

NO. 44505-1-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KITSAP COUNTY,  
Appellant,

v.

INTERNATIONAL UNION OF POLICE ASSOCIATIONS  
LOCAL 748, A/K/A KITSAP COUNTY SHERIFF'S OFFICE  
LIEUTENANT'S ASSOCIATION,  
Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

This appeal asks the Court to resolve a conflict between: (1) the purposes of the Public Employment Collective Bargaining Act (PECBA) and the remedial authority of the Public Employment Relations Commission (PERC), and (2) the remedial goals of RCW 49.48.030 to protect employee wages and ensure payment.

The Superior Court's ruling that RCW 49.48.030 applied to the award resulting from unfair labor practice proceedings before PERC is contrary to contract law, will have a State-wide impact on public employment collective, impairs PERC's remedial authority, is inconsistent with Washington judicial precedent, will serve to delay finality in adjudications, and will increase the burdens on the courts and public finances.

## II. FACTS

This case presents questions of law. In general, the facts are undisputed. In its response, however, Respondent Association omits and strains certain important facts.

The health insurance contribution levels that were the subject of dispute before PERC concerned 2010 contribution levels. However, *no contract was in place for 2010 health insurance contributions*. The parties' collective bargaining agreement that was set to expire on

December 31, 2009, described the contribution levels for 2009, but not 2010. The cost of health insurance was to increase in 2010, but the parties had not forged a new collective bargaining agreement and were unable to reach agreement on contribution levels covering the increased cost of benefits. No express or implied contractual promise bound the County to the level of contributions awarded by PERC. The level of contributions awarded by PERC was that agency's interpretation of the parties' mutual obligations to maintain the status quo during negotiations for a successor collective bargaining agreement.

Facing the requirement that it must maintain the status quo, the County notified the Association of its understanding of the employer's status quo obligations, as summarized by the hearing examiner in the unfair labor practice proceedings:

The employer argues that it maintained the status quo for medical benefits by providing the exact same benefits and employer premium contribution in 2010 as it did in 2009. Additionally, the employer contends that the union chose to tie the medical benefit plan issue to the holiday premium issue, because the union would not agree to the 2010 benefit package until the employer agreed to changes in the holiday premium language. . .

The record shows that the employer notified the union several times of its intent to maintain its version of the status quo, and the union and employer met on several occasions to bargain, prior to implementation. There is no evidence to show that the union objected to the content of the health plan changes recommended by the MBC, nor did it present any alternative proposals. The union only objected to the employer's interpretation of "status quo" as it

related to which party would pay the excess premiums if no agreement was reached by the time its members had to be enrolled in a health plan. The Examiner does not find that the employer presented the union with a fait accompli.

*Kitsap County Sheriff's Office Lieutenant's Association v. Kitsap County*, Decision 10836, pp. 4-6 (PECB 2010). Appendix A. See also Appendix B.

The County was of the belief that status quo meant it could not pay more or less than it had paid in 2009 for health and welfare benefits absent an agreement, while employees were of the belief that the County had to pay the full amount of the increases in the cost of benefits. PERC agreed in part and disagreed in part with both parties, and determined that the County and employees had to share the increase in premiums based on each party's percentage share of contributions under the 2009 contract. Thus, the employees did not fully prevail in the unfair labor practice proceedings. The Association sought attorney fees, but PERC's remedy did not include an award of fees.

### III. ARGUMENT

#### A. More Specific Public Policy Underlying Public Labor Laws Control over the Policy Underlying RCW 49.48.030.

The PECBA's liberal construction and controlling provisions concerning public employment labor matters, including wages, controls over RCW 49.48.030.

RCW 41.56.010 declares the purpose of the PECBA:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

Id.

The PECBA expressly applies to all political subdivisions in the

State:

This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington, including district courts and superior courts, except as otherwise provided by RCW 54.04.170, 54.04.180, and chapters 41.59, 47.64, and 53.18 RCW.

Id.

In addition, the PECBA is to be liberally construed and takes

precedence over any conflicting statute. RCW 41.56.905 reads:

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.

Id.

“When interpreting the Public Employees’ Collective Bargaining Act, we will liberally construe the Act in order to accomplish its purpose.”

*Municipality of Metropolitan Seattle*, 118 Wn.2d 621, 633 (1992); *citing* RCW 41.56.905; *Yakima v. International Ass’n of Fire Fighters, Local*

469, 117 Wn.2d 655, 670 (1991); *PUD 1 v. Public Empl. Relations Comm'n*, 110 Wn.2d 114, 119, 750 P.2d 1240 (1988); and *Roza Irrig. Dist. v. State*, 80 Wn.2d 633, 639, 497 P.2d 166 (1972). A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24, 29 (1984).

The public policy underlying RCW 49.48.030 is acknowledged. However, public employers are much less likely to avoid their obligation to pay employees the wages they are owed. The Public Records Act, chapter 42.56 RCW, and laws requiring public agencies to preserve and maintain public records, chapters 40.14 and 40.16 RCW, serve to ensure that employees and their representatives have access to information concerning employee compensation. RCW 49.48.030 is probably not necessary to prevent a public employer from paying wages owed to public employees.

In addition, as will be seen from the discussion that follows, other reasons support the conclusion that RCW 49.48.030 does not apply to PERC's unfair labor practice award.

B. Health Insurance Contributions Were Not Settled Wages.

The Superior Court ruling and Association's contentions presume that the health insurance contributions awarded to employees constituted "wages owed." But the levels of health insurance contributions paid by the County and employees were provisional pending agreement on a contract for 2010 benefits.

Public employers and employee bargaining representatives are obligated to engage in collective bargaining. RCW 41.56.140(4); RCW 41.56.150(4). However, collective bargaining does not compel a party to agree to a proposal. RCW 41.56.030(4) defines "collective bargaining" to mean:

the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

Id.

The general policy underlying the PECBA is in favor of negotiated agreements, and the PECBA expressly preserves the employer's right to bargain wages and benefits. *City of Bellevue v. Int'l Ass'n of Fire*

*Fighters, Local 1604*, 119 Wn.2d 373, 384 (1992); *citing* RCW 41.56.030(4).<sup>1</sup>

After the termination of a labor contract, terms and conditions in the contract remain in effect until the effective date of a subsequent agreement, not to exceed one year from the termination date of the prior contract. RCW 41.56.123(1). *See Association of Educational Support Professionals v. Vancouver School District*, Decision 11791, p. 4 (PECB, 2013) (“RCW 41.56.123(1) requires the parties to bargain in good faith and maintain the status quo for a full year prior to implementation”). But the requirement to maintain the status quo does not constitute a contract. “A valid contract requires offer and acceptance. No contract exists until there is a meeting of the minds resulting in a signed and ratified document.” *Id.*, p. 5. Thus, the amount of compensation paid by the

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<sup>1</sup> *Int'l Ass'n of Fire Fighters, Local 1445 v. Kelso*, 57 Wn.App. 721, 732, *rev. denied*, 115 Wn.2d 1010 (1990) (“It is axiomatic that, in bargaining, the parties retain the power of decision and are not required to agree. . .); *citing* RCW 41.56.030(4) and *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2nd Cir.1952) (within collective bargaining, employer is free to make economic decisions and free to agree only insofar as he is willing in light of all circumstances).

employer during a contract hiatus is provisional, and is subject to change upon execution of a new contract.<sup>2</sup>

RCW 49.48.030 expressly applies to wages “owed.”<sup>3</sup> Here, the amounts that the County and employees were to contribute toward the cost of health insurance in 2010 were not settled wages. No express or implied contract existed from which to determine what the County’s and employees’ health insurance contributions were to be in 2010. Nothing in the PECBA leads to the conclusion that employees have a non-waivable or vested right in the rate of compensation paid provisionally during the status quo period.

