Washington State Ferries (Marine Engineers' Beneficial Association), Decision 13318 (MRNE, 2021)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE FERRIES, Complainant, vs. MARINE ENGINEERS' BENEFICIAL ASSOCIATION, Respondent.	CASE 132976-U-20 DECISION 13318 - MRNE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Gil Hodgson and *Amee J. Tilger*, Assistant Attorneys General, Attorney General Robert W. Ferguson, for the Washington State Ferries.

Jack Holland, Attorney at Law, Reid, McCarthy, Ballew & Leahy, L.L.P., for the Marine Engineers' Beneficial Association.

On August 13, 2020, the Washington State Ferries (employer) filed an unfair labor practice complaint against the Marine Engineers' Beneficial Association (union) with the Public Employment Relations Commission (Commission). A preliminary ruling was issued on August 14, 2020, and an answer was filed on September 2, 2020. A hearing was conducted on September 18, 2020, before the undersigned Examiner. The parties filed post-hearing briefs on December 11, 2020, to complete the record.

ISSUE

Did the union refuse to bargain in good faith in violation of RCW 47.64.130(2)(c) by insisting to impasse on and seeking interest arbitration of a nonmandatory subject of bargaining?

BACKGROUND

The employer operates a large public ferry system. The union represents several bargaining units of the employer's employees, including licensed engine-room employees, unlicensed engine-room employees, and port engineers. This matter involves the unlicensed engine-room employees bargaining unit.

Oiler Positions

Oilers are one type of unlicensed personnel. Oilers crew the employer's vessels and provide "boots on the ground" operation of the vessels' propulsion equipment under the supervision of licensed personnel. The employer categorizes oilers into three different groups: year-round oilers, vacation-relief oilers, and on-call oilers. Under the terms of the parties' collective bargaining agreement, year-round oilers hold regular assignments on the employer's vessels and are guaranteed at least forty hours of work per week. The employer utilizes vacation-relief oilers and on-call oilers to fill in for year-round oilers when those employees use vacation or other leave time. Vacation-relief oilers are guaranteed at least forty hours of work per week and typically work seven-day assignments; on-call oilers are dispatched to fill assignments as needed and are not guaranteed work.[1]

The level of credentials required for all oiler positions is the same: all have Coast Guard documentation with an oiler endorsement but have not obtained a Coast Guard license. The vessel familiarization or "break in" process for the positions is also the same, and all oilers are required to "break in" on a particular type of vessel in order to crew it. Vacation-relief oiler positions have the highest rate of pay of the oiler positions. Due to the seniority-based assignment bidding system, vacation-relief oiler positions are often filled by higher-seniority personnel from within the oilers' seniority list.

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[1] There is no evidence that the employer has had trouble meeting its staffing needs or providing employees full access to bargained-for leave benefits.

Rule 10.02 of the parties' collective bargaining agreement contains a list of negotiated skill requirements beyond those of the other two oiler positions that vacation-relief oilers must maintain. To summarize the list, vacation-relief oilers must be broken in on and maintain familiarity with three classes of vessels. Union Seattle Branch Agent and lead negotiator Jeff Duncan testified that the Rule 10.02 requirements were negotiated in the 2009–11 collective bargaining cycle to support vacation-relief oilers' higher rate of pay.

Two union witnesses, Duncan and Nathanial Ratcliff, testified about the greater experience of higher-seniority personnel. In particular, Ratcliff, a long-term employee of the employer who currently works as a staff chief engineer and previously worked as an oiler, testified that he tends to feel safer working with a vacation-relief oiler on his crew than an on-call oiler. The theme of Ratcliff's testimony was, "With time comes experience, with experience comes safety." Ratcliff provided examples of situations in which he indicated he would feel safer with an experienced crewmember. For example, in a deck-level fire, the "number one" oiler would be the lead hose person on the back-up fire team. Ratcliff acknowledged that there were some on-call oilers that he felt safe working with—e.g., individuals who came into the employer's employment with other maritime industry experience—but he testified that there were others he did not feel comfortable working with. Ratcliff testified, however, that he had never refused to sail a vessel based upon safety concerns over on-call oilers on his crew.

Employer Director of Vessel Engineering and Maintenance Matthew Von Ruden also provided testimony about the effect of seniority on vessel safety. Von Ruden oversees the port engineering staff that supervises the employer's four hundred engine employees. Von Ruden agreed that, generally, the pool of vacation-relief oilers had more experience than the pool of on-call oilers, though there may be examples where individuals worked as on-call oilers because they had less seniority within the employer's ranks but overall had more industry experience because of prior work with another maritime employer. He opined that, from his perspective, using vacation-relief oilers over on-call oilers "in itself," did not make vessels safer. Von Ruden offered the recent example of a vacation-relief oiler who did not know how to "get the plant lit up" on a vessel to get it underway, causing the employer to miss sailings and service.

Minimum Staffing Provisions

For over 30 years, the parties' collective bargaining agreements have contained a provision (currently, Rule 10.03) requiring the employer to staff vacation-relief oilers at or above certain levels and to provide the union the names of employees designated as vacation-relief oilers:

> The Employer will furnish the Union with the names of the employees designated as Vacation Relief Oilers. There shall be a minimum of twelve (12) Engine Department Vacation Relief Oilers during the summer schedule and a minimum of eight (8) engine department Vacation Relief Oilers during the rest of the year to provide coverage for the positions within the system.

There is no evidence that prior to the instant bargaining cycle, the employer has objected to bargaining over this contract provision.

