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No. 63108-0

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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TEAMSTERS LOCAL 763

Respondent,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

(Respondent in trial court)

and

CITY OF MUKILTEO,

Appellant.

BRIEF OF APPELLANT CITY OF MUKILTEO

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. Conclusion #1.
2. Conclusion #2.
3. Conclusion #3.
4. Conclusion #4.
5. The Order reversing *City of Mukilteo*, Decision 9452-A (PECB, 2008).

Issues Pertaining to Assignments of Error

1. Did the Employer violate RCW 41.56.470 when after the collective bargaining agreement expired on December 31, 2004, the Employer continued to pay the same capped dollar amount for employee monthly health insurance premium contributions as it did during 2004, while making an employee payroll deduction for the difference between the employer's contribution and the actual premium amount for 2005, the same as it did during the life of the collective bargaining agreement?

B. STATEMENT OF THE CASE

1. The CBA.

The City of Mukilteo ("Employer") was party to collective a bargaining agreement with Teamsters Local #763 ("Union") covering the {KNE724952.DOC;1/00014.130081/}

Employers' uniformed law enforcement employees (the "contract").
Exhibit #2. The term of the contract covered calendar years 2002, 2003,
and 2004. The stated expiration date was December 31, 2004.

2. Medical Insurance Premium Payment/Payroll
Deduction.

Section 11.1 of the contract (**Exhibit #1**) required that the Employer purchase medical insurance for the covered employees and for their dependents, but capped the amount of the Employer's monetary contribution to the medical insurance premium. **City Labor Consultant Cabot Dow ("Dow")** testified that during the negotiations leading to the contract, he attempted to achieve language that provided essentially a 30% maximum cap on the amount of Employer contribution to healthcare insurance premiums over the life of each contract and that the effect of this cap at contract end was discussed during negotiations. **TR at page 93, lines 20-24 and pages 95 and 110 at lines 1-5 and page 111 at lines 7-19.** The contract provided that for calendar year 2004, the Employer's contribution would increase a maximum of 10% over the monetary contribution paid by the Employer for healthcare insurance premiums in 2003. The parties stipulated that as of December 31, 2004, the Employer was paying 10% more than it paid in 2003 for employee health insurance.
TR at page 65, lines 1-6.

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City Finance Director Debi Simmers testified that the premium increase required by the AWC Benefit Trust (the “insurer”) for coverage in 2004 was 28%. **TR at pages 74-75.** Thus, in 2004 the employees were already paying a portion of the medical insurance premium when the 9.5% increase beginning January 2005 was announced by the insurer. **Testimony of City Administrator Leahy at TR 88 and of Finance Director Debi Simmers at TR 74-75.**

Ms. Simmers also testified that medical insurance premiums were paid monthly by the City. The employee’s share was deducted from their payroll checks as authorized by the language of section 11.1 of the collective bargaining agreement. Since monthly premiums were due the insurer on the 10th of each month, one-half the employee share was deducted from the 2nd payroll check of the month prior to the premium due date. The other one-half was deducted from the first payroll of the month the healthcare insurance payment was due. **TR at page 73.**

3. Premium Increase For 2005 and Successor Contract Negotiations.

The City was notified by the AWC Insurance Trust (the “insurer”) in the fall of 2004 that healthcare insurance premiums would increase by 9.5% for 2005. The AWC does not give the Employer any choice in what the amount of the premium is going to be for a particular plan. **TR at** {KNE724952.DOC;1/00014.130081/}

page 76. The AWC was selected as the insurer by agreement of the Union. **TR at page 19.**

On November 18, 2004, the Union met with the Employer to discuss the ground rules for negotiations on successor contracts for all three bargaining groups. **TR at pages 23, 80, and 97.** City Administrator Leahy testified that he reminded Wilson of the medical insurance premium increase beginning in January 2005. Leahy told Wilson that without new contracts in effect, the employees' payroll deduction for healthcare insurance premiums would be increased to cover the increase in premium. **TR at page 80-81.** Cabot Dow testified (**TR at page 96**) that the Employer and the Union agreed to a goal of negotiating new contracts by the end of the year and included handwritten language in their written ground rules stating that:

7. Goal for Concluding Negotiations: The parties agree to the goal for conclusion of bargaining as prior to the expiration date of the current contract, December 31, 2004.

