STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE - OFFICE OF FINANCIAL MANAGEMENT, Complainant,	CASE 18805-U-04-4777
vs.	DECISION 8761-A - PSRA
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 775, Respondent.	DECISION OF COMMISSION

Schwerin Campbell Barnard, by *Robert H. Lavitt*, Attorney at Law, for the union.

Rob McKenna, Attorney General,[1] by *Stewart Johnston*, Assistant Attorney General, for the employer.

This case comes before the Commission on a timely appeal filed by Service Employees International Union, Local 775 (union), seeking to overturn certain findings of fact, conclusions of law, and order issued by Examiner J. Martin Smith. The Examiner ruled that the union unlawfully sought interest arbitration on a proposal that was not a mandatory subject of collective bargaining.[2] The Office of Financial Management (employer) supports the Examiner's decision.

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1 Christine O. Gregoire was Attorney General of the State of Washington at the time of the hearing in this case, but has since been inaugurated as Governor of the State of Washington.

2 *Office of Financial Management*, Decision 8761 (PECB, 2004).

We affirm the Examiner's ruling. The union proposal challenged by the employer was not a mandatory subject of bargaining, so the union committed an unfair labor practice by seeking interest arbitration on that proposal.

The Issue

The central issue in this case is whether a union proposal aimed at repealing a so-called "shared living" rule adopted and enforced by the Department of Social and Health Services (DSHS) is a mandatory subject of collective bargaining.

The Legal Framework

In 2001, Washington State voters passed Initiative Measure 775, granting collective bargaining rights to individual providers (IPs) of in-home care under Medicaid and other programs administered by DSHS. As codified within Chapters 41.56 and 74.39A RCW, the initiative required a statewide bargaining unit encompassing all IPs, established a Home Care Quality Authority (HCQA), and named the HCQA as the employer for the purposes of collective bargaining.

The Commission certified the union as exclusive bargaining representative of the IP unit in 2002, following a representation election conducted by the Commission with more than 25,500 voters on the eligibility list. The union and the HCQA negotiated a first contract, but it was not ratified by the Legislature during its session in 2003. In 2004, the Legislature both: (a) approved a revised collective bargaining agreement which expired on June 30, 2005; and (b) enacted Chapter 3, Laws of 2004, amending RCW 74.39A.270 to shift the responsibility for bargaining on behalf of the employer from the HCQA to the Governor or the Governor's designee. The Governor then delegated that bargaining to the Office of Financial Management.

The union and employer commenced negotiations for a successor contract in April 2004. The parties met 13 times between April and July, but were unable to agree on a successor contract. On July 19, 2004, the parties asked for mediation assistance from the Commission. After two mediation sessions, the mediator recommended the parties were at an impasse. The Executive Director thereupon certified the dispute for interest arbitration.[3]

On August 13, 2004, the union submitted its list of issues in accordance with WAC 391-55-200(1)(a) and (b). That list included:

> **Article __ Policies and Practices**
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> **Section 1. Intent.** The Employer and the Union recognize that . . . actions taken by the Employer's subsidiary departments and agencies and their contractors - including the implementation of policies, rules, management bulletins, and the actions of individual . . . decision-makers - often *directly or indirectly impact the wages, hours, and working conditions* of members of the bargaining unit. . . . This Article is . . . intended to provide clear guidelines to the Employer in relation to . . . policies and procedures impacting members of the bargaining unit and their wages, benefits, hours, and working conditions.
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> **Section 2. Changes to Policy.** Except as provided in 74.39A.270(6)(f) [a]ny change of any Employer policy or practice that might *directly or indirectly impact the wages, benefits, hours, or working conditions* of any member of the bargaining unit shall . . . be subject to collective bargaining negotiation.[4]

(emphasis added). The union's proposal on employee hours required bargaining over any proposed rules or regulations implemented by

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[3] RCW 74.39A.270(2)(c) provides that the mediation and interest arbitration provisions contained in RCW 41.56.430 through 41.56.470 and 41.56.480 also apply to individual home care providers.

