State – Adult Family Home Providers (Washington State Residential Care Council), Decision 12345 (PECB, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE RESIDENTIAL CARE COUNCIL, Complainant, vs. STATE – ADULT FAMILY HOME PROVIDERS, Respondent.	CASE 26687-U-14-6801 DECISION 12345 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
STATE – ADULT FAMILY HOME PROVIDERS, Complainant, vs. WASHINGTON STATE RESIDENTIAL CARE COUNCIL, Respondent.	CASE 26692-U-14-6802 DECISION 12346 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cline & Casillas, by *Christopher J. Casillas*, Attorney at Law, and *Erica Shelley Nelson*, Attorney at Law, for the Washington State Residential Care Council.

Attorney General Robert W. Ferguson, by *Margaret M. Kennedy*, Assistant Attorney General, and *Courtlan P. Erickson*, Assistant Attorney General, for the State – Adult Family Home Providers.

On August 18, 2014, the Washington State Residential Care Council (union) filed an unfair labor practice complaint against the Office of Financial Management – Department of Social and Health Services – Adult Family Homes (employer). The union alleged the employer refused to bargain and interfered with employee rights. On August 19, 2014, the employer filed an unfair labor practice complaint against the union. The employer alleged the union refused to bargain by

insisting to impasse and advancing to arbitration nonmandatory subjects of bargaining. On August 20, 2014, the Unfair Labor Practice Manager issued a deficiency notice to the employer for its August 19 complaint. On August 21, 2014, the employer filed an amended complaint to remedy the deficiency.

On August 22, 2014, the Unfair Labor Practice Manager consolidated the union and employer's complaints and issued preliminary rulings for the complaints stating a cause of action existed. Additionally, on August 22, 2014, the Executive Director suspended the determination of the alleged nonmandatory subjects of bargaining while the unfair labor practice complaint was pending. Examiner Emily Whitney held a three day hearing on November 25 and 26, and December 17, 2014. On February 27, 2015, the parties submitted post-hearing briefs to complete the record.

ISSUES

As framed by the preliminary rulings, the issues presented by the parties are as follows:

1. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by failing to give the union timely notice under WAC 391-55-265 concerning alleged nonmandatory subjects of bargaining the union advanced to interest arbitration?

2. Did the union refuse to bargain in violation of RCW 41.56.150(4) and (1) by insisting to impasse and advancing to interest arbitration alleged nonmandatory subjects of bargaining?

3. Did the employer interfere with employee rights in violation of RCW 41.56.140(1) when the employer informed the union it would file an unfair labor practice complaint if the union did not withdraw alleged nonmandatory subjects of bargaining from interest arbitration as outlined in WAC 391-55-265?

4. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) when it delayed giving its full economic proposal to the union in contract negotiations?

The union failed to prove that the employer gave untimely notice under WAC 391-55-265 regarding the alleged nonmandatory subjects of bargaining. The employer failed to prove that the union advanced nonmandatory subjects of bargaining to interest arbitration. The union's proposals are mandatory subjects of bargaining and can be advanced to interest arbitration. The union failed to prove that the employer interfered with employee rights when it notified the union's attorney that it would file an unfair labor practice complaint if the union advanced the alleged nonmandatory subjects to interest arbitration. If a party advances nonmandatory subjects of bargaining to interest arbitration, the opposing party must notify the advancing party that it believes the issues are nonmandatory subjects of bargaining. If the issues are still advanced, the opposing party must file an unfair labor practice complaint prior to the conclusion of the interest arbitration proceeding under Chapter 391-45 WAC. The employer followed the steps laid out in the statute and thus it is unreasonable to perceive the employer's action as a threat to protected union activity. The union failed to prove that the employer refused to bargain by delaying its economic proposal during bargaining. Based on the totality of the circumstances, from the beginning the employer bargained the noneconomic proposals with the union, notified the union it would be delayed in providing the economic proposal, provided the economic proposal earlier than in prior years, and continued to bargain with the union until the parties were certified for interest arbitration.

BACKGROUND

The union represents adult family home providers as defined in RCW 41.56.030(1) who receive payments from the Medicaid and state-funded long-term care programs. The employer and union are parties to a collective bargaining agreement effective from July 1, 2013, through June 30, 2015. The parties began negotiations for the 2015-2017 collective bargaining agreement in May 2014. The employer was represented by Office of Financial Management Senior Labor Negotiator Christina Peterson, and the union was represented by attorney Christopher Casillas. The parties' negotiations for collective bargaining agreements are restricted by statute, and the results of the negotiations must be submitted to the Office of Financial Management no later than October 1 of the year prior to the collective bargaining agreement going into effect. The parties scheduled May

21, June 11 and 19, and July 10, 18, and 30, 2014, as negotiation dates and August 8, 2014, as a mediation date.

It is important to understand the process of how a client is placed into an adult family home. The employer assesses clients' needs using the CARE assessment tool, an electronic based assessment tool. Once the assessment is complete, a service summary and assessment detail document is produced. These documents explain the needs of the individual client. The completed assessment places the client within a classification. There are five main groups of classification (A, B, C, D, and E). There are three to four levels (low to high) within each group for a total of 17 classifications.

Once the assessment is complete, an available adult family home provider (provider) receives the assessment documents and, based on these documents, determines if he or she will be able to meet the needs of the client. If the provider is able to meet the client's needs, the client is then placed into that provider's adult family home. Within 30 days of entering an adult family home the provider and client develop a negotiated care plan, which states how the client's care will be provided. The provider then submits the negotiated care plan to a case manager who reviews it along with the service summary and assessment detail document and has final approval of the negotiated care plan.