4. Notice of Intent/Increased Payroll Deductions for 2005.

On November 29, 2004, Leahy followed up with a written letter to Wilson (**Joint Exhibits #4, #5, and #6**), confirming the City's position expressed to him on November 18, 2004, regarding Employer Health Coverage contributions for coverage beginning January 1, 2005. The
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letters reminded Wilson that absent new contracts increasing the negotiated cap on the Employer's contribution from 10% above the Employer's 2003 contribution, the City would be required to deduct increased amounts from employee paychecks beginning with the January 5, 2005 paycheck.

In actuality, the increased deductions began with the last paycheck in December 2004 (**Union Exhibit #16 and TR at page 33, at lines 18-23, and pages 34-37 and page 77, lines 5-11**) consistent with the established practice of deducting the employee share of the monthly premium in equal increments from the second paycheck in the month prior and from the first paycheck in the month the premium was due.

The 28% rate increase, effective for coverage beginning in January 2004, exceeded the 10% cap over 2003 premium rates provided for in section 11.1 of the contract. Thus, starting the last payroll of December 2003 and continuing throughout 2004 until the increased deduction for the January 2005 premium started on December 20, employees were already experiencing a payroll deduction for medical insurance. Pending the outcome of collective bargaining for the successor contract, the Employer applied the full 9.5% increase on the Employees' share of the monthly premiums for medical insurance coverage beginning January 2005. The

new rates established by the insurer were converted into “composite rates” following the formula used by the City over the years. **Testimony of Wilson and Simmers.**

5. Negotiations Between the Parties Leading to the Contract Language in Section 11.1.

During the negotiation of the three contracts at issue, the question of what would happen after contract expiration in 2005 was specifically discussed at the bargaining table. **Testimony of Cabot Dow, TR at page 95 and page 110, lines 1-5 and page 111 at lines 7-19.** It was discussed that any increase in City contributions above the capped amount paid in 2004 would have to be negotiated. Until an increase was negotiated, the employees would be paying the increased premium amount above the cap established for 2004 by the terms of the contract.

6. Collective Bargaining Prior to The Increased Payroll Deduction for Medical Insurance.

Richard Leahy and Cabot Dow (**TR at pages 80-81 and 96-97**) testified that the Union was advised by the Employer of the effect of the contract hiatus on the medical insurance and the Employer’s intentions when the parties first met in November 2004 to discuss bargaining rules and scheduling for successor contract negotiations. When the Union

received the Employer's letter dated November 29, 2004 (**Exhibit #4**), collective bargaining for a successor contract had already commenced.

When the Employer received the Union's grievance and demand for bargaining dated December 17, 2004, (**Exhibit #6**) the parties had already met and exchanged bargaining proposals on December 1 and December 14, 2004. **Exhibits #20, #21, #22 and #23**. The first payroll from which the employee share of the medical insurance premium for January 2005 was to be deducted was only three days away on December 20, 2004, when the letter was written. The Union's December 1 contract proposal (**Exhibit #20**) did not include a proposal for the medical insurance provisions of Article XI. According to Mike Wilson, the Union preferred not to negotiate health and welfare at that time. The Employer's proposal (**Exhibit #21**) included the following proposal:

5. 11.x_H&W *100% of Medical Cost for PPO, Dental, Vision and 10% increase for 2nd and 3rd year (Currently, employees and their eligible dependents are enrolled in AWC Plan B).

The employer's contract proposal of December 1, 2004, is not the equivalent of the Employer's stated intentions in the November 29, 2004 letter from Richard Leahy to Mike Wilson or with the increased payroll deduction that commenced on December 20, 2004. The Employer did not

implement its contract proposal prior to impasse or prior to reaching a successor contract with the Union.

On December 14, 2004 when the parties met and again exchanged contract proposals, the Employer's Health and Welfare proposal (**Exhibit #23**) did not change from the December 1 proposal. The Union did submit a H&W proposal (**Exhibit #22**) calling for a switch from the current AWC Plan B to the more expensive Plan A with the Employer paying 100% of the cost.