[4] The union's August 13, 2004, proposal is identical to its July 27, 2004, proposal.

the state agencies or departments that would directly or indirectly impact the wages, hours, and working conditions of bargaining unit employees. The union also proposed that DSHS repeal WAC 388-78-0460. That rule provided that when an IP and consumer share a common residence, the IP may not be paid for certain routine tasks that the IP would normally do outside of the workplace.[5]

On August 19 the employer submitted its list of issues for arbitration. In addition to its list of issues, the employer provided the Executive Director and the union notice invoking WAC 391-55-265(1)(a) and asserting that six of the issues submitted by the union for interest arbitration were non-mandatory subjects of bargaining. The union did not withdraw or modify its proposal to eliminate the claimed illegality.

On August 31, 2004, the employer filed a complaint to initiate this unfair labor practice case, alleging that the union failed to bargain in good faith (and violated RCW 41.56.140(4)) by submitting six non-mandatory subjects of bargaining to interest arbitration.

After the employer filed its complaint, the union submitted an amended proposal that would prevent discrimination against the hours an IP was eligible to receive based on the residence of the consumer and the IP.[6] The Executive Director suspended the

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[5] We are aware that WAC 388-78-0460 was challenged in the courts and that the Superior Court for Thurston County has since declared the rule invalid. This case concerns the validity of the union's bargaining proposal, rather than the validity of the rule, and we must proceed with deciding the narrow issue that is before us.

[6] Three of the issues the employer took exception to were settled prior to the hearing.

certification of all six challenged issues under WAC 391-55-265 pending the outcome of the unfair labor practice proceedings.[7]

The Examiner conducted an expedited hearing on October 7 and 8, 2004, and allowed the parties to file supplemental memoranda on an expedited briefing schedule. On October 22, the Examiner issued his decision finding two of the union's proposals, including its proposal that would require bargaining over all decisions that would directly or indirectly repeal the DSHS shared living rule, were permissive subjects of bargaining. Insistence to impasse and interest arbitration on those issues thus constituted an unfair labor practice.[8] The union filed this timely appeal regarding only the Examiner's rulings that the union's shared living rule proposal was not a mandatory subject of bargaining.

Standard of Review

This Commission makes its own de novo conclusions and applications of law, as well as interpretations of statutes. We review an Examiner's findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002); *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991). The Commission attaches consider-

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[7] The Executive Director did not consider the union's modified proposal.

[8] The Examiner's conclusions of law covered both of the union's proposals, describing them as "illegal and permissive". As we later will explain, only one proposal was properly before the Examiner.

able weight to the factual findings and inferences made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

Applicable Procedures

WAC 391-55-265(1)(a) provides for the Executive Director to suspend the certification of some or all issues for interest arbitration if a party claims that a proposal being advanced by the opposing party is not a mandatory subject of bargaining. The party seeking suspension of any issue must first communicate its concerns to the opposing party so the proponent has an opportunity to amend any potentially offending proposal. If the proponent of the proposal declines or fails to amend its proposal, then the objecting party must file an unfair labor practice complaint under Chapter 391-45 WAC alleging a violation of the collective bargaining obligations imposed by RCW 41.56.030(4). WAC 391-55-265(1)(b). If a preliminary ruling determines that a violation of RCW 41.56.140 or .150 could be found, then a final ruling must be made on the unfair labor practice cases before the issue can be sent to interest arbitration. WAC 391-55-265(1)(c).

Chapter 391-45 WAC contains the Commission's rules for processing unfair labor practice complaints. Under WAC 391-45-050(2), the complainant shall provide a clear and concise statement of the facts constituting the alleged unfair labor practice. A party wishing to amend its complaint may do so, provided it conforms with requirements contained within WAC 391-45-070. In answering an unfair labor practice complaint, a respondent shall admit, deny, or explain each fact alleged, and offer any affirmative defenses. WAC 391-45-210.

Only the Union's First Proposal Is Properly Before the Commission

The employer asserts that the union's August 19 proposal violated the union's collective bargaining obligations by submitting to

arbitration non-mandatory subjects of bargaining. The employer's August 31, 2004, complaint alleges that it "communicated its concerns regarding this to the union during bilateral negotiations" and that the union has "not withdrawn or modified these proposals."[9]

The Commission's unfair labor practice rules are designed to give the responding party proper notice of the scope of the charges brought against it. Although the responding party may offer affirmative defenses, those defenses do not alter the basis for the original charge presented by the complainant. The fact that a party later changes its practices to comply with the law does not moot the original complaint, and the complaining party may still be entitled to a remedy. *See, e.g., Bates Technical College*, Decision 5140-A (PECB, 1996); *Shelton School District*, Decision 579-B (EDUC, 1984).

