

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

UNITED AUTO WORKERS LOCAL 4121,

Complainant,

vs.

UNIVERSITY OF WASHINGTON,

Respondent.

CASE 136127-U-23

DECISION 13865-A - PECB

CORRECTED DECISION OF
COMMISSION

Jacob Metzger and Amy Bowles, Attorneys at Law, Douglas Drachler McKee & Gilbrough LLP, for United Auto Workers Local 4121.

Jennifer K. Schubert, Assistant Attorney General, Attorney General Nicholas W. Brown, for the University of Washington.

SUMMARY OF DECISION

The Commission upholds in part and reverses in part the Hearing Examiner's conclusion that the University of Washington (UW) did not violate RCW 41.56.140(4) through its actions related to the exempt status of employees within the United Auto Workers Local 4121 (UAW or union) bargaining unit. While employees' classification as overtime eligible or exempt is governed by the Washington State Department of Labor and Industries (L&I or department) rules, and accordingly is not a mandatory subject of bargaining, UW was not free to provide discretionary increases to some bargaining unit employees as a means to allow those employees to retain exempt status. To the extent that UW granted wage increases to avoid classifying employees as overtime eligible, it was required to bargain those decisions.

BACKGROUND

Organizing and Initial Bargaining

On December 20, 2021, the UAW filed a petition to represent Research Scientists and Engineers (RSEs) working at UW. *University of Washington*, Decision 13865 (PECB, 2024).¹ The Commission issued an interim certification on June 16, 2022, *University of Washington*, Decision 13519 (PECB, 2022), and a final certification on February 8, 2023, *University of Washington*, Decision 13519-C (PECB, 2023).

At the time that the UAW filed its representation petition, UW treated many, but not all, RSE positions as overtime exempt. On July 29, 2022, there were a total of 1,426 RSE positions. Of that number, UW treated 410 RSE positions as nonexempt, and therefore overtime eligible, and treated the remaining 1,016 RSE positions as overtime exempt.² On January 1, 2023, the number of nonexempt, overtime-eligible RSE positions increased to 561.³

On June 17, 2022, the UAW demanded to begin negotiations for the parties' first collective bargaining agreement.⁴ The parties began contract negotiations on August 15, 2022,⁵ and executed a collective bargaining agreement on June 28, 2023.⁶ On July 27, 2022, the parties signed a document entitled "UW-UAW RSE Status Quo Guidelines," which purported to allow UW to "proceed with" certain salary adjustments including full-time equivalent (FTE) adjustments, position reviews, or temporary increases.⁷ Specifically, the agreement allowed in-grade salary adjustments for RSE A-4s to "move forward" and allowed other adjustments for retention

¹ Finding of fact (FF) 3.

² Employer (Er.) Exhibit (Ex.) 49.

³ *Id.*

⁴ Union (Un.) Ex. 1A.

⁵ Un. Ex. 1.

⁶ Er. Ex. 1.

⁷ Un. Ex. 53.

purposes.⁸ In addition, the agreement allowed for FTE adjustments where requested by the employee, to account for budget issues, as needed for workload, or as needed for grant requirements.⁹ The agreement did not permit changes to salaries or FTE for employees to gain or retain exempt status. Indeed, the parties treated that as more a collateral effect than a permissible change: “Consistent with current practice, where an upward FTE adjustment makes (restores) a position to overtime exempt, HR Compensation will identify the appropriate overtime exempt job profile and initiate the change in Workday.”¹⁰

The change in the L&I salary threshold for overtime eligibility was not discussed when the parties negotiated this agreement.¹¹

Washington Minimum Wage Act Overtime Threshold

Like its federal counterpart, the Washington Minimum Wage Requirements and Labor Standards Act (WMWA) requires that

no employer shall employ any of his or her employees for a workweek longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

RCW 49.46.130.

The WMWA, however, does not apply to employees employed in a “bona fide executive, administrative, or professional capacity.” RCW 49.46.010(3)(c). The definition of these so-called white-collar exemptions are left to be “defined and delimited” by the director of L&I. *Id.* The department’s regulations require the employer to demonstrate three things to prove an employee is covered by the exemption: (1) the employee’s primary job duties are as described in the regulation; (2) the employee is paid on a salary basis; and (3) the employee is paid at least a

⁸ *Id.*

⁹ *Id.*

¹⁰ Un. Ex. 53 at 2.

