Governor of the State of Washington - Office of Financial Management, Decision 8761 (PECB, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GOVERNOR OF THE STATE OF WASHINGTON - OFFICE OF FINANCIAL MANAGEMENT Complainant, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 775, Respondent.	)	CASE 18805-U-04-4777 DECISION 8761 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Schwerin Campbell Barnard, by *Robert H. Lavitt*, Attorney, for SEIU, Local 775.

Christine Gregoire, Attorney General for the state of Washington, by *Stewart Johnston*, Assistant Attorney General, for Governor and Office of Financial Management.

On August 31, 2004, the State of Washington, through the Governor's Office and Office of Financial Management (employer), filed an unfair labor practice claim under RCW 41.56.150(4). The employer alleges a failure of the union, Service Employees International Union, Local 775 (union) to bargain in good faith under the statute. The claim is that six of the issues submitted to an interest arbitration panel beginning September 8, 2004, were permissive and not mandatory topics for bargaining, and that therefore the union was committing an unfair labor practice by insisting on submitting those proposals to the panel.

The Commission issued a preliminary ruling on September 2, 2004, which framed the issues as follows:

> Union refusal to bargain in violation of RCW 41.56.150(4) [and if so, derivative "interference" in violation of RCW 41.56.150(1)] and an "other unfair labor practice" by breach of its good faith bargaining obligations in insisting to impasse over six issues which are alleged to be non-mandatory subjects of bargaining: 1) Just Cause for Termination of Individual Service Contracts; 2) Eligibility for Referral Registry; 3) Removal from Referral Registry; 4) Repeal of Shared Living Rule; 5) Multiemployer Long-Term Care Industry Training and Education Fund; and 6) Side Letter on Dues deduction.

The parties submitted the issues to arbitrator Timothy Williams and concluded hearing September 20, 2004. Williams issued an opinion and award October 1, determining the final contract terms for a number of issues certified by the Commission. Williams deferred on several issues suspended by the Commission: (1) Section 9, the Shared Living Rule; (2) three sections on the "referral registries"; (3) a proposal on a long-term care training fund; and (4) a side letter on union dues collection.

The new collective bargaining statute for state employees, Chapter 41.80 RCW and Chapter 74.39A RCW requires that most agreements and successor contracts be signed and ratified by October 1, 2004, so that the Governor's office can incorporate monetary impacts from such agreements into his budget request to the Legislature. However, the processing of this instant unfair labor practice case is administered on the authority of Chapter 41.56 RCW and Chapter 391-45 WAC. The interest arbitration process from which the parties have recently emerged is derived entirely from RCW 41.56.450-.490. Although no expedited process rule can be implemented here, the Examiner and the Commission have accelerated filing of briefs, submission of transcripts and editing factors so that a decision in this case could be accomplished on or before October 22, 2004, to enable the parties to submit any remaining issues to the interest arbitrator October 28 and 29, 2004.

J. Martin Smith of the Commission staff was appointed Examiner, and a hearing was conducted October 7 and 8, 2004, at Olympia, Washington. Memoranda of authority were filed to conclude the record in this case.

BACKGROUND

The Bargaining Unit

The home health care workers comprise Washington's largest bargaining unit in terms of numbers of state employees, some 26,000 people who take care of Medicaid-eligible patients in private residences and homes. By *Home Care Quality Authority*, Decision 7823 (PECB, 2002), the union was certified to represent these employees as per RCW 74.39A.270. The Act refers to home-care workers as "individual providers" (IPs) and defines them as employees of the State of Washington Home Care Quality Authority. The union reached a contract for the years 2002-2005, which included provisions for the payment of medical insurance for employees, a wage of $8.93 an hour effective October 1, 2004, and a separate contract for the payment of union dues by employee-members.

The 2004 Negotiations

In March 9 of 2004, the Legislature removed Home Care Quality Authority as the "employer" of the home health care workers, and made the Governor the employer for purposes of collective bargaining. Laws of 2004, Chapter 3 section 8. Funding of the statewide program is directed by Department of Social and Health Services (DSHS), and is administered by local area aging councils (AAAs) at

the county and city level of municipal government.[1] The parties started to negotiate April 30, 2004, and met thirteen additional times by July 22, 2004. Rick Hall was head spokesman for the Governor's office; David Rolf of SEIU was lead spokesman for the union.

