCW, we will not speculate about the legislative intent. The union could not show a specific definition, contrary legislative intent or that the language is ambiguous in the above statute. Thus, under the existing statutory scheme, the employer was required to deduct the employees' share of the premium.

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[5] In *City of Seattle*, Decision 4687-A (PECB, 1996), *aff'd*, *City of Seattle*, Decision 4687-B, the Examiner noted that "occupying the field" occurs "where state law gives (or leaves) the employer no authority."

[6] In *Skagit County*, the statutory preemption issue was analyzed as a "legal necessity" defense, rather than analyzed as an "illegal subject." Still, *Skagit County* is relevant because of its analysis into how a statutory mandate can preclude bargaining on an issue.

Id. (internal citations omitted).

Just as the industrial insurance statute was found to require the employer's action in *Skagit County*, the plain language of RCW 41.14.060(7) and RCW 41.14.130 indicate that the Rule of Five is a requirement, and so bargaining is not required in order to follow the statutory requirement.[7]

Cases Cited by the Guild Involved Statutory Grants of Discretion or Authority, Rather Than Specific Mandates

The Guild pointed to several cases where civil service statutes were not found to preempt the duty to bargain. The distinction between these cases and the instant case is aptly described in the Examiner's decision in *City of Seattle*, Decision 4687-A, *aff'd*, Decision 4687-B: "Each of the cited cases involved the exercise of *discretion and authority* conferred upon the public employer; none of those cases involved a dispute where a state statute has pre-empted an issue which might otherwise have been a mandatory subject of bargaining" (emphasis added).

In *City of Bellevue*, Decision 3156-A (PECB, 1990), the employer argued that chapter 41.08 RCW authorized the Bellevue Civil Service Commission to adopt rules, and therefore the Civil Service Commission's rules, which affected hiring, discipline, layoff, recall, promotion, transfer, and appeal, were not subject to bargaining.

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[7] In *Skagit County*, the Commission noted the insufficiency of the union's evidence of legislative intent. I do not find that this indicates there is an evidentiary issue precluding summary judgment in this case. In its motion for summary judgment, the County asserted their interpretation that RCW 41.14.060(7) and RCW 41.14.130 required a Rule of Five. The Guild did not bring forth any evidence of a contrary legislative intent (instead, the Guild argued that regardless of legislative intent, the employer could not implement the statute without bargaining). The Guild did not create a genuine issue of material fact relating to the Legislature's intent that would require a hearing or would preclude summary judgment for the County.

The employer cited to RCW 41.08.040,[8] which provides in pertinent part, "[i]t shall be the duty of the civil service commission . . . [t]o make suitable rules and regulations not inconsistent with the provisions of this chapter." RCW 41.08.040(1).

The statute did not specifically prescribe the content of the rules that the Civil Service Commission was tasked with adopting. The Commission found that the statutes could be harmonized, i.e., the city could bargain over the rules and still comply with its statutory authority to adopt rules: "[c]ertainly, if the civil service commission adopts new rules on mandatory subjects only after the employer had satisfied its bargaining obligation, and the rules adopted are consistent with what occurred in the collective bargaining process, there would be no conflict."

Here, in contrast to *City of Bellevue*, RCW 41.14.060(7), and RCW 41.14.130 do not merely require the Civil Service Commission to adopt rules about how many names would be on a list provided to the Sheriff. The statutes require a specific outcome – a Rule of Five. The Guild seeks to bargain to retain a Rule of Three. Unlike the situation in *City of Bellevue*, such a bargain could not be harmonized with the statutory requirement to use a Rule of Five. Indeed, RCW 41.14.060(1) authorizes the Civil Service Commission to "make suitable rules and regulations *not inconsistent with the provisions hereof*," (emphasis added), so it could not use its rulemaking authority to vary from the Rule of Five.

The Guild also cited *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd, Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991). *City of Yakima* dealt primarily with the employer's contention that the proviso of RCW 41.56.100 exempted the employer from the duty to bargain concerning matters delegated to the civil service commission, which is not at issue here. As the Guild noted, in that case, the Commission applied the holding of

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[8] *See* the examiner's decision in *City of Bellevue*, Decision 3156 (1989), *aff'd*, *City of Bellevue*, Decision 3156-A.

City of Bellevue to the Yakima Police and Fire Civil Service Commission. The same distinction between *City of Bellevue* and the present case is applicable.