¹¹ Transcript (Tr.) 316:22-318:20.

“threshold” amount per week. WAC 296-128-530; *see also* Wash. Dep’t of Lab. & Indus., Admin. Policy ES.A.9.9 (June 26, 2020) https://www.lni.wa.gov/workers-rights/_docs/esa9.9.pdf.

Having been unchanged since 1976, in 2019 L&I issued new rules increasing the salary threshold. WAC 296-128-545; *see also* Wash. Dep’t of Lab. & Indus., Admin. Policy ES.A.9.9. Relevant to this matter, beginning January 1, 2022, the salary threshold was 1.75 times the 2022 minimum wage, or \$1,014.30 per week.¹² WAC 296-128-545(3); *see also* Wash. Dep’t of Lab. & Indus., Admin. Policy ES.A.9.9 at 3. For the next year, beginning January 1, 2023, the salary threshold increased to two times the Washington state minimum wage, or \$1,259.20 per week, for employers with more than 50 employees.¹³ WAC 296-128-545(4)(b); *see also* Wash. Dep’t of Lab. & Indus., Admin. Policy ES.A.9.9. at 3.

On May 26, 2022, UW Executive Director for Compensation, Randy West, emailed the “admin council,” a group of unit administrators and finance leaders, advising of changes to the overtime threshold and explaining the status quo obligation while the representation petition was pending.¹⁴ The email explained that “any overtime exempt Research Scientist/Engineer 1, 2, 3 and 4 positions [were] subject to a status quo hold until PERC” issued a decision about the bargaining unit.¹⁵ Nonetheless, on October 24, 2022, West emailed the administrative council allowing for requests to increase the salary of employees who newly fell beneath the threshold. The email included an updated list of employees who would be below the overtime threshold starting on January 1, 2023, and said,¹⁶

Please review the list of impacted employees in your organization and indicate those employees for whom you plan to either:

- Request a salary or FTE adjustment so that they may **remain overtime exempt**

¹² Minimum wage in Washington in 2022 was \$14.49. Thus, $\$14.49 \times 40 \times 1.75 = \$1,014.30$.

¹³ Minimum wage in Washington in 2023 was \$15.74. Thus, $\$15.74 \times 40 \times 2 = \$1,259.20$.

¹⁴ Un. Ex. 13A; Tr. 390:6-10.

¹⁵ Un. Ex. 13A.

¹⁶ Un. Ex. 13B.

when the L&I changes become effective January 1, 2023.

- Remain at their current salary and FTE and **become overtime eligible** in January, moving into nonexempt job profiles in the last week of December to prepare to track their hours worked starting December 26, 2022

Consistent with this allowance, during the period between October 2022 to January 1, 2023, UW increased either the salary or FTE level of 94 RSEs. As a result, those employees remained overtime exempt.¹⁷ Those decisions were made at the department level, and increases varied in amount: \$150 per month,¹⁸ \$390 per month or 7.8 percent,¹⁹ \$242 per month,²⁰ and over 10 percent.²¹ The record suggests in some cases departments increased employee salaries explicitly to avoid employees being classified as overtime eligible. In most cases, and in nearly all cases, those increases were not given for reasons complying with the UW-UAW RSE Status Quo Guidelines.²²

In November 2022, the UAW bargaining team began hearing from members that some RSEs' salaries would fall below the new threshold, and therefore those employees would both be eligible for overtime and be required to begin tracking their work hours.²³ The UAW raised the issue of overtime eligibility conversion during the parties' November 28, 2022, contract negotiations.²⁴

¹⁷ Tr. 416:20-22.

¹⁸ Un. Ex. 40.

¹⁹ Un. Ex. 37

²⁰ Un. Ex. 38.

²¹ Un. Ex. 39.