Although the Examiner noted in his decision that he was "mindful of the employer['s] argument that the first proposal made by the union is the only one before the examiner", he nevertheless made an analysis of both the union's pre-complaint and post-complaint proposals. The union's submission of a modified proposal to the employer on September 2, 2004, was outside the timeframe established by WAC 391-55-265. The employer did not amend its complaint to include the later proposal.

Based on these facts, we hold that the union's second proposal was outside the scope of the employer's original unamended complaint.

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[9] The record indicates that the employer only verbally expressed its concerns to the union. Despite the lack of a written objection, substantial evidence exists within the record to support a finding that the employer's objection was communicated prior to the filing of the unfair labor practices complaint.

Although we can accept the possibility that the Examiner was attempting to demonstrate to the union that any proposal regarding the shared living rule would be a permissive subject of bargaining, we nevertheless conclude the Examiner only needed to consider the union's initial proposal. Formulating a finding of fact and conclusion of law based upon the union's modified shared-living proposal was in error.[10] The Examiner's findings of fact and conclusions of law shall be amended accordingly.

The "Scope" Of Bargaining

The Public Employees' Collective Bargaining, Chapter 41.56 RCW requires employers and unions to bargain in good faith. *Peninsula School District v. Public School Employees*, 130 Wn.2d 401, 407 (1996). The scope of bargaining under Chapter 41.56 is "grievance procedures and ... personnel matters, including wages, hours and working conditions." Commission and judicial precedents interpreting that definition identify three broad categories of bargaining: mandatory subjects, permissive subjects, and illegal subjects. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958)(cited in *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997)); *see also Federal Way School District*, Decision 232-A (EDUC, 1977).

- Employee "wages, hours and working conditions" are generally "mandatory" subjects over which the parties must bargain in good faith. It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse

[10] The Commission has the authority to liberally construe or, in certain cases, waive its own rules to effectuate the purpose and provisions of the statutes this agency administers to promote peace in labor relations. See WAC 391-08-003. This is not such a case. The Commission does not waive its rules in every situation, particularly one where a party fails to request such waiver, or where the non-moving party has not been permitted to demonstrate how it could potentially be prejudiced by such waiver.

to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).

- Management and union prerogatives, along with procedures for bargaining mandatory subjects, are "permissive" subjects over which the parties may negotiate, but are not obliged to do so. *City of Pasco*, 132 Wn.2d at 460 (holding that as to permissive subjects, each party is free to bargain or not to bargain, and to agree or not to agree.) Pursuing a permissive subject to impasse, *including submitting a permissive subject of bargaining to interest arbitration*, is an unfair labor practice. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342 (1986)(emphasis added).

- Matters that parties cannot agree upon because of statutory or constitutional prohibitions are "illegal" subjects of bargaining. Neither party has an obligation to bargain such matters. *See, e.g., City of Seattle*, Decision 4687-B (PECB, 1997), *affirmed* 93 Wn. App. 235 (1998), *rev. denied* 137 Wn.2d 1035 (1999).

In deciding whether an issue of bargaining is mandatory, this Commission examines two principal considerations: (1) the extent to which managerial action impacts the wages, hours and working conditions of employees, and (2) the extent to which a managerial action is deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989)(*City of Richland*). The Supreme Court held in *City of Richland* that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decision that are predominantly 'managerial prerogatives,' are

classified as non-mandatory subjects." *City of Richland*, 113 Wn.2d at 200.

The "scope" of bargaining is a question of law and fact for the Commission to determine on a case-by-case basis. *City of Richland* 113 Wn.2d at 203; WAC 391-45-550. Decisions about what services will be offered by an employer are generally accepted by the National Labor Relations Board (NLRB) and various state labor relations boards as prerogatives of management and, as such, permissive subjects of bargaining. *See Federal Way School District*, Decision 232-A. On numerous occasions, this Commission has recognized that public employers have the right to "entrepreneurial control" over nonmandatory subjects of bargaining. *Snohomish County Fire District 1*, Decision 6008-A (PECB, 1998), *Wenatchee School District*, Decision 3240-A (PECB, 1990).

