



DECISIONS

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DECISIONS

Whatcom County, Decision 13082-A (PECB, 2020)

Collection: **DECISIONS**

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Statute: **PECB – RCW 41.56**

Whatcom County, Decision 13082-A (PECB, 2020)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHATCOM COUNTY DEPUTY SHERIFF'S
GUILD,

Complainant,

vs.

WHATCOM COUNTY,

Respondent.

CASE 131286-U-19

DECISION 13082-A - PECB

DECISION OF COMMISSION

Derrick Isackson and Erica Shelley Nelson, Attorneys at Law, Vick, Julius, McClure, P.S., for the Whatcom County Deputy Sheriff's Guild.

Daniel A. Swedlow and Laura Y. Davis, Attorneys at Law, Summit Law Group PLLC, for Whatcom County.

Jacob Metzger, Attorney at Law, Douglas, Drachler, McKee & Gilbrough, amicus curiae on behalf of SEIU 1199NW.

The Whatcom County Deputy Sheriff's Guild (union) filed an unfair labor practice complaint alleging that Whatcom County (employer) unilaterally changed wages of uniformed personnel when it began deducting Paid Family Medical Leave (PFML) premiums from those wages on January 4, 2019. The Unfair Labor Practice Administrator issued a preliminary ruling. The employer filed an answer and admitted many of the facts the union alleged.

The employer filed a motion for summary judgement arguing that Washington's Paid Family Medical Leave Act (PFMLA) created a new status quo and the employer did not unilaterally change wages. The union filed a response and cross-motion for summary judgment arguing the status quo was the existing wages at the time the PFMLA went into effect and the employer unilaterally changed wages.

Examiner E. Matthew Greer found that there were no disputed material facts precluding summary judgment. *Whatcom County, Decision 13082 (PECB, 2019)*. He concluded that the PFMLA established a statutory "premium sharing apportionment" procedure in RCW 50A.10.030(3). Because the parties did not negotiate an apportionment formula different than the one allowed by statute before finalizing their December 5, 2017, through December 31, 2019, collective bargaining agreement, the Examiner held that the "apportionment outlined in the law became the status quo" effective January 1, 2019, when the employer was required by RCW 50A.10.030 to begin remitting premiums to the Employment Security Department. The Examiner reasoned that because the employer adhered to this statutory status quo, and apportioned the PFMLA premium between the employer and the bargaining unit employees in a manner permitted by RCW 50A.10.030(3), the employer did not unilaterally change wages without bargaining in violation of RCW 41.56.140(4) and (1). He dismissed the complaint. The union appeals.

ISSUE

The issue before the Commission is whether the employer refused to bargain by unilaterally implementing the maximum employee premiums for Paid Family Medical Leave without providing the union an opportunity to bargain.

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We reverse the Examiner's decision that the employer did not unilaterally implement employee PFML deductions. The PFMLA did not create a new status quo. The status quo was the wages and terms and conditions of the collective bargaining agreement in effect before the employer implemented the PFML contributions. The bargaining unit is eligible for interest arbitration. Therefore, before the employer could implement the PFML premiums, the employer was required to give notice to the union and, upon request, bargain in good faith to an agreement or impasse. In the event the parties reached an impasse, they were statutorily required to pursue the issue through mediation, and, if necessary, interest arbitration. By unilaterally implementing the employee PFML contributions, the employer refused to bargain and violated RCW 41.56.140(4).

BACKGROUND

In 2017, the legislature enacted Washington's Paid Family Medical Leave Act. Laws of 2017, 3rd Spec. Sess., ch. 5 § 1. The PFMLA provides eligible employees with compensation for qualifying medical or family events, such as the birth of a child. The PFMLA went into effect on October 17, 2019. Employers were not required to begin reporting premiums until January 2019. Employers and unions were not required to reopen collective bargaining agreements in effect on October 19, 2017. RCW 50A.05.090.

RCW 50A.10.030 identified the premiums to be assessed by the Employment Security Department (ESD) for the period of January 1, 2019–December 31, 2020:

(1)(a) Beginning January 1, 2019, the department shall assess for each individual in employment with an employer and for each individual electing coverage a premium based on the amount of the individual's wages subject to subsection (4) of this section.

(b) The premium rate for family leave benefits shall be equal to one-third of the total premium rate.

(c) The premium rate for medical leave benefits shall be equal to two-thirds of the total premium rate.

...

(3)(a) Beginning January 1, 2019, and ending December 31, 2020, the total premium rate shall be four-tenths of one percent of the individual's wages subject to subsection (4) of this section.

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

(c) For medical leave premiums, an employer may deduct from the wages of each employee up to forty-five percent of the full amount of the premium required.

(d) An employer may elect to pay all or any portion of the employee's share of the premium for family leave or medical leave benefits, or both.