The Superior Court’s ruling has the effect of vesting as property rights provisional payments made during a contract hiatus. To hold that employees have a vested property right in provisional payments made

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<sup>2</sup> The level of contributions to be paid by the employer in 2010 could conceivably have been less than the amount in PERC’s award. The Supreme Court has recognized that the State’s “ever-worsening economy may ultimately require some pay reductions rather than pay raises.” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 601 (2010). Numerous cases hold that a government employer may reduce employee compensation. *Baltimore Teachers Union, Am. Fed’n of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 510 U.S. 1141; *Barnes v. District of Colum.*, 611 F.Supp. 130 (D.C. D.Ct. 1985); *Carlson v. City of Hackensack*, 983 A.2d 203 (N.J., 2009); *State ex rel. Mullin v. City of Mansfield*, 269 N.E.2d 602 (OH, 1971).

<sup>3</sup> RCW 49.48.030 reads in relevant part: “In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney’s fees, in an amount to be determined by the court, shall be assessed against said employer or former employer; . . .”

during a status quo period effectively removes the parties' power of decision which the PECBA strives to preserve. To conclude that compensation provisionally paid during a contract hiatus is compensation "owed" to employees such that the public employer is liable for attorney fees under RCW 49.48.030 is simply contrary to contract law and public labor law.

The Court of Appeals has held that RCW 49.48.030 does not apply to interest arbitration proceedings under the PECBA. *City of Moses Lake v. International Assoc. of Firefighters, Local 2052*, 68 Wn.App. 742, 748-749 (1993). Likewise, RCW 49.48.030 should not be construed to apply to unfair labor practice proceedings. Despite literally hundreds of unfair labor practice proceedings resolving disputes over wages and benefits, the Association has cited to not a single action in which a court or PERC awarded attorney fees pursuant to RCW 49.48.030 to employees or bargaining representatives successful in recovering wages or salary in unfair labor practice actions instituted under PECBA.

C. The Superior Court's Ruling Impairs PERC's Remedial Authority and Disrupts Public Labor Relations.

The public policy underlying RCW 49.48.030 must give way to PERC's remedial authority. PERC derives its power from chapter 41.58 RCW, the statute that creates the Commission, and from the PECBA. "The

creation of the Commission was intended ‘to achieve more efficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services.’” *Municipality of Metropolitan Seattle v. Public Employment Relations Comm’n*, 118 Wn.2d at 633.

Washington courts have consistently held that PERC has authority to award attorney fees under RCW 41.56.160 which reads in pertinent part:

(1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders . . . This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

*Id.*

Washington courts have interpreted the statutory phrase “appropriate remedial orders” to be “those necessary to effectuate the purposes of the collective bargaining statute and to make PERC’s lawful orders effective. The authority granted PERC by the remedial provision of the statute has been interpreted to be broad enough to authorize an award of attorney fees when such an award ‘is necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless.’” *Municipality of Metropolitan Seattle*, 118 Wn.2d at 633-634, quoting *Lewis Cy. v. Public Empl. Relations Com’n*, 31 Wn.App. 853,

865-66, *review denied*, 97 Wn.2d 1034 (1982); and citing *State ex rel. Wash. Fed'n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67-69 (1980) (“remedial” action is broad enough to encompass the power to award attorney fees under appropriate circumstances).

In *Municipality of Metropolitan Seattle* the court explained:

Agencies enjoy substantial freedom in developing remedies. . . .  
“Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, especially where a statute expressly authorizes the agency to require that such action be taken as will effectuate the purposes of the act being administered. The relation of remedy to policy is peculiarly one for the administrative agency and its special competence, at least the agency has the primary function in this regard. . . .”

*Municipality of Metropolitan Seattle*, at 634; quoting *In re Case E-368*, 65 Wn.2d 22, 29 (1964) (quoting 2 Am.Jur.2d Administrative Law § 672 (1962)).

PERC’s remedial orders are not to be affected or impaired. *City of Bellevue v. International Ass’n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 379-380 (1992) (“The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders. . . . This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law. . . .”) *Id.*, citing RCW 41.56.160; and *PUD 1 v. Public Empl. Relations Com’n*, 110 Wn.2d 114, 119 (1988).

The courts have also held that an administrative agency's determination of sanctions receives even greater judicial deference than a court's because remedies are peculiarly a matter of administrative competence. *In re Discipline of Brown*, 94 Wn.App. 7, 12 (1998), review denied, 138 Wn.2d 1010, (1999). In *Pasco Housing Authority v. State, Public Employment Relations Com'n*, the court explained:

Both the Washington Legislature and Supreme Court have recognized that public employee labor relations policy is best managed by creating an expert administration, giving it extensive jurisdiction to fashion equitable remedies, and severely limiting judicial review. That is the scheme in Washington.

*Id.*, at 98 Wn.App. 809, 813 (2000); citing RCW 41.58.005(1), (3); and *In re Case E-368*, 65 Wn.2d 22, 28 (1964) (citing *Phelps Dodge Corp. v. National Labor Relations Bd.*, 313 U.S. 177 (1941)).

To allow an automatic recovery of fees and costs under RCW 49.48.030 is contrary to the intent and spirit of collective bargaining, given that the courts and PERC have concluded that attorney fees and costs are an extraordinary remedy in PECBA actions. Awarding attorney fees in collective bargaining disputes regardless of the employer's good or bad faith is contrary to judicial precedent, will impair PERC's remedial authority, serves to disregard PERC's expertise and ability to decide and enforce employee and employer collective bargaining rights, and will

skew the structure of public employment collective bargaining established by the legislature.

D. Allowing Additional Litigation to Recover Fees Thwarts the Priority of Action Doctrine.

Contrary to the Superior Court's ruling and Respondent's argument, the priority of action doctrine applies to this action. Where a controversy between a public employer and a union has been submitted to PERC the priority of action rule requires the superior court to decline to decide the controversy in a declaratory judgment action. Like the doctrines of res judicata and collateral estoppel, the priority of action doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, (1998). Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. Teglund, Civil Procedure § 35.21, at 446.

There is no dispute that: (1) the Lieutenant's Association was a party to the unfair labor practice proceedings before PERC, (2) the Association's unfair labor practice complaint included a claim for attorney fees, (3) PERC's award did not include fees; (4) and the Association had the right to appeal PERC's failure to award fees but did not do so.

Contrary the Association's contention, application of the priority of action doctrine will not work an injustice on the Association by chilling a bargaining unit's exercise of rights. The costs of litigating unfair labor practice complaints is substantially lower than the cost of litigating in court for the reason that PERC's rules limit discovery. WAC 391-08-300.<sup>4</sup> The cost of representing a party in unfair labor practice proceedings is even less than in grievance arbitration proceedings where the neutral arbitrator hired to conduct arbitration proceedings usually charges a fee. PERC charges no fees for conducting unfair labor practice hearings.

E. Superior Court's Ruling has State-Wide Impact.

The superior court's ruling will have a significant impact on public finances in this State. Unless reversed, the award of attorney fees and costs by the Superior Court here is likely to increase the likelihood that employees and employee organizations will file separate actions to recover attorney fees and costs whenever PERC's remedial orders require an employer to reimburse employee wages and benefits.