The parties were effectively at impasse after the meeting on December 14, 2004. Mike Wilson agreed with Cabot Dow to file a mediation request with the PERC. **TR at pages 113-116.**

7. Status Quo on Medical Insurance Payments and Deductions.

The Union stipulated at the hearing that the only thing the City did different was to increase the amount of the employee payroll deduction based on the 9.5% premium increase imposed by the AWC. **TR at page 60-61.** The Union also stipulated that as of December 31, 2004, the City was continuing to pay 10% more than it paid in 2003 for employee health insurance. **TR at page 65, lines 1-6. See Exhibit #1 and #2.**

8. Grievance Filed/Arbitrator Decision.

On December 17, 2004, just three days prior to the first payroll deduction, the Union filed a grievance on behalf of the law enforcement, public works, and office, clerical and technical employee bargaining groups. **Exhibit #6.** The written grievance made in the form of a letter from Wilson to Leahy objected to the announced *unilateral implementation of changes in healthcare benefits, including increases in premiums and deductions from employees' paychecks.* The grievance asserted that section 11.1, of the three contracts, required that except with respect to the calendar years 2002, 2003, and 2004, the employer must pay the full cost of medical, dental, and vision coverage for every employee and his/her eligible dependents. The only mention in the grievance letter of the so-called "10% rule" now asserted by the Teamsters, appears in a settlement proposal on page 2 of Exhibit #6. With respect to the grievance, Arbitrator Pool ultimately made the following finding of fact:

The Business Agent Mike Wilson responded to Mr. Leahy's letter on December 17, 2004. Mr. Wilson's response was the City's action would be in violation of Articles 11.1 of the three Agreements. Mr. Wilson stated that "Your unilateral action violates Sentence 1 of Article 11.1 which requires that the employer pay the full cost of medical, dental, and vision coverage for every employee and his/her eligible dependents....

As a remedy, the Union requests that the employer pay one hundred per cent (100%) of the healthcare premiums commencing January 1, 2005, absent contrary agreement between the parties". The Union also proposed a settlement whereby the parties would apply the 2004 10% cap in 2005. The City rejected the Union's proposal. In mid December 1004, the Union filed a grievance which was processed to this arbitration (Jt-7).

Following a hearing and the submittal of Post-Hearing Briefs, Arbitrator Pool issued an Opinion and Award on January 3, 2006. It was the decision of the Arbitrator that the Employer did not violate Article XI 11.1 of the contract. Arbitrator Pool denied the grievance. Pool reasoned that the Union's contention that the Employer was obligated to pay either 100% of the 2005 insurance premium increase or carry over the "10% rule of 2004" and pay 10% of the rate increase in for 2005 was not persuasive and was not supported by the negotiated language in Article XI 11.1 of the Agreement. Arbitrator Pool determined that:

The negotiated language made no reference to 2005 or how any premium increases beyond 2004 would be apportioned or what, if any, cap would be on the Employer's contribution. That was a matter to be resolved at the bargaining table, not through arbitration. The Arbitrator had no authority to determine any terms and conditions in the parties' successor agreements. The Arbitrator also had no authority to add to the Agreements that expired on December 31, 2004. The

Arbitrator's authority, in this case, was limited to the question of whether the Employer's action violated Article XI 11.1 of the three Agreements when it commenced, in December 2004, deducting the 2005 insurance premium increase from the employees pay checks. The answer is no. There was no violation. (Bold emphasis added.)

9. Hearing Examiner Martin Smith

Hearing Examiner Martin Smith heard the unfair labor practice allegation on December 8, 2005. Mr. Smith issued his decision in favor of the City on October 4, 2006. *City of Mukilteo*, Decision 9452 (PECB 2006). In pertinent part, Mr. Smith held that PERC precedent, namely *City of Seattle*, Decision 651 (PECB, 1979), *Snohomish County*, Decision 1868 (PECB, 1984), and *Cowlitz County*, Decision 7007 (PECB, 2000), supported the City's position; that the relevant status quo was the City's health insurance contribution for 2004; and that past practices of increasing insurance premium contributions was not a valid consideration. *City of Mukilteo*, Decision 9452, at *3-4 (PECB, 2006).