Each Medicaid client the provider accepts is assigned a monetary base daily rate. Some clients are also assigned additional add-on rates based on their needs. The providers are paid these rates for the services and expenses incurred while caring for those clients. The union and employer bargain about these rates during negotiations for the collective bargaining agreement. There is no dispute that Medicaid clients' rates are lower than private-pay clients' rates. The union's 2014 proposals attempted to raise some of the existing rates and created additional rates.

After a client's rate is determined, if a case manager feels the CARE assessment tool has generated an inappropriate rate for a client, that case manager can access the exception to rule (ETR) process. The ETR process requires the case manager to describe the client's needs and the additional rate he or she believes is necessary to meet those needs. The employer reviews the request and

approves or denies it. If the employer approves the request, it gives the provider an additional rate of pay for the care of that client. The employer testified that the ETR process has not undermined the CARE assessment tool.

The parties first negotiated on May 21, 2014. During this negotiation session the union provided the employer with a complete economic and non-economic proposal. The parties spent the entire session discussing the various parts of the proposal. The union's proposal contained six relevant economic sections (six proposed add-ons) regarding (1) Article 7.1, Appendix B, pertaining to the capital add-on rate (capital add-on rate); (2) Article 7.2, Mileage Reimbursement (mileage reimbursement); (3) Article 7.3, Trip Fee (trip fee); (4) Appendix C, pertaining to two plus persons physical assist (two person assist); (5) Appendix C, pertaining to awake staff at night (awake at night); and (6) Appendix C, pertaining to mood and behavior for classifications C, D, or E (mood and behavior). A brief description of the six proposed add-ons is relevant.

Capital Add-on Rate: The union designed the capital add-on rate proposal after the Medicaid incentive rate in assisted living facilities. The proposal stated that the provider would receive an additional amount of money for accepting clients who are Medicaid clients if the provider had a 60 percent or greater Medicaid occupancy rate. The employer testified that this rate would not affect the CARE assessment tool. The union explained that providers receive a lower base daily rate for Medicaid clients than they receive for private-pay clients. The union was attempting to negotiate an incentive to help stabilize the providers' financial position with regard to Medicaid clients. The union believed that the capital add-on rate would pay providers for the services they were providing to Medicaid clients but were not being reimbursed for.

Mileage Reimbursement: The union designed the mileage reimbursement proposal to reimburse providers for driving clients to medical appointments when there was no other transportation provider identified in the CARE assessment documents or negotiated care plan. Currently, the providers are responsible for incurring the cost of transportation. Negotiated care plans identify clients' transportation needs, but some do not identify a provider. Transportation is provided to clients by the Medicaid Transportation Broker, which for various reasons some clients do not have

access to. If no other transportation is available, the provider is responsible for taking the client to medical appointments.

Trip Fee: The union designed the trip fee to reimburse providers for the cost of having additional employees on staff when clients need to be transported to medical appointments. Paying for employees' wages is an actual cost incurred by the provider. The provider has a duty to make sure all clients are cared for. Currently, if a client requires a provider to transport him or her to a medical appointment, the clients remaining in the home (who are not being transported) also need to be cared for. Because of this need the provider is required to schedule and pay for two different employees at one time: one employee provides the transportation and the other employee provides care to the clients remaining in the home.

Two Person Assist: The union designed the two person assist proposal to reimburse providers for the cost of hiring multiple employees to care for one individual. The current base rate does not change depending on how many employees are needed to care for each client. Some clients' CARE assessment documents and negotiated care plans identify the need for those clients to have a two person assist in order to complete certain tasks. For example, a client may need a two person assist for toileting, requiring two employees to assist that client in getting to and from the bathroom. This means that a provider must have two employees assigned to one client during the times that client requires a two person assist.

Awake at Night: The union designed the awake at night proposal to reimburse providers for the higher costs associated with clients needing staff who are awake at night. Adult family homes are required to have an employee present in the home at all times. For those homes that have clients that do not require awake at night staff, the employee is allowed to sleep during the night. The providers are able to pay those employees a lower rate because they are sleeping. For those homes that have clients that require awake at night staff, the provider is responsible for paying a higher rate to the employees who have to remain awake.

Mood and Behavior: The union designed the mood and behavior proposal to reimburse providers for costs associated with caring for clients with mood and behavior needs. Once a client is assessed

he or she is placed within a classification. The only classification which specifies mood and behavior is classification B. Classifications C, D, and E are considered higher levels of need than classification B, and clients in those classifications may or may not have mood and behavior needs. The union provided evidence that some clients in classifications C, D, or E require assistance from employees specially trained in certain behaviors. The providers incur a cost to have employees trained in these behaviors or may have to pay a higher wage for an employee who is already specially trained to deal with specific moods and behaviors.

After the first negotiation session, the parties negotiated five more times prior to mediation. On June 11, 2014, the parties negotiated for a second time. During this negotiation session the employer provided its non-economic proposal to the union. The employer also informed the union that it had intended to provide its economic proposal during the June 19 negotiation session; however, it would not be able to provide this proposal until July. The Office of Financial Management had just informed the employer that it needed to complete a 15 percent budget cut exercise in preparation for the 2015-2017 budget. The employer was attempting to determine its economic state while completing the budget exercise, and it needed more time to complete these tasks.

On June 19, 2014, the third negotiation session, the employer provided the union with information on how the CARE assessment tool was developed and how it assessed clients' needs. The employer explained how it believed the CARE assessment tool already captured the cost of the union's six proposed add-ons and could not pay for a client's needs twice, once in the base daily rate and additionally in the six proposed add-ons.