The potential that employee organizations can recover attorney fees and costs will likely create a disincentive to resolving disputes short

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<sup>4</sup> WAC 391-08-300 reads: "The power of subpoena shall be limited to compelling the testimony of witnesses and production of documents or other tangible evidence at hearings conducted by the agency. Pursuant to the authority delegated to the agency by RCW 34.05.446(2), other forms of discovery shall not be available in proceedings before the agency."

of ULP complaints, and increase the number of ULP complaints filed. A review of unfair labor practice awards issued by PERC against public employers illustrates the impact if employees or their bargaining units are allowed a separate cause of action to recover fees under RCW 49.48.030.<sup>5</sup>

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<sup>5</sup> *WA State – Corrections*, Decision 11060-A (PRSA, 2012) (back wages lost through contracting out work); *Yakima Valley Community College*, Decision 11326 (PECB, 2012) (back pay resulting from reinstating 3% wage reduction); *Everett Community College*, Decision 11135-A (CCOL, 2011) (restoring counselors' full-time wages); *University of Washington*, Decision 10726 (PRSA, 2010) (back pay resulting from cessation of wage increases); *WA State DOT, Ferries Division*, Decision 563 (MEC, 2009) (lost wages for unpaid watch turnover and overtime); *Edmonds Community College*, Decision 10250-A (CCOL, 2009) (reinstatement, back pay and benefits); *Community College District 10 - Green River*, Decision 9676 and 9677 (PRSA, 2007) (reinstatement, back pay, and benefits); *City of Sunnyside*, Decision 11629 (PECB, 2013) (economic losses resulting from elimination of take home vehicles); *City of Vancouver*, Decision 11276 (PECB, 2012) (back pay and benefits resulting from change in shift trading policy); *City of Everett*, Decision 11241 (PECB, 2011) (lost overtime wages); *City of Tukwila*, Decision 10536-A (PECB, 2010) (vacation and sick leave); *City of Mabton*, Decision 10323 (PECB, 2009) (reinstatement with back pay and benefits); *City of Auburn*, Decision 10062 (PECB, 2008) (reinstatement of wages lost through contracting out work); *City of Brier*, Decision 10013 (PECB, 2008) (reinstatement and back wages and benefits); *City of Anacortes*, Decisions 9004-A and 9012-A (PECB, 2007) (health insurance premiums); *City of Redmond*, Decision 8879 (PECB, 2005) (reinstatement of tentative agreement and 3.15% wage increases); *City of Kalama*, Decision 6853-A (PECB, 2000) (economic losses resulting from elimination of take home vehicles); *Lewis County*, 10571-A (PECB, 2011) (insurance premiums); *Mason County*, Decision 1082 (PECB, 2010) (retroactive wages imposed for failure to ratify tentative agreements); *King County*, Decision 10576, 10577, 10578 (PECB, 2009) (wages lost due to furloughs); *Skagit County*, Decision 8886-A, 8887-A (PECB, 2007) (dental plan deductibles); *Yakima County*, Decision 9338 (PECB, 2006) (medical co-pays and deductibles); *Snohomish County*, Decision 8852 (PECB, 2005) (difference between lieutenant and sergeant pay); *Adams County*, Decision 7961 (PECB, 2003) (back pay resulting from reduction in hours); *Grays Harbor County*, Decision 8043, 8044 (PECB, 2003) (EAP fees and expenses); *Pierce County*, Decision 7258 (PECB, 2001) (wages lost from denial of promotion); *Spokane*

In the recent past, public agencies have been faced with downsizing and doing the same amount of -- or more -- work with less staff, static or declining revenues, increased costs, and continued voter reluctance to pass revenue measures. Public agencies do not have the advantage that private sector employers have, simply to pass increases in the cost of doing business to the ultimate consumers of their products and services. Adding the expense of attorney fees and costs to the costs of managing a public employee workforce only hurts taxpayers. Like the case in *SEIU Healthcare 775NW*, 168 Wn.2d 593, 601 (2010), this is a case where “where private rights would be unwisely advanced at the expense of public interests.”

#### IV. CONCLUSION

Any conflict between RCW 49.48.030 and the PECBA and PERC’s remedial authority should be resolved in favor of the PECBA. The Superior Court’s ruling that RCW 49.48.030 applied to the award resulting from unfair labor practice proceedings before PERC is contrary to contract law, will have a State-wide impact on public employment collective bargaining, impairs PERC’s remedial authority, serves to disregard PERC’s expertise and ability to decide and enforce employee

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*County*, Decision 8154 (PECB, 2003) (insurance premiums from demutualization).

and employer collective bargaining rights, is inconsistent with judicial precedent, will serve to delay finality in adjudications, and will increase the burdens on the courts and public finances.

For the reasons stated in this Reply and the County's Appellate brief, the Superior Court ruling awarding attorney fees to the Association should be reversed and the judgment entered against Kitsap County should be vacated.

RESPECTFULLY SUBMITTED this 31st day of October, 2013.

RUSSELL D. HAUGE  
Kitsap County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Jacquelyn M. AuDerheide", written in a cursive style.

JACQUELYN M. AU DERHEIDE  
WSBA No. 17374  
Chief Deputy Prosecuting Attorney  
Attorneys for Respondent

## CERTIFICATE OF SERVICE

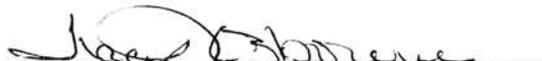
I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On October 31, 2013, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Stephen M. Hansen Law Offices of Stephen M. Hansen, PS 1703A Dock Street Tacoma, WA 98402
<input checked="" type="checkbox"/> Via U.S. Mail
<input type="checkbox"/> Via Fax:
<input checked="" type="checkbox"/> Via E-mail: <a href="mailto:steve@stephenmhansenlaw.com">steve@stephenmhansenlaw.com</a>
<input type="checkbox"/> Via Hand Delivery

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

DATED October 31, 2013, at Port Orchard, Washington.

  
Tracy L. Osbourne, Legal Assistant  
Kitsap County Prosecutor's Office  
614 Division Street, MS 35-A  
Port Orchard, WA 98366  
(360) 337-5776  
[tosbourn@co.kitsap.wa.us](mailto:tosbourn@co.kitsap.wa.us)

# APPENDIX A

2010 WL 3376980 (Wash.Pub.Emp.Rel.Com.)

Public Employment Relations Commission  
State of Washington

**\*1 KITSAP  
COUNTY  
SHERIFF'S OFFICE  
LIEUTENANT'S  
ASSOCIATION, COMPLAINANT**

v.  
**KITSAP  
COUNTY**  
, RESPONDENT

Case 22907-U-09-5844  
Decision 10836 - PECB

August 24, 2010

Lowenberg, Lopez & Hansen, P.S., by Stephen M. Hansen, Attorney at Law, for the union.

Russell D. Hauge, **Kitsap County** Prosecuting Attorney, by Deborah A. Boe, Attorney at Law, for the employer.

#### FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On December 11, 2009, the **Kitsap County** Sheriff's Office **Lieutenant's** Association (union)<sup>[FN1]</sup> filed an unfair labor practice complaint against **Kitsap County** (employer). The complaint alleged that the employer refused to bargain by making a unilateral change in health insurance premiums. A preliminary ruling was issued on December 17, 2009, finding a cause of action. The employer filed a timely answer, and Examiner Lisa A. Hartrich conducted a hearing on April 6, 2010. The parties submitted post-hearing briefs to complete the record.

#### ISSUE PRESENTED

Did the employer make a unilateral change in medical premium contributions and refuse to bargain in violation of RCW 41.56.140(4) and (1)?