²² Tr. 431:22-432:5; Un. Ex. 37, 38, 39, 40, 42, 58. In only two instances the record demonstrates that the increases fell within the UW-UAW RSE Status Quo Guidelines, though in these cases the increases were also motivated by the overtime threshold.

²³ Tr. 52:3-11.

²⁴ Tr. 52:14-22; Un. Ex. 30

On December 2, 2022, the UAW demanded to bargain “the decision and impacts of any change to bargaining unit pay structure and associated benefits.”²⁵ The parties subsequently met on December 8, 15, 16, 19, and 22, 2022, in dedicated meetings devoted to the exemption and overtime issue.²⁶ The parties did not reach an agreement, and UW began treating the RSEs who fell below the new threshold as overtime eligible on December 26, 2022.²⁷

STANDARD OF REVIEW

On appeal, the Commission reviews findings of fact to determine if they are supported by substantial evidence, and, if so, whether those findings in turn support the Examiner’s conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Brinnon School District*, Decision 7210-A (PECB, 2001). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

The UAW appealed findings of fact 7, 14, 15, 16, and 17, conclusion of law 2, and the order. With the exception of findings of fact 14 and 15, the findings of fact are supported by substantial evidence.

ANALYSIS

To determine whether UW engaged in an unlawful unilateral change, we must make two related decisions. First, we must determine whether the decision to treat RSEs who newly fell beneath the overtime threshold as overtime eligible was a mandatory subject of bargaining. Second, we must determine whether UW’s decision to allow departments to adjust certain RSE’s salaries upward was a mandatory subject of bargaining. If the answer to either question is in the affirmative, UW had an obligation to bargain prior to instituting the change. We find that, while

²⁵ Un. Ex. 8, 8A; FF 10.

²⁶ FF 12.

²⁷ *University of Washington*, Decision 13865 at 15; FF 16.

the decision to comply with the newly increased salary threshold was not a subject over which UW had the obligation to bargain, the decision to exercise its discretion to increase salaries for the RSEs should have been bargained.

UW Was Not Obligated to Bargain the Decision to Comply With Threshold Regulations and
Change Certain RSE's Overtime Eligibility

Under the Public Employees' Collective Bargaining Act, chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees over "grievance procedures . . . personnel matters, including wages, hours, and working conditions." RCW 41.56.030(4). While RCW 41.56.100 grants employers the authority to engage in collective bargaining, any collective bargaining must be within the authority granted to the employer elsewhere. *City of Seattle*, Decision 4687-B (PECB, 1997) at 14, *aff'd*, *International Association of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235 (1998), *rev. denied*, 137 Wn.2d 1035 (1999). An otherwise mandatory subject of bargaining can be preempted by statute. *Id.* at 25. Such preemption occurs when "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.* at 5 (finding firefighter pensions to be preempted by statute and that the employer was not obligated to negotiate over a proposal for statutorily provided retirement benefits). Where a state statute sets a minimum employment standard, the parties are not free to bargain a lesser protection. *Hisle v. Todd Pacific Shipyards*, 151 Wn.2d 853, 861 (2004) (explaining that employees and employers may not bargain away the minimum requirements of the WMWA); *see also City of Richland*, Decision 2486-A (PECB, 1986) (characterizing illegal subjects as "matters which neither the employer nor the union have the authority to negotiate, because agreement would contravene applicable statutes or court decisions"). Moreover, as UW correctly argues, complying with a legal requirement, often referred to as legal necessity, is an affirmative defense to a failure to bargain change. *Kitsap Transit*, Decision 11098-B (PECB, 2013) (citing *Cowlitz County*, Decision 7007-A (PECB, 2000)) (holding an employer can raise a necessity defense when compelling legal circumstances necessitate a unilateral change of employee wages, hours, or working conditions).