On July 10, 2014, the fourth negotiation session, the employer provided its economic proposal to the union. The proposal did not include any of the union's six proposed add-ons. The employer stated it would not be able to capture the union's six proposed add-ons in the current CARE assessment tool. However, the employer's proposal did include an increase in the base daily rate, other new rates, and add-on rates different than those the union proposed. During the negotiation the union provided the employer with a counterproposal which included lower rates for the original six proposed add-ons.

On July 18, 2014, the fifth negotiation session, the union provided another counterproposal. The union also clarified some of the other issues that were on the table. During this session the parties further discussed the union's six proposed add-ons. On July 30, 2014, the sixth negotiation session, the union and employer discussed more open issues, and the union continued to propose the six proposed add-ons.

On August 8, 2014, the parties met in mediation. The parties discussed all open issues and attempted to reach agreement on as many as possible to limit the number of issues they would advance to interest arbitration. At the end of the mediation the parties reviewed the remaining open issues and agreed to negotiate about a few of those issues in an attempt to settle them prior to interest arbitration. The parties continued these negotiations over the phone and by e-mail. The mediator remained available to help in the negotiations if necessary.

The parties continued to negotiate from August 8 through 15, 2014. The parties did not discuss the union's six proposed add-ons, but they did negotiate about other issues they had not yet reached agreement on. Before noon on August 15, 2014, Peterson called Casillas and notified him that she was sending the union some revised proposals on open issues. Peterson also notified Casillas that the employer believed the six proposed add-ons were nonmandatory subjects of bargaining, and if the union advanced those six proposed add-ons to interest arbitration, the employer would file an unfair labor practice complaint.

On August 15, 2014, at 2:27 p.m. the employer e-mailed the revised proposals to the union. At 3:39 p.m. the union sent the mediator its list of open issues to be certified to interest arbitration. The list included the six proposed add-ons. At 3:46 p.m. the employer sent an e-mail to the union saying that the parties had tentative agreements on the revised proposals the employer had sent to the union at 2:27 p.m. At 4:45 p.m. the employer submitted its list of issues to the mediator.

The Executive Director declared the parties were at impasse on August 18, 2014. Because the union advanced the six proposed add-ons to interest arbitration, the employer filed an unfair labor practice complaint. The Executive Director suspended the determination of the six proposed

add-ons in interest arbitration while the unfair labor practice complaint was pending. The parties held their interest arbitration on August 25 through 27, 2014.

ISSUE 1

Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by failing to give the union timely notice under WAC 391-55-265 concerning alleged nonmandatory subjects of bargaining the union advanced to interest arbitration?

Conclusion

The union failed to prove the employer provided untimely notice. The employer notified the union about its concern regarding the nonmandatory subjects during bilateral negotiations and prior to the issues being certified to interest arbitration.

Applicable Legal Standard

An interest arbitration eligible party, who believes that nonmandatory subjects of bargaining are being advanced to interest arbitration, has a duty to notify the opposing party of its belief. WAC 391-55-265. WAC 391-55-265(1)(a) states:

> A party which claims that a proposal being advanced to interest arbitration is not a mandatory subject of collective bargaining must communicate its concerns to the other party during bilateral negotiations and/or mediation. If the party advancing the proposal does not withdraw the proposal or modify it to eliminate the claimed illegality, the objecting party must file and process a complaint charging unfair labor practices under chapter 391-45 WAC prior to the conclusion of the interest arbitration proceedings.

If a party is unable to provide proof that it has provided the required notice, then the Commission will find a violation against the party who failed to comply with the statute. *Spokane International Airport*, Decision 7890-A (PECB, 2003). Even if a party fails to comply with the procedural rule in WAC 391-55-265, the failure to comply is not necessarily fatal to the unfair labor practice case. *Id.*

Analysis

The union argues that the employer did not provide the union with notice of its belief that the six proposed add-ons were nonmandatory subjects during bilateral negotiations or mediation because the parties had already reached impasse. The analysis begins with a determination of whether or not the parties continued to participate in bilateral negotiations or if they were at impasse. As stated in *Spokane International Airport*, "neither the declaration of impasse by one party or even the concurrence of both parties is conclusive as to whether an impasse actually exists. Rather, it is the statutory duty of the Executive Director . . . acting on recommendation of the mediator . . . to determine the existence of an impasse and to invoke interest arbitration . . . ."

In the present case the parties continued to have bilateral negotiations with the assistance of the mediator at the time the employer provided notice. The parties had negotiation sessions from May 21 through July 30, 2014. They also had a mediation session on August 8, 2014. At the end of the mediation the parties reviewed the list of issues that were not resolved. The mediator agreed to assist the parties with resolving a few of the remaining issues in an attempt to exclude those issues from interest arbitration. The continued discussions between the parties were negotiations during which they offered various proposals and counterproposals to each other and were able to agree on those issues prior to interest arbitration.

The employer did not notify the union of its belief that the six proposed add-ons were nonmandatory subjects of bargaining during any of the negotiation sessions or the mediation. Both parties testified that prior to the parties submitting their lists of issues for interest arbitration to the mediator, the employer notified the union that it believed the six proposed add-ons were nonmandatory subjects. While this notification came at the eleventh hour, it was provided within the appropriate time period according to the statute.