Rose v. Erickson Held that RCW 41.56.905 Preempted Earlier *Statutes*

In *City of Bellevue*, the Commission relied on RCW 41.56.905, and the Washington Supreme Court case interpreting RCW 41.56.905, *Rose v. Erickson*, 106 Wn.2d 420 (1986). The Guild also cited to *Rose* in its motion for summary judgment and response to the County's motion.

Rose dealt with RCW 41.56.905 (discussed above and in *City of Seattle*). In *Rose*, an employee argued that he could use a collectively bargained arbitration procedure to challenge his discipline, rather than being required to use an appeal to the civil service commission as provided in Chapter 41.14. *Rose* at 422.

The employer in *Rose* argued that chapter 41.14 RCW preempted chapter 41.56 RCW regarding the discipline of Sheriff's employees. RCW 41.14.080 stated, in pertinent part, "No person in the classified civil service shall be reinstated in or transferred, suspended, or discharged from any such place, position, or employment contrary to the provisions of this chapter."

In turn, the employee argued that chapter 41.56 RCW prevailed over the civil service statute, under RCW 41.56.905. *Id.* at 423.

The Supreme Court noted that RCW 41.56.905 was enacted *after* RCW 41.14.080, and so found that the Legislature intended for RCW 41.56 to prevail over RCW 41.14.080:

> RCW 41.56.905 was added as a part of the 1973 amendment to chapter 41.56. Significantly, in . . . 1983 . . . , the Legislature . . . enacted the provisions stating that a liberal construction should be given to all of RCW 41.56 and conflicts resolved in favor of the dominance of that chapter. The change is significant and we conclude that in the event of conflict between RCW 41.14 and RCW 41.56, RCW 41.56 must prevail.
>
> RCW 41.14 has been amended often since the enactment of RCW 41.56. The Legislature has not amended the pertinent portion of RCW 41.14.080 cited above.

> This indicates that the Legislature did not intend the procedures of RCW 41.14 to supplant RCW 41.56.

Id. at 424 (citations omitted). Thus, although 41.14.080 purported to make appeals under chapter 41.14 RCW the exclusive remedy for discipline, RCW 41.56's mandate for collective bargaining was enacted later. Chapter 41.56 RCW was interpreted as essentially modifying RCW 41.14.080's exclusivity.

Here, by contrast, RCW 41.14.060(7) and RCW 41.14.130 were amended by the Legislature in 2020, and the newer Legislation is presumed to have effect.[9] The situation here is different from the statutory conflict dealt with by the Supreme Court in *Rose.*

Notably, *City of Seattle* was decided after *City of Bellevue* and *Rose v. Erickson*. As discussed above, the Commission in *City of Seattle* found that RCW 41.56.905 did not apply to require bargaining when the Legislature imposed a mandate in a different statute.

City of Tacoma and City of Bellingham are Not Persuasive On This Issue

The Guild cited *City of Tacoma*, Decision 5686 (PECB, 1996), where the union alleged a unilateral change when the City of Tacoma changed a "rule of three" to allow the employer to select a candidate from the top five names, or the top 10 percent of the eligible list. The Executive Director found that the complaint stated a cause of action.

Although the similarities to the present case are enticing, *City of Tacoma* does not compel the result that the Guild seeks here. First, in that case there were no decisions on the merits, findings of fact, or conclusions of law – the Executive Director only found that the facts alleged in the complaint *may* constitute an unfair labor practice under WAC 391-45-110, which allows a case to

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[9] The chronological order of the legislation was considered a significant factor when deciding whether RCW 41.56.905 superseded another statute in other cases. *See Town of Steilacoom*, Decision 5947 (PECB, 1997) (RCW 41.56 was enacted after RCW 42.17 "and is entitled to interpretation as the more recent of the statutes"; *City of Fife*, Decision 5645 (PECB, 1996) (Legislature had amended other sections of chapter 42.30 RCW after RCW 41.56.905 was enacted, but not RCW 42.30.140, therefore RCW 41.56.905 prevailed over RCW 42.30.140).

proceed to a hearing but does not compel a particular result.[10] Neither the Executive Director, nor the Commission, actually found that a change to the Rule of Three in that case was a mandatory subject. The Commission, in its order granting temporary relief noted, "[t]he Executive Director particularly noted the *potential* applicability in this case of *City of Yakima*, Decision 3503-A (PECB, 1990) . . ." (emphasis added).[11]