Negotiations

The employer and union had a collective bargaining agreement effective from December 5, 2017, through December 31, 2019. The collective bargaining agreement did not address the PFML premiums.

On November 9, 2018, the employer sent employees a benefit alert stating the employer "intend[ed] to deduct the employee portion" from employees' wages on January 4, 2019.^[1] After receiving this notice, the union requested bargaining.

The parties met to negotiate another matter on November 27, 2018, and discussed the PFML premium. The union proposed the employer pay the employees' premium. The employer proposed the employees pay the employee premium as outlined in RCW 50A.10.030(1) and (3). The parties did not reach an agreement on the PFML premiums. On January 4, 2019, the employer began deducting the maximum employee premium as provided in RCW 50A.10.030 from employees' wages.

On January 16, 2019, Union President Steven Harris e-mailed HR Associate Manager Nan Kallunki.^[2] Harris demanded the employer return to the status quo and cease payroll deductions until the parties reached an agreement. On January 23, 2019, Kallunki responded that the status quo was the "default split as outlined in the statute."^[3] The employer was willing to meet and negotiate the effects of the new tax.^[4] The union filed the unfair labor practice complaint on February 1, 2019.

ANALYSIS

Applicable Legal Standards

Standard of Review

The standard of review on summary judgment is de novo. *Washington Federation of State Employees v. State of Washington*, 127 Wn.2d 544, 551 (1995); *Kiona-Benton City School District (Kiona Benton Education Association)*, Decision 11862-A. On review, the Commission performs the same inquiry as the Examiner. *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 694 (2013); *Kiona-Benton City School District (Kiona Benton Education Association)*, Decision 11862-A. On appeal, the issue is whether there are any genuine issues of material fact that would contravene the motion for summary judgment. *Jacobsen v. State of Washington*, 89 Wn.2d 104, 108 (1977); *Cowlitz County*, Decision 12483-A (PECB, 2016).

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining, which includes "wages, hours and working conditions." RCW 41.56.030(4).

Unilateral Change

The parties' collective bargaining obligation requires that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or a term of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, *City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). To prove a unilateral change, the complainant must establish that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). The complainant must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990).

Whatcom County, Decision 13082-A (PECB, 2020); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587), Decision 2746-B (PECB, 1990)*; *King County, Decision 4893-A (PECB, 2007)* (citing *King County, Decision 4893-A (PECB, 1995)*).

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees before making the decision. *Lake Washington Technical College, Decision 4721-A (PECB, 1995)*. To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System, Decision 6058-A (PECB, 1998)*. Formal notice is not required; however, in the absence of formal notice, it must be shown that the union had actual, timely knowledge of the contemplated change. *Id.*

The Commission focuses on the circumstances as a whole to assess whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System, Decision 6058-A*. If the employer's action has already occurred when the employer notifies the union (a *fait accompli*), the notice would not be considered timely and the union would be excused from the need to demand bargaining. *Id.* If the union was adequately notified of a contemplated change at a time when there was still an opportunity for bargaining that could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, then a *fait accompli* will not be found. *Lake Washington Technical College, Decision 4721-A*.

When the bargaining unit is eligible for binding interest arbitration, the employer may not unilaterally implement its desired change to a mandatory subject of bargaining without bargaining to impasse and obtaining an award through interest arbitration. *Snohomish County, Decision 9770-A (PECB, 2008)*. Interest arbitration is applicable when an employer desires to make a midterm change to a mandatory subject of bargaining. *City of Yakima, Decision 9062-A (PECB, 2006)*; *City of Yakima, Decision 11352-A (PECB, 2013)*.

Application of Standards

The Case Was Appropriately Decided on Summary Judgment

The union filed an unfair labor practice complaint alleging that on January 4, 2019, the employer refused to bargain by unilaterally implementing employee payroll deductions for the employee PFML premium. The employer filed an answer and admitted many of the relevant facts. The employer filed a motion for summary judgment asserting that there were no disputed material facts. The union filed a cross-motion for summary judgment. The facts presented in the complaint, answer, and motions for summary judgment do not raise a question of material fact. Therefore, summary judgment is appropriate.

The Employer Unilaterally Changed Employees' Wages When the Employer Began Deducting the Maximum Employee PFML Premium

The employees in the bargaining unit are uniformed personnel eligible for interest arbitration. RCW 41.56.030(13); *Whatcom County, Decision 7244-B (PECB, 2004)*. Accordingly, the employer and union are subject to the procedures for collective bargaining and impasse resolution in RCW 41.56.430 through .470. For interest arbitration-eligible employees, an employer may not change a mandatory subject of bargaining unless the parties reach a negotiated agreement or fulfill their collective bargaining obligations, including proceeding to mediation and, if necessary, interest arbitration.

