

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF
STATE EMPLOYEES,

Complainant,

vs.

UNIVERSITY OF WASHINGTON,

Respondent.

CASE 22273-U-09-5681

DECISION 10726-A - PSRA

DECISION OF COMMISSION

Younglove & Coker, P.L.L.C., by *Edward Earl Younglove III*, Attorney at Law,
for the union.

Attorney General Robert M. McKenna, by *Mark K. Yamashita*, Assistant
Attorney General, for the employer.

This case comes before the Commission on a timely appeal by the University of Washington (employer) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Christy Yoshitomi.¹

ISSUES

1. Did the employer refuse to bargain when it unilaterally ceased payment of market adjustment increases to skilled trade employees and increases in the shift differential to other employees in the bargaining unit?
2. Can this Commission order the employer to pay interest on back pay awards?

¹ *University of Washington*, Decision 10726 (PECB, 2010).

We affirm the Examiner. The employer refused to bargain when it unilaterally ceased mid-term contract wage increases without providing the union an opportunity to bargain. This Commission has the authority to order the employer to pay interest on judgments against it.

SUMMARY OF FACTS

The 2007-2009 collective bargaining agreement between the employer and the union contained an agreement to conduct a market survey of custodial employees' shift differential and implement any increase no later than July 1, 2007. The term of the collective bargaining agreement was from July 1, 2007 to June 30, 2009. In the spring of 2008, Phyllis Naiad, a union representative, approached the employer about increasing the shift differential as provided in the 2007-2009 collective bargaining agreement. On July 3, 2008, Gene Woodard, Director of Custodial Services, sent a letter to the swing shift and graveyard shift custodial staff. Woodard informed employees that effective July 1, 2008, employees received an increase in the shift differential from 65 cents to \$1 per hour.

Sometime in 2008, the parties began negotiating a successor collective bargaining agreement to be effective July 1, 2009. During bargaining, the parties agreed to amend the collective bargaining agreement and provide wage increases to be effective 30 days after the union ratified the 2009-2011 collective bargaining agreement. Certain skilled trades employees received a wage increase. All employees who were not receiving a \$1 shift differential received an increase to a \$1 shift differential. Employees received these increases on November 1, 2008.

Pursuant to RCW 41.80.010, the employer submitted the 2009-2011 collective bargaining agreement to the Office of Financial Management (OFM) for a determination of financial feasibility. On December 18, 2008, OFM notified the union that the collective bargaining agreement was not financially feasible. On December 29, 2008, Lou Pisano, Assistant Vice President of Labor Relations for the employer, received the letter from OFM that the 2009-2011 collective bargaining agreement was not financially feasible.

During the week of January 23, 2009, the employer's management group met. On January 23, 2009, the employer decided to withdraw the wage increases granted on July 1 and November 1,

2008. That day, Pisano telephoned Naiad and informed her of the employer's decision to withdraw the wage increases on January 31, 2009. Pisano sent Naiad a letter consistent with their conversation.

APPLICABLE LEGAL PRINCIPLES

Duty to Bargain in Good Faith

RCW 41.80.005(2) defines collective bargaining as:

the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. The obligation does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter.

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

The Status Quo Must be Maintained

The status quo ante must be maintained regarding all mandatory subjects of bargaining, except where changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, *City of Yakima v. IAFF 469*, 117 Wn.2d 655 (1991). A complainant alleging a "unilateral change" must establish the relevant status quo. *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1989). An employer commits an unfair labor practice under RCW 41.80.110(1)(e) if it changes an existing term or condition of employment, or if it imposes a new term or condition of employment upon its represented employees, without having exhausted its bargaining obligation under Chapter 41.80 RCW. *University of Washington*, Decision 10608-A (PSRA, 2011), *citing City of Tacoma*, Decision 4539-A (PECB, 1994). An employer also violates RCW 41.80.110(1)(e) if it presents an exclusive bargaining representative with a *fait accompli*, or if it

fails to bargain in good faith upon request. *Federal Way School District*, Decision 232-A (EDUC, 1977).

In *City of Dayton*, Decision 2111-A (PECB, 1984), the employer agreed to remove an employee from the bargaining unit, but keep the employee's wages above bargaining unit levels until a certain time. The union agreed to the grandfathered wages, but not to the period of time. Seven months after adding the employee to the bargaining unit, the employer unilaterally lowered the employee's wages, consistent with its original proposal. The parties had altered the status quo when they agreed the employee would be paid higher than bargaining unit wages. Then the employer had a duty to bargain its reduction in wages, which became a deviation from the altered status quo. *City of Seattle*, Decision 651 (PECB, 1979).

ANALYSIS

The collective bargaining agreement establishes the status quo for the life of the agreement, absent a negotiated change or change made in conformity with the agreement. When an employer implements a negotiated wage increase during the term of the agreement, the status quo is altered. The employer created a new status quo when it implemented the increased shift differential for custodial employees on July 1, 2008; the increased shift differential for other employees on November 1, 2008; and the market adjustment for certain skilled trades employees on November 1, 2008. The fact that the November 1 wage increases were part of the tentative agreement for the 2009-2011 collective bargaining agreement does not excuse the employer's unilateral withdrawal of the increases. Parties may negotiate mid-term collective bargaining agreement changes, which become the status quo unless altered by agreement.

