

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BELLINGHAM POLICE GUILD,

Complainant,

vs.

CITY OF BELLINGHAM,

Respondent.

CASE 134913-U-22

DECISION 13826 - PECB

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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On September 21, 2021, the Mayor of the City of Bellingham (employer or the City) ordered all city employees to be vaccinated against COVID-19. Failure to comply with this mandate would result in separation from city employment, subject to an exception and accommodation process. The Bellingham Police Guild (union) alleges that the City did not bargain with them before implementing the mandate and committed an unlawful unilateral change.

The City mandated COVID-19 vaccinations in order to protect the health and safety of its employees and the community and to ensure continuity of essential government services. At the time of the mandate, the spread of the Delta variant of COVID-19 presented an unpredictable and urgent situation. The city government's interests in being able to decide how best to protect employee and community health and safety during this situation, as well as its ability to rapidly implement that decision, outweighed the union's interests in bargaining over the issue. The decision to implement the COVID-19 vaccine mandate under the specific circumstances of this

case was not a mandatory subject of bargaining, and the City did not commit an unlawful unilateral change.¹

ISSUE

As stated in the preliminary ruling of March 30, 2022, the issue in this case is whether the City violated the Public Employees Collective Bargaining Act in the following manner:

Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by unilaterally implementing a COVID-19 vaccine mandate without providing the union an opportunity for bargaining.

BACKGROUND

The City of Bellingham is located in Whatcom County. The union represents uniformed police officers employed by the Bellingham Police Department.

The union and the City were parties to a collective bargaining agreement (CBA) that was effective from January 1, 2018, to December 31, 2021. The duties of police officers represented by the union include patrolling, conducting criminal investigations, responding to calls, mediating civil disputes or interceding in domestic disturbances, apprehending, controlling and arresting persons, assisting disabled persons, providing information and direction, meeting with and making presentations to community groups, administering immediate assistance to citizens in critical or emergency situations, administering first aid, CPR, or other assistance, providing support to victims and families, securing and controlling crime scenes, gathering evidence and witness statements, appearing in court, and maintaining surveillance of suspects.

¹ Today I am also issuing *King County*, Decision 13825 (PECB 2024), which deals with King County's COVID-19 vaccine mandate as applied to uniformed personnel of the King County Sheriff's Office. Because both cases concerned whether a COVID-19 vaccine mandate was a mandatory subject of bargaining, I believed it was appropriate to issue the decisions together. However, each case was decided based on its own record.

The COVID-19 Pandemic Reaches Whatcom County

Shortly after Seth Fleetwood took office as the Mayor of Bellingham on January 1, 2020, a novel coronavirus known as SARS-CoV-2 reached Washington. SARS-CoV-2 is extremely communicable and causes COVID-19, a respiratory disease for which humanity had no established immunity and which can lead to serious illness and death.

In February and March 2020, the Governor of Washington, the Whatcom County Executive, and Mayor Fleetwood proclaimed states of emergency in their jurisdictions. “Nonessential” personnel of the City were sent to work from home, including police department support staff and, to an extent, Detectives. Due to the nature of police work, the Patrol Officers at the Bellingham Police Department were not assigned to work from home and continued to work in person.

2020 was a difficult year in Washington as the spread of COVID-19 waxed and waned with the changing of the seasons, changing restrictions on everyday life, and the changing of the virus itself. Life in western Washington changed dramatically in response to the COVID-19 pandemic. Schools and businesses were closed, and people were ordered to stay home, wear masks, and engage in “social distancing.” As the City’s expert witness, Dr. John Lynch of the University of Washington and Harborview Medical Center testified, “It is... a nonarguable point that COVID-19 and the pandemic that it is responsible for has been a massive threat to life and has led to demand on public health and other facilities in our community at an unprecedented level during our lifetime.”

COVID-19 Vaccines Become Available.

In December 2020, the United States Food and Drug Administration (FDA) issued emergency use authorizations (EUAs) for COVID-19 vaccines developed by Pfizer/BioNTech and Moderna. In February 2021, the FDA issued an EUA for a COVID-19 vaccine developed by Janssen (Johnson & Johnson). The FDA approved the vaccines after studies showed that they reduced transmission of COVID-19 and were effective at preventing symptomatic disease and death. The immunity from the vaccines provided better protection than being previously infected or from having no prior infection. Research also indicated that the vaccines provided better protection than testing or masking strategies.

In the spring of 2021, as the population began to get vaccinated, COVID-19 infections and hospitalizations decreased. Fleetwood, along with many others, hoped that this meant that masking and social distancing restrictions could be eased.

In April 2021, the Whatcom County Health Department issued a document, "COVID Vaccine Employer Resources," which read, "We suggest a better approach at this time is for employers to be proactive by encouraging staff to get vaccinated rather than mandating they do so." Whatcom County Health Department Director Erika Lautenbach testified that, at the time, the vaccine wasn't even available for all the residents of Whatcom County, and "in April we had lines for vaccine[s]; so mandates weren't even really something employers were talking about because their employees were scrambling for vaccines and trying to get appointments."