The Guild also cited to *City of Bellingham*, Decision 6950 (PECB, 2000) for the general proposition that "civil service rules and procedures affecting mandatory subjects of collective bargaining are themselves mandatory subjects of bargaining." *City of Bellingham* was an order of dismissal by the Executive Director, and the Executive Director did not actually apply or analyze the statutory preemption/illegal subject issue. Rather, the Executive Director said that the complainant's claims that the employer violated the city charter would need to be decided by a court rather than at the Commission, "but [a court] would do so in the context of certain rulings [and] established precedents." The Executive Director then cited to *Rose v. Erickson* and *City of Yakima,* and stated the general proposition that civil service rules are mandatory subjects of bargaining. There are also other cases in the annals of the Commission that, without extensive analysis, similarly state that general rule. Statutory preemption is an exception to the general rule that can render an otherwise mandatory subject illegal. *City of Bellingham* does not have precedential value in this case, nor is it helpful to the analysis here.

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[10] The case was later dismissed for lack of prosecution and did not proceed to a hearing. *City of Tacoma,* Decision 5686-A (PECB, 2000).

[11] *City of Tacoma* dealt with a city police department rather than a county sheriff's office. It is not clear from *City of Tacoma* what the applicable civil service statute was, and whether it was the union or the city who was deviating from the rule established in the statue. If there was a statutory Rule of Three in place at the time, as there was for sheriff's offices, then it may have been the *union* that was seeking to have the *city* comply with the statutory Rule of Three – the reverse of this case.

Recent Decisions by the Commission Continue to Draw A Similar Line Between Mandatory and Illegal Subjects

Whatcom County

Whatcom County, Decision 13082-A (PECB, 2020), dealt with RCW 50A.10.030, a statute enacted in 2017 relating to the premiums for Paid Family Medical Leave. Subsection 1 and subsection 3(a) of the statue defined the total premium rate, and subsections 3(b), 3(c), and 3(d) described how the premium could be apportioned between the employer and the employee:

> (b) For family leave premiums, an employer may deduct from the wages of each employee up to the full amount of the premium required.
>
> (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.
>
> (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.

After failing to reach an agreement with the union on how much of the premium would be paid by the employer, the employer began unilaterally deducting the maximum employee premium provided in this statute. The employer argued that the status quo was the premium apportionment set forth in the statute, and could implement this apportionment even in the absence of an agreement or impasse.

The Commission disagreed:

> Here . . . the legislature provided employers, whether public or private, represented or not, *several paths to take* when dealing with the matter of required PFML premiums. The statute permits employers to pay the entirety of the premiums, or to share them with its employees by percentages, up to a maximum of "forty-five percent of the full amount of the premium" charged for medical leave and the "full amount of the premium" for family leave. RCW 50A.10.030(3)(b), (c). Nowhere in the statute does the legislature suggest that public employers with represented employees could treat the statutory maximum deduction of 45 percent of the medical leave premium as what the employer terms a "statutory default split," and deduct that amount from employees' wages without bargaining with the representatives of its employees.

(emphasis added). The present case is distinct from the situation in *Whatcom County* because the civil service statutes at-issue do not provide the employer with "several paths to take" regarding the number of names provided to the Sheriff by the Civil Service Commission. Rather, "[i]t *shall be the duty* of the civil service commission . . . [t]o certify . . . the names of the five persons . . ." and "[t]he commission *shall* certify the names of the five persons . . . ." RCW 41.14.060(7) and RCW 41.14.130 (emphasis added).

Benton County

In *Benton County*, Decision 12790-A (PECB, 2018), *aff'd, Teamsters Local 893 v. Benton County*, 15 Wn. App. 2d 335 (2020), the employer discovered that employees in the Sheriff's Department had been overpaid. The employer unilaterally decided on the employees' options for repaying the County. The employer unilaterally moved forward with collecting the overpayments and refused to bargain the issue with the union.

The employer argued that it had no duty to bargain because its actions were authorized under RCW 49.48.200 and RCW 49.48.210. The Commission disagreed, stating:

> RCW 49.48.200 established a cap on the percentage of wages an employer may deduct to recoup an overpayment. However, the statute is otherwise silent on how the employees are to pay back overpayments . . . . By offering the employees multiple options, . . . the employer proved that it had discretion to determine how it might recoup the overpayment. The union wanted to bargain the method of overpayment, or, more simply stated how employees would pay back the employer.