Bargaining for 2021–23 Successor Agreement

In June 2020, the parties began negotiations for a 2021–23 successor agreement. Before commencing bargaining with the union, the employer's bargaining team reviewed the existing collective bargaining agreement. The employer's new lead bargainer, Gina Comeau of the Office of Financial Management, compared Rule 10.03 to the language of RCW 47.64.120 and RCW 41.80.040(2) and formed the belief that the employer was prohibited by law from bargaining staffing levels like those found in Rule 10.03.

Accordingly, when the parties met on June 3 and the employer passed its first proposal, Comeau had struck through the second sentence of Rule 10.03. Comeau asserted to the union bargaining team that the employer was not required to bargain the issue of staffing levels. The union received the employer's proposal and little discussion ensued.

The parties met again on or around June 18. The union passed its first counterproposal to the employer and proposed retaining the contract language in Rule 10.03. Upon receipt of the union's proposal, Comeau began a short exchange by asking, "Isn't this an illegal subject?" Comeau asserted the employer's right to strike the language. Union lead bargainer Duncan responded to the effect that the language had been in the contract and should therefore remain there. Comeau

challenged Duncan's position, stating that he should know better than to think that just because a provision is in a contract it is a mandatory subject of bargaining. According to Comeau's unrebutted testimony, Duncan provided no other rationale for considering the subject mandatory. The parties indicated that they understood each other's positions on Rule 10.03 and moved on to discussing other subjects.

The parties discussed Rule 10.03 again on July 14. The employer again passed a proposal striking the second sentence of Rule 10.03. Comeau again asserted that Rule 10.03 was a nonmandatory subject and asked the union to agree to the sentence's removal. The union did not agree.

The parties continued their negotiation by exchanging proposals and correspondence electronically on July 30. Comeau again transmitted a proposal striking the second sentence of Rule 10.03. In her cover email, Comeau stated:

> We are reproposing striking minimum staffing levels for vacation relief identified in 10.03. As you are aware this issue is an illegal subject of bargaining. The state will strike this from our agreement. You will see that RCW 47.64.120(3) leads you to RCW 41.80.040, summarizes the rights of management that are not subject to bargaining i.e. Section (2), "the employer's budget and size of the agency workforce, including determining the financial basis for layoff." If MEBA choses [*sic*] to pursue this issue to certification we will file a ULP.

In an email to Comeau in the afternoon, union representative Eric Winge shared the union's response, a counterproposal that held the union's position maintaining the current contract language of Rule 10.03. Winge did not respond to Comeau's statements about Rule 10.03 as a subject of bargaining.

Comeau and Duncan had a sidebar conversation by phone at the end of the day on July 30. During the call, Duncan asked what the employer's "real" motivation was for wanting to strike the Rule 10.03 language. Duncan shared a union concern about the employer cutting vacation-relief oiler positions through attrition. Comeau indicated that she was motivated by the law and her sense that the language was an illegal subject of bargaining. She also stated that the employer was facing fiscal pressures given the COVID-19 pandemic and related budget deficit and said that she was

not going to promise that the employer would not evaluate the size of its workforce moving forward. Comeau stated that the employer needed the flexibility to determine its service needs and number of employees.

Comeau and Duncan had a follow-up conversation on August 5. Duncan asked if Comeau had considered setting out the vacation-oiler staffing requirement in terms of a percentage rather than a fixed number. Comeau considered this with her team and responded by email later that day, rejecting the idea:

> I considered your proposal and I [*sic*] regardless of how we identify the number either as a minimum or percentage of the total, it remains an illegal subject in my mind. It is still mandating a number of employees for the classification, which the legislature has said is illegal. I would maintain my proposal that legal necessity requires us to strike any reference to the number of vacation reliefs in Section 10.

On August 10, the union passed a new written counterproposal to the employer. This counterproposal struck the existing language of 10.03 and substituted a requirement that the parties:

> shall meet from time to time, but in no case less than quarterly, to determine the number of Vacation Relief Oilers as required by the number of vacation periods awarded to the Unlicensed Engine Room Employees.

Comeau and Duncan discussed the union's counterproposal by text message and telephone call. They considered what would occur under the union's proposal if the parties met but could not reach agreement on the number of vacation-relief oilers for a quarter. After some discussion, Comeau grew concerned that a lack of agreement would result in a grievance or other dispute.

Duncan mentioned that the language had been modeled after language from another employer contract with the International Organization of Masters, Mates & Pilots. Comeau reviewed that contract and consulted with the colleague responsible for its negotiation. She found that that contract called for the parties to meet and confer regarding a staffing matter but did not give that union a role in the employer's ultimate staffing level decision. Thus, the employer rejected the

union's language and counterproposed language that would require the parties to meet and "discuss" vacation-relief oiler staffing quarterly but would give the employer the "sole discretion to determine the number of Vacation Relief Oilers to utilize for coverage of positions within the system." Comeau passed this counterproposal by email on August 10.[2]

On August 11, Duncan emailed Comeau with the union's "final proposal" on Rule 10.03. This proposal restored the existing contract language requiring minimum staffing levels for vacation-relief oilers.

That same day, union counsel Jack Holland submitted a letter to the Commission seeking certification of four unresolved issues to interest arbitration. The union requested certification of Rule 10.03 and stated its position that no change be made to the Rule 10.03 language. On August 13, the employer filed the instant unfair labor practice complaint. On August 14, Executive Director Michael Sellars certified the parties for interest arbitration but subsequently suspended Rule 10.03 from the interest arbitration proceeding in accordance with WAC 391-55-265.