10. Public Employment Relations Commission Decision

The Teamsters filed a Notice of Appeal to the full Commission on October 23, 2006. PERC issued its decision affirming the Hearing Examiner's decision on April 23, 2008, without oral argument. *City of Mukilteo*, Decision 9452-A (PECB, 2008). The PERC decision held,

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consistent with the contract interpretation given by the Hearing Examiner, that the CBA language provided that the City's contribution is a fixed amount, while the employees were required to pay the remaining premium cost, no matter how much those costs escalated. The Commission found, in pertinent part:

The most important part of the formula at issue, however, is the fact that the contractual language ties the percentage based increase to a specific rate paid in a specific time period. The uniqueness of the formula used by the parties in this case is distinguishable from the formulae utilized by the parties in cases relied upon by the union, *City of Anacortes*, Decision 7004 (PECB, 2005), *aff'd*, Decision 7007-A (PECB, 2006) and *Val Vue Sewer District*, Decision 8963 (PECB, 2004), as well as NLRB precedent, and easily allow us to differentiate those cases from this one.

City of Mukilteo, Decision 9452-A (PECB, 2008).

11. Trial Court Decision

The Teamsters filed a Petition for Review with the King County Superior Court on May 20, 2008. Judge Jay V. White entered an Order Granting Union's Appeal, following oral argument, on February 17, 2009. In its Order, the trial court made the following conclusions: (1) PERC's interpretation of Article 11.1 — that the employer's health and welfare contributions were intended be a fixed amount and that the employees should absorb all additional premium increases — was erroneous as a

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matter of law; (2) Article 11.1 actually reflects the mutual intention that the employer should absorb all premium increases up to the 10% cap and that employees should absorb all increases in excess of the cap. This the status quo that the employer was required to comply following the expiration of the contract on December 31, 2004; (3) The City committed an unfair labor practice by unilaterally altering the status quo as reflected in Article 11.1 when it froze its own monthly contributions to medical premiums at the 2004 levels and required employees to pay all 2005 increases imposed by the insurer; and (4) PERC's decision erroneously interpreted and applied RCW 34.05.570(3)(d) and RCW 34.05.570(3)(i). The City filed a Notice of Appeal on March 5, 2009.

C. SUMMARY OF ARGUMENT

The issue before the court is essentially as follows: *Must an employer pay for any amount of increase in employee health insurance premium cost following the expiration of the parties' collective bargaining agreement when the employer's obligation to pay any premium increases during the term of the collective bargaining agreement was limited in an amount tied to each of the specific contract years?*

If, as was determined first by the experienced Hearing Examiner and subsequently the PERC, the Employer maintained the maximum

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health insurance benefits required of it by the language of the expired collective bargaining agreement, the trial court erred in reversing PERC's decision. The PERC, in fact, was precluded from re-determining the issue of the interpretation to be given the language of the collective bargaining already determined by the neutral arbitrator.

The Commission, whose expertise in unfair labor practice claims must be given deference by this court, correctly determined that the contractual language sets the status quo and, based upon the record before the Commission, that the employer maintained that status quo. Because the employer did not alter the status quo, the PERC Examiner and the Commission properly dismissed the union's complaint.

Both the Commission and PERC Examiner came to the same determination of status quo as did an independent Arbitrator who heard the grievance complaint filed by the union prior to a determination by the PERC Examiner on the ULP claim. The Union's continued insistence that the employer's actions were not consistent with the statutory status quo simply flies in the face of the reasoned opinions given by three unbiased labor experts, an independent arbitrator, a PERC Hearing Examiner, and the Public Employment Relations Commission.

In the Employer's view, the Commission's decision is entirely consistent with Washington State statute and both PERC and NLRB precedents. Public policy was fulfilled because the employer maintained the same wages and benefits it paid prior to contract termination, during the period of new contract negotiations. The results of Collective Bargaining, memorialized in the expired Collective Bargaining Agreement were respected. The Commission's decision did nothing to adversely affect the law enforcement employees from seeking, through collective bargaining or interest arbitration, the reimbursement of the additional cost to them for medical insurance that they incurred during the interim between the end of the contract and a new contract.