Based on the arguments and evidence presented by the parties, the Examiner rules that the employer violated RCW 41.56.140(4) and (1) by unilaterally changing the status quo in health insurance premiums.

#### APPLICABLE LEGAL STANDARDS

##### Duty to Bargain

Under the Public Employees' Collective Bargaining Act, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. An employer that fails or refuses to bargain in good faith

over a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140.

Wages, hours and working conditions of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958). The Commission has long held that medical benefits are mandatory subjects of bargaining. *Spokane County*, Decision 2167-A (PECB, 1985); *City of Mukilteo*, Decision 9452-A (PECB, 2008).

#### Unilateral Change

The employer is prohibited from making changes to mandatory subjects of bargaining until it has satisfied its collective bargaining obligations. As outlined in *Val Vue Sewer District*, Decision 8963 (PECB, 2004), a complainant alleging a unilateral change must establish the following:

1. The existence of a relevant status quo or past practice.
2. That the relevant status quo or past practice was a mandatory subject of bargaining.
3. That notice and an opportunity to bargain the proposed change was not given, or that notice was given but an opportunity to bargain was not afforded and/or the change was a *fait accompli*.
4. That there was an actual change to the status quo or past practice.

#### Status Quo

After a collective bargaining agreement expires, an employer must maintain the existing terms and conditions of employment while it negotiates a new agreement with the union. An employer that alters a term or condition of employment during this period without first satisfying its bargaining obligation violates the statute. *City of Mukilteo*, Decision 9452-A. For non-commissioned employees, RCW 41.56.123 provides that all terms and conditions 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, unless the parties agree otherwise. *City of Anacortes*, Decision 9004-A (PECB, 2007). For uniformed personnel, terms and conditions concerning mandatory subjects of bargaining must remain in effect until agreement is reached either mutually or through interest arbitration. RCW 41.56.470.

#### Fait Accompli

\*2 An employer contemplating a change to a mandatory subject of bargaining must give adequate notice to the union prior to making a decision in order to allow for a reasonable opportunity to bargain. If the employer acts without providing notice sufficiently in advance, the union is excused from demanding to bargain over the issue, because the action was presented as a *fait accompli*. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995); *City of Edmonds*, Decision 8798-A (PECB, 2005). In order to determine whether a *fait accompli* occurred, the Commission looks at the circumstances as a whole, and whether the opportunity for meaningful bargaining existed. *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

#### Notice and Opportunity to Bargain

Even if an employer gives the union sufficient notice and opportunity to bargain over the subject of the proposed change, it still is not entitled to implement its proposal unilaterally, absent an overall impasse in bargaining. *Skagit County*, Decision 8746-A (PECB, 2006). The only exceptions to this rule are when a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. *Maple Grove Health Care Center*, 330 NLRB 775, 779 (2000). For employees eligible for interest arbitration, the employer cannot implement its proposal at impasse, but rather must obtain an award through interest arbitration. *City of Seattle*, Decision 1667-A (PECB, 1984); *King County*, Decision 10547-A (PECB, 2010).

## ANALYSIS

### Background

The union is the exclusive bargaining representative for a bargaining unit of two corrections officers and five commissioned **lieutenants**. The union and the employer were parties to a collective bargaining agreement dated January 1, 2007 through December 31, 2009. The agreement included provisions related to health and welfare benefits. For 2007, the employer agreed to pay a fixed contribution to medical insurance premiums, and the employees paid any remaining amount over and above the employer's fixed contribution. For 2008, the employer agreed to pay the first 10 percent increase over the amount it paid in 2007, and the employees were to pay the remaining share. In addition, the parties agreed to participate in a joint Medical Benefits Committee to "make every effort to devise plan changes that will keep rate increases below 10% for 2008."

The Medical Benefits Committee (MBC) is a labor-management group that meets annually to discuss medical benefits. Both represented and unrepresented employees, including the **lieutenant's** union, participate in the process. As part of that process, the MBC recommended changes to medical benefits for 2008. Those changes were incorporated into the 2007-2009 agreement by amendment, signed by the union and employer in October 2007. Similarly, the committee's recommendations for changes in benefits for 2009 were incorporated into the 2007-2009 agreement by amendment, signed by the union and employer in October 2008.<sup>[FN2]</sup>

\*3 Both amendments set forth the choice of medical plans offered to employees for each year, and listed fixed monthly contribution amounts for both the employer and employee. For example, the 2009 employer contribution for an employee with no dependents under a Group Health plan was \$404.10, and the employee contribution was \$0.14. The 2009 employer contribution for an employee and family under Premier Blue Cross was \$1,160.92, and the employee contribution was \$46.40.

In April 2009, the MBC began meeting to develop its recommendations for 2010. The employer reported that the projected cost increase for 2010 medical coverage was 18.3 percent above the cost in 2009. The employer also stated that it could only pick up five percent of that projected increase in 2010. Over the next several months, the MBC met and worked to reduce the increase from 18.3 percent to 11.8 percent. This was achieved, at least in part, by increasing various copayments and deductibles.

On October 2, 2009, the MBC presented its recommendations for the 2010 medical benefits package. On the same day, the non-interest arbitration groups approved the recommendation. The four interest arbitration bargaining units, including the **lieutenant's** union, did not approve the recommendation at that time.

In the meantime, the union and employer were negotiating a successor agreement for 2010. Bargaining meetings commenced in July 2009, and continued into 2010. At the time of the hearing in this matter, impasse had not been declared by either party.

One negotiation session occurred on October 13, 2009. Labor Relations Manager, Fernando Conill, testified that at that point, there were two outstanding issues left on the table: a holiday premium proposal the **lieutenants** had put forth, and the medical benefits proposed by the employer (as per the recommendation of the MBC). Following that meeting, **Lieutenant** Earl Smith, a representative on the union's bargaining team, sent an e-mail to Conill. The October 16, 2009 e-mail stated, "[W]e [the union] are under the impression that the county needs to have a decision on whether to accept or reject the Medical Benefits Recommendation for 2010 by Monday October 26<sup>th</sup>." On October 19, Conill extended that deadline to November 2.

On October 26, the parties met again. Prior to that meeting, Conill sent an e-mail to the union explaining the employer's position that it would have to "implement the status quo 2009 medical benefits with the 2010 status quo rates, effective January 1, 2010, for those unions that do not choose the 2010 Medical Benefits (and rates) as proposed and attached."(emphasis in original.)

The parties met yet again on October 29. Conill sent an e-mail to the union on November 9, once again reiterating the employer's position on medical benefits. Attached was a "what if" proposal, which included language on holiday premiums. The union responded the same day, indicating it had not changed its position on holiday premiums, and requested further meetings. The union also stated that it required a "complete package" in order to resolve the contract, and objected to the employer increasing the medical premiums in 2010 if an agreement still had not been reached on all matters.

\*4 On November 12, Conill responded to the union's e-mail, once again extending the deadline for a decision on medical benefits to November 30. Conill stated that, given the union's rejection of the county's last "what if" proposal, and the employer's imminent need to enroll employees in a medical plan,<sup>[FN3]</sup> the employer had to provide benefits enrollment forms to the union's membership. Conill explained, "Short of a Contract Amendment for 2010 health benefits and rates (since we obviously won't have an entire contract settled by 12/31/09), the Lts. Union members will have to pick up the entire cost difference for increase in the status quo benefits cost, between the 2009 benefits rates and the 2010 benefits rates ... which is an average of 18% increase in medical."