The union's argument that the parties were already at impasse is not persuasive. When the employer notified the union on August 15 that it believed the six proposed add-ons were nonmandatory subjects, the parties were still negotiating. As stated in *Spokane International Airport*, the Executive Director determines the existence of impasse. The Executive Director in the present case did not determine that the parties were at impasse and certify them for interest

arbitration until August 18, 2014, three days after the employer provided notice. Thus, the employer provided timely notice to the union.

ISSUE 2

Did the union refuse to bargain in violation of RCW 41.56.150(4) and (1) by insisting to impasse and advancing to interest arbitration alleged nonmandatory subjects of bargaining?

Conclusion

The union did not refuse to bargain by insisting to impasse and advancing to interest arbitration the six proposed add-ons the employer alleged were nonmandatory subjects of bargaining. The employer failed to prove the union's proposals modified the employer's ability to establish a plan of care for each client in violation of RCW 41.56.029. The six proposed add-ons relate to wages and are mandatory subjects of bargaining. Because the parties had reached impasse on those mandatory subjects, the union can advance them to interest arbitration.

Applicable Legal Standard

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). The Commission recently reiterated the duty to bargain in *City of Bellevue*, Decision 11435-A (PECB, 2013). The scope of bargaining under Chapter 41.56 RCW encompasses "grievance procedures and . . . personnel matters, including wages, hours and working conditions." RCW 41.56.030(4). Both Commission and judicial precedents identify three broad categories of subjects of bargaining: mandatory, permissive, and illegal. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450 (1997), *citing NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958); *Federal Way School District*, Decision 232-A (EDUC, 1977).

Mandatory subjects, including the "wages, hours and working conditions" of bargaining unit employees, are matters over which employers and unions must bargain in good faith. *City of Pasco*, 132 Wn.2d 460. It is an unfair labor practice for either the employer or union to fail or refuse to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4). Permissive subjects are management and union prerogatives, along with procedures for bargaining mandatory

subjects, over which the parties may negotiate, but each party is free to bargain or not to bargain, and to agree or not to agree. *City of Pasco*, 132 Wn.2d 460. Illegal subjects are matters that parties may not agree upon because of statutory or constitutional prohibitions. Neither party has an obligation to bargain such matters. *City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd*, 93 Wn. App. 235 (1998), *rev. denied*, 137 Wn.2d 1035 (1999).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the "relationship the subject bears to" the wages, hours, and working conditions of employees, and (2) the "extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 203 (1989) (*City of Richland*). The inquiry focuses on which characteristic predominates. *Id.* "The scope of mandatory bargaining thus is limited to matters of direct concern to employees" and "[m]anagerial decisions that only remotely affect 'personnel matters,' and decisions that are predominately 'managerial prerogatives,' are classified as nonmandatory subjects." *City of Richland*, 113 Wn.2d 200, *citing Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341 (1986).

When determining mandatory subjects, the Commission assesses whether the particular proposal directly impacts wages, hours or working conditions of bargaining unit employees. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197 (1989); *Whatcom County*, Decision 7244-B (PECB, 2004), *citing Lower Snoqualmie Valley School District*, Decision 1602 (EDUC, 1983).

A party can bargain to impasse and seek interest arbitration of a mandatory subject of bargaining. A party commits an unfair labor practice violation when it bargains to impasse a permissive subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338. Nonmandatory subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Id.* It is well established that if a subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not to bargain, and to agree or not to agree. *City of Pasco*, 132 Wn.2d 450; *Whatcom County*, Decision 7244-B.

Including a permissive subject of bargaining in a collective bargaining agreement does not render that subject mandatory. *See Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Bargaining procedures are not, themselves, mandatory subjects. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 341-342; *Whatcom County*, Decision 7244-B; *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012).

The statute applicable to the parties in this case limits the scope of collective bargaining for adult family home providers. RCW 41.56.029. One of the subjects the parties can bargain is "[e]conomic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements . . . and other economic matters." RCW 41.56.029(2)(c)(i) and (vi). The collective bargaining rights of the parties cannot "create or modify: (a) [t]he department's authority to establish a plan of care for each consumer or its core responsibility to manage long-term care services under chapter 70.128 RCW, including determination of the level of care that each consumer is eligible to receive." RCW 41.56.029(4)(a).

Analysis

The employer argues that the union's six proposed add-ons are nonmandatory subjects of bargaining and it was an unfair labor practice for the union to insist to impasse and advance them to interest arbitration. The employer also argues that five of the proposed add-ons – mileage reimbursement, trip fee, two person assist, awake at night, and mood and behavior – are permissive subjects of bargaining because they modify the employer's ability to establish a plan of care. The employer uses the CARE assessment tool to develop a plan of care. The employer alleged that it would be required to fundamentally change the CARE assessment tool, which is prohibited by RCW 41.56.029, to assess for the five proposed add-ons.

The employer cites *State – Office of Financial Management*, Decision 8761-A (PSRA, 2005), as evidence that RCW 41.56.029(4) limits the ability to bargain if the subject modifies the department's ability to establish a plan of care. Thus, because the six proposed add-ons modify the employer's ability to establish a plan of care, they are nonmandatory. In that case, the Commission affirmed the examiner's determination that the proposed subjects under the balancing test were mandatory, but when reviewed under the statute, were nonmandatory. The employer

was able to prove the subjects were nonmandatory because they modified the employer's authority to establish a plan of care.

The present case is distinguishable from *State – Office of Financial Management*, Decision 8761-A. The employer testified it would have to change the CARE assessment tool by taking out these five proposed add-ons and assessing them in a different way. It alleged this change in turn modifies the employer's ability to establish a plan of care. The employer's argument fails. The union was requesting a monetary reimbursement for services provided to clients under all five proposed add-ons. The union's proposals did not change the employer's authority to establish a plan of care. Once the employer assessed and established a plan of care for a client, there would be a monetary value attached to the employer's determined plan of care. The union's five proposed add-ons were the monetary value.