ANALYSIS

Applicable Legal Standards

Subjects of Bargaining

Subjects of bargaining are either mandatory or nonmandatory. *See* WAC 391-45-550. Nonmandatory subjects are either permissive or illegal. *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A (MRNE, 2020). Parties may bargain over permissive subjects such as those dealing with the procedures by which wages, hours, and other terms and conditions of employment are established but are not legally compelled to do so. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341–42 (1986). Illegal subjects of bargaining are those on which the parties may not agree because of statutory or constitutional

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[2] It is not clear from the record that the parties' August 10 counterproposals were ever couched as "what if" proposals, and there is no explanation why the union subsequently reverted to its original Rule 10.03 proposal, maintaining existing contract language, on August 11.

prohibitions. *Snohomish County (Snohomish County Deputy Sheriff's Association)*, Decision 8733-C (PECB, 2006).

Whether a particular item is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "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. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision 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." *Id.* at 200 (citing *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 341).

Arguments raised only at hearing and not presented to the other party during negotiations should not be allowed to form the basis of a party's argument that a proposal is or is not a mandatory subject of bargaining. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017), *aff'd*, *City of Everett v. Public Employment Relations Commission*, 11 Wn. App. 2d 1 (2019); *City of Spokane*, Decision 4746 (PECB, 1994).

An interest arbitration-eligible party can bargain to impasse and seek interest arbitration of mandatory subjects of bargaining. *City of Bellevue*, Decision 11435-A (PECB, 2013). A party commits an unfair labor practice violation when it bargains to impasse over a nonmandatory subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338. 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. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450 (1997); *Whatcom County*, Decision 7244-B (PECB, 2004). Including a permissive subject of bargaining in a collective bargaining agreement does not render that subject mandatory. WAC 391-45-550; *Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134-C (MRNE, 2016) (citing *Allied Chemical & Alkali Workers of*

America, Local 1 v. Pittsburgh Plate Glass Company, 404 U.S. 157 (1971)). Agreements on nonmandatory subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338.

Statutory Interpretation

Statutes must be interpreted and construed so that all language is given effect, and no portion is rendered meaningless or superfluous. *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A (citing *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546 (1996)); *Western Washington University*, Decision 10068-A (PSRA, 2008). To determine the intent of the legislature, a court "must look first to the language of the statute." *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A (citing *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110 (1984)). Absent any ambiguity, the Commission interprets a statute according to its plain and ordinary meaning. *State – Transportation*, Decision 8317-B (PSRA, 2005).

The Commission finds a statute ambiguous when it is subject to more than one reasonable interpretation. *Central Washington University*, Decision 8127-A (FCBA, 2004); *see also State – Early Learning*, Decision 9880-A (PSRA, 2008) ("A statute is ambiguous when it is fairly susceptible to different, reasonable interpretations, either on its face or as applied to particular facts, and must be construed to avoid strained or absurd results.") "Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme." *Fish and Wildlife Officers' Guild v. Department of Fish and Wildlife*, 191 Wn. App. 569, 580 (2015) (citing *In re Bankruptcy Petition of Wieber*, 182 Wn.2d 919, 926 (2015)). "While we look to the broader statutory context for guidance, we 'must not add words where the legislature has chosen not to include them,' and we must 'construe statutes such that all of the language is given effect.'" *Id.* (citing *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526 (2010)).

Application of Standards

First, it is undisputed that, through the actions above, the union insisted to impasse and sought certification of Rule 10.03 to interest arbitration. If Rule 10.03 is a mandatory subject, then its

actions were lawful. If Rule 10.03 is nonmandatory, the union has violated RCW 47.64.130(2)(c). See *Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134-C.

Therefore, this case puts into sharp relief the question of whether language that parties have bargained and maintained over a period of years without objection can nonetheless be a nonmandatory subject such that a party who insisted to impasse and sought interest arbitration to maintain existing contract language committed an unfair labor practice. The employer contends that the second sentence of Rule 10.03 is, by statute, an illegal subject of bargaining that contravenes its RCW 41.80.040(2) management right to set "the size of the agency workforce." Alternatively, it argues that if the language is not an illegal subject, it is still a nonmandatory permissive subject. The union contends that the subject is a mandatory subject that falls outside the prohibited management rights of RCW 41.80.040(2) and has a relationship to workplace safety and vacation procedures. The union also relies on the parties' bargaining history and argues that because "the parties have never considered minimum staffing levels to be nonmandatory," the Rule 10.03 language should be found to be mandatory.

While ideally disputes over long-term contractual provisions would be rare, the applicable law is clear that parties' actions can neither dictate nor waive whether a subject is mandatory or nonmandatory. The employer has met its burden of proving that Rule 10.03 is a nonmandatory subject. I find that the language was an illegal subject of bargaining but would also conclude that the subject was nonmandatory under the *City of Richland* balancing test.

Rule 10.03's Minimum Staffing Language Conflicts with The Nonbargainable Employer Rights Set Forth in RCW 41.80.040(1) and (2)

Rule 10.03 sets minimum staffing levels by season for a position within the employer's workforce. The relevant question of statutory interpretation is whether these minimum staffing requirements run afoul of the RCW 41.80.040(2) prohibition on bargaining "the size of the agency workforce." The employer argues that "size of the agency workforce" encompasses any workforce staffing-

level decision including those constrained by Rule 10.03.[3] The union argues that "size of the agency workforce" applies only to bargaining over the total size of an agency's workforce and that Rule 10.03 falls outside this prohibition because it constrains the size of only a portion of the workforce. After careful consideration, I find that the employer's interpretation is the only reasonable interpretation of the statute.