UW did not have an obligation to bargain over the decision to treat RSEs whose salary fell below the salary threshold as overtime eligible because such treatment was mandated by statute

and regulations. While the union is correct that decisions about wage and overtime rates are mandatory subjects of bargaining, the classification of RSEs as overtime eligible or overtime exempt is determined by the WMWA and regulation promulgated thereunder. By operation of those regulations, whenever an RSE's salary falls below the threshold, that employee is entitled to overtime pay (along with other protections) for any work over 40 hours in a workweek. Thus, UW's "decision" to treat these employees as overtime eligible was no decision at all. This was legally required.²⁸

UW Engaged in an Unlawful Unilateral Change When It Increased the Salaries of Certain Employees to Avoid the Overtime Eligibility Threshold

A public employer's collective bargaining obligation requires it to maintain the status quo for all mandatory subjects of bargaining while negotiating an initial collective bargaining agreement. *Washington State University*, Decision 11749-A (PSRA, 2013) (citing *Asotin County*, Decision 9549-A (PECB, 2007)). The terms and conditions of employment that are part of the status quo include those that exist when the representation petition is filed. In some circumstances, the status quo can be considered "dynamic," that is, subject to prior determined change. *King County Library System*, Decision 9039 (PECB, 2005). The most common in this category include yearly step increases where those increases were "set in motion prior to the filing of a representation petition." *Id.* at 5 (citing *King County*, Decision 6063-A (PECB, 1998)).

UW's decision to allow individual departments to exercise discretion to adjust RSE salaries was not in place at the time the UAW filed the representation petition. The petition was filed on December 20, 2021. At that time, there was no directive to administrators to adjust individual wage

²⁸ Having determined that UW was not required to bargain the decision to classify RSEs as overtime eligible or overtime exempt, we uphold the Hearing Examiner's conclusion that UW discharged any effects bargaining obligation. During negotiations on December 22, 2022, UW communicated to the UAW that UW believed the parties were at impasse on increasing salaries to prevent employees from becoming overtime eligible, and UW was willing to continue bargaining the effects of the required change in overtime eligibility. Un. Ex. 35; Er. Ex. 26; Tr. 528:19-529:3. That same day, Banks Evans, the lead negotiator for UW, followed up by email, stating, "[T]he Employer is willing to continue to meet and discuss or bargain the effects of the transition for the subset of impacted employees that will move to overtime eligible and begin tracking time on December 26th." Er. Ex. 26. UW was not required to pause compliance with the L & I overtime threshold change while the parties completed effects bargaining. *City of Bellevue*, Decision 3343-A (PECB, 1990) (finding the employer did not change the status quo while the parties bargained the effects of the employer creating a new position). The Hearing Examiner's finding of fact 17 is supported by substantial evidence.

rates to account for impending changes to the overtime salary threshold. It was not until October 24, 2022—10 months after the petition was filed—that UW issued a memo giving discretion to administrators to “[r]equest a salary or FTE adjustment so that they may remain overtime exempt when the L&I changes become effective January 1, 2023.”²⁹ And the directive resulted in actual salary changes; 94 RSEs received increases sufficient to avoid overtime eligibility. This was a discretionary change to the status quo, which required bargaining prior to implementation.

UW argues that the UAW waived its right to bargain over these changes by agreeing to the UW-UAW RSE Status Quo Guidelines. The burden of proving waiver rests with UW. WAC 391-45-270(1)(b); *Lakewood School District*, Decision 755-A (PECB, 1980). Specifically, the employer must prove that the waiver was consciously made, clear, and unmistakable. *City of Yakima*, Decision 11352-A (PECB, 2013); *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes so long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999).

UW has not met its burden to prove that the UAW waived its right to bargain discretionary wage increases given here. The UW-UAW RSE Status Quo Guidelines are insufficient to demonstrate a knowing waiver to allow UW to implement increases for some, but not all, RSEs in order to avoid exempt status. The guidelines do appear to allow some increases but contemplates “moving forward” with such decisions, suggesting that those decisions must already be in the works. Even if the agreement contemplates a broader grant of authority, each kind of increase is described with particularity, and in each case, there are limits to its use. Beyond acknowledging that some increases awarded for other reasons might have a collateral effect on exempt status, there is no clause in this agreement allowing UW to award increases in order to leap over the salary threshold. In short, there is insufficient evidence in this record to prove that the union knowingly granted discretion to UW to award some increases to some RSEs in order to allow those employees to avoid overtime eligibility.

²⁹

Un. Ex. 13B.