The Delta Variant Emerges

Since its emergence in humans in late 2019, the SARS-CoV-2 virus mutated and evolved into many variants. The Delta variant first began to emerge in the United States around late spring of 2021 and was a variant of concern because it was much more transmissible and led to higher rates of hospitalization and death than prior variants. Dr. Lynch testified that this period "was, up to that point, the most challenging phase of the pandemic." The FDA-approved vaccines were less effective in preventing infection by the Delta variant, and "breakthrough" infections increasingly occurred, but the vaccines still provided some reduction in infection and transmission. The vaccines continued to provide very high levels of protection against severe disease and death.

In August 2021, the Delta variant reached western Washington, and COVID-19 infections surged in Whatcom County. Hospitalizations, intensive care unit (ICU) admissions, and deaths all markedly increased. The infection and hospitalization rates were much higher for unvaccinated people compared to those who were fully vaccinated. No one knew when the Delta wave would peak or end. According to Dr. Lynch, public health officials were concerned about entering a "crisis standards of care in our healthcare environments." Around the state, ICUs were filled to over 90 percent capacity. Vaccinations were likely to offer substantial protection from severe illness and death because, at the time, much of the population had still never been infected with SARS-CoV-2 and had no immunity at all.

Fleetwood Issues the Vaccine Mandate

By September 2021, some, but not all, of the City's employees were vaccinated. According to self-attestations, 72.83 percent of the police department staff were vaccinated by August 2021 (however, by October 28, 2021, only 58.19 percent of the police department had actually provided proof of vaccination). As the Delta variant continued to spread, with no end in sight, Fleetwood began to believe that a city vaccine mandate might be in order. By September 13, 2021, the local hospital had set a record high for COVID-19 patients. Fleetwood was concerned that the local ICUs would be overrun and that more people in the community would die from COVID-19. Fleetwood knew that a vaccine mandate would be controversial, but he believed that it would be the most safe and effective means of tamping down on the virus and achieving safety for the workforce and the community. Fleetwood "believed the issuance of a vaccination mandate would substantially protect employees and the public."

On September 21, 2021, Fleetwood issued an executive order providing the following: "all City employees are required to be fully vaccinated against the COVID-19 virus as a condition of employment no later than December 3, 2021." Only vaccines that had been authorized by the FDA at the time—the Moderna, Pfizer, and Janssen vaccines—would satisfy the vaccine mandate. The order described the background and reasoning for the mandate, including that the Delta variant had caused COVID-19 cases and hospitalizations to rise sharply; that COVID-19 vaccines are safe and effective in reducing serious disease and hospitalizations; that it was the duty of the employer to protect the health and safety of employees; and that city employees provide services to and interact with the public. The order provided that employees who asserted the need for a medical or religious exemption from the vaccine mandate would go through an accommodation process.

Fleetwood did not attempt to bargain the decision with the union before he issued the vaccine mandate. He felt he could not wait to bargain with the union before implementing the order,

[b]ecause of the deadly threat that was the Delta variant and the dramatically increasing case counts that we were seeing in August and September. The time that would be involved in bargaining that [decision] would have required postponing for potentially considerable amounts of time issuance of the order, which would have a direct bearing on the rate at which City employees got vaccinated, and, thus, protected themselves and the community.

However, the City committed to bargaining the impacts of the decision with the union. Union president Travis Hauri testified that if bargaining over the decision had been available, the union would not have agreed to the vaccine mandate, explaining, “[p]eople would have been able to get a vaccine or not get a vaccine and retain their jobs.”

On September 21, 2021, Fleetwood sent an email to all city employees announcing that he had signed the vaccine mandate order. He said, “I am committing the city to join the growing alliance of organizations, both public and private, who understand that the pathway to defeating COVID-19 is getting as many people as possible vaccinated.”

The same day that Fleetwood signed the order and announced it to the employees, the union sent a letter to Chief of Police Flo Simon demanding to bargain the mandate. The City agreed to bargain over the impacts of the mandate with the union.

The parties first met for bargaining on September 28, 2021. At the meeting, the union sought to have the City adopt alternatives to the vaccine mandate, such as testing and masking. The City would not agree to any such alternatives, taking the position that the decision to issue the vaccine mandate was not subject to bargaining. Over the course of additional meetings, the parties negotiated and agreed to a memorandum of understanding (MOU) regarding the impacts of the mandate. Hauri signed the MOU on behalf of the union on October 25, 2021. Among other things, the MOU provided for additional paid leave for vaccinated employees and set forth details of the accommodation process and the termination process.

As a result of the vaccine mandate, some officers who did not get a COVID-19 vaccine were involuntarily separated from employment with the City. The separations were characterized as non-disciplinary. Some others chose to resign. About 10 officers left city employment because of the vaccine mandate,² and the City’s police force decreased from about 100 officers to around 90.

² Hauri provided an estimate, stating, “I think all told it was between 12 and 14 chose to either leave or be terminated.” However, a union exhibit titled “Separated Employees” listed 10 names, which Hauri said “looks like a pretty accurate list.” Chief Simon estimated that 10 or 11 officers were lost as a result of the mandate.

One officer who did not get a COVID-19 vaccine was accommodated and remained employed. The loss of officers through terminations and resignations had an impact on the department's operations, which were already understaffed for other reasons.