The parties met on November 17. On November 18, the union responded in writing to the employer's position on holiday premiums, stating that it was not acceptable. The letter did not mention any specific objection to the medical benefits proposal, except to mention that the union's proposal to increase holiday pay would not nearly offset the increase in medical premiums they would incur. Conill e-mailed the union on November 19, once again restating the employer's need to enroll union members in the 2009 status quo benefits if no agreement could be reached on the 2010 health benefits.

The parties met again on November 23, but with no apparent resolution. The new payroll deductions were withdrawn from the December paychecks, at an increased rate over the 2009 amount. The parties met again on December 10, and this complaint was filed on December 11.

#### Legal Analysis

The union argues that the employer unilaterally altered the status quo when it increased the health care premium rates for 2010 medical benefits, beginning with the December 2009 payroll deduction. It contends that the status quo is the employees' "capped" contribution amount, as determined in the 2009 agreement. It also argues that the employer presented the union with a *fait accompli*.

The employer argues that it maintained the status quo for medical benefits by providing the exact same benefits and employer premium contribution in 2010 as it did in 2009. Additionally, the employer contends that the union chose to tie the medical benefit plan issue to the holiday premium issue, because the union would not agree to the 2010 benefit package until the employer agreed to changes in the holiday premium language.<sup>[FN4]</sup>

This case presents yet another twist in the expanding line of Commission decisions related to the inevitable increases in health care costs each year, and the attempt to define the parameters of the legal status quo in light of these increases.

The facts of this case are unique and distinguishable from previous decisions otherwise on point. For example, in *City of Anacortes*, Decision 9004-A, the employer agreed to pay 100 percent of health insurance premiums. When the contract expired, the employer began deducting excess premium amounts from employee paychecks, because the employer claimed it was only obligated to pay the actual dollar amount it had previously paid for premiums. The Commission found that the employer disrupted the status quo by not funding health benefits at 100 percent, as required by the contract. (See also *Val Vue Sewer District*, Decision 8963.)

\*5 In *Snohomish County*, Decision 9834-B (PECB, 2008), the Commission held that, where an employer's medical contribution is "capped" at a specific amount in the contract, that term is part of the status quo, and cannot be disturbed. Therefore, employees were bound to cover any remaining premium costs until the parties reached a successor agreement.

In *City of Tukwila*, Decision 9691-A (PECB, 2008), the employer agreed to pay the full medical premium. However, the contract placed a percentage cap on the employer's obligation to pay in the event the premiums increased over twelve percent in Year 1, eleven percent in Year 2, and ten percent in Year 3. The contract also gave either party the right to reopen the agreement in order to negotiate changes in the event that the premiums exceeded these percentages. The Commission agreed with the employer that the language placed a cap on the employer's contribution to premiums for each year of the contract. However, because the agreement included the ability to reopen negotiations, and the union made a demand to bargain, the employer was required to bargain with the union before charging employees the excess premium amounts.

In *City of Mukilteo*, Decision 9452-A, the employer's insurance contribution increases were capped by maximum percentage increases, similar to the language in *City of Tukwila* (above). However, the contract also specifically provided "[a]ny increases that exceed those amounts ... shall be paid by the employee via payroll deduction." The Commission held that the employer's contribution was a fixed amount, and the employees were thus obligated to pay any additional amounts to maintain the status quo.<sup>[FN5]</sup>

In the present case, the contract contains fixed contribution amounts for both the employer *and* employee. This presents a conundrum. If both parties continue to pay the fixed amounts set forth in the contract until a new agreement is ratified, who will pay the excess premium costs for maintaining the necessary status quo health benefits?

The National Labor Relations Board, in *Maple Grove Health Care Center*, 330 NLRB 775 (2000), described the impossibility of the instant case:

[I]f the employer's practice was to pay a specified amount for each employee's health insurance, and for the employees to pay the rest, the employer could lawfully require the employees to bear the entire weight of the premium increase. On the other hand, if an employer's practice was for *employees* to pay a set amount of the premium and the *employer* to pay the rest, the employer could not lawfully impose any part of the increase on the employees without first bargaining to agreement or impasse with the union. (emphasis in original.) 330 NLRB at 780.

#### Element 1: What is the Status Quo?

Determining the status quo in this case poses a unique problem, because both sides cannot continue to pay the same "cap" on their respective health care premiums, as enumerated in and required by the collective bargaining agreement. If it were the case where only the employer's contribution was specified in the agreement, the employee would be responsible for any increase, and that would be considered the "status quo." On the other hand,

if just the employee's contribution was specified, the employer would be responsible for any increase in order to maintain the status quo. However, both situations cannot coexist, because the premium will ultimately increase, and someone will have to bear the cost.

\*6 In the case where the parties have agreed that an employer pays a set percentage (e.g. 80 percent) and the employee pays a set percentage (e.g. 20 percent), when the premium inevitably increases, maintaining the status quo means both parties will see increases in the amounts they will be responsible for paying until a new agreement is reached. However, in this case, the parties did not agree to pay a specific percentage amount. Rather, they each agreed to pay a specific dollar amount.

Here, the employer passed on the entire increase in premiums to the employee. This caused a significant change in the amounts deducted from each employee's paycheck. For example, an employee paying for family coverage under the 2009 Premera Blue Cross paid \$46.40 in 2009. In 2010, the employee's contribution was projected to jump to \$278.11 for the same coverage. That amounts to nearly a 600 percent increase for the employee, while the employer realized no increase at all. That hardly describes a situation that could be characterized as "status quo."

The Examiner concludes that the status quo in this case is akin to those situations in which set percentages have been specified for both the employer and employee. Even though the parties did not agree to pay a specific percentage amount, it is still possible to calculate what percentage each side was paying. Under these circumstances, the status quo can be determined by calculating the percentage of the premium the employer was paying in 2009, and the percentage the employee was paying in 2009. Those percentages can then be applied to the 2010 rates in order to determine the status quo.

#### Element 2: Mandatory Subject of Bargaining

The parties do not dispute that medical premiums are mandatory subjects of bargaining.

#### Element 3: Notice and Opportunity to Bargain

The record shows that the employer notified the union several times of its intent to maintain its version of the status quo, and the union and employer met on several occasions to bargain, prior to implementation. There is no evidence to show that the union objected to the content of the health plan changes recommended by the MBC, nor did it present any alternative proposals. The union only objected to the employer's interpretation of "status quo" as it related to which party would pay the excess premiums if no agreement was reached by the time its members had to be enrolled in a health plan. The Examiner does not find that the employer presented the union with a *fait accompli*.

#### Element 4: Change to the Relevant Status Quo

The employer did maintain the status quo in the level of benefits provided to the employees, and probably at some inconvenience since most of its employees are now enrolled in the modified plan with new rates (as recommended by the MBC) for 2010. The employer also provided the union with plenty of notice and opportunity to bargain. However, the parties agreed that they did not reach impasse, and the parties did not advance the issue to interest arbitration. Therefore, the employer was not entitled to implement a change in the status quo.

#### CONCLUSION

\*7 The Examiner finds that: (1) the status quo for health insurance premiums involved a shared employer/employee split in responsibility for payment of the premiums; (2) health insurance premiums are mandatory subjects of bargaining; and (3) the employer provided notice and an opportunity to bargain the proposed change in

health insurance premiums. Nevertheless, the employer implemented a unilateral change to the status quo before the parties reached impasse and advanced to interest arbitration.