Where a subject both relates to conditions of employment and is a managerial prerogative, this Commission will examine the record presented to determine which characteristic predominates. If the Commission determines that a party has submitted a permissive or illegal subject of bargaining to interest arbitration, that party will be found guilty of an unfair labor practice.

Individual Providers Have a Unique Collective Bargaining Statute

In ascertaining the meaning of a particular word or words within a statute, this Commission must consider both the statute's subject matter and the context in which the word is used. *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 217 (1995). Statutes must be interpreted and construed so that all language used is given effect, and no portion is rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*, 127 Wn.2d 537 (1996). Statutes should be read together creating a unified whole, to the end that a harmonious, total statutory scheme evolves which

maintains the integrity of the respective statutes, and the entire sequence of statutes relating to a given subject matter should be considered. *State v. Wright*, 84 Wn.2d 645 (1974).

The statutory scheme governing collective bargaining for IPs is not the traditional employer/employee relationship. RCW 74.39A.270(1) provides the circumstances under which IPs are considered public employees solely for the purposes of collective bargaining as defined within Chapter 41.56 RCW, unlike state civil service employees, who are covered by Chapter 41.80 RCW. IPs are also eligible for interest arbitration under RCW 74.39A.270(2)(c) unlike state civil service employees and most employees covered by Chapter 41.56 RCW. RCW 74.39A.270(2) establishes who the employer is for purposes of collective bargaining, and provides that the collective bargaining relationship between the employer and the union will be governed by Chapter 41.56 RCW except for certain instances. RCW 74.39A.270(6) provides that the wages, hours and working conditions of IPs are determined solely through collective bargaining except as specifically outlined with that section and within RCW 74.39A.300. RCW 74.39A.270(6) also provides that no agency or department of the state, other than the authority, may establish policies or rules governing the wages or hours of IPs.[11]

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[11] Certain tension may exist between RCW 74.39A.270(6) and RCW 74.39A.030(3)(a). RCW 74.39A.030(3)(a) provides that DSHS shall by rule establish payment rates for home and community service providers, and in the event any conflict exists between any such rule and a collective bargaining agreement, the collective bargaining agreement prevails. Because RCW 74.39A.270(6) was amended during the 2004 legislative session and specifically reserves certain management rights, as opposed to the general provisions contained within RCW 74.39A.030(3)(a), which was enacted as part of I-775 in 2002, the provisions of RCW 74.39A.270 prevail. *See Schumacher v. Williams* 107 Wn. App. 793 (2001)(Generally, rules of statutory construction indicate that where a later enacted statute on the same subject is the more specific, it will control the earlier and more general statute).

RCW 74.39A.270(6)(a) also expressly provides that RCW 74.39A.270(6) does not modify DSHS's managerial authority to establish a plan of care for each consumer and to determine the hours of care that each consumer is eligible to receive. Because the Legislature has created a unique statutory framework to administer collective bargaining for home health care workers, we must conduct our traditional examination of the scope of bargaining, as set forth in RCW 41.56.030(4) and RCW 74.39A.270(6), but at the same time be mindful of the management rights provision of RCW 74.39A.270(6)(a).

The union does not dispute that RCW 74.39A.270(6)(a) grants the employer the authority to determine the number of hours of care each *consumer* is eligible for. Rather, it argues that the legislative intent behind RCW 74.39A.270 was to ensure that the employer's ability to set the hours of care would be applied very narrowly, and would not affect the hours of the IPs.

To support its contention, it submitted into evidence the legislative history of RCW 74.39A.270. An examination of RCW 74.39A.270's legislative history is necessary only when the language used within the statute is ambiguous.[12] There is no ambiguity within this statute: the employer is free to establish the hours consumers are eligible for, and any change to wages, hours and working conditions of the IPs must be bargained. The union's reading of

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[12] At the hearing, the Examiner allowed the union, over the employer's objection, to call the prime sponsor of the legislation as a witness to testify regarding the Legislature's intent when it amended RCW 74.39A.270 in 2004. While we have great respect for the opinion's of the senators and representatives who govern this state, the Washington Supreme Court has consistently held that the interpretation of individual legislators cannot be used to establish legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 238 (2004). The Supreme Court's precedents expressly direct us to discount the prime sponsor's testimony.