COVID-19 was the leading cause of death in the United States for police officers in 2020 and 2021. According to the *Officer Down Memorial Page* and the *National Law Enforcement Memorial and Museum*, between March and December 2020, COVID-19 killed an estimated 221 law enforcement officers, and in 2021 COVID-19 killed an estimated 301 law enforcement officers. These were considered "line of duty deaths," indicating that these officers acquired COVID-19 in the workplace.³

The union filed the unfair labor practice complaint in this matter on March 14, 2022. Unfair Labor Practice Administrator Dario de la Rosa issued a preliminary ruling on March 30, 2022, finding that the complaint stated a cause of action. The employer filed an answer on April 20, 2022. A hearing was conducted over Zoom, a videoconferencing computer program, on June 27, June 28, and July 19, 2023. The parties filed briefs to complete the record on September 15, 2023.

ANALYSIS

Applicable Legal Standard

The parties' collective bargaining obligation requires that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or a term of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, *City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). To prove a unilateral change, the complainant must establish that the dispute involves a mandatory subject of bargaining and that

³ In *King County*, Decision 13825, the record showed that COVID-19 killed an estimated 496 law enforcement officers in 2021. I recognize this inconsistency is unusual. However, as noted in footnote 1, each decision must be based on its own record. In each of these decisions, different sources for line of duty deaths in 2021 were entered into evidence.

there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). The complainant must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (METRO) (ATU Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007) (citing *King County*, Decision 4893-A (PECB, 1995)).

Whether a particular subject is mandatory or nonmandatory is a question of law and fact to be determined by the Commission and is not subject to waiver by the parties by their action or inaction. 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. WAC 391-45-550; *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017). To decide whether an issue is a mandatory subject of bargaining, 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 Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The public’s interest in effective government services is also a factor in the balance. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (considering the public’s interest in effective fire suppression service and observing that “the public’s interest in safety must be weighed”). The actual application of this test is nuanced and is not strictly black and white. Subjects of bargaining fall along a continuum. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. The decision depends on which characteristic predominates. *Id.*

Application of Standard

There is no dispute that the City implemented the COVID-19 vaccine mandate without first bargaining over the decision with the union. There is also no dispute that the vaccine mandate was

a change to the status quo. The dispositive issue in this case is whether the City's COVID-19 vaccine mandate is a mandatory subject of bargaining.

Identifying the Subject at Issue

The union argues that the issue in this case is “whether one is able to keep one's job. That is the working condition that was unilaterally changed in this case.”

The union argues that the City “conflates *two separate subjects*. One subject is whether the City can order a vaccine to combat a pandemic. Whether someone choosing not to be vaccinated loses their job *is an entirely different subject*.” The union asserts, “[E]ven if the vaccine order is a management right, the consequences on the officers, including whether they keep their job are negotiable.” The union essentially argues that the City can order employees to be vaccinated, but there cannot be any consequences for employees for violating the order unless bargaining with the union is completed.

The subject at issue cannot be carved up as the union suggests. The preliminary ruling in this case specifically concerns whether the City unlawfully implemented “a COVID-19 vaccine mandate.” The City was clear that the “mandate” meant that vaccination was a condition of continued employment. Termination for non-compliance was integral to the mandate, as it was a vaccine “mandate” rather than a vaccine “request,” “option,” or “suggestion.” The decision to issue “a COVID-19 vaccine mandate” must be analyzed under the *City of Richland* test as a whole.

The union also argues that the City could have, and should have, decided on a different course of action instead of the COVID-19 vaccine mandate. For example, the union suggests that the City could have implemented a regimen of masking, testing, and/or putting unvaccinated employees on a leave of absence. The union also suggested during the hearing that the City should have allowed a vaccine that had not been approved by the FDA at the time, Novavax, to satisfy the vaccine mandate. The union argues that “because these alternatives did exist and the City failed to them [*sic*], it committed an Unfair Labor Practice.”

The question here is not whether the City's COVID-19 vaccine mandate was—at the time, or especially in hindsight—a wise decision or the best possible choice. The only issue is whether the

City had the right to unilaterally make the choice that it did make or whether the City was required to bargain with the union first. If the vaccine mandate was a mandatory subject, then the City could not unilaterally implement it and would have had to first bargain over the decision, including considering the union's proposed alternatives. If the vaccine mandate was not a mandatory subject, then the employer was under no obligation to consider the union's proposed alternatives, as no bargaining was required. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A. The mandatory or permissive nature of the subject is determined by the *City of Richland* balancing test, and whether there were other options available is not a factor in that test.⁴

The City of Richland Test Applied

A mandatory subject of bargaining must be bargained to either agreement or lawful impasse before it can be implemented. The bargaining unit in this case is subject to interest arbitration, so if the parties do not come to an agreement in bargaining, they must then engage in mediation and interest arbitration. RCW 41.56.430 - RCW 41.56.465; *City of Mountlake Terrace*, Decision 11702-A (PECB, 2014) ("Interest arbitration is applicable when an employer desires to make a mid-term contract change to a mandatory subject of bargaining."). The full bargaining, mediation, and interest arbitration process between the union and the City for the 2018-2020 CBA took over two years. Hauri testified that the union would not have agreed to the vaccine mandate, and so the full impasse resolution process may have been required here. Ultimately, the *City of Richland* analysis determines whether a particular change is the type of change that the employer—the city government in this instance—should be able to make without going through this process or whether the subject is “amenable to bargaining with the union and, should they reach impasse, to