#### REMEDY

After calculating the relative percentages paid by the employer and employees, based on the 2009 actual amounts paid, the Examiner finds that the employees' percentage share varies depending on what type of plan they were enrolled in. That range falls between a fraction of a percentage to nearly four percent of the total premium. For example, an employee with no dependents paid 0.13% of the total Premera premium (\$.58/\$431.20), and an employee with covered dependents (children and spouse) paid 3.84% of the total Premera premium (\$46.40/\$1207.32). Because there is no consistent percentage across the board, the employer will calculate the percentage each individual employee paid in 2009, and apply that percentage to the 2010 rates. The employer will refund each employee the amount he or she paid above that percentage, beginning with the first withdrawal from their December 2009 paycheck. Interest will be applied, as provided under WAC 391-45-410.

#### FINDINGS OF FACT

1. **Kitsap County** is a public employer within the meaning of RCW 41.56.030(1).
2. **Kitsap County Sheriff's Office Lieutenant's Association** is a bargaining representative within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative for a bargaining unit of two corrections officers and five commissioned **lieutenants**.
3. The union and employer were parties to a collective bargaining agreement dated January 1, 2007, through December 31, 2009.
4. An amendment to the collective bargaining agreement, signed by the union and employer in October 2008, set forth the choice of medical plans offered to employees for 2009, and listed fixed monthly contribution amounts for both the employer and employee.
5. The fixed monthly contribution amounts for both the employer and employee established the relevant status quo.
6. Health insurance premiums are mandatory subjects of bargaining.
7. The Medical Benefits Committee (MBC) is a labor-management group that meets to develop recommendations for changes in health benefits from year to year. The **lieutenant's** union has a representative on the committee. The MBC began meeting in April 2009 to develop its recommendations for 2010.
8. The union and employer began meeting to negotiate a successor collective bargaining agreement in July 2009.
9. The MBC presented its recommendations for 2010 medical benefits on October 2, 2009. The **lieutenant's** union did not approve the recommendation at that time.
- \*8 10. The employer notified the union that rates for maintaining the same 2009 medical benefits in 2010 were expected to increase. The employer notified the union that the employees would be responsible for paying the entire increase if a successor agreement was not reached by the end of 2009.
11. The employer and union continued to negotiate, but did not reach agreement on a new contract before the

employer had to make arrangements to continue 2010 health coverage for employees. However, the parties did not reach impasse.

12. The employer began withdrawing the increased rates from the employees' December 2009 paychecks.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56 and WAC 391-45.

2. By unilaterally changing the status quo in health insurance premiums before reaching impasse and obtaining an interest arbitration award, as described in Findings of Fact 11 and 12, the employer committed an unfair labor practice under RCW 41.56.140(4) and (1).

#### ORDER

**Kitsap County**, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

- a. Deducting the entire increase for the 2010 health insurance premiums from employee paychecks.
- b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by 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. Restore the status quo ante by reinstating the wages, hours and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change in health insurance premiums found unlawful in this order.
- b. Calculate the relative percentages paid by each individual employee for health insurance premiums in 2009, and refund each employee the amount he or she paid above that percentage for insurance in 2010, beginning with the first withdrawal from the December 2009 paycheck. Interest will be applied.
- c. Give notice to and, upon request, negotiate in good faith to agreement or receipt of an interest arbitration award with the **Kitsap County Sheriff's Office Lieutenant's Association**, before making changes in health insurance premiums for bargaining unit employees.
- d. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission 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.
- e. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of County Commissioners of **Kitsap County**, 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.
- \*9 h. 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.

- i. Notify the Compliance Officer of the Public Employment Relations Commission, 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 he provides.

ISSUED at Olympia, Washington, this 24th day of August, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Lisa A. Hartrich  
Examiner

FN1. The International Union of Police Associations (IUPA), Local 7408 filed the complaint on behalf of the **Kitsap County Sheriff's Office Lieutenant's Association**.

FN2. The contract states that the union's representative on the MBC will not be required to cast a vote. If the union's representative does vote for the recommendation, it will become a tentative agreement, subject to final ratification by the bargaining unit membership.

FN3. The new 2010 rates began to be withdrawn from the December 2009 payroll checks.

FN4. However, the employer made no formal complaint that the union was bargaining in bad faith.

FN5. Although the Commission's decision in *City of Mukilteo* was appealed, the Court of Appeals of the State of Washington upheld and deferred to the Commission's decision as it related to establishing the status quo.

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.

**NOTICE**

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT KITSAP COUNTY COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY changed the health insurance premiums for employees of the **Kitsap County Sheriff's Office Lieutenant's Association**.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL calculate the relative percentages paid for health insurance premiums by the employer and employee, based on the 2009 amounts paid. We will apply those percentages to the 2010 rates, and refund the amount paid above that percentage to each employee, with interest.

WE WILL give notice to and, upon request, negotiate in good faith to agreement or receipt of an interest arbitration award with the **Kitsap County Sheriff's Office Lieutenant's Association**, before making changes in health insurance premiums for bargaining unit employees

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

**DO NOT POST OR PUBLICLY READ THIS NOTICE.**

**\*10 AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.**

The full decision is published on PERC's website, [www.perc.wa.gov](http://www.perc.wa.gov).

2010 WL 3376980 (Wash.Pub.Emp.Rel.Com.)

END OF DOCUMENT

# APPENDIX B

2011 WL 3563058 (Wash.Pub.Emp.Rel.Com.)

Public Employment Relations Commission  
State of Washington

**\*1 KITSAP  
COUNTY  
SHERIFF'S OFFICE  
LIEUTENANT'S  
ASSOCIATION, COMPLAINANT**

v.

**KITSAP  
COUNTY  
, RESPONDENT**

Case 22907-U-09-5844  
Decision 10836-A - PECB

August 10, 2011

Lowenberg, Lopez & Hansen, P.S., by Stephen M. Hansen, Attorney at Law, for the union.

Russell D. Hauge, **Kitsap County** Prosecutor, by Deborah A. Boe, Deputy Prosecuting Attorney, for the employer.

#### DECISION OF COMMISSION

On December 11, 2009, the **Kitsap County** Sheriff's Office **Lieutenant's** Association (union) filed a complaint alleging that **Kitsap County** (employer) committed an unfair labor practice by unilaterally changing its contribution to employee health insurance premiums without providing notice and an opportunity for bargaining. Examiner Lisa A. Hartrich held a hearing, found that the employer committed the alleged unfair labor practice, and fashioned a status quo remedy that gave full effect to the parties' agreements while at the same time preserving employee health insurance premiums. **Kitsap County**, Decision 10836 (PECB, 2010). The employer appeals the Examiner's conclusion that it unilaterally altered the status quo without bargaining.

For the reasons set forth below, we affirm the Examiner's decision that the employer committed an unfair labor practice when it unilaterally changed its contribution to employee health insurance premiums. The evidence in this case demonstrates that the parties agreed to amend their collective bargaining agreement for calendar year 2009 that required employees and the employer to contribute a fixed amount to employee health insurance. Because of the fixed contribution rates specified in the addendum to the agreement, the Examiner did not commit reversible error when she required both the employer and employees to proportionally increase their contributions in order to maintain employee health insurance when the rates increased in 2010.