74.39A.270(6), which requires any decision that affects the wages, hours and working conditions of IPs to be bargained, renders RCW 74.39A.270(6)(a) meaningless. Any program decision implemented by DSHS with respect to the eligible hours of the consumers, such as use of the CARE assessment tool[13] or the use of the shared living rule, is going to affect the hours of IPs.

Impact of Shared Living Rule

In supporting his decision that the shared living rule was a management prerogative, the Examiner found that the union's proposal did not concern IP hours of work that constituted a mandatory subject of bargaining "given the scheme by which IPs are hired, supervised, and paid for their work." The Examiner also noted that the union's proposal would obliterate the authority of DSHS to determine the amount of care a consumer is eligible to receive. The union argues that the Examiner failed to consider or acknowledge the impact of the shared living rule on bargaining unit employees, and asserts there is an undeniable connection between the shared living rule and employee hours and wages.

We agree with the union under our traditional analysis, the shared living rule impacts employee hours and wages, and the impacts of the shared living rule would, under a traditional analysis, be a mandatory subject of bargaining. However, we find that when the Legislature amended Chapter 74.39A RCW, it vested in DSHS the authority to enact rules that could possibly impact employee wages and hours, and also placed that agency action outside the scope of the collective bargaining process.

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[13] The CARE assessment tool is a computer program that determines the number of hours of care for which consumers are eligible.

RCW 74.39A.270(6)(a) explicitly announces the Legislature's intention to maintain DSHS's authority over the administration of the Medicaid program and to set the hours and plan of care for each *consumer*. When RCW 74.39A.270(6)(a) is examined in conjunction with our own case precedents regarding management prerogatives, it is clear that the shared living rule is a permissive subject of bargaining. This Commission has consistently held that employers retain the right to determine what kind of services they offer. In *Wenatchee School District*, Decision 3240-A, the employer decided to change from a half-day to a full-day kindergarten format. While that decision eliminated a mid-day bus run that had been a significant source of work opportunities for bargaining unit employees, the Commission nevertheless held that the program decision balanced in favor of the employer, and the employer was thus under no obligation to bargain the decision with the union. We see little difference between the authority over core services in *Wenatchee School District* and the program authority delegated to DSHS in Chapter 74.39A RCW.[14]

The unique employment situation of IPs also supports a conclusion that DSHS retains the authority to administer the hours available to consumers, including the adoption of a shared living rule. Although the Office of Financial Management is the "employer" for purposes of collective bargaining, the consumers retain the authority to select, hire, and fire any IP without input from DSHS, the HCQA, or the state government. The consumer decides whether the IP will reside with the consumer. We are mindful that many IPs are related to the consumers they serve, and that many consumers may not have the capacity to fully understand or act upon the impact of their decisions. Nevertheless, any consideration of

[14] Because we find that the union's proposal pertained to a permissive subject of bargaining, RCW 41.56.905 does not apply to this situation.

consumers' interests is beyond the jurisdiction, as well as the expertise, of this Commission.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner J. Martin Smith are adopted as the Findings of Fact of the Commission.

2. The Conclusions of Law issued by Examiner J. Martin Smith are adopted as the Conclusions of Law of the Commission except paragraph 2, which is amended as follows:

> The union's proposal on the "shared living rule" at WAC 388-71-0460 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).

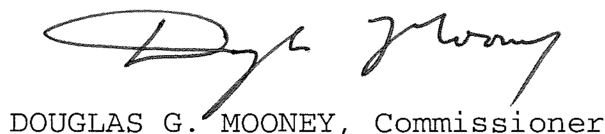
3. The Order issued by Examiner J. Martin Smith is adopted as the order of the Commission.

Issued at Olympia, Washington, the 12th day of October, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner



DOUGLAS G. MOONEY, Commissioner