When the employer increased the shift differential and implemented the market adjustment, the employer altered the status quo in conformity with its bargaining obligation because it negotiated with the union and implemented the wage increases in conformity with the agreement. The status quo for wages became the \$1 shift differential and the increased wages for skilled trades employees.

Employers are required to provide notice and an opportunity to bargain prior to making a change to a mandatory subject of bargaining. Wages are a mandatory subject of bargaining. *Federal Way School District*, Decision 232-A. The employer was required to provide the union with notice that it intended to cease paying the increased shift differential and the increased skilled trades wages and provide the union with an opportunity to bargain prior to making the change. The employer unilaterally changed the status quo. The employer presented its decision to rescind the mid-term wage increases as a *fait accompli*; therefore, the union was excused from requesting bargaining.

Remedy

In its brief, the employer requested a declaratory ruling on whether the employer, as a state institution, may be ordered to pay interest on a back pay remedy. The employer argues that the Examiner and this Commission cannot order a remedy that includes prejudgment interest absent the employer waiving its sovereign immunity and objecting to the rate of interest imposed. The employer's request for a declaratory ruling is denied.² The Examiner properly ordered interest to accrue on the back pay remedy.

A party seeking a declaratory order must file its request in accordance with WAC 391-08-520. By raising its request in its appeal brief, we note that the employer did not properly request a declaratory order.

This Commission derives its authority to remedy unfair labor practices from Chapter 41.80 RCW.

RCW 41.80.120 UNFAIR LABOR PRACTICE PROCEDURES –
POWERS AND DUTIES OF COMMISSION. (1) The commission is
empowered and directed to prevent any unfair labor practice and to issue
appropriate remedial orders: PROVIDED, That a complaint shall not be processed
for any unfair labor practice occurring more than six months before the filing of

² The employer asserts that Chapter 4.92 RCW, which governs tort actions and claims against the state, applies to the Commission. Chapter 4.92 RCW applies to tortious conduct. This Commission derives its authority from Chapter 41.80 RCW, not from Chapter 4.92 RCW. An unfair labor practice is not a tortious act. Unfair labor practices are statutorily created by RCW 41.80.110. Allegations of an unfair labor practice are statutory violations, not torts. Chapter 4.92 RCW does not govern remedies granted under Chapter 41.80 RCW. Remedies for unfair labor practice complaints are governed by Chapter 41.80 RCW and Chapter 391-45 WAC.

the complaint with the commission. 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.

(2) If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.

The Commission's rules establish unfair labor practice remedies.

WAC 391-45-410 UNFAIR LABOR PRACTICE REMEDIES – BACK PAY. If an unfair labor practice is found to have been committed, the commission or examiner shall issue a remedial order. In calculating back pay orders, the following shall apply:

(3) Money amounts due shall be subject to interest at the rate which would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of the payment.

Generally, to be liable for pre-judgment interest on back pay awards, the state must impliedly or expressly waive sovereign immunity. *Architectural Woods, Inc. v. State*, 92 Wn.2d 521 (1979). However, court decisions discussing waiver of sovereign immunity and pre-judgment interests on remedies have analyzed statutes distinct from Chapter 41.80 RCW.

Chapter 41.56 RCW is remedial in nature. *International Association of Firefighters Local 469 v. City of Yakima*, 91 Wn.2d 101, 109 (1978). When interpreting the Commission's remedial authority under Chapter 41.56 RCW, the Supreme Court of the State of Washington approved a liberal construction of the statute to accomplish its purpose, and the Supreme Court interpreted the statutory phrase "appropriate remedial orders" as including those remedies necessary to effectuate the purposes of the collective bargaining statute and to make the Commission's lawful orders effective. *METRO v. Public Employment Relations Commission*, 118 Wn.2d 621, 633 (1992). The language of RCW 41.56.160, governing the authority of the Commission to remedy unfair labor practices, is identical to the language of RCW 41.80.120.

This Commission has remedial authority granted under Chapter 41.80 RCW. When it enacted Chapter 41.80 RCW, the Legislature granted this Commission the same remedial authority to remedy unfair labor practices that the Legislature granted under Chapter 41.56 RCW. WAC

391-45-410(3) was in effect at the time the Legislature enacted Chapter 41.80 RCW, and the Commission had applied interest on back pay remedies. The Legislature could have exempted the employer from the requirement to pay interest on back pay awards from the date of the violation, but it did not. The Legislature also could have placed limitations on this Commission's ability to remedy unfair labor practices. The Legislature impliedly waived the state's sovereign immunity when it enacted Chapter 41.80 RCW and granted this Commission broad remedial authority.

In this case, the union sought an award of back pay and interest to remedy the alleged unfair labor practice. As the Examiner correctly found, the employer unilaterally changed the status quo, thereby opening itself up to liability for its actions. In conformity with the Commission's rule, the Examiner ordered the employer to pay back pay and interest from the date of the violation. WAC 391-45-410(3).

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Christy Yoshitomi are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 15th day of March, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


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PAMELA G. BRADBURN, Commissioner


THOMAS W. McLANE, Commissioner



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PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER: 22273-U-09-05681 FILED: 02/13/2009 FILED BY: PARTY 2
DISPUTE: ER MULTIPLE ULP
BAR UNIT: MIXED CLASSES
DETAILS: Harborview Medical Center See case 22436-S-09-0099
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