Here, this is not a dispute about *how* the statutory Rule of Five will be applied. The Guild was clear that they wanted to bargain to not have a Rule of Five at all. The present dispute deals not with a demand to bargain in an area of statutory silence as in *Benton County*, but rather on the Guild's demand to bargain a term specifically mandated by the statute. The present dispute is more akin to the "cap on the percentage of wages" that the Commission in *Benton County* found *was* specifically established by statute.

Washington State Ferries

In *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A (MRNE, 2020), the union sought to submit to interest arbitration a contract provision requiring the employer to make premium contributions to a medical plan for certain employees. The employer argued that this was an illegal subject of bargaining and therefore could not be submitted to interest arbitration.

The statute at-issue provided that the employer and a coalition of unions would conduct negotiations regarding the "dollar amount expended on behalf of each employee for health care benefits." RCW 47.64.270(1). The Examiner found that this prohibited the employer and union from directly (outside the coalition) bargaining over health care benefits, and so the union's proposal was an illegal subject of bargaining.

The Commission reversed, observing:

> By its plain terms, RCW 47.64.270(1), added to the statute in 2010, is confined to describing the procedure for bargaining the "dollar amount" to be expended "on behalf of each employee" for health care benefits. It says nothing about the health care plans to which those agreed dollar amounts might eventually be directed, nor the "health care benefits" such plans might offer. Nothing in RCW 47.64.270(1) suggests that the coalition is empowered to bargain over health care benefits, and there is nothing in RCW 47.64.270(1) pertinent to the issue whether the union committed an unfair labor practice in seeking to retain Section 26 in the labor agreement.

The Commission found that the statutory mandate of coalition bargaining over the "dollar amount" was distinct from the "plan" and "benefits" – the *destination* of the "dollar amount" – that the union sought to bargain.

The present case is distinguishable from *Washington State Ferries (Marine Engineers' Beneficial Association).* Here, the statutory mandate is for a Rule of Five, and the Guild seeks to bargain that precise issue.

Summary of PERC Precedent

Contrary to the Guild's broad assertions, when the Commission has squarely dealt with a question of statutory preemption, it has not ruled that *all* other statutes are *always* subject to the bargaining obligation under RCW 41.56. The possibility of "illegal" subjects of bargaining has been part of the Commission's vocabulary for decades. *See City of Richland*, Decision 2486-A (PECB, 1986) ("illegal subjects are those matters which neither the employer nor the union have the authority to negotiate, because agreement would contravene applicable statutes or court decisions").[12]

In cases where the Commission has found a statute did not preempt the duty to bargain, it has consistently found either some flexibility, discretion, or authority in the statute, creating some room for bargaining (*City of Bellevue*, *Benton County*, *Whatcom County*), or else found that there was not an exact alignment between the statutory mandate and the issue the union sought to bargain (*Washington State Ferries (Marine Engineers' Beneficial Association)*).

In this case, there is neither flexibility, discretion, nor authority on the Rule of Five, and the issue the Guild seeks to bargain (to have a Rule of Three) perfectly aligns with the statutory mandate (requiring a Rule of Five). This case falls into the category of cases where bargaining is preempted by another state statute, in company with *City of Seattle* and *Skagit County*.

CONCLUSION

RCW 41.14.060(7) and 41.14.130 were amended by the Legislature to provide for a Rule of Five for filling vacancies in county sheriff offices, instead of a Rule of Three. The Rule of Five is a duty, not a grant of discretion or authority. Kitsap County is required to follow these state statutes, and amended its civil service rules accordingly.

Agreement on anything but a Rule of Five would "contravene applicable statutes". *City of Seattle*, Decision 4687-B. The County's decision to change its rules to a Rule of Five was therefore an

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[12] *City of Richland*, Decision 279-A (PECB, 1978), may be the first case where the Commission actually mentioned the "mandatory/permissive/illegal" triad, although it was not really discussed.

illegal, nonmandatory subject of bargaining. *Id.*[13] The County was not required to bargain with the Guild for a Rule of Three, a Rule of One, or anything other than the Rule of Five required by state statute.

Accordingly, the Guild's complaint that the County committed an unlawful unilateral change must be dismissed.

The Guild's motion for summary judgment is denied. The County's motion for summary judgment is granted. The complaint is dismissed.

FINDINGS OF FACT

1. Kitsap County is a public employer within the meaning of RCW 41.56.030(13).

2. Kitsap County Deputy Sheriff's Guild, a bargaining representative within the meaning of RCW 41.56.030(2), is the exclusive bargaining representative of a bargaining unit of uniformed Deputy Sheriffs, Corporals, and Sergeants.