I look first at the language of the applicable statutes. *See Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A (citing *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d at 110). The Marine Employees' Act, under which these parties collectively bargain, mandates that, "The employer shall not bargain over the rights of management as identified in RCW 41.80.040."[4] RCW 47.64.120(3). Among those management rights, RCW 41.80.040 explicitly includes:

> (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
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> (2) The employer's budget, which includes for purposes of any negotiations conducted during the 2019-2021 fiscal biennium any specification of the funds or accounts that must be appropriated by the legislature to fulfill the terms of an agreement, and the size of the agency workforce, including determining the financial basis for layoffs;
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> (3) The right to direct and supervise employees;
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> (4) The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies; and
>
> (5) Retirement plans and retirement benefits.

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[3] The employer acknowledges that, even under its reading of the statute, it would still have an obligation to bargain effects of its staffing-level decisions.

[4] This change to the Marine Employees' Act was enacted in 2011. Laws of 2011, 1st Spec. Sess., ch. 16 §7.

The parties make their arguments under RCW 41.80.040(2), "[t]he employer's budget . . . and the size of the agency workforce, including determining the financial basis for layoffs."

I must consider the "plain and ordinary meaning" of the statutory language, as well as any specific definitions provided by the legislature. *See State – Transportation*, Decision 8317-B (PSRA, 2005). The applicable statutes contain no specific definitions for "size" or "workforce," so I look to their dictionary definitions. *See State – Washington State Patrol (Washington State Patrol Troopers Association)*, Decision 12967-A (PECB, 2019). "Agency" is defined by statute. Reviewing the definitions, I find the phrase "size of the agency workforce" reasonably susceptible to either party's suggested interpretation.

Chapter 41.80 RCW states that "agency" refers to "any agency as defined in RCW 41.06.020 and covered by chapter 41.06 RCW." RCW 41.80.005(1). RCW 41.06.020 defines "agency" as

> an office, department, board, commission, or other separate unit or division, however designated, of the state government and all personnel thereof; it includes any unit of state government established by law, the executive officer or members of which are either elected or appointed, upon which the statutes confer powers and impose duties in connection with operations of either a governmental or proprietary nature.

RCW 41.06.020(2). "Workforce" is defined as "the workers engaged in a specific activity or enterprise . . . [;] the number of workers potentially assignable for any purpose." *Workforce*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/workforce (last visited Feb. 15, 2021). Putting these definitions together (as "agency" modifies "workforce") I interpret "agency workforce" to mean the personnel engaged in work for or potentially assignable by the Washington State Ferries.

However, the ordinary definition of size is significant, and in this context, I find that it suggests ambiguity. "Size" is defined as "physical magnitude, extent, or bulk: relative or proportionate dimensions[;] relative aggregate amount or number[;] considerable proportions: BIGNESS." *Size*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/size (last visited Feb. 15,

2021). Importantly, "size" can refer to something's full "extent" or to its "relative or proportionate dimensions."

I next consider the prior interpretations of RCW 41.80.040 by the Commission, cited by the employer. The Commission has previously found both RCW 41.80.040(1) and (2) to protect state employers' unilateral right to make layoffs or otherwise adjust their staffing levels. *See Washington State University*, Decision 11704-B (PSRA, 2013); *State – Attorney General*, Decision 10733-A (PSRA, 2011). In so doing, the Commission has recognized the distinction the employer urges: that a state employer is prohibited from bargaining its staffing-level decisions but may be obligated to bargain effects of its decisions. *Washington State University*, Decision 11704-B.

In *Washington State University*, the employer laid off one of six bargaining unit custodians and redistributed the custodian's duties, increasing employee workloads, without bargaining. *Washington State University*, Decision 11704. An examiner found that the employer did not have a duty to bargain the layoff but had failed in its duty to bargain the effects of the layoff and ordered the employer to return the workloads to *status quo ante* conditions. *Id.* When asked to consider the examiner's *status quo ante* remedy, which the employer argued impermissibly impaired its right to set staffing levels, the Commission addressed the rights of management under RCW 41.80.040(2), stating plainly:

> *The statute explicitly prohibits the employer from bargaining the size of its workforce. As the Examiner found, the employer was within its rights to reduce the number of custodians.* However, the obligation remained for the employer to bargain the effects of that decision.

Washington State University, Decision 11704-B (emphasis added).

The Commission has also found that a state employer has the unilateral right to reduce the size of its workforce under a second management rights prong: RCW 41.80.040(1) power to control "[t]he functions and programs of the employer . . . and the structure of the organization." *State – Attorney General*, Decision 10733-A. In *State – Attorney General*, the employer conducted a reorganization

of one of its offices during the pendency of a representation petition and made changes that included eliminating a position and reallocating another employee's position to a different job classification. The Commission affirmed an examiner decision finding that the employer was privileged to make the changes because "they [fell] squarely under the management rights set forth in RCW 41.80.040, which are not subject to bargaining." *State – Attorney General*, Decision 10733 (PSRA, 2010), *aff'd*, Decision 10733-A.

I am bound by the precedent of the Commission. I note that the Commission did not face the unique argument raised by the union in the cases above. Nonetheless, the statutory interpretation the employer advocates is in harmony with the Commission's decisions, while the statutory interpretation the union advocates is at odds with the outcomes of both *Washington State University* and *State – Attorney General*, as in each case the employer had the right to eliminate a position and the Commission found that the RCW 41.80.040 management rights applied.[5] *Washington State University*, Decision 11704-B; *State – Attorney General*, Decision 10733-A; *see also Central Washington University*, Decision 10967-A (PECB, 2012) (deciding state higher education employer had right to unilaterally eliminate jobs, though not merely reduce employee hours, under the "substantially similar" statutory language of RCW 41.56.021(4)(b)).