⁴ In virtually every case applying the *City of Richland* balancing test, the employer could have decided not to make the change at issue. The fact that the employer could have chosen not to make the given change has never been a factor in whether the subject is mandatory or not. For example, in *Wenatchee School District*, Decision 3240-A (PECB, 1990), the Commission found that the employer's decision to convert to a full-day kindergarten was not a mandatory subject. The school district certainly could have *not* made such a decision. In *City of Seattle*, Decision 11588-A (PECB, 2013), the Commission found that the City's decision to have in-house counsel represent employees in police action lawsuits was not a mandatory subject. The City could have decided to not make such a change. In *University of Washington*, Decision 11075-A (PSRA, 2012), the Commission found that the employer's decision to consolidate its call centers was not a mandatory subject. The university certainly could have not consolidated the call centers or could have found other ways to achieve its goal of remaining competitive with other hospitals.

submission to binding interest arbitration.” *University of Washington*, Decision 13483-A (PSRA, 2022).

The *City of Richland* test requires that the Commission “accommodat[e] the diverse public, employer and union interests at stake in public employment relations” and “achieve the balance of public, employer and union interests...” *City of Richland*, 113 Wn.2d 197 at 203, 204.

In this case, there are significant and substantial interests on each side of the balance.

The Union Has Significant Interests in Being Able to Bargain the COVID-19 Vaccine Mandate

The *City of Richland* decision asks how strongly “the subject bears [a relationship] to [the] wages, hours and working conditions” of employees. The City argues that the COVID-19 vaccine mandate bears a “weak relationship... to working conditions.” The COVID-19 vaccine mandate is, by its own terms and in the most fundamental sense, a new working condition. It is literally a condition that must be satisfied for employees to continue working for the City. The City minimizes the union’s interests in the COVID-19 vaccine mandate, describing it as “having to receive a safe and effective vaccine.” The union’s interests are much more significant than this.

The Union Has an Interest in Its Members’ Continuing Employment Under Existing Conditions

Employees have a substantial interest in continuing their employment, which is impacted by the implementation of a new and controversial job qualification. When the employees in this case began working for the City, there was no COVID-19 vaccine mandate. They did not sign up for a COVID-19 vaccine requirement as a job qualification. Under the COVID-19 vaccine mandate, the workforce was told that if they did not comply with this new job qualification (i.e., being irrevocably injected with new and/or not fully approved drugs),⁵ they would be terminated. Receiving these new vaccines, in the midst of conflicting information about their safety and effectiveness, was a difficult choice for some of the employees. Hauri testified, “I had some people

⁵ The vaccine mandate could be satisfied by taking the Pfizer-Biontech vaccine, which had just been fully approved by the FDA by the time the City’s vaccine mandate was issued; the mandate could also be satisfied by taking the Moderna or Janssen (Johnson & Johnson) vaccines, both of which were only approved under EUAs at the time. The Pfizer-Biontech and Moderna vaccines were messenger RNA (mRNA) based vaccines, which was a relatively new vaccine technology.

with some very strong opinions on the vaccine thing.” The union introduced evidence of one employee who had an anaphylactic allergic reaction after taking the first dose of the Moderna vaccine and went to the emergency room, whose doctor then recommended she not get the second dose. This employee had a legitimate reason for not wanting to take the complete vaccine series.⁶ Feeling that she was unable to comply with the mandate, she described her reaction as “fear of losing my job, fear of do I risk my life and try to get the second dose to keep my job? What’s going to happen to me? I’m a single mom with a deadly illness allergy.” I agree with the union that “[a] job provides an important paycheck necessary to live off, but often much more. For professional employees, including law enforcement officers, work is often integral to their identity.” Leaving a job can have lasting impacts on an employee’s career. Some employees who left employment with the City of Bellingham because of the COVID-19 vaccine mandate left law enforcement altogether.⁷

The Union Has an Interest in Its Members’ Freedom to Choose Whether to Take the Vaccine Without Pressure from Their Employer

The employees also have a substantial liberty interest at stake here. They have an interest in not being pressured, under threat of job loss, to take a new vaccine that had, at the time, only received an emergency use authorization from the FDA. There is a compelling argument that utilizing such a substance should be a personal decision free from such enormous pressure from one’s employer. These interests weigh in favor of requiring the City to bargain over the COVID-19 vaccine mandate with the union prior to having implemented it.

⁶ This employee was given a medical accommodation and was not separated from employment with the City.

⁷ The union contends that if an issue impacts job tenure, it is automatically a mandatory subject, asserting (quoting *City of Olympia*, Decision 3194 (PECB, 1989)) that “If the work rule affects an employee’s continuation of employment . . . it will be a mandatory subject of bargaining, *regardless of the employer’s legitimate reason for its promulgation.*” This probably is almost always the case, and I can understand why Examiner Downing would feel comfortable expressing such an axiom, but I do not think this reflects our current application of *City of Richland*. The Commission has rejected the notion that any issues are categorically mandatory or permissive, instead requiring the balancing test to be performed on “a case-by-case” basis and considering the specific facts of each case. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A. Although the union’s interest in job tenure is a substantial one, it is only one side of the balance.