3. Under a longstanding past practice, when the Sheriff wished to fill a vacancy in the bargaining unit, the County's Civil Service Commission would provide the Sheriff with

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[13] Where issues are found to be nonmandatory, employers can still be required to bargain the effects of the change. *Central Washington University*, Decision 10413-A (PSRA, 2011). However, in this case the Guild did not indicate in its complaint, in its motion for summary judgment, or in its response to the employer's motion for summary judgment, that it requested effects bargaining, or that the employer failed to bargain effects.

Notably, the undisputed facts show that on April 29, 2020, the County asked, "Can you clarify what the Guild is demanding to bargain? . . . the Guild does not have the ability to bargain a change in a civil service rule, but may bargain the impact of such changes . . . ." The Guild responded, "We want to bargain the rule of 5. We feel we still have the right to have the rule of 3," indicating that the Guild wanted to bargain the decision, not the effects. There is no genuine issue of material fact relating to effects bargaining that would preclude summary judgment here. *Skagit County*, Decision 8886-A (PECB, 2007); *see also Grays Harbor County*, Decision 8043-A (PECB, 2004) (union only pleaded relating to effects bargaining violation, and so could not obtain a remedial order relating to decision bargaining).

the names of the top three candidates, based on civil service test scores. This practice was codified in the Civil Service Commission's Rule 9.3, and is known as a "Rule of Three."

4. This was consistent with the state civil service law for Sheriffs as it existed at the time, in RCW 41.14.060(7) and RCW 41.14.130.

5. In 2020, the Legislature passed HB 1750, which changed the statutory Rule of Three, in RCW 41.14.060(7) and RCW 41.14.130, to a Rule of Five.

6. On April 28, 2020, the Guild's President, Jason Hedstrom, sent an email to the County's Labor Relations Director, Kate Cummings, and the Civil Service Commission's Chief Examiner, Carol Mackie. Hedstrom stated that he learned that the Civil Service Commission was going to vote to amend its rules in accordance with HB 1750, changing the Rule of Three to the Rule of Five. Hedstrom demanded to bargain the change.

7. On April 29, 2020, the Civil Service Commission changed its Rule 9.3 to provide for a Rule of Five instead of a Rule of Three.

8. Subsequent to the Civil Service Commission's action, Cummings, Hedstrom, and the Guild's Attorney, Jim Cline, exchanged emails. The County took the position that the change was an illegal subject of bargaining. The Guild believed it was a mandatory subject of bargaining, and wanted to retain a Rule of Three. The Guild asserted that the County had to maintain the Rule of Three until a different rule was bargained. The parties met and discussed the issue on May 11, 2020. The parties did not come to agreement.

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. The County's change to the Rule of Three was an illegal subject of bargaining because RCW 41.14.060(7) and RCW 41.14.130 specifically require a Rule of Five, and agreement on anything other than a Rule of Five would contravene those statutes.

3. Based upon findings of fact 3 through 8 and conclusion of law 2, Kitsap County did not refuse to bargain or violate RCW 41.56.140(4) and (1) when the Civil Service Commission changed its Rule 9.3 from a Rule of Three to a Rule of Five.

ORDER

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

ISSUED at Olympia, Washington, this 5th day of February, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN M. LEONARD, 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.

RECORD OF SERVICE

ISSUED ON 02/05/2021

DECISION 13306 - PECB has been served electronically on February 5, 2021, and will be served by mail on February 9, 2021, by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 132943-U-20

EMPLOYER: KITSAP COUNTY

REP BY:

KATE CUMMINGS
KITSAP COUNTY
614 DIVISION ST MS-23A
PORT ORCHARD, WA 98366
kcummings@co.kitsap.wa.us

JACQUELYN M. AUFDERHEIDE
KITSAP COUNTY
614 DIVISION ST MS 35A
PORT ORCHARD, WA 98366-4676
jaufderh@co.kitsap.wa.us

PARTY 2: KITSAP COUNTY DEPUTY SHERIFF'S GUILD

REP BY:

JASON HEDSTROM
KITSAP COUNTY DEPUTY SHERIFF'S GUILD
PO BOX 1545
SILVERDALE, WA 98383
jasonandashleyhedstrom@gmail.com

MARK A. ANDERSON
CLINE & ASSOCIATES
520 PIKE ST STE 1125
SEATTLE, WA 98101
manderson@clinelawfirm.com