I also specifically find no way to reconcile the union's proffered interpretation of RCW 41.80.040(2) with the employer's unilateral right under RCW 41.80.040(1) to make changes

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[5] I am also mindful of the purposes of the Marine Employees' Act outlined in RCW 47.64.006. *See Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A. However, I do not find that my interpretation of the employer's RCW 41.80.040 and 47.64.120(3) management rights conflicts with the stated purposes of the act. As the union points out, RCW 47.64.006 declares it the public policy of the state to "promote harmonious and cooperative relationships between the ferry system and its employees" through collective bargaining, to "protect the citizens of this state by assuring effective and orderly operation of the ferry system in providing for their health, safety, and welfare," and to "promote [comparably] just and fair compensation, benefits, and working conditions for ferry system employees." However, within the seven codified public policies of RCW 47.64.006, the legislature included several others that suggest some degree of management control over the ferry system's operations: the policies of "efficiently provid[ing] levels of service consistent with trends and forecasts of ferry usage" and "[p]rovid[ing] continuous operation of the . . . ferry system at reasonable cost to users." Allowing management to set its staffing levels in accordance with these public policies does not trample the rights of organized employees to bargain over compensation, benefits, and working conditions.

to "[t]he functions and programs of the employer . . . and the structure of its organization," which the Commission has held includes the right to eliminate and reallocate positions. *State – Attorney General*, Decision 10733-A; *Fish and Wildlife Officers' Guild v. Department of Fish and Wildlife*, 191 Wn. App. at 580 ("Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme."). Because the Rule 10.03 minimum staffing provision would constrain the employer from unilaterally eliminating or reallocating vacation-relief oiler positions as well as prevent the employer from laying off vacation-relief oilers, I find that the provision conflicts with RCW 41.80.040(1) and (2). The proposal therefore presents an illegal subject of bargaining.

The City of Richland Test Merits the Same Ultimate Outcome.

Even if I did not find that Rule 10.03 was an illegal subject of bargaining, I would find that the same ultimate outcome was warranted by weighing the evidence under the *City of Richland* balancing test—that the union insisted on a nonmandatory subject of bargaining.

Employer's Interests

The employer articulated an interest in having the flexibility to manage its operations in accordance with its service needs and budget. Employer lead bargainer Comeau shared these concerns with union lead bargainer Duncan during a sidebar discussion on July 30. Comeau stated that while she was primarily motivated by her belief that Rule 10.03 was an illegal subject of bargaining, the employer was facing fiscal pressures due to the COVID-19 pandemic and related budget deficit and that she would not promise that the employer would not re-evaluate the size of its workforce.

Von Ruden, ultimately responsible for the staffing of the employer's engine room employees, also testified about these interests at hearing. Von Ruden described vacation-relief oilers and on-call oilers as different "tools" or options that management could use to meet its leave-staffing coverage needs. Similar to Comeau's explanation to union bargainer Duncan, Von Ruden explained that the employer desired the flexibility to "use [its] resources to best effect," pending the uncertainties of potential budgetary and level-of-service requirements.

The Commission and courts have often recognized "general staffing levels" as "fundamental prerogatives of management." *City of Richland*, 113 Wn.2d at 205. An employer has a "strong managerial prerogative in controlling the size of its workforce." *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A; *see also Central Washington University*, Decision 10413-A (PSRA, 2011) (citing *City of Centralia*, Decision 5282-A (PECB, 1996)) ("Generally, the size of an employer's workforce is a managerial prerogative, and therefore a permissive subject of bargaining."). This is consistent with the fact that employers are tasked with managing their budgets and determining their programmatic and level-of-service needs. *See Wenatchee School District*, Decision 3240-A (PECB, 1990); *City of Kelso*, Decision 2120-A (PECB, 1985); *Federal Way School District*, Decision 232-A (EDUC, 1977).

As discussed above, Rule 10.03 directly constrains the employer's ability to decide the size of its workforce by requiring that the employer maintain certain minimum levels of vacation-relief oiler staffing by season. The language of Rule 10.03 imposes these staffing requirements regardless of the employer's budget or level-of-service decisions.

Union's Interests

The union argues an interest in Rule 10.03's minimum vacation-relief staffing language as a matter of workplace and public safety. The union particularly relies upon (1) the testimony of Ratcliff and (2) the added knowledge requirements that Rule 10.02 of the parties' agreement imposes on vacation-relief oilers for its argument that relying on vacation-relief oilers instead of on-call oilers has "direct" safety advantages. The union argues that its interest in bargaining for "safe and competent" leave-coverage staffing outweighs the employer's managerial interests.

The Commission has also long recognized workplace and public safety as union interests that may shift the balance in favor of requiring bargaining over staffing levels. Specifically, the Commission has stated:

> If a union presents evidence that the shift staffing relates to workload and safety . . . then we must balance how the minimum shift staffing relates to employees' wages, hours, and working conditions against the employer's interest in entrepreneurial control or managerial prerogatives. If a union is able to show that

> the shift staffing level had a "demonstratedly direct relationship to employee workload and safety," then requiring an employer to bargain staffing will result in a balance of the interests of the public, employer, and union in furtherance of the public employment collective bargaining laws.

City of Everett (International Association of Fire Fighters, Local 46), Decision 12671-A (citing *City of Richland*, 113 Wn.2d at 204).