The employer's argument also ignores the fact that it already has a process that assesses individual needs outside of the CARE assessment tool. The employer uses the ETR process which provides for additional rates based on clients' individual needs. The employer testified that the ETR process does not undermine or change the CARE assessment tool. For example, if a case manager believes that a client needs a two person assist and the CARE assessment tool inappropriately designated a one person assist, the case manager can access the ETR process. The employer then reviews the request and if it is approved, the provider would receive an additional rate for the two person assist. If the parties then bargain about a rate of pay for this two person assist, that does not modify the employer's ability to establish a plan of care.

The employer's argument as it relates to the capital add-on rate differs slightly from the other five proposed add-ons. The employer argues that it is a nonmandatory subject because it relates to the employer's role in managing long-term care services. If the employer was required to bargain over the capital add-on rate, its ability to manage long-term care services would be affected. One way the employer manages long-term care services is by determining how it distributes its funds across various services. The capital add-on rate for assisted living facilities was created as an incentive because Medicaid clients needed more access to assisted living facilities. The employer determined it wanted to distribute some of its budget toward providing this incentive to assisted

living facilities but, in the employer's opinion, this same need does not exist in adult family homes. The capital add-on rate for adult family homes was not a priority to the employer, and it decided it did not need to provide that add-on. The employer argues that until it "makes the decision to provide such incentives, the subject is solely permissive."

The employer's argument fails. The priority an employer gives to a subject of bargaining does not determine whether it is mandatory or nonmandatory. The employer failed to prove the capital add-on rate would adversely affect its ability to manage long-term services and should be a nonmandatory subject of bargaining.

Since the employer's two statutory arguments fail, the *City of Richland* balancing test must be applied to the six proposed add-ons. On balance, the relationship the six proposed add-ons bears to the wages of the employees predominates. The union proposed the six add-on rates as reimbursements for services provided to clients or for additional costs associated with the services clients needed. These six proposed add-ons directly impact wages for services rendered or services requiring higher rates of pay. The add-ons are also similar to what some groups refer to as premium pay. Premium rates have been found to be mandatory subjects of bargaining. *See City of Kalama*, Decision 6773-A (PECB, 2000); *City of Kalama*, Decision 6739 (PECB, 1999). Premium pay is typically paid for additional services or for services that are provided at a higher rate. Like premium pay, the six proposed add-ons are mandatory subjects of bargaining.

ISSUE 3

Did the employer interfere with employee rights in violation of RCW 41.56.140(1) when the employer informed the union it would file an unfair labor practice complaint if the union did not withdraw alleged nonmandatory subjects of bargaining from interest arbitration as outlined in WAC 391-55-265?

Conclusion

The employer did not interfere with employee rights when it notified the union that it believed the six proposed add-ons were nonmandatory subjects. The employer stated that if the union did not

withdraw them from its list for certification to interest arbitration it would file an unfair labor practice complaint. The employer followed the plain language of WAC 391-55-265.

Applicable Legal Standard

Employees covered by Chapter 41.56 RCW have the right to organize and designate representatives of their own choosing for purposes of collective bargaining or exercise other rights under the chapter free from interference, restraint, coercion, or discrimination. RCW 41.56.040. It is an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by statute. RCW 41.56.140(1).

The burden of proving unlawful interference rests with the complaining party. *Wenatchee School District*, Decision 8206-A (EDUC, 2005). In *Washington State Patrol*, Decision 11863-A (PECB, 2014), the Commission reiterated the legal principles applicable to prove employer interference under RCW 41.56.140(1). To prove an interference violation, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd*, 98 Wn. App. 809 (2000) (remedy affirmed). An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or a promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A, *aff'd*, 98 Wn. App. 809.

The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *Id.*

Analysis

The union failed to prove that the employer interfered with employee rights when it notified the union it believed the six proposed add-ons were nonmandatory subjects and informed the union it would file an unfair labor practice complaint if the union advanced the add-ons to interest arbitration. On August 15, 2014, Peterson called Casillas to notify him that the employer believed the six proposed add-ons were nonmandatory subjects. Peterson also notified Casillas that if the union did not withdraw the six proposed add-ons from interest arbitration, the employer would file an unfair labor practice complaint. After the phone call, the union e-mailed the mediator and advanced the six proposed add-ons for certification to interest arbitration.

According to WAC 391-55-265, it was appropriate for the employer to file an unfair labor practice complaint in this situation. The rule states that "[i]f the party advancing the [nonmandatory subject] proposal does not withdraw the proposal or modify it to eliminate the claimed illegality, the objecting party must file and process a complaint charging unfair labor practices under chapter 391-45 WAC prior to the conclusion of the interest arbitration proceedings." WAC 391-55-265(1)(a).

Based on the totality of the circumstances, the union did not meet its burden to prove that the employer's later notice and statement about filing an unfair labor practice complaint interfered with the union's rights. Here a sophisticated party, Peterson, communicated to another sophisticated party,[1] Casillas, the employer's intent to follow the rule regarding filing an unfair labor practice complaint if the union did not withdraw the alleged mandatory subjects. The employer clearly followed the steps laid out in the statute. It is unreasonable to perceive the employer's actions as a threat to protected union activity.

ISSUE 4

Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) when it delayed giving its full economic proposal to the union in contract negotiations?