The Union Has Interests Relating to Staffing Impacts of the Vaccine Mandate on Its Members

The employer's COVID-19 vaccine mandate resulted in some employees being terminated, and this impact to staffing, in turn, impacted officer morale. Union president Hauri testified

That was an extremely large hit for us all at once. It created a lot of internal staffing issues almost immediately.... The department is understaffed significantly for an agency and a city our size, and that was a tremendous blow to the agency and the City, for that matter, and it created a lot of stress on all the other employees.... It was highly emotional and difficult, you know. That entire time, much like the rest of the world, got to go home. We didn't. And then we were rewarded with coming through the pandemic with terminating our coworkers, and it weighed heavily mentally.... I had many of those individuals in my office in tears over facing termination....

The loss of officers as a result of the COVID-19 vaccine mandate also impacted workload. Chief Simon said, "it further limited my pool of officers that were on patrol, and so officers were having to work overtime on some shifts or coming in on their days off to cover shifts. And so I think that during this entire time officers were getting tired mentally and physically."

These interests weigh in favor of requiring the City to have bargained over the COVID-19 vaccine mandate with the union prior to implementing it.

In sum, there are substantial interests on the union's side of the *City of Richland* balancing test.⁸

⁸ There are some employee interests that weigh in favor of the employer being able to implement a vaccine mandate without having to go through the (often protracted) bargaining and impasse resolution procedure. The employees have an interest in not getting sick or dying from COVID-19. COVID-19 was the leading cause of line of duty deaths of law enforcement officers in 2020 and 2021. Fleetwood testified, "remember that there were many, many employees in the City who very much supported a mandate. They didn't want to be sitting next to people that were unvaccinated." Chief Simon also indicated that some officers were in favor of the mandate, saying, "there are two sides to the coin; so it depended on who you were talking to. . . ." At least some employees had an interest in a maximally safe work environment where all of their co-workers were vaccinated against COVID-19.

The Employer Has Significant Interests in Being Able to Unilaterally Implement the COVID-19 Vaccine Mandate

The union, in their brief, does not appear to acknowledge any employer interests in implementing a COVID-19 vaccine mandate. Nonetheless, there are significant employer interests at stake.

The *City of Richland* balancing test weighs “the extent to which the subject lies ‘at the core of entrepreneurial control’ or is a management prerogative.” The Commission has observed that “public sector employers are not ‘entrepreneurs’ in the same sense as private sector employers, [so] entrepreneurial control should consider the right of a public sector employer, as an elected representative of the people, to control management and direction of government.” *Central Washington University*, Decision 12305-A (PSRA, 2016).

The Employer Has an Interest in Protecting Its Employees’ Health.

The City’s COVID-19 vaccine mandate was issued, in part, “to preserve and protect the health and safety of City employees.” The employer has a substantial interest in protecting the health of its employees. The COVID-19 vaccine mandate foreseeably⁹ reduced the chance that employees would infect each other with COVID-19. The vaccine mandate also foreseeably protected the employees from getting infected with COVID-19 by members of the public as they performed their law enforcement duties. Hauri agreed that the vaccine mandate was a precaution the City put in place in order to make interactions with the public safe. In turn, the vaccine mandate also foreseeably helped protect each employee from getting sick and dying from COVID-19. The employer’s interest in being able to act decisively and unilaterally to protect employee health by implementing a COVID-19 vaccine mandate is compelling. Being able to implement the vaccine mandate quickly, rather than having to wait until bargaining with the union was completed, may have saved the lives of police officers working for the City of Bellingham.

⁹ We can’t ultimately know what direct effect the City’s COVID-19 vaccine mandate had in comparison to what it would have looked like if the City had not implemented the vaccine mandate. The employer’s interests at the time the decision was made should be considered, that is, what effects the employer had reasonably foreseen the vaccine mandate would have.

The Employer Has an Interest in Protecting Public Health

The City's COVID-19 vaccine mandate was issued, in part, "to preserve and protect the health and safety of... the public . . ." Protecting public health is a core governmental function. *See, e.g., In re Recall of Inslee*, 508 P.3d 635, 642 (2022). The police officers working for the City interact closely with members of the public as part of their core job duties, entering homes and business, rendering life-saving assistance, and taking people into custody. The COVID-19 vaccine mandate foreseeably reduced the chances of city police officers spreading COVID-19 to the members of the public during these interactions. The employer's interest in being able to act decisively and unilaterally to protect public health by implementing a COVID-19 vaccine mandate is compelling. Being able to implement the vaccine mandate quickly, rather than having to wait until bargaining with the union was completed, may have saved the lives of members of the public in the City of Bellingham.

In announcing the vaccine mandate, Fleetwood stated that a significant goal of the order was to combat the COVID-19 pandemic by "getting as many people as possible vaccinated." The vaccine mandate furthered the government's public health mission as it foreseeably increased the portion of the local population that was vaccinated. Increasing population immunity through vaccination was regarded as a safe and effective means of preventing sickness and death in the community and combatting the COVID-19 pandemic. Ending the COVID-19 pandemic so that the community could return to a normal life is a compelling interest, and the vaccine mandate furthered that interest. Being able to implement the vaccine mandate quickly, rather than having to wait until bargaining with the union was completed, foreseeably furthered these broader public health interests.