In this case, the glaring problem with the union's safety interest argument is that there is no evidence that the union ever shared this interest with the employer during bargaining to support the assertion that Rule 10.03 was a mandatory subject. Instead, employer lead bargainer Comeau testified clearly and without rebuttal that the only rationale the union asserted during negotiations for considering Rule 10.03 a mandatory subject was the parties' longstanding history of bargaining the subject.[6] The Commission has determined that "[a]rguments raised only at hearing and not presented to the other party during negotiations should not be allowed to form the basis of a party's argument that a proposal is or is not a mandatory subject of bargaining." *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A; *City of Spokane*, Decision 4746 (PECB, 1994) (dismissing worker safety argument on the basis that union "portrayed itself as concerned about" safety at hearing but raised only mismanagement concerns in prior discussions with employer). Because there is no evidence that the union's safety concerns were raised even once during the parties' negotiations, I do not consider the union's now-professed safety arguments.[7]

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[6] Union lead negotiator Duncan expressed a general concern during the July 30 sidebar that the employer would attrit the vacation-relief oiler position absent the Rule 10.03 language but apparently did not elaborate on the concern or cite safety or any other factor as its basis.

[7] At hearing, the employer offered rebuttal evidence about the impact of the staffing mix on workplace safety and argues in its brief a lack of a "well-correlated nexus" between the two. Because I find that the union failed to properly raise its now-alleged safety interest, I do not need to resolve the parties' dispute over the degree of the relationship between Rule 10.03 and the type of safety interests the Commission has previously recognized as necessitating bargaining.

Secondarily, the union urges that Rule 10.03 is a "leave-related procedure," and should be given the same treatment as certain leave-related proposals found to be mandatory in past cases. Leave benefits themselves are often found to be mandatory subjects, akin to compensation; practices that bear upon employee leave rights have been found to be mandatory in some cases, depending upon the facts presented. *See, e.g., Washington State Ferries*, Decision 12873 (MRNE, 2018) (determining employer was required to bargain change to supervisor leave coverage practice that caused measurable impairments to employees' ability to use accrued leave); *City of Clarkston*, Decision 3286 (PECB, 1989) (finding employer was required to bargain change to call-back procedure that impacted employees' ability to enjoy vacation leave, holidays, and "Kelly" days). However, this argument suffers the same defect as the union's safety argument in that it was never communicated to the employer during bargaining. *See City of Everett* (*International Association of Fire Fighters, Local 46*), Decision 12671-A. Because the argument was not properly raised, I decline to consider the extent to which Rule 10.03 bears similarity to the leave-related cases cited above.

Given the nexus of Rule 10.03 to the core of the employer's entrepreneurial control over its operations and the lack of a properly raised, countervailing interest affecting employee wages, hours, or working conditions, I find that Rule 10.03 is not a mandatory subject under the *City of Richland* balancing test.

The Parties' Bargaining History Cannot Render Rule 10.03 Mandatory

Finally, I have considered but am not persuaded by the evidence that Rule 10.03 was a long-standing provision of the parties' collective bargaining agreements and that the parties had a history of bargaining other staffing provisions. Under the plain law of the Commission, these facts cannot render a nonmandatory subject mandatory: "Including a permissive subject of bargaining in a collective bargaining agreement does not render that subject mandatory." *Washington State Ferries*, Decision 12134-C (citing *Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Company*, 404 U.S. 157); *see also Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338 (agreements over nonmandatory subjects "must be a product of renewed mutual consent"). WAC 391-45-550 states the agency's long-held policy that whether a

particular subject is mandatory or nonmandatory is a question of law and fact "to be determined by the commission . . . . [A] party which engages in collective bargaining with respect to a particular issue does not and cannot confer the status of a mandatory subject on a nonmandatory subject."

CONCLUSION

Rule 10.03 is a nonmandatory subject of bargaining, and the employer has met its burden of proving that the union insisted to impasse and sought interest arbitration of a nonmandatory subject in violation of RCW 47.64.130(2)(c). The appropriate remedy is to strike the union's proposal on Rule 10.03 from the interest arbitration certification. *See Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134-C. The union is also directed to post and read an appropriate notice explaining its unfair labor practice, as described below.

FINDINGS OF FACT

1. Washington State Ferries is a public employer within the meaning of RCW 47.64.011(4).

2. The Marine Engineers' Beneficial Association is a bargaining representative within the meaning of RCW 47.64.11(1) and is the exclusive bargaining representative of a unit of unlicensed engine-room employees.

3. The union and employer have been parties to a series of collective bargaining agreements. Their most recent agreement was in effect from July 1, 2019, through June 30, 2021.

4. Oilers are one type of unlicensed personnel. Oilers crew the employer's vessels and provide "boots on the ground" operation of the vessels' propulsion equipment under the supervision of licensed personnel. The employer categorizes oilers into three different groups: year-round oilers, vacation-relief oilers, and on-call oilers. Under the terms of the parties' collective bargaining agreement, year-round oilers hold regular assignments on the employer's vessels and are guaranteed at least forty hours of work per week.

5. The employer utilizes vacation-relief oilers and on-call oilers to fill in for year-round oilers when those employees use vacation or other leave time. Vacation-relief oilers are guaranteed at least forty hours of work per week and typically work seven-day assignments; on-call oilers are dispatched to fill assignments as needed and are not guaranteed work.

6. Employer Director of Vessel Engineering and Maintenance Matthew Von Ruden considered vacation-relief oilers and on-call oilers different "tools" or options that management could use to meet its leave-staffing coverage needs. Von Ruden desired the flexibility to "use [the employer's] resources to best effect," pending the uncertainties of potential budgetary and level-of-service requirements.