On July 19 the union asked for mediation from the Commission, and two mediation sessions were held with Commission mediator Vincent Helm on August 10 and 12, 2004. The mediator determined that a true impasse was reached and that the parties ought to be certified to interest arbitration under RCW 74.39A.270(2)(c) and WAC 391-55-200(1)(a)-(b). The parties exchanged lists of issues to be submitted under the rule, but the employer objected to six of the items submitted to interest arbitration by the union:

- An article on service contracts at Section 6 of the existing agreement (since withdrawn);
- A revision to section 9 of the contract with regard to the "Shared Living Rule";
- Referral registry section 1 (since ratified and agreed);
- Referral registry section 3 (since ratified and agreed);
- An article (new) on training for long-term care employees; and
- A side letter (new) on union dues and deduction of dues.

The parties' bargaining for a 2002 agreement set the stage for bargaining in 2004, which concluded with the interest arbitration

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[1] The caption of this case deletes reference to "Home Care Quality Authority" and refers to "Governor of the State of Washington - Office of Financial Management" to reflect the appropriate statutory employer for the employees covered by 74.39A.

in September of 2004. The employer was advised that the Commission would suspend certification of the noted six issues so long as an unfair labor practice complaint was filed, which is now the case. The Commission suspended arbitration of these six items by an order of September 2, 2004. *See* WAC 391-55-265. The remaining issues are:

Service Contracts (Section 6). The employer contended that bargaining "just cause" requirements to terminate individual providers would violate RCW 74.39A.270(6)(b) which says that only the department (DSHS) and the individual client-customer may terminate the contract of individual providers. On September 30, 2004, the union through its president, David Rolf, indicated it was withdrawing the proposal.

Shared Living Rule (Section 9). The "shared-living rule" derives from an administrative rule promulgated by DSHS and followed by the area aging providers. WAC 388-71-460(3) requires a set-off in hours compensated for individual providers in cases where the provider shares a living space with the client, or the client lives with the provider. The union's first proposal asks DSHS to repeal the rule, and also to reimburse each individual provider who "lost hours" during the period July 1, 2003, through July 1, 2004. On September 2, 2004, the union revised its proposal to read: "No employee shall be deemed ineligible to be paid for time worked or tasks performed (including but not limited to housekeeping, meal preparations, essential shopping, laundry and wood chopping) by virtue of his or her shared residence with his or her client."

Referral Registry (Section 1, Section 3). These proposals have been agreed to and ratified by the parties. Therefore, neither topic was submitted to the Examiner for determination of whether they are mandatory or permissive subjects of bargaining.

Training for Long-Term Care Employees (New Article). The union has proposed a new article establishing a "Long-Term Care Industry Training and Education Fund." It calls for contributions by the employer to this fund based upon a fixed rate per paid hour of work. The employer declared this to be a permissive topic in June of 2004, and cited 74.39A.050 RCW as a bar to such funds.

Union Dues and Deduction of Dues (Side Letter). The parties have signed a separate agreement with regard to union dues and deductions. The union has proposed a side letter or Memorandum of Understanding which permits them to recover over $6.8 million in dues it says is owed to it for the period October 2003 to September 2004.

The hearing in this matter was limited to consideration of the shared living, training, and dues deduction issues.

DISCUSSION AND ANALYSIS

The issue is whether any of the three topics left unsettled between the parties are mandatory topics for bargaining, requiring good faith negotiation, and, under these circumstances, submission to interest arbitration under Chapter 74.39A and Chapter 41.56.450 RCW.[2]

The Shared Living Rule of WAC 388-71-460

The Union's Two Proposals -

The union has made two contract proposals to eliminate the "shared living rule" from consideration of how many hours the individual

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[2] The parties' advance to interest arbitration on these issues is stayed by virtue of WAC 391-55-200.

providers are paid on a monthly basis. That rule is interesting in that it is addressed in layman's language to the client-customer:

> *Are there limitations to HCP* [Home Care Provider] *services I can receive?* The following are limitations to HCP services you can receive:
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> (1) HCP services may not replace other available resources, both paid and unpaid.
>
> (2) ADSA [Aging and Disability Services Administration] published rates and program rules establish your total hours and how much the department [DSHS] pays toward the cost of your services.
>
> *(3) The department will not pay for shopping, housework, laundry, meal preparation or wood supply when you and your individual provider, agency provider, or personal aide live in the same household.*
>
> (4) The department will adjust payments to an individual provider, agency provider, or personal aide who is doing household tasks for more than one client living in the same household.

(emphasis added). The source of the controversy involves subsection (3) of the rule, above, involving individual providers who reside in the same home as the cared-for client.[3] The handbook used to orient IPs to their jobs mentions the rule and specifies housekeeping, meal preparation, essential shopping and fuel supply as particular work activities to be accomplished for the client-customer as part of a home-care program -- these activities are compensated when the provider does *not* live with the client.

The two proposals made by union were:

(1) The August 17, 2004, proposal stated that the employer would repeal WAC 388-71-0460(3) and (4), and would thereafter inform

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[3] This rule was written and became effective August 3, 2003 but prior variants of the rule existed at both WAC 391-88-208 and WAC 388-15-202.

each IP that he/she was eligible to be "eligible" for pay for those hours cut between July 1, 2003 through July 1, 2004.

(2) The September 2, 2004, proposal stated that "cut hours" would be restored, as in the first proposal, and that:

> no employee shall be deemed ineligible to be paid for time worked or tasks performed (including but not limited to housekeeping, meal preparation, essential shopping, laundry and wood chopping) by virtue of his or her shared residence with his or her client. . . . *The Employer shall not discriminate in setting wages, hours, or working conditions of workers based on any worker's shared residence with his or her client . . . Existing policies of the employer inconsistent with this section shall be repealed."*

(emphasis added). The Examiner is mindful of the employer argument that the first proposal made by the union is the only one before the Examiner, since it was advanced during mediation and prior to certification of issues for interest arbitration. However, it is clear that both proposals ask for another state agency -- here, DSHS -- to repeal one of its administrative rules. As such, both proposals are illegal topics for bargaining, as opposed to mandatory or permissive, under the case precedents of *City of Seattle*, Decision 4688-B (PECB, 1997); and *Federal Way School District*, Decision 232-A (EDUC, 1977).[4]

The union has couched its latter proposal in terms of "discrimination," which is not helpful given the fact that only two generic

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[4] The Attorney General's brief refers to this case as "Int'l Association of Fire Fighters Local 27" as plaintiff representing Seattle fire fighters; the Commission denominates its case by the employer involved. The case involved a request to bargain additional and supplemental pension systems for uniformed employees under the LEOFF pension system established under RCW 41.28.

types of discrimination are barred under collective bargaining statutes. Those are discrimination based upon union activity or membership and discrimination under federal and state law for protected categories such as race, national origin, handicapping condition and those set out in RCW 49.60.020.

The New Bargaining Statute -

Plainly presented is whether the department's "shared living rule" can be reconciled with a new statute regulating bargaining for home care workers at RCW 74.39A.270(6):

> Except as expressly limited in this section and RCW 74.39A.300, the wages, hours and working conditions of individual providers are determined solely through collective bargaining as provided in this chapter. No agency or department of the state other than the authority, may establish policies or rules governing the wages or hours of individual providers. However, this subsection does not modify: (a) *the department's authority to establish a plan of care for each consumer and to determine the hours of care that each consumer is eligible to receive . . .* [or] *(b) the department's authority to terminate its contracts with individual providers* who are not adequately meeting the needs of a particular consumer, or to deny a contract under RCW 74.39A.095(8); . . . [or] (d) the consumer's right to *select, hire, terminate, supervise* the work of, and determine the conditions of employment for each individual provider providing services to the consumer under this chapter.