#### DISCUSSION

A brief recitation of the facts is necessary to place this controversy in its proper context. The employer and union were parties to a collective bargaining agreement covering the period of January 1, 2007 through December 31, 2009. Article

II, Section H of the agreement covered "Health and Welfare Benefits" and stated, in part:

1. Effective January 1, 2007, the County's contributions towards medical, dental and life insurance coverage for regular full-time employees shall be as follows:

a. The parties agree to renew the following plans with upgraded vision coverage as proposed in the joint-union offer by the members of the joint labor-management Medical Benefits Committee dated August 29, 2006. For the period January 1, 2007 through December 31, 2007, employees may choose to participate in one of the plans listed below. Effective with January 2007 premiums, the County will make contributions to medical insurance premiums as shown in the table below. *Employees will pay the remaining contributions through payroll deduction.*

Group Health Options POS	[employer] contribution
Employee	\$370.86
Ee + Spouse	\$744.98
Ee + Child(ren)	\$638.08
Ee + Family	\$1,012.22

\*2 [The agreement then lists the employer's contribution for the Group Health Select, KPS PPO 1, and KPS PPO 2 plans.]

b. Effective with the January 2008 premiums, the County will pay the first 10% increase over the 2007 the (sic) County premium contributions for employee-only and dependent coverage under the KPS PPO 1 and PPO 2 plan, and the Group Health Select \$15.00 co-pay Plan, or as modified upon the recommendation of the joint labor-management Medical Benefits Committee, *with employees paying the remaining share through payroll deduction.* The parties agree to participate in a joint labor-management Medical Benefits Committee that will make every effort to devise plan changes that will keep rate increases below 10% for 2008. The parties recognize that insurance providers' dual carrier rules may place restrictions on the County's ability to allow differentials between employee contribution rates for similar levels of coverage provided by different carriers. Therefore, the Medical Benefits Committee will consider such adjusting employee contributions rates when devising plan changes under this paragraph.

c. The parties agree to open Article II, Section H.1 for negotiations of coverage for the 2009 Plan year. Such negotiations will open not later than June 1, 2008 and may be conducted in part by participation in the joint labor-management Medical Benefits Committee.

d. During the final year for which the contract establishes medical contributions, the Association's representative on the joint labor-management Medical Benefits Committee may participate in deliberations regarding medical coverage for the following year and the Association's representative may, but will not be required to cast a vote. If the Association's representative votes for a majority recommendation to the Board of County Commissioners that is thereafter adopted by the Board of County Commissioners, such recommendations will become a tentative agreement between the parties, subject to final ratification by the bargaining unit membership and approval by the Board of County Commissioners as part of a successor collective bargaining agreement.

e. The parties recognize that it may be mutually beneficial to memorialize the practices of the joint labor-management Medical Benefits Committee and/or to establish more definite rules for the Medical Benefit Committee's function. ...

Exhibit 1 (emphasis added). The Medical Benefits Committee (MBC) referenced in the agreement is a labor-management group that meets annually to recommend changes to employee health insurance and the contribution rates for insurance

premiums. Representatives from management, represented employees, and unrepresented employees participate in the MBC. As noted above, the union participates in the MBC, but is not bound by any decision made by the MBC and the union is free to request independent bargaining over health insurance.

For calendar year 2007, the employer contributed to employee health insurance premiums in a manner consistent with subsection 1.a. of the contract, and the employees contributed the remaining costs through payroll deduction. For calendar year 2008, the employer increased its contribution to employee health insurance premiums by 10% over what it contributed in 2007, consistent with subsection 1.b. of the collective bargaining agreement. The employees continued to pay the remainder of the total premium consistent with section 1.a. of the agreement.

\*3 For calendar year 2009, the MBC recommended a change to the medical insurance contributions that was adopted by the employer and union and memorialized in an amendment to the collective bargaining agreement. The amendment stated, in part:

**Kitsap County** and undersigned Union(s), having participated in the Joint Labor Management Medical Insurance Committee, and having reviewed employees' health care benefits plans; hereby mutually agree to amend the insurance provisions of their collective bargaining agreement for the calendar year 2009:

1. Medical Insurance

a. The parties agree that the choices of plans offered to employees for the year 2009 will be as follows:

- Group Health — Revised to include Welcome Package
- Premera Blue Cross PPO Plan

A summary of the two are set forth in Attachment A and incorporated fully into this amendment.

b. Contributions. *The [employer's] monthly contributions towards medical coverage for full-time employees and the employee's monthly premium contribution are set forth below:*

Group Health	[employer] Contribution	Employee Contribution
Employee	\$404.10	\$0.14
Employee + Spouse	\$811.20	\$17.46
Employee + Child(ren)	\$694.88	\$12.46
Employee + Family	\$1,102.04	\$29.78

[The agreement then lists the employer's contribution for Premera Blue Cross.]

In addition, employees who elect spousal medical coverage will be required to pay an additional \$25.00 per month if that spouse has group medical insurance through his/her own employer (including **Kitsap County**).

Exhibit 2 (emphasis added). In April 2009, the MBC met to develop its recommendations for 2010 medical contribution rates. The employer informed the MBC that premium costs were projected to increase by 18.3% over what was paid in 2009, and that the employer was only able to contribute an additional 5%. The record demonstrates the MBC eventually developed an insurance package that resulted in only an 11% increase over what was paid in 2009. On October 2, 2009, the MBC made its recommendation for 2010 medical benefit package. The union did not vote on the MBC's proposal.

Starting in July 2009, the employer and union met several times to negotiate the successor agreement. The parties did not initially bargain over health insurance premiums, as they were awaiting the MBC's recommendation. On October 2, 2009, the MBC released its recommendation. The union decided against accepting the recommendation and instead requested to bargain medical benefits during negotiations for the successor agreement.

On October 26, 2010, Fernando Conill, the employer's labor relations manager, sent the union an e-mail explaining that

the employer believed that it would have to “implement the status quo 2009 medical benefits with the 2010 status quo rates, effective January 1, 2010, for those unions that do not choose the 2010 Medical Benefits (and rates) as proposed[.]” Exhibit 3. In December 2009, the employer increased the amount that employees contributed to medical premiums to cover the additional costs while at the same time maintaining the level it paid in 2009. At the time the employer made its change, the parties had not reached agreement on the health insurance premiums and they had not sought interest arbitration as an alternative means for settling the matter.

#### Applicable Legal Standard — Duty of Bargain

\*4 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. RCW 41.56.030(4). A[P]ersonnel matters, including wages, hours, and working conditions@ of bargaining unit employees are characterized as the mandatory subjects of bargaining under *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

This Commission has long held that medical benefits are mandatory subjects of bargaining. *See Snohomish County*, Decision 9834-B (PECB, 2008); *City of Seattle*, Decision 651 (PECB, 1979). Prior to any changes to mandatory subjects of bargaining, employers must give unions advance notice of the potential change, so as to provide unions time to request bargaining and, upon such requests, bargain in good faith to resolution or lawful impasse. Because the employees at issue in this case are uniformed employees eligible for interest arbitration under Chapter 41.56 RCW, the employer may not unilaterally implement a term or condition of employment, but must utilize the Chapter 41.56 RCW interest arbitration provisions to secure a change.

#### Duty to Maintain Status Quo

Following the expiration of a collective bargaining agreement, an employer must maintain terms and conditions of employment that existed at the time the agreement expired during the subsequent negotiations for a new collective bargaining agreement. *City of Mukilteo*, Decision 9452-A (PECB, 2008); *see also City of Seattle*, Decision 651 (PECB, 1979). An employer who alters a term or condition of employment during this period without first satisfying its bargaining obligation violates the statute.

#### Determining the Status Quo

The status quo obligation depends on how the parties craft the language in the collective bargaining agreement. *City of Mukilteo*, Decision 9452-A (PECB, 2008), *review denied*, 171 Wn.2d 1019 (2011). In making such determinations, this Commission has “adhered to an objective manifestation theory in construing words and acts of contractual parties, and impute to a person an intention corresponding to the reasonable meaning of the words and acts.” *City of Mukilteo*, Decision 9452-A, *quoting City of Wenatchee*, Decision 8802-A (PECB, 2006). The subjective intent of the parties is irrelevant. *City of Mukilteo*, Decision 9452-A, *citing Everett v. Estate of Sumstad*, 95 Wn.2d 853 (1981). If the plain language used within the collective bargaining agreement demonstrates a meeting of the minds, there is no need to look further into the bargaining process to determine what was intended. *City of Mukilteo*, Decision 9452-A.