To prove a unilateral change, the union must establish the status quo. See *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587), Decision 2746-B (PECB, 1990)*. In the instant case, the Examiner concluded that the PFMLA created a new status quo. *Whatcom County, Decision 13082*. On appeal, the union argued that RCW 50A.05.090 did not create a new status quo requiring the employees to pay the maximum employee premium. The union argued that before January 4, 2019, the employees were not paying PFML premiums and that was the status quo. The employer supported the Examiner's decision. The amicus curiae brief argued that the status quo was the wages that existed before the employer began deducting the employee share of the PFML premium.

The term "status quo" refers to the existing collective bargaining relationship between the parties. The status quo is established by the parties' collective bargaining agreement or by established practice. *Walla Walla County, Decision 11877 (PECB, 2013)*. Here, before the employer began deducting partial PFML premiums from their wages, employees received their full pay as set out in the collective bargaining agreement. Therefore, the wages the parties had negotiated in the 2017–19 collective bargaining agreement were the status quo.

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

The Examiner correctly determined that that deduction of PFML premiums bore on the matter of wages and was therefore a mandatory subject of bargaining. Employees' wages are a mandatory subject of bargaining. RCW 41.56.030(4). Wages broadly encompasses every form of compensation for labor performed, including alternative forms of compensation, such as insurance, and agreements on how compensation is delivered. *City of Auburn, Decision 455 (PECB, 1978)* (finding the employer refused to bargain when it changed the payday); *Island County, Decision 5388 (PECB, 1995)* (finding insurance benefits are a mandatory subject of bargaining); *Benton County, Decision 12920-A (PECB, 2019)* (finding the employer refused to bargain over changes to deferred compensation). Employee contributions to PFML premiums are similar to employee contributions to health and other insurance premiums. Employees, through their unions, must agree to divert wages to these other benefits. The deduction of PFML premiums reduces employees' wages and is therefore a mandatory subject of bargaining. As such, the employer was not permitted to change employees' wages without first notifying the union and providing an opportunity to bargain and either negotiating to an agreement or pursuing the issue through mediation and interest arbitration. The employer altered the status quo and reduced wages by the amount of the PFML premium it unilaterally deducted from bargaining unit member wages beginning in 2019.

The employer argues that paying the employee PFMLA contribution would be an unlawful unilateral increase in employees' wages. This overlooks the fact that the employer's bargaining obligation requires it to maintain the status quo as defined in the collective bargaining agreement. The wages due under the agreement do not include a deduction for PFML premiums. Continuing to pay full wages required by the collective bargaining agreement can in no sense be deemed a unilateral breach of the contractual status quo. A contrary holding would stand the status quo concept on its head.

On November 9, 2018, the employer notified the union that it would begin deducting the employee PFML contributions. The union made a timely demand for bargaining. The parties met once and negotiated employee PFML premiums but did not reach agreement or impasse. No further negotiations occurred. Neither party requested mediation. The Executive Director did not certify the matter to interest arbitration. The parties did not arbitrate the issue. The employer did not receive an award from an interest arbitrator before it implemented the employee contribution to the PFML premium. By implementing the maximum employee PFML premium contribution, the employer did not fulfill its statutory obligation.

By unilaterally deducting premium payments from bargaining unit member wages without fulfilling its obligation to properly notify the union of its intent and without providing an opportunity to either negotiate to an agreement or pursue the issue through mediation and binding interest arbitration, the employer breached RCW 41.56.140(4) and (1).

The Union Did Not Waive Its Right to Bargain

The employer pled the affirmative defense of waiver by conduct. In this case, the employer notified the union at a time when the parties could still bargain. The union requested bargaining. The parties negotiated the matter on November 27, 2018. On January 16, 2019, the union requested the employer return to the status quo and not deduct the premiums until the parties reached an agreement. The employer implemented its decision without fulfilling its bargaining obligation. The union did not waive its right to bargain when it requested bargaining, and the employer implemented its decision before completing bargaining.

A Make-Whole Remedy Is Appropriate

Chapter 41.56 RCW is remedial in nature, and its "provisions should be liberally construed to effect its purpose." *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101, 109 (1978). The Commission has authority to issue appropriate orders that, in its expertise, the Commission "believes are consistent with the purposes of the act, and that are necessary to make its orders effective unless such orders are otherwise unlawful." *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621, 634-35 (1992). See also *Snohomish County*, Decision 9834-B (PECB, 2008). The standard remedy for an unfair labor practice violation orders the offending party to cease and desist and, if necessary, restore the status quo; make employees whole; post notice of the violation; and publicly read the notice and orders the party to bargain from the status quo. *City of Anacortes*, Decision 6863-B (PECB, 2001).