The Employer requests that this Court find and conclude, as did the independent arbitrator, the Hearing Examiner and the Commission, that the Employer maintained the statutory required *status quo* by increasing the employee payroll deduction for medical insurance, just prior to the end of the 2002 - 2004 collective bargaining agreement, to cover the difference between the negotiated cap on the employer's share of the medical insurance premium and the actual premium being charged by the insurer.

The Hearing Examiner's key finding in *City of Mukilteo*, Decision 9452 (PECB, 2006) affirmed by the Commission, is that:

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In the present case, the status quo was the employer's health insurance contribution for 2004. The status quo was neither full maintenance of benefits, nor the employer's supposed contribution in 2005, based upon a hypothetical agreement for the continued use of the 10% formula.

Decision 9452 - PECB at 6.

The Hearing Examiner and PERC's decisions are based upon substantial precedent found in *City of Seattle*, Decision 651 (PECB, 1979); *Snohomish County*, Decision 1868 (PECB, 1984); and *Cowlitz County*, Decision 7007 (PECB, 2000).

D. ARGUMENT

1. Standard of Review.

The decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997). Agency action may be reversed only where the agency erroneously interprets or applies the law, its order is not supported by substantial evidence, or its order is arbitrary or capricious. *Id.* An order is arbitrary and capricious where it is willful and unreasoning, without consideration, and with disregard of facts and circumstances. *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d

690, 695, 658 P.2d 648 (1983). Great deference is usually given to PERC's interpretation of the law it administers. *Int'l Ass'n of Fire Fighters, Local 27 v. City of Seattle*, 93 Wn. App. 235, 239, 967 P.2d 1267 (1998).

2. Pertinent Statutory Provisions.

a. RCW 41.56.470

During the pendency of the proceedings before the arbitration panel, **existing wages, hours and other conditions of employment shall not be changed by action of either party** without the consent of the other but a party may so consent without prejudice to his rights under chapter 131, Laws of 1973. (Emphasis added.)

b. RCW 41.56.140

It shall be an unfair labor practice for a public employer:

(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

(2) To control, dominate or interfere with a bargaining representative;

(3) To discriminate against a public employee who has filed an unfair labor practice charge;

(4) To refuse to engage in collective bargaining.

3. Was the Employer's Conduct Protected by Contract?

a. The Employer did not violate the contract.

Arbitrator Pool's determination that the Employer did not violate the contract in December 2004 when the Employer increased the Employees' payroll deduction for medical insurance to pay for the January 2005 premium, is binding upon the parties. *Collateral estoppel (issue preclusion)* applies and bars the re-litigation of the issue of the contract interpretation central to the claim made by the Teamsters in this proceeding. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); and *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).

WAC 391-45-110 codifies the Commission's deferral policy and includes the following:

Post-arbitral consideration by the Commission -

Regardless of whether a question of contract interpretation is decided by the Commission or by an arbitrator, there are three likely results:

1. Action protected by contract. If it is determined that the contract authorized the employer to make the change at issue in the unfair labor practice case, that conclusion by either the Commission or an arbitrator will generally result in dismissal of the unfair labor practice allegation. The parties

will have bargained the subject, and the union will have waived its bargaining rights by the contract language, taking the disputed action out of the "unilateral change" category prohibited by RCW 41.56.140(4). Examples of cases applying this principle include: City of Richland, Decision 2792 (PECB, 1987); King County, Decision 2810 (PECB, 1987); and King County, Decision 3204-A (PECB, 1989).

Since the contract covered the Employer's action in December of 2004 of increasing the payroll deduction for medical insurance and the medical insurance deduction on January 5, 2005 (the payroll for the last two weeks of December 2004), it is clear that the Employer's response to the premium increase imposed by the insurer not only did not violate the contract, but was protected by the contract and as discussed below, established the statutory status quo for after the expiration of the contract on December 31, 2004.

- b. The independent arbitrator's contract interpretation is consistent with state law requiring the status quo be maintained.