For example, in *City of Mukilteo*, the parties' collective bargaining agreement required the employer to contribute 100% of the cost for employee health insurance in the first year of the agreement. However, the language went on to state that in each subsequent year, the employer's “contribution increases shall be limited to a maximum increase of 11% above 2001 rates in 2002, 10% above 2002 rates in 2003, and 10% above 2003 rates in 2004. Any increases that exceed those amounts in 2002, 2003 and 2004 shall be paid by the employee ....” That agreement expired without being replaced by a subsequent agreement. *City of Mukilteo*, Decision 9452-A. The Commission found that the language of the collective bargaining agreement demonstrated that “the employer's contribution level is a formula that would be capped at a certain

amount, and bargaining unit employees would be required to cover any additional costs of health insurance premiums.” *City of Mukilteo*, Decision 9452-A.

\*5 Similarly, in *Snohomish County*, Decision 9834 (PECB, 2007), *aff'd*, *Snohomish County*, Decision 9834-B (PECB, 2008), the collective bargaining agreement required the employer to pay a fixed dollar amount toward premiums, and employees were required to pay any remaining amount needed to cover the costs of insurance, regardless of how high or low the cost. When employees changed bargaining representatives, the employer continued to contribute towards insurance premiums only the fixed amount specified in the previously negotiated agreement, even though the overall cost of insurance escalated substantially during the subsequent negotiations.

In *City of Anacortes*, Decision 7007-A (PECB, 2006), a different result was reached. There, the collective bargaining agreement stated the employer would pay 100% of employee health insurance premiums. Insurance premiums subsequently escalated, and when the existing agreement expired, the employer claimed it was only obligated to pay the actual dollar amount it previously paid for premiums. The Commission found that the status quo required the employer to continue to pay 100% of health insurance premiums, regardless of the cost. When the employer attempted to fix a set amount it contributed, it committed an unfair labor practice.

In *Lewis County*, Decision 10571-A (PECB, July 15, 2011), the parties' agreement provided that the employer pays 95% of health insurance premiums, and the employees would pay 5%. When the agreement expired, the employer claimed it was only obligated to pay the actual dollar amount it had previously paid for premiums, even though the total premium costs had increased. The Commission found that the status quo required a continuation of the 95%/5% split, regardless of the total cost of insurance premiums.

#### Application of Standard

Here, the Examiner found that the parties' 2009 agreement placed a “cap” on the health insurance premium contributions that limited the amount paid by both the employer and employee. In reaching this conclusion, the Examiner compared the language of the 2009 amendment to the contractual language cited in the above-mentioned precedents and determined that the parties' language differed in that premiums were not tied to any specific formula, and the language was silent as to whether the employer or employees were liable to cover any additional increases to premium rates.

The employer argues that this case is similar to the *City of Mukilteo* and *Snohomish County* cases because the employer's contribution is set at a specific amount that increases by a certain percentage. The employer also points out that the parties' collective bargaining agreement capped the employer's contribution and required employees to cover all additional costs, and urges this Commission to read the 2009 amendment together with the original contract language to determine the status quo. We disagree.

The 2009 amendment demonstrates a clear intent on the part of the parties to “mutually agree to *amend* the insurance provisions of their collective bargaining agreement for the calendar year 2009.” To amend means “to alter ... formally by adding or deleting a provision or by modifying the wording.” BLACK'S LAW DICTIONARY, 80 (7<sup>th</sup> ed., 1999). A plain reading of the 2009 amendment demonstrates two distinct changes from the original collective bargaining agreement.

\*6 First, the 2009 amendment specifically lists in dollar amount contributions of both the employer and employees to health insurance premiums, and those amounts are not tied to a formula that allows the amount paid to vary. Stated another way, both the employer and employee knew that for calendar year 2009 the amount paid would not vary from the amount specified in the amended agreement. This is in stark contrast to the original language of the collective bargaining agreement, which set forth only the employer's contribution amount, and contained a formula that limited the amount the employer was bound to pay for the following year of the agreement.

Second, while subsection 1.b. of the original agreement required employees to pay the “remaining share” of health insurance premiums beyond the fixed amount that the employer was required to pay no matter what the amount was, the 2009 amendment did not include similar language. Thus, while the original collective bargaining language fixed the employer's contribution to a specific amount that would increase by only a specific percentage over what was paid in the previous year, the 2009 amendment fixed *both* the employer's and employee's contributions to a specific amount.

These facts, examined together, are distinguishable from the facts presented in both the *City of Mukilteo* and *Snohomish County* decisions. If this employer and union intended to fix the employer's contribution to a specific amount while at the same time requiring employees to cover all additional increases for health insurance benefits, they would have explicitly stated so in the amended agreement in a manner similar to the original agreement. The changes and omissions to the contractual language from 2008 to 2009 are significant and material changes that altered the employer's and employee's obligations in the event the contract expired. In this manner, the language of the instant case is similar to the *Lewis County* case in that both the employer and employees have fixed contributions.

Having determined that the 2009 amendment represents the status quo and required the employer and employee to pay the specific amounts referenced in that agreement, we next turn to the question of whether the employer maintained the status quo.

#### The Unilateral Change

In this case, the record clearly demonstrates that although the employer maintained the level of health insurance benefits provided to employees upon expiration of the agreement, the premium for those benefits increased above what those same benefits cost in 2009, and the employer passed the entire cost of the increase on to the employees. Accordingly, by unilaterally altering the status quo without first bargaining in good faith to impasse and seeking interest arbitration, the employer committed an unfair labor practice.

#### Remedy

The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change, making employees whole for any loss of wages, benefits, or working conditions as a result of the employer's unlawful act, posting a notice of the violation, and reading that 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 order also instructs the employer to cease and desist from making unilateral changes to mandatory subjects of bargaining unless the employer first provides the complainant union with notice of proposed changes and the opportunity to bargain over the proposed changes. 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. *Lewis County*, Decision 10571-A.

\*7 In *Lewis County*, this Commission held that in certain cases where a unilateral change violation has been found, the factual circumstances may dictate a remedial order different from the regular status quo remedy in order to effectuate the purposes of statute. This is such a case.

The Examiner found that the fixed contributions of both the employer and employees created a conundrum because premium costs have increased over the 2009 cost, thus raising the question of which party will be responsible for the excess costs. Because an exact maintenance of the 2009 status quo would result in an inadequate amount of funding for the level of health insurance benefits, the Examiner held that the specific amounts paid by the employer and employees under the various plans outlined in the 2009 amendment should be converted to percentages and then be applied to the 2010 rate. The employer is also required to refund each employee the amount he or she paid above that percentage beginning

with the December 2009 paycheck.

We find that the ordered remedy is tailored in such a fashion to respect the agreed upon amendment while at the same time recognizing that both the employer and employees need to pay an increased premium rate in order to prevent employees' health insurance from lapsing. Accordingly, the ordered remedy is appropriate for this case.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Lisa A. Hartrich are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 10<sup>th</sup> day of August, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Marilyn Glenn Sayan  
Chairperson

Pamela G. Bradburn  
Commissioner

Thomas W. McLane  
Commissioner

2011 WL 3563058 (Wash.Pub.Emp.Rel.Com.)

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