(emphasis added). By enacting this statutory language, there is no ambiguity that the Legislature intended DSHS to retain its core responsibility to administer the Medicaid-DSHS program of home care, and to set the *hours of care* and *plan of care* as its two primary components.[5]

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[5] This conclusion is reached despite testimony of a legislator who helped draft the bill. Whether DSHS was being "penalized" or "admonished" by the 2002-04 legislation is speculative at the very best.

The CARE Assessment Tool of DSHS -

Much was made at hearing and in the briefs about the CARE tool and the Time Study[6] which was conducted which resulted in the new assessment tool. There was little dispute that the AAA agencies automatically applied the assessment tool and deducted 15% from the hours compensated after a client identified his/her caregiver as someone who lived in the same residence. The Examiner concludes here that the DSHS assessment tool was not intended to impact collective bargaining but patient care and the administration of this service. DSHS representative Bill Moss testified as to the budget impact of the new assessment tool:

> Q. [by Johnston] A question about the CARE assessment tool. Now that it's in operation can it -- can you say whether the CARE assessment tool results in an increase or a decrease in consumer hours on a case-by-case basis?
>
> A. [by Moss] Well, on a case-by-case basis what we've seen so far with the roll out of the CARE system -- and there are - there are many reasons for why a consumer might receive a reduction or an increase based on the CARE roll out. A lot of it has to do with the subjectivity of the old Legacy CA tool. Much better measurement in the CARE tool. And we have seen a much better -- or a much more improved distribution of hours and yet some consumers have received decreases, some have received increases. But as I testified earlier, on the average in the aggregate the data currently is showing there's a slight increase in the overall hours provided under the CARE program.

Transcript 92-93. Whether a computer-based assessment tool or one involving clip-boards, is for DSHS to determine, because it

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[6] The Time Study was a motion-and-effort study conducted by DSHS where certain workers evaluated their time spent in work activities, using an electronic measuring device.

determines the programs which are offered.[7] Many Commission cases stand for the proposition that under Chapter 41.56 RCW there is no obligation of the employer to negotiate the scope or nature of its core services to citizens and consumers, whether it involves school services, budgets or the manning and staffing of fire departments. *See Federal Way School District*, Decision 232-A (EDUC, 1977); *City of Centralia*, Decision 5282 (PECB, 1995).

Impacts or Effects Bargaining -

The union raises for the first time in its memoranda of authority the possibility that the shared-living rule posits a mandatory topic for bargaining because the "effects" of the rule are to reduce hours, *citing Skagit County*, Decision 8746 (PECB, 2004). The problem with that analysis is that the union made two proposals on the shared living rule, and neither of them asked to bargain "effects" but instead the *decision* to carry out the 15% deduction of hours called for in the CARE tool and the shared-living rule. Interestingly, the union had in fact proposed a new section to the "policies" portion of the existing contract, asking to bargain certain impacts on the home care workers as a result of DSHS policies that might be changed during the contract's term. The Arbitrator rejected this proposal without comment. But he granted (and wrote) new language which called for DSHS-HCQA to reassess client's allotted hours of care, if cut as a result of the elimination of the "184/96 hour" rule at WAC 388-71-0531. SEIU made no proposal on hours of work, shifts, posting of vacancies,

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[7] The prior assessment tool, called the "CA Legacy" instrument, did not automatically make the "shared living" deduction. There was no evidence that it declined the number of hours available for home care workers to be paid, or increased them. We do not reach a conclusion as to whether the Time Study used to change the tool was effective or adequately involved the Union, which had not been certified to represent employees at that time.

workday or the like and made no other cognitive proposals that would be typical of a collective bargaining agreement in the public sector.[8]