The City Has an Interest in Ensuring the Continuity of Police Services

The City's COVID-19 vaccine mandate was issued, in part, because "City employees... provide services to and interact with the public." One of the City's primary missions is to provide police services. The COVID-19 vaccine mandate foreseeably helped ensure that the police department continued to provide its essential services. COVID-19 was the leading cause of line of duty deaths for police officers in the United States in 2020 and 2021. The City has an interest in avoiding sickness and death among its police officers so that it can continue to provide essential police

services to the community. By mid-2021, the City's police department was already understaffed for reasons other than COVID-19. Being able to implement the vaccine mandate quickly, rather than having to wait until bargaining with the union was completed, foreseeably kept the City's police force healthy and at work performing their critical mission.

The nature of the COVID-19 pandemic created a strong interest for the employer in being able to implement the COVID-19 vaccine mandate without having to wait for bargaining and impasse resolution. The situation was urgent. The Delta variant was surging at the time of the mandate, the area's hospitals were filling to capacity, and no one knew how long the Delta variant would last or how bad it would get. It was legitimate for the City to be concerned that the Delta variant, and other possible variants, could lead to a massive crisis. As the City points out, having to wait could have "completely undermin[ed] the effectiveness of vaccination in responding to the crisis." Being able to act decisively to preserve health and safety, limit sickness and death, and maintain essential government services during a once-in-a-century pandemic "lies 'at the core of entrepreneurial control'" for the government of the City of Bellingham.

The Public Has Interests at Stake in the City's COVID-19 Vaccine Mandate

Where public safety may be impacted by an employer's decision, the public's interest in safety must be weighed as part of the balance. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A. In this case, the public's interests largely overlap with the interests articulated above. The City's police officers interact with members of the public in person, in homes, in public and private buildings, and in the back of patrol cars. Social distancing and masking are not always possible. Members of the public have an interest in reducing the likelihood that a police officer will transmit COVID-19 to them. The public also has an interest in continued police services to preserve safety and order in the community. These public interests were furthered by the employer's ability to implement a COVID-19 vaccine mandate quickly, rather than having to wait until bargaining with the union was completed.

By issuing the vaccine mandate, the City intended to "join the growing alliance of organizations, both public and private, who understand that the pathway to defeating COVID-19 is getting as many people as possible vaccinated." There is a public interest in having a greater portion of the

population vaccinated. Fleetwood testified that this public health interest was a substantial motivation for the mandate, stating

I think there was a hope at that time amongst those of us that believed this was an appropriate thing to do that the more private and public entities that imposed a requirement as a condition of employment being vaccinated, the better we would do in the community writ large in tamping down the spread of the virus.

The Balance of Interests Weighs in Favor of the Employer's Ability to Unilaterally Implement the COVID-19 Vaccine Mandate

The union's interests in being able to bargain over the City's COVID-19 vaccine mandate are substantial and compelling. However, under the unique facts of this case, the employer and public's interests in the City being able to decisively and unilaterally implement the COVID-19 vaccine mandate outweigh the union's interests.

The union urged that the reduction in police department staffing levels as a result of the COVID-19 vaccine mandate detrimentally impacted the workforce and impacted services to the public and that these facts weigh in the union's favor. Staffing levels can be impacted by many factors, such as pay, recruitment efforts, and job qualifications. Chief Simon stated that, prior to the COVID-19 vaccine mandate, the department was already understaffed, and recruitment efforts were impacted by other factors. She said, "I don't think the mandate affected our recruiting efforts at all." Moreover, it is impossible to know how staffing, morale, and workload could have been impacted by increased sickness and death among the police force if the vaccine mandate had not been implemented. The potential and foreseeable impacts to staffing from *not* immediately implementing a COVID-19 vaccine mandate could weigh in favor of the employer.

The union argues that the employees were not hired with a COVID-19 vaccine mandate in place and that it is unfair for the employer to change the conditions of employment to impose one. This argument is compelling. However, many, if not all, of the employees in the unit were not hired under the conditions of COVID-19 either. Returning to pre-pandemic working conditions wasn't possible at the time. The employer's vaccine mandate was intended to help reach a point when that would be possible again. Ending the pandemic to return things to normal is also a compelling interest.

The application of the *City of Richland* test is specific to the facts of each case, and “[o]ne case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive.” *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A. This is such a case. The particular circumstances present here lead to an outcome that could easily differ from another vaccine mandate case with different facts. It is critical to analyze the circumstances that existed at the time the decision was made. Mayor Fleetwood acknowledged that, even under the circumstances of the Delta variant where “we had increased hospitalizations [and there] was [concern] about our ICU being overrun,” implementing the vaccine mandate was a “difficult decision.”

There are several specific facts that were present at the time that tip the balance in the employer’s favor in this case.

One important factor unique to this case is the nature of the COVID-19 pandemic itself. COVID-19 is extremely transmissible between people in close proximity. Humanity had no prior immunity to it, and it causes a significant amount of sickness and death. A case involving a vaccine mandate for a different disease that is not as transmissible or virulent might come out differently.