Remedy

The standard remedy for a unilateral change violation is restoring the status quo that existed before the unilateral change, making employees whole for any lost wages, benefits, or working conditions as a result of the unlawful act, posting a notice of the violation, and reading the notice into the record at a public meeting of the employer's governing body. *City of Anacortes*, Decision 6863-A (PECB, 2001) (citing *Seattle School District*, Decision 5733-A (PECB, 1997)). The typical status quo order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining unless the employer provides the union notice of proposed changes and the opportunity to bargain over the proposed changes. *Lewis County*, Decision 10571-A (PECB, 2011). 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. *Id.* (citing *Herman Sausage Co.*, 122 NLRB 168, 172 (1958)).

To effectuate the purposes of the statute, circumstances may dictate a remedial order different from the standard remedy. *Lewis County*, Decision 10571-A (PECB, 2011); *University of Washington*, Decision 11499-A (PSRA, 2013) (stating that deviation from the standard remedy is an extraordinary remedy and should be explained). In the absence of a request from the exclusive bargaining representative, an unlawfully granted unilateral wage increase should not be revoked. *Lewis County*, Decision 10571-A (citing *Herman Sausage Co.*, 122 NLRB 168). The exclusive bargaining representative is in the best position to determine whether a complete return to the status quo is appropriate to ensure the affected employees are not harmed as a result of enforcement of the statute. *Id.* Therefore, while we will order UW to bargain over these increases if requested by the union, to refrain from any further salary increases without bargaining with the union, and to post and read a notice, we will not order UW to reinstate the wages that existed before UW increased wages.

CONCLUSION

UW was not required to bargain the decision to classify RSEs as overtime exempt or overtime eligible because overtime eligibility is not decided by UW. It is determined by chapter 49.46 RCW and chapter 296-128 WAC. Thus, while UW was not required to bargain the "classification decision," UW was required to bargain the decision to change employee wages to

avoid the salary threshold. By allowing departments to increase employee salaries to avoid classifying employees as overtime eligible, UW unilaterally changed employee wages in violation of RCW 41.56.140(4).

ORDER

The findings of fact 1 through 13 and 16 through 17 entered by Examiner Jessica J. Bradley are AFFIRMED and adopted as the findings of fact of the Commission. Findings of fact 14 and 15 are VACATED. We substitute the following findings of fact.

14. When L&I has adjusted its salary threshold, UW notified employees whose salaries fell below the threshold that their positions would become overtime eligible. As required by L&I, overtime eligible employees track their hours worked. These adjustments ensure that UW remains in compliance with state wage and hour requirements.
15. UW asked departments which employees should receive wage or FTE increases to remain classified as overtime exempt. UW changed the wages or FTE of 94 RSEs, who were subsequently not classified as overtime exempt.

Conclusion of law 1 entered by Examiner Jessica J. Bradley is AFFIRMED and adopted as a conclusion of law of the Commission. Conclusion of law 2 is VACATED. We substitute the following conclusion of law.

2. By the actions described in finding of fact 15, the UW refused to bargain in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1).

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

1. CEASE AND DESIST from
 - a. Refusing to bargain with the United Autoworkers Local 4121 (UAW).

- b. Unilaterally changing the wages of the RSE employees to avoid classifying employees as overtime exempt without providing the union an opportunity to bargain the decision or effects.
 - 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. Maintain RSE wages that resulted from UW's unlawful unilateral change. Upon request, bargain collectively in good faith with the United Autoworkers Local 4121 concerning the discretionary wage increase for RSEs.
 - b. Give notice to and, upon request, negotiate in good faith with the UAW before changing bargaining unit employee wages to avoid classification as overtime eligible.
 - c. Contact the compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for 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.
 - d. Read the notice provided by the compliance officer into the record at a regular public meeting of the University of Washington Board of Regents 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.

- e. 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.
- f. 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 11th day of June, 2025.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK LYON, Chairperson



ELIZABETH FORD, Commissioner

Commissioner Henry Farber did not participate in the consideration or decision of this case.

This order will be the final order of the agency unless a notice of appeal is filed under RCW 34.05.542.