The Balancing Test for Mandatory Topics -

The Commission has applied a balancing test to determine whether certain topics for bargaining are mandatory. Where a subject "does not directly affect employee wages, hours, or working conditions, the employer's need for entrepreneurial judgment must be weighed against the employee's interest in their terms and conditions of employment. *King County Fire District 16*, Decision 3714 (PECB, 1991). In application of the balancing test under Chapter 41.56 RCW, the Commission has ruled that an employer can ban smoking from its workplace but must be willing to negotiate the effects at the bargaining table. *City of Chehalis*, Decision 2803 (PECB, 1987). The employer can determine which paydays are appropriate. *Lewis County*, Decision 2957 (PECB, 1988). An employer can determine the staffing level for certain services -- reducing the staffing of a fire facility from three to two fire fighters per shift. In this case, the Commission referred to the employer's duties to the taxpayers in making the decision. *City of Centralia*, Decision 5282 (PECB, 1995). The Commission ruled that staffing was a management prerogative and not a mandatory topic for bargaining in *City of Spokane*, Decision 4746 (PECB, 1994), a case involving fire suppression staffing levels. Similarly, an employer can eliminate an "industrial nurse" position, despite what effects it might have on an organized group of employees. *City of Tacoma*, Decision 4740 (PECB, 1994). Nor may a union insist on negotiating the municipal budget (or preliminary budgets) from which spending decisions of

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[8] Public school teachers, like the home-care workers, sign individual contracts which set their hours of work for certain projects outside of the collective bargaining contract under Chapter 41.59 RCW. Hourly rates of pay, however, are negotiated.

the employer are based. *Anacortes School District*, Decision 2544 (EDUC, 1986). To abolish the "shared living rule" would inevitably impact DSHS' authority to determine staffing levels for the home care clients as well as how much money was being spent to provide that service.

The union argues in its brief that "while the State has an interest in administering the in-home services program, that interest is overshadowed by the IPs' interest in safeguarding their compensation." Brief of Union at 15. This analysis is incorrect. The State doesn't merely have an "interest" -- the State of Washington, through DSHS, administers the program, and spends Federal Medicaid monies to do it. Nothing so close to "core responsibility" or "entrepreneurial control" could be more obvious.[9]

The Commission must interpret the union's proposals with regard to its statutory rights under Chapter 74.39A RCW. It is an unusual collective bargaining statute because it predetermines the bargaining unit, the resolution procedure, the dues collection procedure, and several other topics for bargaining. The union here has not advanced hours of work proposals which are mandatory topics, given the scheme by which employees are hired, supervised, and paid for their work.

Home Care Authority Industry Training Fund

The union has proposed a training program and new fund to administer the training for home care workers:

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[9] Equally incredible is the union's claim that its shared-living proposal "in no way disturb[s] the Department's medical assessment of a client . . . Under the union's shared living proposal, DSHS still determines the acuity, the abilities and capacities of the client." Either union proposal would obliterate DSHS and AAA's authority to determine a plan of care or assessment tool.

> No later than July 30, 2005, the union and the employer together with other interested Local 775 employers (if any) shall create a Multiemployer Long-Term Care Industry Training and Education Trust Fund, governed by an equal number of union and employer representatives, which shall take control of all matters related to employee training not otherwise specified by statute . . . The employer shall contribute . . . $0.03 [per hour of work in 2005-06] . . . $0.33 [per hour of work in contract years 2006-07] . . . .

Presently, IPs must, as a condition of employment, avail themselves of certain training courses in home care services under RCW 74.39A.050. These include orientation, basic training and continuing education. The goal -- although not yet a requirement -- is to impart enough learning to IPs, in addition to their experience as caregivers -- so that they could qualify and be certified as "nursing assistants" as codified and described in RCW 18.88A.[10]

Under *Spokane Fire District* 9, Decision 3661 (PECB, 1990), the Commission has held that the decision to require particular training courses was within the managerial control of the employer. Hence, training manuals, audio-visual tapes, and record-keeping materials prescribed by the National Fire Academy were an appropriate curriculum for fire fighters. The training was found to be a subject not available to bargaining by the union. The Commission has also ruled that in fire service, the employer may order and require employee competency with certain types of equipment, such

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[10] In 1991, the Legislature redrafted the statute on nursing assistants, largely to address a perceived "high turnover" of employees who worked as nurse-assistants in health care facilities, nursing homes and home health care agencies. Certification of nursing assistants is governed by the Nursing Care Quality Assurance Commission.

as computer systems, CAD drafting machine systems. In *King County Fire District 16*, Decision 3714 (PECB, 1991), automatic defibrillation equipment used by EMT fire fighters.[11] The union had a right in both cases to offer to bargain the *effects*, but not the decision, of such actions.