The status quo on December 31, 2004, was that the employees paid via payroll deduction, the difference between the medical insurance premium required by the insurer and the amount equal to 10% above the amount paid by the Employer for medical insurance in 2003. The language of Article XI, Section 11.1 of the collective bargaining agreement was

interpreted by an independent arbitrator selected by the parties for determination of the contract grievance claim brought by the Teamsters. It was the decision of the Arbitrator that the Employer did not violate Article XI 11.1 of the contract. Arbitrator Pool denied the grievance. Pool reasoned that the Union's contention that the Employer was obligated to pay either 100% of the 2005 insurance premium increase or carry over the "10% rule of 2004" and pay 10% of the rate increase in for 2005 was not persuasive and was not supported by the negotiated language in Article XI 11.1 of the Agreement. Arbitrator Pool determined that:

The negotiated language made no reference to 2005 or how any premium increases beyond 2004 would be apportioned or what, if any, cap would be on the Employer's contribution. That was a matter to be resolved at the bargaining table, not through arbitration. The Arbitrator had no authority to determine any terms and conditions in the parties' successor agreements. The Arbitrator also had no authority to add to the Agreements that expired on December 31, 2004. The Arbitrator's authority, in this case, was limited to the question of whether the Employer's action violated Article XI 11.1 of the three Agreements when it commenced, in December 2004, deducting the 2005 insurance premium increase from the employees pay checks. The answer is no. There was no violation. (Bold emphasis added.)

PERC decisions interpreting RCW 41.56.470 and RCW 41.56.123 (non-uniformed employees) have concluded that the statutes require the maintenance of the status quo as that status quo existed before the expiration of a CBA. *See Cowlitz County*, Decision 7007 (PECB, 2000). In that case, PERC determined that an employer did not unilaterally change its contribution towards the cost of medical and dental premiums of its employee between contracts by returning to the status quo of payments made under an expired contract. In making its decision, PERC determined that the status quo was stated in the terms of the previous contract.

Cowlitz County supports a conclusion that the City can deduct from its employees' payroll the costs of any contribution increases the City pays for health insurance where such costs exceed 10% of the rates set in 2003. Doing so is directly consistent with the plain language of the last sentence of Section 11.1.1, which requires the City to deduct from employee payroll "any increases that exceed" 10% above the 2003 rates. Doing so is also consistent with RCW 41.56.470 and RCW 41.56.123, which require that the status quo be maintained until a new contract is negotiated.

PERC in *Cowlitz County* relied upon *City of Seattle*, Decision 651 (PECB, 1979). In *City of Seattle*, the City was faced with a health insurance premium increase after the expiration of a CBA. The City of Seattle had no obligation to pay the costs of increased premiums during the contract hiatus, but was ultimately found guilty of an unfair labor practice because it created a new status quo when it paid the costs of the increase for a time, but then implemented a unilateral change by reverting to the old contract rates which had preceded the premium increase. See *City of Seattle*, attached.

City of Seattle was cited in *Snohomish County*, Decision 1868 (PECB, 1984). In *Snohomish County* an employer learned of an increased premium cost required by its health insurance providers during a contract hiatus. The employer, without negotiations, unilaterally increased employee benefits by paying the increased premium for the first month it was in effect. The employer then made an additional unilateral change, without negotiations, when it reverted to the level of premium payments which had existed under the expired contract. PERC specifically stated that:

Under terms of the expired collective bargaining agreement, the employer provided medical and dental coverage for

the firefighters and agreed to maintain full payment of premiums for the life of the contract. The record indicates that the medical premium issue was a subject of bargaining in 1983, and respondent made at least one proposal to increase wages and medical insurance payments by five percent in 1984. While negotiations were still under way, the employer learned of an increase in insurance premiums. The respondent, without negotiations, unilaterally increased employee benefits by paying the increased premium for the first month it was in effect. The respondent then made an additional unilateral change, without negotiations, when it reverted to the level of premium payments which had existed under the expired contract. **Refusal to assume any additional cost in the absence of a new contract would not have constituted an unfair labor practice.** The employer had consistently maintained that medical and dental insurance premiums were to be considered as part of the total compensation. **Having no obligation to do so (and potentially in violation of RCW 41.56.030 and RCW 41.56.470),** the employer in fact increased the insurance benefits paid on behalf of bargaining unit employees. Having done so, the employer was not in a position to recoup the benefits of its largess without bargaining to impasse with the union and going through the procedures provided by statute. City of Seattle, Decision 651 (PECB, 1979). (Emphasis added.)