Another important circumstance unique to this case is the nature of the COVID-19 vaccines as their effectiveness was understood at the time. At the time of the vaccine mandate, the vaccines were either fully FDA approved or approved under EUAs and were understood to be highly effective at preventing infection, transmission, disease, and death. The vaccines were also understood at that time to have very minimal and rare side effects.¹⁰ A different case dealing with different vaccines that were not understood to be as safe and effective might come out differently. Similarly, a COVID-19 vaccine mandate case arising at a different time, with a different body of knowledge about the safety and effectiveness of the vaccines, might come out differently. This

¹⁰ Subsequent to the City’s vaccine mandate, in May 2022, the FDA limited the use of the Janssen (Johnson & Johnson) vaccine to “individuals . . . who would otherwise not receive a COVID-19 vaccine” because of a rare but serious blood clotting side effect.

case must be weighed based on what was known about the COVID-19 vaccines at the time of the City's mandate.

Another important circumstance unique to this case is that, at the time the vaccine mandate was implemented, the Delta variant was creating a significant public health crisis. At the time of the mandate, no one knew how long the Delta variant would circulate, how many people it would make sick or kill, or whether the hospitals would exceed capacity. At the time, there was an understandable urgency to take action to combat the Delta variant. Under other circumstances, the COVID-19 vaccine mandate might not have the same urgency. At the time of the publication of this decision, the COVID-19 pandemic seems to have largely stabilized, and life has largely returned to normal. If the COVID-19 vaccine mandate were ordered today, the case might turn out differently. This case, however, must be weighed based on the circumstances that existed at the time of the City's decision.

Another important circumstance unique to this case is that it deals with the COVID-19 vaccine mandate as applied to a bargaining unit of police officers. Police officers cannot work from home and must work in close contact with each other and with members of the public. They also perform a critical and fundamental mission for public safety and order. A COVID-19 vaccine mandate case as applied to a different group of employees, such as those who can work from home or who have a less critical mission, might have a different outcome.

Another important circumstance unique to this case is that, at the time of the COVID-19 vaccine mandate, the Bellingham Police Department was already understaffed and was having difficulty recruiting new officers. Additionally, the onboarding process to train new recruits to the point where they can be on patrol on their own is substantial, taking about 18 months. The City had an understandable urgency in ensuring that the members of its police force were protected from COVID-19 so that they could continue to perform their jobs. In a different case where the workforce was in surplus or where employees were easily replaced, the outcome might be different.

In this case and under these circumstances, the government of the City of Bellingham had the right to implement a COVID-19 vaccine mandate to protect its employees and the public from

COVID-19 and maintain its police force. Under the circumstances, this was not the type of decision that could wait for bargaining. The City's COVID-19 vaccine mandate was not a mandatory subject of bargaining.

CONCLUSION

Because the City of Bellingham's September 21, 2021 COVID-19 vaccine mandate was not a mandatory subject of bargaining, the City was not required to bargain the decision. Accordingly, it was not unlawful for the City to unilaterally implement the vaccine mandate. The complaint is dismissed.

FINDINGS OF FACT

1. The City of Bellingham is a public employer within the meaning of RCW 41.56.030(13).
2. The Bellingham Police Guild is a bargaining representative within the meaning of RCW 41.56.030(2) and is the exclusive bargaining representative of a bargaining unit of the employer's police officers.
3. The employer's police officers are uniformed personnel within the meaning of RCW 41.56.030(14).
4. Seth Fleetwood was the Mayor the City of Bellingham.
5. Flo Simon was the Chief of Police for the Bellingham Police Department.
6. Travis Hauri was the union president of the Bellingham Police Guild.
7. The employer and union were parties to a collective bargaining agreement that was effective from January 1, 2018, to December 31, 2021.
8. The police officers working for the City interact closely with members of the public as part of their core job duties, entering homes and business, rendering life-saving assistance, and taking people into custody.

9. In January 2020, a novel coronavirus known as SARS-CoV-2 reached Washington. SARS-CoV-2 is extremely communicable and causes COVID-19, a respiratory disease for which humanity had no established immunity and which can lead to serious illness and death.
10. In February and March 2020, the Governor of Washington, the Whatcom County Executive, and Mayor Fleetwood proclaimed states of emergency in their jurisdictions. “Nonessential” personnel of the City were sent to work from home, including police department support staff and, to an extent, Detectives. Due to the nature of police work, the Patrol Officers at the Bellingham Police Department were not assigned to work from home and continued to work in person.
11. In December 2020, the United States Food and Drug Administration (FDA) issued emergency use authorizations (EUAs) for COVID-19 vaccines developed by Pfizer/BioNTech and Moderna. In February 2021, the FDA issued an EUA for a COVID-19 vaccine developed by Janssen (Johnson & Johnson). The FDA approved the vaccines after studies showed that they reduced transmission of COVID-19 and were effective at preventing symptomatic disease and death. The immunity from the vaccines provided better protection than being previously infected or from having no prior infection. Research also indicated that the vaccines provided better protection than testing or masking strategies.
12. The Delta variant of the SARS-CoV-2 virus first began to emerge in the United States around late spring of 2021 and was a variant of concern that was much more transmissible and led to higher rates of hospitalization and death than prior variants. The FDA-approved vaccines were less effective in preventing infection by the Delta variant, and “breakthrough” infections increasingly occurred, but the vaccines still provided some reduction in infection and transmission. The vaccines continued to provide very high levels of protection against severe disease and death.
13. In August 2021, the Delta variant reached western Washington, and COVID-19 infections surged in Whatcom County. Hospitalizations, intensive care unit (ICU) admissions, and deaths all markedly increased. The infection and hospitalization rates were much higher

for unvaccinated people compared to those who were fully vaccinated. No one knew when the Delta wave would peak or end. Public health officials were concerned about entering a “crisis standards of care in our healthcare environments.” Around the state, ICUs were filled to over 90 percent capacity. Vaccinations were likely to offer substantial protection from severe illness and death because, at the time, much of the population had still never been infected with SARS-CoV-2 and had no immunity at all.