The union apparently sees an "industry" standard to be applied to the work of the home care workers. In fact, the employees in this bargaining unit are public employees recognized under Chapter 41.56 RCW and Chapter 74.39A RCW. HCQA, DSHS and the thirteen public service areas (AAAs) that administer the home care program have developed a basic orientation and training plan; the IPs also have all signed a contract of some eight pages, which obligates them to follow regulations of DSHS or the AAAs, and more specifically, to administer the service plan for each client-customer. Although the union proposal seems to call for supplemental training for that "not otherwise specified by statute," it in fact would supplant the training now designed for the IPs. It is within the authority of the agencies to set the training plan for providers, and the service plan for clients. The negotiation of an additional training plan is a permissive topic for bargaining.[12] The union cannot insist to impasse on bargaining their proposal on the training fund.

Dues Deductions and the "Side Letter"

By virtue of a separate agreement, the parties have set out the method by which employees' dues are deducted under the existing

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[11] State employee labor boards in Pennsylvania, Maine and New Jersey are in accord.

[12] It would be appropriate for a union to request negotiation of employer contribution to supplemental training funds which applies to the working conditions of affected employees.

collective bargaining agreement. An amendment to the Public Employee's Collective Bargaining Act at RCW 41.56.113(a) required the union to negotiate a reimbursement to DSHS for additional costs incurred in making dues deductions from individual providers' paychecks. Those payments were made but remittal of dues did not begin until August 2004.[13]

The union has long sought initiation fees and dues dating from January 2003 through September 2004. It proposes to waive dues deductions for some period but to recoup $6.9 million for the period between October 2003 and September 2004. The employer, on behalf of DSHS as payor agency, argues that the "reimbursement" amount was waived by the union in negotiating the Dues Agreement. The Examiner agrees that bargaining of union dues and remittals is a mandatory topic for bargaining under *Cherry Hill Textiles*, 309 NLRB 268 (1992); *see also Pierce County*, Decision 1840-A (PECB, 1985) (regarding appropriate union action in deducting "re-initiation fees"); *Tacoma School District*, Decision 5465-E (EDUC, 1997) (regarding appropriate deduction of dies and fees on a monthly basis); Chapter 41.56.110 RCW.

The provisions of RCW 41.56.113 were meant to reimburse the DSHS agency for additional costs. Such a requirement does not remove the topic from the realm and responsibilities attendant to a mandatory topic for bargaining. It is not clear in the bargaining of the parties whether the DSHS deducted *any* dues during the disputed period, or only some. If the dispute resolution procedure of the parties' contract is better used to collect union dues, that

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[13] RCW 41.56.110 has always required employers to deduct initiation fees and periodic dues of a labor organization which submits its statement of what those dues amounts are. RCW 41.56.113 is now codified to immediately succeed this section of the statute.

is for the interest arbitrator to decide as per RCW 41.56.450-.490.

Remedies

The Commission is commanded to make appropriate remedial orders, which are those orders necessary to effectuate the collective bargaining statute. *METRO v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). It is the practice of the Commission to order remedies for unfair labor practices which include posting of notices in bulletin boards or newsletters regarding a parties' failure to bargain in good faith; affirmative actions to carry out certain actions; and cease and desist remedies. The Examiner determines that remedies additional to what are set out below are not necessary. These are the first two agreements negotiated by the parties, and posting remedies do not make sense where the actual employers are clients living in their homes. Affirmative actions to proceed to interest arbitration are set out below.

FINDINGS OF FACT

1. The Governor of the State of Washington and the Office of Financial Management are public employers within the meaning of Chapter 74.39A.270(1) RCW and Chapter 41.56.030(9) RCW.

2. The Governor's designee, Office of Financial Management, is appointed to bargain collectively for the employer under authority of Chapter 41.80 RCW (PSRA).

3. Service Employees International Union, Local 775 (SEIU) is a bargaining representative under Chapter 74.39A.270(2)(a) and

(b) and was certified as representative in *Home Care Quality Authority*, Decision 7823 (PECB, 2002).