7. The level of credentials required for all oiler positions is the same: all have Coast Guard documentation with an oiler endorsement but have not obtained a Coast Guard license. The vessel familiarization or "break in" process for the positions is also the same, and all oilers are required to "break in" on a particular type of vessel in order to crew it. Vacation-relief oiler positions have the highest rate of pay of the oiler positions. Due to the seniority-based assignment bidding system, vacation-relief oiler positions are often filled by higher-seniority personnel from within the oilers' seniority list.

8. Rule 10.02 of the parties' collective bargaining agreement contains a list of negotiated skill requirements beyond those of the other two oiler positions that vacation-relief oilers must maintain. To summarize the list, vacation-relief oilers must be broken in on and maintain familiarity with three classes of vessels. Union Seattle Branch Agent and lead negotiator Jeff Duncan testified that the Rule 10.02 requirements were negotiated in the 2009–11 collective bargaining cycle to support vacation-relief oilers' higher rate of pay.

9. Two union witnesses, Duncan and Nathanial Ratcliff, testified about the greater experience of higher-seniority personnel. In particular, Ratcliff, a long-term employee of the employer who currently works as a staff chief engineer and previously worked as an oiler, testified that he tends to feel safer working with a vacation-relief oiler on his crew than an on-call

oiler. The theme of Ratcliff's testimony was, "With time comes experience, with experience comes safety."

10. Ratcliff provided examples of situations in which he indicated he would feel safer with an experienced crewmember. For example, in a deck-level fire, the "number one" oiler would be the lead hose person on the back-up fire team. Ratcliff acknowledged that there were some on-call oilers that he felt safe working with—e.g., individuals who came into the employer's employment with other maritime industry experience—but he testified that there were others he did not feel comfortable working with. Ratcliff testified, however, that he had never refused to sail a vessel based upon safety concerns over on-call oilers on his crew.

11. Von Ruden also provided testimony about the effect of seniority on vessel safety. Von Ruden oversees the port engineering staff that supervises the employer's four hundred engine employees. Von Ruden agreed that, generally, the pool of vacation-relief oilers had more experience than the pool of on-call oilers, though there may be examples where individuals worked as on-call oilers because they had less seniority within the employer's ranks but overall had more industry experience because of prior work with another maritime employer. He opined that, from his perspective, using vacation-relief oilers over on-call oilers "in itself," did not make vessels safer. Von Ruden offered the recent example of a vacation-relief oiler who did not know how to "get the plant lit up" on a vessel to get it underway, causing the employer to miss sailings and service.

12. For over 30 years, the parties' collective bargaining agreements have contained a provision (currently, Rule 10.03) requiring the employer to staff vacation-relief oilers at or above certain levels and to provide the union the names of employees designated as vacation-relief oilers. Its language states that: "[t]he Employer will furnish the Union with the names of the employees designated as Vacation Relief Oilers. There shall be a minimum of twelve (12) Engine Department Vacation Relief Oilers during the summer schedule and a minimum of eight (8) engine department Vacation Relief Oilers during the rest of the year to provide coverage for the positions within the system." There is no evidence that prior to

the instant bargaining cycle, the employer has objected to bargaining over this contract provision.

13. In June 2020, the parties began negotiations for a 2021–23 successor agreement. Before commencing bargaining with the union, the employer's bargaining team reviewed the existing collective bargaining agreement. The employer's new lead bargainer, Gina Comeau of the Office of Financial Management, compared Rule 10.03 to the language of RCW 47.64.120 and RCW 41.80.040(2) and formed the belief that the employer was prohibited by law from bargaining staffing levels like those found in Rule 10.03.

14. When the parties met on June 3 and the employer passed its first proposal, Comeau had struck through the second sentence of Rule 10.03. Comeau asserted to the union bargaining team that the employer was not required to bargain the issue of staffing levels. The union received the employer's proposal and little discussion ensued.

15. The parties met again on or around June 18. The union passed its first counterproposal to the employer and proposed retaining the contract language in Rule 10.03. Upon receipt of the union's proposal, Comeau began a short exchange by asking, "Isn't this an illegal subject?" Comeau asserted the employer's right to strike the language.

16. Union lead bargainer Duncan responded to the effect that the language had been in the contract and should therefore remain there. Comeau challenged Duncan's position, stating that he should know better than to think that just because a provision is in a contract it is a mandatory subject of bargaining. According to Comeau's unrebutted testimony, Duncan provided no other rationale for considering the subject mandatory. The parties indicated that they understood each other's positions on Rule 10.03 and moved on to discussing other subjects.

17. The parties discussed Rule 10.03 again on July 14. The employer again passed a proposal striking the second sentence of Rule 10.03. Comeau again asserted that Rule 10.03 was a

nonmandatory subject and asked the union to agree to the sentence's removal. The union did not agree.

18. The parties continued their negotiation by exchanging proposals and correspondence electronically on July 30. Comeau again transmitted a proposal striking the second sentence of Rule 10.03. In her cover email, Comeau stated: "We are reproposing striking minimum staffing levels for vacation relief identified in 10.03. As you are aware this issue is an illegal subject of bargaining. The state will strike this from our agreement. You will see that RCW 47.64.120(3) leads you to RCW 41.80.040, summarizes the rights of management that are not subject to bargaining i.e. Section (2), 'the employer's budget and size of the agency workforce, including determining the financial basis for layoff.' If MEBA choses [*sic*] to pursue this issue to certification we will file a ULP."