---

[1] *See State – Office of Financial Management*, Decision 11084-A (the longer a representative is involved in representing the interests of bargaining unit employees, the less reasonable are their claimed perceptions of threats and coercion.)

Conclusion

The union clearly established that it is the exclusive bargaining representative of the employees and that it requested negotiations. The union failed to prove that the employer refused to bargain when it delayed giving its full economic proposal to the union.

Applicable Legal Standard

Chapter 41.56 RCW imposes a mutual obligation upon public employers and the exclusive bargaining representative of public employees "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." RCW 41.56.030(4); *State – Washington State Patrol*, Decision 10314-A (PECB, 2010). In order to resolve their contractual differences through negotiations, parties to the collective bargaining agreement must meet in a timely fashion. *Morton General Hospital*, Decision 2217 (PECB, 1985).

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982). The complainant union must first demonstrate that it is the exclusive bargaining representative of the employees involved and that it requested negotiations on a collective bargaining agreement or some issue that was a mandatory subject of bargaining. If the complainant establishes these two facts, it must then demonstrate that the employer either failed or refused to meet with the complainant, or imposed unreasonable conditions or limitations which frustrated the collective bargaining process. *See City of Clarkston*, Decision 3246 (PECB, 1989). What may be reasonable conduct in one case may not be reasonable in another.

Analysis

The union clearly established that it is the exclusive bargaining representative of the employees, and it requested negotiations. The union argues that the employer failed to bargain in good faith when it delayed giving its full economic proposal to the union until July. The union points to

State – Washington State Patrol, Decision 11283 (PECB, 2012), as guidance for the examiner to find that the employer failed to bargain in good faith. In that case the examiner determined that the employer failed to bargain in good faith when it delayed providing its economic package until five weeks prior to already-scheduled interest arbitration. There were several relevant facts related to the examiner's determination. The parties had been in negotiations and mediation from April through July 2010. The employer notified the union that it would provide its economic proposal a week or so after the June revenue forecast was received. The union did not receive the employer's economic proposal and filed an unfair labor practice complaint. After the union filed the unfair labor practice complaint the employer provided its economic proposal. The employer argued that the delay in providing the economic proposal was consistent with prior years, but the evidence showed that the 2010 economic proposal was provided almost a month later than prior economic proposals.

The present case is distinguishable from *State – Washington State Patrol*, Decision 11283. Based on the totality of the circumstances, the employer bargained in good faith when it provided its economic proposal in July 2014. The parties began bargaining in May 2014. During the first negotiation the union provided its proposal, and the parties bargained in good faith when they spent time discussing the union's initial proposal. The employer continued to bargain in good faith during the second negotiation on June 11, 2014, by providing its non-economic proposals. During that same session the employer told the union that it had intended to provide its economic proposal during the June 19, 2014, negotiation session, but it would not be able to provide it until July. The employer had just been informed it needed to complete a budget cut exercise. The employer was also attempting to determine its economic state, so it would need more time to complete these tasks.

During the fourth negotiation session on July 10, 2014, the employer provided the union with its economic proposal. The proposal included increases to the base daily rate, other new rates, and add-ons. The employer provided evidence that this was the earliest it had provided an economic proposal compared to prior years. After the employer provided this proposal it continued to bargain in good faith with the union until the parties were certified to interest arbitration.

FINDINGS OF FACT

1. The Office of Financial Management – Department of Social and Health Services – Adult Family Homes (employer) is a public employer within the meaning of RCW 41.56.029(1).

2. The Washington State Residential Care Council (union) is an exclusive bargaining representative within the meaning of RCW 41.56.030(2). The union represents adult family home providers as defined in RCW 41.56.030(1) who receive payments from the Medicaid and state-funded long-term care programs.

3. The employer and union are parties to a collective bargaining agreement effective from July 1, 2013, through June 30, 2015. The parties began negotiations for the 2015-2017 collective bargaining agreement in May 2014. The employer was represented by Office of Financial Management Senior Labor Negotiator Christina Peterson, and the union was represented by attorney Christopher Casillas. The parties' negotiations for collective bargaining agreements are restricted by statute, and the results of the negotiations must be submitted to the Office of Financial Management no later than October 1 of the year prior to the collective bargaining agreement going into effect. The parties scheduled May 21, June 11 and 19, and July 10, 18, and 30, 2014, as negotiation dates and August 8, 2014, as a mediation date.

4. The employer assesses clients' needs using the CARE assessment tool, an electronic based assessment tool. Once the assessment is complete, a service summary and assessment detail document is produced. These documents explain the needs of the individual client. The completed assessment places the client within a classification. There are five main groups of classification (A, B, C, D, and E). There are three to four levels (low to high) within each group for a total of 17 classifications.

5. Once the assessment is complete, an available adult family home provider (provider) receives the assessment documents and, based on these documents, determines if he or she will be able to meet the needs of the client. If the provider is able to meet the client's needs,

the client is then placed into that provider's adult family home. Within 30 days of entering an adult family home the provider and client develop a negotiated care plan, which states how the client's care will be provided. The provider then submits the negotiated care plan to a case manager who reviews it along with the service summary and assessment detail document and has final approval of the negotiated care plan.

6. Each Medicaid client the provider accepts is assigned a monetary base daily rate. Some clients are also assigned additional add-on rates based on their needs. The providers are paid these rates for the services and expenses incurred while caring for those clients. The union and employer bargain about these rates during negotiations for the collective bargaining agreement. There is no dispute that Medicaid clients' rates are lower than private-pay clients' rates. The union's 2014 proposals attempted to raise some of the existing rates and created additional rates.