14. By September 2021, some, but not all, of the City’s employees were vaccinated. According to self-attestations, 72.83 percent of the police department staff were vaccinated by August 2021 (however, by October 28, 2021, only 58.19 percent of the police department had actually provided proof of vaccination). By September 13, 2021, the local hospital had set a record high for COVID-19 patients. Fleetwood was concerned that the local ICUs would be overrun and that more people in the community would die from COVID 19. Fleetwood knew that a vaccine mandate would be controversial, but he believed that it would be the most safe and effective means of tamping down on the virus and achieving safety for the workforce and the community. Fleetwood “believed the issuance of a vaccination mandate would substantially protect employees and the public.”
15. On September 21, 2021, Fleetwood issued an executive order providing the following: “all City employees are required to be fully vaccinated against the COVID-19 virus as a condition of employment no later than December 3, 2021.” Only vaccines that had been authorized by the FDA at the time—the Moderna, Pfizer, and Janssen vaccines—would satisfy the vaccine mandate. The order described the background and reasoning for the order, including that the Delta variant had caused COVID-19 cases and hospitalizations to rise sharply; that COVID-19 vaccines are safe and effective in reducing serious disease and hospitalizations; that it was the duty of the employer to protect the health and safety of employees; and that city employees provide services to and interact with the public. The order provided that employees who asserted the need for a medical or religious exemption from the vaccine mandate would go through an accommodation process.
16. Fleetwood did not attempt to bargain the decision with the union before he issued the vaccine mandate. He felt he could not wait to bargain with the union before implementing

the order. However, the City committed to bargaining the impacts of the decision with the union. If the union had been able to bargain the decision, the union would not have agreed to the vaccine mandate.

17. On September 21, 2021, Fleetwood sent an email to all city employees announcing that he had signed the vaccine mandate order. He said, "I am committing the city to join the growing alliance of organizations, both public and private, who understand that the pathway to defeating COVID-19 is getting as many people as possible vaccinated."
18. On September 21, 2021, the union sent a letter to Chief of Police Flo Simon demanding to bargain the mandate. The City agreed to bargain over the impacts of the mandate with the union.
19. The parties first met for bargaining on September 28, 2021. Over the course of additional meetings, the parties negotiated and agreed to a memorandum of understanding (MOU) regarding the impacts of the mandate. Hauri signed the MOU on behalf of the union on October 25, 2021.
20. As a result of the vaccine mandate, some officers who did not get a COVID-19 vaccine were involuntarily separated from employment with the City. The separations were characterized as non-disciplinary. Some others chose to resign. About 10 officers left city employment because of the vaccine mandate, and the City's police force decreased from about 100 officers to around 90. One officer who did not get a COVID-19 vaccine was accommodated and remained employed. The loss of officers through terminations and resignations had an impact on the department's operations, which were already understaffed for other reasons.
21. COVID-19 was the leading line of duty cause of death in the United States for police officers in 2020 and 2021.
22. One employee had an anaphylactic allergic reaction after taking the first dose of the Moderna vaccine and went to the emergency room, and the employee's doctor then recommended she not get the second dose.

23. Some employees who left employment with the City of Bellingham because of the COVID-19 vaccine mandate left law enforcement altogether.
24. The City's COVID-19 vaccine mandate resulted in some employees being terminated, and this impact to staffing, in turn, impacted officer morale. The loss of officers as a result of the COVID-19 vaccine mandate also impacted workload.
25. The City's COVID-19 vaccine mandate foreseeably reduced the chance that employees would infect each other with COVID-19. The vaccine mandate also foreseeably protected the employees from getting infected with COVID-19 by members of the public as they performed their law enforcement duties. The vaccine mandate also foreseeably helped protect each employee from getting sick and dying from COVID-19.
26. The City's COVID-19 vaccine mandate foreseeably reduced the chances of city police officers spreading COVID-19 to the members of the public during these interactions.
27. The City's COVID-19 vaccine mandate foreseeably increased the portion of the local population that was vaccinated. Increasing population immunity through vaccination was regarded as a safe and effective means of preventing sickness and death in the community and combatting the COVID-19 pandemic.
28. One of the City's primary missions is to provide police services. The COVID-19 vaccine mandate foreseeably helped ensure that the police department continued to provide its essential services.

CONCLUSIONS OF LAW

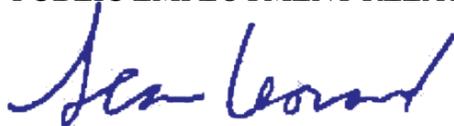
1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.
2. As described in findings of fact 8 through 28, the City did not refuse to bargain in violation of RCW 41.56.140(4) within six months of the date the complaint was filed by unilaterally implementing a COVID-19 vaccine mandate without providing the union an opportunity for bargaining.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 26th day of April, 2024.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



SEAN M. LEONARD, 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.