City of Seattle and Snohomish County, when read in conjunction with RCW 41.56.123, all support the conclusion that the Employer in this case is obligated to pay no more and no less than it contributed to the health insurance premium in 2004. Under the plain language of the last

sentence of Section 11.1.1, the City must pass on any health insurance rate increases to its employees to the extent those rate increases exceed 10% of the 2003 rates. As strange as it might seem, if the City did not charge the employees the additional amounts and made a change in its 2004 practice, under *City of Seattle* and *Snohomish County*, it would be construed as a unilateral change in working conditions or wages, which is prohibited.¹

The more recent *City of Anacortes*, Decision 9012 (PECB, 2005), reaffirms this assessment. There PERC wrote:

The employer is obligated to maintain the status quo with regard to all mandatory subjects of bargaining during the hiatus between contracts. *City of Shelton*, Decision 7602 (PECB, 2002). **During this period, any change in practice that is arguably less advantageous (or more favorable) to employees might be seen as a threat (or coercion), in violation of RCW 41.56.140(1).** (Bold emphasis added.)

Contract termination rules for noncommissioned employees in this case are governed by RCW 41.56.123. Under that statute, all terms and conditions specified in a collective bargaining agreement must remain in effect until the parties settle a new contract, not to exceed one year from the date the contract expired. RCW 41.56.123(1). For uniformed personnel, mandatory subjects of bargaining must remain in effect while the case is pending

¹ As a practical matter, however, it is unlikely that the Union would file an unfair labor practice claim over a unilateral increase in the City's contribution.

before an arbitration panel, unless the parties mutually agree otherwise. RCW 41.56.470.

The Teamsters argue that their self-serving interpretation of section 11.1, calling for a “10% rule,” is supported by the *Val Vue Sewer District*, Decision 8963 (PECB, 2005). The facts in *Val Vue Sewer District* case however, did not involve the termination of a collective bargaining agreement or the hiatus between contracts. The facts in *Val Vue Sewer District* did not involve a collective bargaining agreement, but involved a newly certified bargaining unit yet to negotiate its first contract. As noted by the Commission in footnote 5 of its decision: *Contractual provision like the ones described in this case should not be confused with the concept of dynamic status quo, which relates to actions taken to follow through with a change that was set in motion prior to a specific event, such as a representation petition. For a discussion regarding the dynamic status quo, see Val Vue Sewer District, Decision 8963, and King County, Decision 6063-A (PECB, 1998).*

The Teamsters also mistakenly rely upon *Brook Meade Health Care Acquirors, Inc.*, 330 NLRB 775, 164 LRRM 1020 (2000), a case which actually supports the examiner’s decision:

Thus, when an insurance carrier imposes a premium increase, the employer may unilaterally require employees to shoulder

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part or all of the increase if it can show that the status quo ante is not changed as a result. To show that no change has taken place in the status quo ante, however, the employer must show what the status quo ante was. The Respondent has made no such showing in this case. ...

At 780.

Here the issue of the contract *status quo* is answered by what the Employer was doing in 2004, the last year of the contract. The employer was paying no more than 10% above the amount it paid in 2003, just as was required by the language in section 11.1 of the expired contract. To maintain the status quo, the difference in premium was to be paid by the employees via payroll deduction. Just as the increase in premium deduction for employees beginning on December 20, 2004 did not violate the contract, the increase did not constitute a change in *status quo* during the contract hiatus. The Union's initial allegation that the maintenance of the status required the employer to start paying 100% of the health insurance premium (TR at page 29, lines 14-18 and page 30, lines 17-21 and at page 55, lines 2-8) has utterly no basis in fact or in the contract.