7. After a client's rate is determined, if a case manager feels the CARE assessment tool has generated an inappropriate rate for a client, that case manager can access the exception to rule (ETR) process. The ETR process requires the case manager to describe the client's needs and the additional rate he or she believes is necessary to meet those needs. The employer reviews the request and approves or denies it. If the employer approves the request, it gives the provider an additional rate of pay for the care of that client. The employer testified that the ETR process has not undermined the CARE assessment tool.

8. The parties first negotiated on May 21, 2014. During this negotiation session the union provided the employer with a complete economic and non-economic proposal. The parties spent the entire session discussing the various parts of the proposal. The union's proposal contained six relevant economic sections (six proposed add-ons) regarding (1) Article 7.1, Appendix B, pertaining to the capital add-on rate (capital add-on rate); (2) Article 7.2, Mileage Reimbursement (mileage reimbursement); (3) Article 7.3, Trip Fee (trip fee); (4) Appendix C, pertaining to two plus persons physical assist (two person assist); (5) Appendix C, pertaining to awake staff at night (awake at night); and (6) Appendix C, pertaining to mood and behavior for classifications C, D, or E (mood and behavior).

9. The union designed the capital add-on rate proposal after the Medicaid incentive rate in assisted living facilities. The proposal stated that the provider would receive an additional amount of money for accepting clients who are Medicaid clients if the provider had a 60 percent or greater Medicaid occupancy rate. The employer testified that this rate would not affect the CARE assessment tool. The union explained that providers receive a lower base daily rate for Medicaid clients than they receive for private-pay clients. The union was attempting to negotiate an incentive to help stabilize the providers' financial position with regard to Medicaid clients. The union believed that the capital add-on rate would pay providers for the services they were providing to Medicaid clients but were not being reimbursed for.

10. The union designed the mileage reimbursement proposal to reimburse providers for driving clients to medical appointments when there was no other transportation provider identified in the CARE assessment documents or negotiated care plan. Currently, the providers are responsible for incurring the cost of transportation. Negotiated care plans identify clients' transportation needs, but some do not identify a provider. Transportation is provided to clients by the Medicaid Transportation Broker, which for various reasons some clients do not have access to. If no other transportation is available, the provider is responsible for taking the client to medical appointments.

11. The union designed the trip fee to reimburse providers for the cost of having additional employees on staff when clients need to be transported to medical appointments. Paying for employees' wages is an actual cost incurred by the provider. The provider has a duty to make sure all clients are cared for. Currently, if a client requires a provider to transport him or her to a medical appointment, the clients remaining in the home (who are not being transported) also need to be cared for. Because of this need the provider is required to schedule and pay for two different employees at one time: one employee provides the transportation and the other employee provides care to the clients remaining in the home.

12. The union designed the two person assist proposal to reimburse providers for the cost of hiring multiple employees to care for one individual. The current base rate does not change

depending on how many employees are needed to care for each client. Some clients' CARE assessment documents and negotiated care plans identify the need for those clients to have a two person assist in order to complete certain tasks. For example, a client may need a two person assist for toileting, requiring two employees to assist that client in getting to and from the bathroom. This means that a provider must have two employees assigned to one client during the times that client requires a two person assist.

13. The union designed the awake at night proposal to reimburse providers for the higher costs associated with clients needing staff who are awake at night. Adult family homes are required to have an employee present in the home at all times. For those homes that have clients that do not require awake at night staff, the employee is allowed to sleep during the night. The providers are able to pay those employees a lower rate because they are sleeping. For those homes that have clients that require awake at night staff, the provider is responsible for paying a higher rate to the employees who have to remain awake.

14. The union designed the mood and behavior proposal to reimburse providers for costs associated with caring for clients with mood and behavior needs. Once a client is assessed he or she is placed within a classification. The only classification which specifies mood and behavior is classification B. Classifications C, D, and E are considered higher levels of need than classification B, and clients in those classifications may or may not have mood and behavior needs. The union provided evidence that some clients in classifications C, D, or E require assistance from employees specially trained in certain behaviors. The providers incur a cost to have employees trained in these behaviors or may have to pay a higher wage for an employee who is already specially trained to deal with specific moods and behaviors.

15. After the first negotiation session, the parties negotiated five more times prior to mediation. On June 11, 2014, the parties negotiated for a second time. During this negotiation session the employer provided its non-economic proposal to the union. The employer also informed the union that it had intended to provide its economic proposal during the June 19 negotiation session; however, it would not be able to provide this proposal until July. The

Office of Financial Management had just informed the employer that it needed to complete a 15 percent budget cut exercise in preparation for the 2015-2017 budget. The employer was attempting to determine its economic state while completing the budget exercise, and it needed more time to complete these tasks.

16. On June 19, 2014, the third negotiation session, the employer provided the union with information on how the CARE assessment tool was developed and how it assessed clients' needs. The employer explained how it believed the CARE assessment tool already captured the cost of the union's six proposed add-ons and could not pay for a client's needs twice, once in the base daily rate and additionally in the six proposed add-ons.

17. On July 10, 2014, the fourth negotiation session, the employer provided its economic proposal to the union. The proposal did not include any of the union's six proposed add-ons. The employer stated it would not be able to capture the union's six proposed add-ons in the current CARE assessment tool. However, the employer's proposal did include an increase in the base daily rate, other new rates, and add-on rates different than those the union proposed. During the negotiation the union provided the employer with a counterproposal which included lower rates for the original six proposed add-ons.