4. The bargaining unit represented by SEIU is set out in statute at 74.39A.270(2)(a). It is a statewide unit of all individual home care providers in Washington's 39 counties.

5. During bargaining for a successor agreement in July of 2004, the employer provided notice to the union that it considered six proposals made to it to be permissive or illegal topics which could not be advanced to interest arbitration under RCW 41.56.450.

6. The parties could not reduce all the sections of their collective bargaining agreement in negotiations. They proceeded to mediation and then interest arbitration under 74.39A.270 and RCW 41.56.450 through .480, inclusive. A hearing was conducted by an arbitration panel and an award was issued October 1, 2004. Suspended from consideration were six issues that the employer identified as permissive topics. Three of those issues were resolved prior to the hearing in this case.

7. The three disputed bargaining topics were (a) a proposal to abolish the shared living rule at WAC 388-71-0460; (b) a proposal to adopt a new Training Fund and plan for inservice training of individual providers; (c) a proposal for an additional side letter on union dues collection, seeking dues for 2003-2004.

8. A proposal to repeal WAC 388-71-460, the "shared living rule" would abolish an administrative rule written by DSHS and State of Washington. Implementation of the rule has deducted 15%

from the hours allotted to individual providers as compensation for their care in homes where they also reside.

9. Despite deductions to hours because of the shared living rule, individual providers may work for more than one client and certainly one or more with whom they do not reside. Individual providers may also contract independently with their clients for paid hours of service consistent with their training.

10. The shared living rule is implemented as a result of the "CARE" assessment instrument which determines the level of care needed by the clients statewide and is the principle process by which Area Aging Agencies and DSHS determine how much to compensate clients for such care under the Medicaid waiver program. As such the "plan of care" and "hours of care" determined for each customer is a core responsibility of DSHS and the AAAs which contract to administer the program.

11. The proposal to establish a "home care authority industry training fund" would require the Department of Social and Health Services and Area Aging Agencies to pay into a fund which supplants and controls the training for home care workers. Individual providers agree in individual contracts to be oriented and trained under existing programs. The effect of such a new program would impair the employer from implementing its statutory duty to carry out training under RCW 18.88 and 74.39A.

12. The proposal to reimburse the union for dues collection is based on a factual dispute about whether the union is owed retroactive dues for months that it was certified but had not yet reached agreement on a dues agreement required by Chapter

74.39A RCW. The proposal essentially addresses the dues collection procedure under that statutory provision.

13. The design of training for home care workers is a core responsibility of the Home Care Quality Authority and DSHS.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 and 391-45 WAC, as well as 74.39A.270(1) and (2).

2. The union proposals on the "shared living rule" at WAC 388-71-0460 is a permissive and illegal topic for bargaining, and insistence to impasse and interest arbitration is an unfair labor practice under RCW 41.56.040(1)-(4).

3. The union's proposal on training is a permissive topic for bargaining, and insistence to impasse and interest arbitration is an unfair labor practice under RCW 41.56.040(1)(4).

4. The union's proposal on a side-letter to collect union dues is a mandatory topic for bargaining under RCW 41.56 and said issue will be remanded to the interest arbitration panel as per Chapter 74.39A RCW.

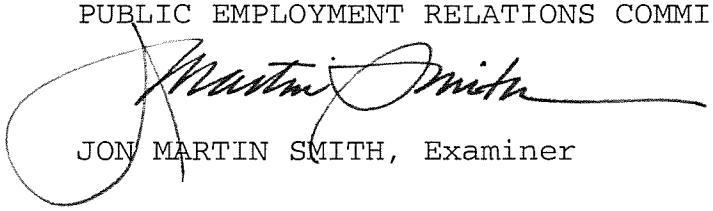
ORDER

The parties are ordered to submit the issue regarding union dues collection, and the side-letter, to the interest arbitration panel convened September 9, 2004, to consider contract provisions

consistent with paragraph 4 of the above conclusions of law and this Order.

Issued at Olympia, Washington on the 22nd day of October, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JON MARTIN SMITH, 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.