Commission orders must return the affected employees to the position they occupied before the unilateral change. In this case, it is necessary to make whole the employees for the employee PFML premiums the employer deducted from employee paychecks before complying with its statutory bargaining obligation. We will order the employer to reimburse employees for the employee PFML premiums the employer deducted before fulfilling its bargaining obligation.

CONCLUSION

The employee contribution to the PFML premium, like an employee contribution to a health care premium, is a subject that is well suited to collective bargaining. The statute, as written, gave the employer options for the amount of premiums to pay on behalf of the employees. Because deducting any premium from the employees' wages would impact wages, a mandatory subject of bargaining, the employer was required to give notice to the union before making a decision and provide an opportunity to bargain the decision and effects of the decision. The employees in the bargaining unit are uniformed personnel; therefore, the employer was required to engage in the statutory impasse procedures, including mediation and, if necessary, interest arbitration before implementing the change.

The status quo was the existing employees' wages as defined in the collective bargaining agreement. The PFMLA did not change the status quo. The employer gave the union notice of its decision to implement the employee share of the PFML premium. The parties discussed the issue once but did not reach agreement. Because the bargaining unit is eligible for interest arbitration, the employer was obligated to negotiate to an agreement before implementing a change to employees' wages. If the parties were unable to reach a negotiated agreement, they were required to submit to mediation and, if necessary, binding interest arbitration. The employer implemented the employee share of the PFML premium before negotiating to an agreement or pursuing the matter through mediation or binding interest arbitration. Therefore, the employer refused to bargain and violated RCW 41.56.140(4).

FINDINGS OF FACT

Findings of fact 1, 2, 3, 7, and 9 are AFFIRMED and adopted as the findings of fact of the Commission. Findings of fact 4, 5, 6, and 8 are VACATED. The following findings of fact are substituted, and the affirmed findings of fact are renumbered:

1. Whatcom County is a public employer within the meaning of RCW 41.56.030(12).
2. The Whatcom County Deputy Sheriff's Guild (union) is a bargaining representative within the meaning of RCW 41.56.030(2). The union represents a bargaining unit of all fully commissioned law enforcement officers up through the rank of sergeant who are employed by Whatcom County.
3. Whatcom County and the union are parties to a collective bargaining agreement that went into effect on December 5, 2017, and expired on December 31, 2019.
4. On October 19, 2017, the law creating the new paid family and medical leave benefit went into effect. In part, the law requires premiums for the paid family medical leave benefit to start being paid in January 2019. The premium amount is tied to employees' wages. For 2019 and 2020, the premium is set at four-tenths of one percent of employees' wages.
5. On November 9, 2018, Whatcom County emailed its employees, including those represented by the union, informing them that the employee share of the paid family medical leave premium would be deducted from their paychecks in January 2019. The union informed Whatcom County that it objected to the deduction of the employee share of the premium from paychecks and demanded to bargain.
6. The parties discussed the premium issue on November 27, 2018, but did not come to agreement.
7. In January 2019, Whatcom County proceeded to deduct the employee share of the premium.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction under chapter 41.56 RCW and chapter 391-45 WAC.
2. As described in findings of fact 4 through 7, Whatcom County refused to bargain and violated RCW 41.56.140(4) and (1) when it deducted paid family and medical leave premiums from employees' paychecks beginning in January 2019.

ORDER

Whatcom 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 employee share of the paid family and medical leave premiums from employees' paychecks.
 - b. Failing or refusing to bargain in good faith with the Whatcom County Deputy Sheriff's Guild over the decision to deduct the employee share and the amount of employee premiums for the paid family and medical leave premium.
 - c. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.56 RCW:
 - a. Give notice to and, upon request, negotiate in good faith with the Whatcom County Deputy Sheriff's Guild, including mediating and pursuing interest arbitration if necessary, before implementing the employee paid family and medical leave premium.
 - b. Make employees whole by reimbursing employees for any employee PFML premiums deducted from their wages beginning January 4, 2019. Back pay shall be computed in conformity with WAC 391-45-410.
 - c. Restore the *status quo ante* by reinstating the wages, hours, and working conditions that existed for the employees in the affected bargaining unit prior to the unilateral change that occurred when the employer began deducting the maximum employee contribution to the paid family and medical leave premium found unlawful in this order.
 - d. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.
 - e. Read the notice provided by the compliance officer into the record at a regular public meeting of the Whatcom County Council, 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.
 - f. 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.
 - g. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 12th day of May, 2020.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

KENNETH J. PEDERSEN, Commissioner

[1] Union's Response to County's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Declaration of Steven Harris, Attachment A.

[2] Union's Response to County's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Declaration of Steven Harris, Attachment B.

[3] *Id.*

[4] *Id.*

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