STATE OF WASHINGTON

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON Complainant, vs. WESTERN WASHINGTON UNIVERSITY, Respondent.	CASE 134181-U-21 DECISION 13369 - PSRA ORDER OF DISMISSAL

John Kapple, Field Representative, for the Public School Employees of Washington.

Chyerl Wolfe-Lee, Assistant Vice President for Human Resources, for the Western Washington University.

On May 10, 2021, the Public School Employees of Washington (union) filed an unfair labor practice complaint against Western Washington University (employer). The complaint was reviewed under WAC 391-45-110.[1] A deficiency notice issued on May 18, 2021, notified the union that a cause of action could not be found at that time. The union was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

On May 28, 2021, the union filed an amended complaint. The Unfair Labor Practice Administrator dismisses the amended complaint for failure to state a cause of action.

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[1] At this stage of the proceedings, all of the facts alleged in the complaint or amended complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

ISSUE

The amended complaint alleges the following:

> Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so derivative inference in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed, by
>
> (a) Breaching its good faith bargaining obligation related to unidentified actions.
>
> (b) Unilaterally changing its policy by mandating vaccines for the fall 2021 quarter, without providing the union an opportunity for bargaining.

The amended complaint is dismissed. The amended complaint lacks facts alleging a good faith bargaining or unilateral change violation.

BACKGROUND

The Public School Employees of Washington (union) represents classified employees at Western Washington University (employer). On May 6, 2021, the university President issued a statement that vaccines would be mandated for staff and students prior to returning to campus for the fall 2021 quarter. The statement identified the need for some employee groups to bargain the change in working conditions prior to implementing the vaccine requirement for all employees.

ANALYSIS

Good Faith Bargaining

Applicable Legal Standard

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.80.110(1)(e). An exclusive bargaining representative must also fulfill its collective bargaining obligations to a public employer. RCW 41.80.110(2)(d). Whether a particular item is a mandatory subject of bargaining is a mixed

question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to the wages, hours, and working conditions" of employees, and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

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

Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which parties may negotiate. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

The bargaining obligation applies to a decision on a mandatory subject of bargaining and the effects of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decision could be mandatory subjects of bargaining. *See Wenatchee School District*, Decision 3240-A (PECB, 1990).

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake*

Washington Technical College, Decision 4721-A (PECB, 1995). To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of formal notice, it must be shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A.

A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining on mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of the employer and employees. *Yakima Valley Community College*, Decision 11326-A (PECB, 2013).

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A. 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. *Id.* If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a fait accompli will not be found. *Washington Public Power Supply System*, Decision 6058-A (citing *Lake Washington Technical College*, Decision 4721-A).

Application of Standard

The complaint lacks facts alleging the employer refused to bargain in good faith. The elements necessary to allege a good faith bargaining violation include: (1) the union is the exclusive bargaining representative, (2) the union requested collective bargaining negotiations on an issue that was a mandatory subject of bargaining, and (3) the employer engaged in specific conduct and/or a course of conduct designed to frustrate the collective bargaining process.

Here, the union alleges that it is the exclusive bargaining representative of classified employees at Western Washington University. It also alleges the president issued a statement that vaccines would be mandated for staff and students prior to returning to campus for the fall 2021 quarter. The new vaccine mandate is implied to be a mandatory subject of bargaining.

The deficiency notice stated the complaint lacked facts alleging the union demanded to bargain the vaccine mandate. The amended complaint stated the employer notified the union on May 6 regarding the fall 2021 vaccine mandate. The amended complaint does not allege the union demanded to bargain the fall 2021 vaccine mandate. Because the amended complaint lacks facts alleging the union demanded to bargain, the amended complaint does not state a cause of action for a good faith bargaining violation. The good faith bargaining allegation must be dismissed.

Unilateral Change

Applicable Legal Standard

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010) (citing *Skagit County*, Decision 8746-A (PECB, 2006)).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (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. *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. *Kitsap County*, Decision 8893-A (PECB, 2007) (citing *King County*, Decision 4893-A (PECB, 1995)).

Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may reasonably be considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Kitsap County*, Decision 8893-A (citing *Whatcom County*, Decision 7288-A; *City of Pasco*, Decision 4197-A (PECB, 1994)).

For a "past practice" to exist, two basic elements are required: (1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *See Whatcom County*, Decision 7288-A (no unilateral change violation found where employer lacked knowledge of past practice). It must also be shown that the conduct was known and mutually accepted by the parties. To constitute an unfair labor practice, a change in the status quo must be meaningful. *City of Kalama*, Decision 6773-A (PECB, 2000).

To be timely, notice must be given sufficiently in advance of the decision or the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A. The notice would not be considered timely if the employer's action has already occurred when the employer notified the union (a *fait accompli*). *Washington Public Power Supply System*, Decision 6058-A. If a *fait accompli* is found to exist, the union will be excused from requesting bargaining. *Id.* A *fait accompli* will not be found if an opportunity for bargaining existed and the employer's behavior does not seem inconsistent with a willingness to bargain upon request. *Washington Public Power Supply System*, Decision 6058-A (citing *Lake Washington Technical College,* Decision 4712-A). The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A.

Application of Standard

The amended complaint alleges the employer made a change to working conditions. To allege a unilateral change violation, the complaint must allege that the (1) union is the exclusive bargaining representative, (2) the employer had an established practice concerning a mandatory subject of

bargaining, and (3) the employer decided upon and actually implemented a change of that mandatory subject of bargaining without notice to the union, with insufficient notice, without engaging in bargaining as requested by the union, or without bargaining in good faith to agreement or impasse.

The amended complaint alleges the union is the exclusive bargaining representative and the employer had a practice of not having a vaccination mandate. The amended complaint lacks facts that the employer actually implemented a change. The amended complaint alleges that the vaccine mandate will be implemented in the fall of 2021. Based on the alleged facts, the change has not yet occurred. Because the amended complaint lacks facts alleging the change has occurred, the amended complaint does not state a cause of action for a unilateral change violation. The unilateral change allegation must be dismissed.

ORDER

The amended complaint charging unfair labor practices in the above-captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 22nd day of June, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Unfair Labor Practice Administrator

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 06/22/2021

DECISION 13369 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 134181-U-21

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