18. On July 18, 2014, the fifth negotiation session, the union provided another counterproposal. The union also clarified some of the other issues that were on the table. During this session the parties further discussed the union's six proposed add-ons. On July 30, 2014, the sixth negotiation session, the union and employer discussed more open issues, and the union continued to propose the six proposed add-ons.

19. On August 8, 2014, the parties met in mediation. The parties discussed all open issues and attempted to reach agreement on as many as possible to limit the number of issues they would advance to interest arbitration. At the end of the mediation the parties reviewed the remaining open issues and agreed to negotiate about a few of those issues in an attempt to settle them prior to interest arbitration. The parties continued these negotiations over the

phone and by e-mail. The mediator remained available to help in the negotiations if necessary.

20. The parties continued to negotiate from August 8 through 15, 2014. The parties did not discuss the union's six proposed add-ons, but they did negotiate about other issues they had not yet reached agreement on. Before noon on August 15, 2014, Peterson called Casillas and notified him that she was sending the union some revised proposals on open issues. Peterson also notified Casillas that the employer believed the six proposed add-ons were nonmandatory subjects of bargaining, and if the union advanced those six proposed add-ons to interest arbitration, the employer would file an unfair labor practice complaint.

21. On August 15, 2014, at 2:27 p.m. the employer e-mailed the revised proposals to the union. At 3:39 p.m. the union sent the mediator its list of open issues to be certified to interest arbitration. The list included the six proposed add-ons. At 3:46 p.m. the employer sent an e-mail to the union saying that the parties had tentative agreements on the revised proposals the employer had sent to the union at 2:27 p.m. At 4:45 p.m. the employer submitted its list of issues to the mediator.

22. The Executive Director declared the parties were at impasse on August 18, 2014. Because the union advanced the six proposed add-ons to interest arbitration, the employer filed an unfair labor practice complaint. The Executive Director suspended the determination of the six proposed add-ons in interest arbitration while the unfair labor practice complaint was pending. The parties held their interest arbitration on August 25 through 27, 2014.

CONCLUSIONS OF LAW

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

2. Based on Findings of Fact 3, 8, and 15 through 22, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) by giving untimely notice under WAC 391-55-265

regarding alleged nonmandatory subjects of bargaining the union advanced to interest arbitration.

3. Based on Findings of Fact 4 through 14 and 16 through 22, the union did not refuse to bargain in violation of RCW 41.56.150(4) and (1) by insisting to impasse and advancing to interest arbitration alleged nonmandatory subjects of bargaining.

4. Based on Findings of Fact 20 through 22, the employer did not interfere with employee rights in violation of RCW 41.56.140(1) when it informed the union it would file an unfair labor practice complaint if the union did not withdraw alleged nonmandatory subjects of bargaining from interest arbitration as outlined in WAC 391-55-265.

5. Based on Findings of Fact 8 and 15 through 22, the employer did not refuse to bargain in violation of RCW 41.56.140(4) and (1) when it delayed giving its full economic proposal to the union in contract negotiations.

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are dismissed.

ISSUED at Olympia, Washington, this 28th day of May, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

EMILY K. WHITNEY, Examiner

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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 05/28/2015

The attached document identified as: DECISION 12345 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ VANESSA SMITH

CASE NUMBER:	26687-U-14-06801	FILED:	08/18/2014	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	ADULT FAMILY				
DETAILS:	-				
COMMENTS:					

EMPLOYER: STATE - ADULT FAMILY HOME PROV
ATTN: GLEN CHRISTOPHERSON
210 11TH AVE SW STE 331
OLYMPIA, WA 98504-3113
labor.relations@ofm.wa.gov
Ph1: 360-902-7316

REP BY: MARGARET M KENNEDY
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
Ph1: 360-664-4167

REP BY: COURTLAN P ERICKSON
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DRIVE SW
PO BOX 40145
Olympia, WA 98504-0145
Ph1: 360-664-4167

PARTY 2: WA RESIDENTIAL CARE COUNCIL
ATTN: JOHN FICKER
523 PEAR ST SE
OLYMPIA, WA 98501
john@wsrcc.org
Ph1: 360-754-3329

REP BY: CHRISTOPHER CASILLAS
CLINE AND CASILLAS
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770

REP BY: ERICA SHELLEY NELSON
CLINE & CASILLAS
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 05/28/2015

The attached document identified as: DECISION 12346 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ VANESSA SMITH

CASE NUMBER: 26692-U-14-06802 FILED: 08/19/2014 FILED BY: EMPLOYER
DISPUTE: UN MULTIPLE ULP
BAR UNIT: ADULT FAMILY
DETAILS: -
COMMENTS:

EMPLOYER: STATE - ADULT FAMILY HOME PROV
ATTN: GLEN CHRISTOPHERSON
210 11TH AVE SW STE 331
OLYMPIA, WA 98504-3113
labor.relations@ofm.wa.gov
Ph1: 360-902-7316

REP BY: MARGARET M KENNEDY
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
Ph1: 360-664-4167

REP BY: COURTLAN P ERICKSON
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DRIVE SW
PO BOX 40145
Olympia, WA 98504-0145
Ph1: 360-664-4167

PARTY 2: WA RESIDENTIAL CARE COUNCIL
ATTN: JOHN FICKER
523 PEAR ST SE
OLYMPIA, WA 98501
john@wsrcc.org
Ph1: 360-754-3329

REP BY: CHRISTOPHER CASILLAS
CLINE AND CASILLAS
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770

REP BY: ERICA SHELLEY NELSON
CLINE & CASILLAS
2003 WESTERN AVE STE 550
SEATTLE, WA 98121
Ph1: 206-838-8770