19. In an email to Comeau in the afternoon, union representative Eric Winge shared the union's response, a counterproposal that held the union's position maintaining the current contract language of Rule 10.03. Winge did not respond to Comeau's statements about Rule 10.03 as a subject of bargaining.

20. Comeau and Duncan had a sidebar conversation by phone at the end of the day on July 30. During the call, Duncan asked what the employer's "real" motivation was for wanting to strike the Rule 10.03 language. Duncan shared a union concern about the employer cutting vacation-relief oiler positions through attrition. Comeau indicated that she was motivated by the law and her sense that the language was an illegal subject of bargaining. She also stated that the employer was facing fiscal pressures given the COVID-19 pandemic and related budget deficit and said that she was not going to promise that the employer would not evaluate the size of its workforce moving forward. Comeau stated that the employer needed the flexibility to determine its service needs and number of employees.

21. Comeau and Duncan had a follow-up conversation on August 5. Duncan asked if Comeau had considered setting out the vacation-oiler staffing requirement in terms of a percentage rather than a fixed number. Comeau considered this with her team and responded by email later that day, rejecting the idea. Comeau stated: "I considered your proposal and I [*sic*]

regardless of how we identify the number either as a minimum or percentage of the total, it remains an illegal subject in my mind. It is still mandating a number of employees for the classification, which the legislature has said is illegal. I would maintain my proposal that legal necessity requires us to strike any reference to the number of vacation reliefs in Section 10."

22. On August 10, the union passed a new written counterproposal to the employer. This counterproposal struck the existing language of Rule 10.03 and substituted a requirement that the parties: "shall meet from time to time, but in no case less than quarterly, to determine the number of Vacation Relief Oilers as required by the number of vacation periods awarded to the Unlicensed Engine Room Employees."

23. Comeau and Duncan discussed the union's counterproposal by text message and telephone call. They considered what would occur under the union's proposal if the parties met but could not reach agreement on the number of vacation-relief oilers for a quarter. After some discussion, Comeau grew concerned that a lack of agreement would result in a grievance or other dispute.

24. Duncan mentioned that the language had been modeled after language from another employer contract with the International Organization of Masters, Mates & Pilots. Comeau reviewed that contract and consulted with the colleague responsible for its negotiation. She found that that contract called for the parties to meet and confer regarding a staffing matter but did not give that union a role in the employer's ultimate staffing level decision. Thus, the employer rejected the union's language and counterproposed language that would require the parties to meet and "discuss" vacation-relief oiler staffing quarterly but would give the employer the "sole discretion to determine the number of Vacation Relief Oilers to utilize for coverage of positions within the system." Comeau passed this counterproposal by email on August 10.

25. On August 11, Duncan emailed Comeau with the union's "final proposal" on Rule 10.03. This proposal restored the existing contract language requiring minimum staffing levels for vacation-relief oilers.

26. That same day, union counsel Jack Holland submitted a letter to the Commission seeking certification of four unresolved issues to interest arbitration. The union requested certification of Rule 10.03 and stated its position that no change be made to the Rule 10.03 language. On August 13, the employer filed the instant unfair labor practice complaint. On August 14, Executive Director Michael Sellars certified the parties for interest arbitration but subsequently suspended Rule 10.03 from the interest arbitration proceeding in accordance with WAC 391-55-265.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 47.64 RCW and chapter 391-45 WAC.

2. As described in findings of fact 4–26, the union unlawfully submitted a nonmandatory subject of bargaining to interest arbitration in violation of RCW 47.64.130(2)(c).

ORDER

MARINE ENGINEERS' BENEFICIAL ASSOCIATION, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Bargaining to impasse and seeking interest arbitration over the Rule 10.03 minimum vacation-relief oiler staffing provision, a nonmandatory subject of bargaining.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 47.64 RCW:

a. Withdraw its Rule 10.03 proposal concerning minimum vacation-relief oiler staffing made during collective bargaining negotiations with the employer. Notify the arbitrator in writing that this issue, which was certified for arbitration in a letter dated August 14, 2020, is being removed from the list of issues certified for consideration.

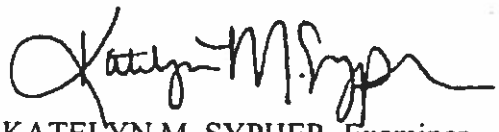
b. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

d. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 12th day of March, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KATELYN M. SYPHER, 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.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 03/12/2021

DECISION 13318 - MRNE has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 132976-U-20

EMPLOYER: WASHINGTON STATE FERRIES

REP BY:

FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
LABOR RELATIONS SECTION
PO BOX 47500
OLYMPIA, WA 98504-7500
labor.relations@ofm.wa.gov

DIANE LUTZ
OFFICE OF FINANCIAL MANAGEMENT
128 10TH AVE SW 4TH FL
PO BOX 47500
OLYMPIA, WA 98504-7500
diane.lutz@ofm.wa.gov

GIL HODGSON
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
gil.hodgson@atg.wa.gov

AMEE J. TILGER
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DRIVE SW
PO BOX 40145
OLYMPIA, WA 98504-0145
amee.tilger@atg.wa.gov

PARTY 2: MARINE ENGINEERS' BENEFICIAL ASSOCIATION

REP BY:

JEFF DUNCAN
MARINE ENGINEERS' BENEFICIAL ASSOCIATION
5210 12TH ST E
FIFE, WA 98424
jduncan@mebaunion.org

JACK HOLLAND
REID, MCCARTHY, BALLEW & LEAHY, L.L.P.
100 W HARRISON ST NORTH TOWER STE 300
SEATTLE, WA 98119-4143
jack@rmbllaw.com