Additionally, the Teamsters' reliance on *Brook Meade* to demonstrate that all percentage splits survive the expiration of the CBA is not persuasive because Article 11.1 is temporally limited. The NLRB

clearly stated in *Maple Grove Health Care Center*, 330 NLRB 775 (2000) that an 80/20 split would survive the expiration of the contract: “[I]f an employer had a practice of paying, for example, 80 percent of the premiums and the employees 20 percent, no change in the status quo ante would be found if both the employer and the employees continued, after the increase, to pay the same percentages of the larger total.” *Id.* at 780. Thus, the fact that percentage splits may survive expiration of a CBA is not in dispute.

However, Teamsters miss the fundamental point that the percentage split unique to Article 11.1 was scheduled to occur only in 2004. Because the percentage split was not scheduled to continue, and Teamsters cannot rely on historical practices, the percentage split would not survive to increase employer premium coverage in 2005.

The Commission correctly observed at footnote 7 to its decision that, in fact, *Brook Meade* did not demand survival of percentage splits in every situation: “*The NLRB follows similar precedent. See, e.g., Brook Meade Health Care Acquirors, Inc.*, 330 NLRB 775, 164 LRRM 1020 (2000), where the Board held that an employer may lawfully pass on an increase to health benefits to employees provided that the employer maintains the status quo, and noted that depending on the contractual

language, the status quo could result in different burdens for employers and employees.” The union’s arguments totally misapply *Brook Meade* to the record and, in particular, to the pertinent language of the contract at issue.

4. The Employer Fulfilled All of Its Collective Bargaining Obligations.

The Employer had no obligation to bargain the increased payroll deduction implemented on December 20, 2004. The Employer’s action was allowed by the contract. The Employer fulfilled any bargaining obligations associated with such action when it negotiated the expired contract.

The Employer had no duty to bargain any action consistent with maintaining the status quo during the contract hiatus after the contract expired. Such action is mandated by statute (RCW 41.56.470).

The Employer was already complying with its obligation to bargain a successor contract with the Union when the Union’s December 17, 2004 letter arrived. The increase in payroll deduction to cover the difference between the contract cap on the Employer’s contribution and the premium did not implement the Employer’s bargaining proposal.

The demand made by the Union in its December 17, 2004 grievance letter for the Employer to bargain before making any increase in the employee payroll deduction had no basis in the collective bargaining statutes, PERC Decisions, or the contract.

5. The Commission's Decision Promotes The Policies in Chapter 41.56 RCW.

The Commission's decision in no way promotes an unfair labor practice or discourages collective bargaining. To the contrary, the decision honors the agreement made by the Union in its collective bargaining agreement with the Employer. The Union must negotiate with the employer to raise the status quo cap on the Employer's dollar amount contribution to health insurance for bargaining unit employees. The Employee's insistence upon an increase in the cap without first reaching an agreement in collective bargaining with the Employer violates the public policy requiring the wages, hours and benefits received by Employees to be determined by collective bargaining.

E. CONCLUSION

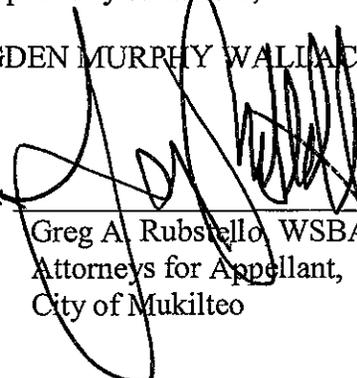
Appellant City of Mukilteo respectfully requests that the Court reverse the trial court's findings and conclusions. The City of Mukilteo

maintained the status quo after the CBA expired in 2004 by continuing to pay the 2004 employer contribution insurance premium rates..

RESPECTFULLY SUBMITTED this 11th day of June, 2009.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

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No. 63108-0

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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TEAMSTERS LOCAL 763

Respondent,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

(Respondent in trial court)

and

CITY OF MUKILTEO,

Appellant.

DECLARATION OF SERVICE

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ORIGINAL

N. Kay Richards hereby makes the following declaration: I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein. I certify that on June 12, 2009, I mailed via U.S. First Class Mail a copy of BRIEF OF APPELLANT CITY OF MUKILTEO and this DECLARATION OF SERVICE to the following counsel:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

6/12/09 Seattle, WA
Date and Place

N. Kay Richards
N. Kay Richards