STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BELLINGHAM POLICE GUILD, Complainant, vs. CITY OF BELLINGHAM, Respondent.	CASE 134913-U-22 DECISION 13826-A - PECB DECISION OF COMMISSION

Jim Cline, Attorney at Law, Cline & Associates, for the Bellingham Police Guild.

Shannon E. Phillips, Attorney at Law, Summit Law Group, PLLC, for the City of Bellingham.

SUMMARY OF DECISION

On September 21, 2021, the Mayor of the City of Bellingham (city) issued an emergency order mandating all city employees be fully vaccinated against COVID-19 by December 3, 2021. The Bellingham Police Guild (guild) filed a demand to bargain. The city and the guild negotiated a memorandum of understanding (MOU) covering impacts of the vaccine order. On March 14, 2022, the guild filed an unfair labor practice (ULP) complaint alleging that the City had refused to bargain. Following a hearing on June 27 and 28 and July 19, 2023, Examiner Sean Leonard concluded that the decision to implement a COVID-19 vaccine mandate was a permissive subject of bargaining and dismissed the unfair labor practice complaint. *City of Bellingham*, Decision 13826 (PECB, 2024). The guild filed a timely appeal.

The guild's appeal presents the following issues. First, did the Examiner err in framing the issue? Second, did the city refuse to bargain by unilaterally implementing a COVID-19 vaccine mandate without providing the guild an opportunity for bargaining? We affirm the Examiner's treatment of the issues and conclusion that the decision to require employees to be vaccinated for

COVID-19 or be terminated was a permissive subject of bargaining under the special circumstances presented by this case. The city was not required to complete bargaining before implementing the vaccine order. The city satisfied its obligation to bargain the mandatory effects of its decision by negotiating an MOU covering these impacts with the guild.

STANDARD OF REVIEW

On appeal, the Commission reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

The Commission reviews findings of fact for substantial evidence in light of the entire record. *Wapato School District*, Decision 12894-A (PECB, 2019). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Brinnon School District*, Decision 7210-A (PECB, 2001).

A party assigning error has the burden of showing a challenged finding is in error and not supported by substantial evidence; otherwise, findings are presumed correct. *Renton Technical College*, Decision 7441-A (CCOL, 2002) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990); *Brinnon School District*, Decision 7210-A. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its Examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

The guild has appealed findings of fact 14, 15, 16, 26, 27, and 28. After reviewing the record, we find the challenged findings of fact are supported by substantial evidence. The appeal

before us turns on whether the Examiner applied the correct legal standard and correctly balanced the parties' interests.

ANALYSIS

The Examiner Did Not Err in Framing the Issue

In its appeal brief, the guild argues that the Examiner too narrowly read the preliminary ruling.[1] As a result, the Examiner did not resolve all the issues in the guild's complaint. The city contends that the guild did not appeal the preliminary ruling in its notice of appeal as required by the rule. We agree that the guild did not challenge the preliminary ruling in the manner allowed by the rules and raised the issue for the first time in its appeal brief.

"The cause of action statement limits the cause(s) of action before an examiner and the commission." WAC 391-45-110(2)(b). Should a party think the cause of action statement does not accurately reflect the allegations of the complaint, WAC 391-45-110(2)(b) provides a mechanism for clarification before adjudication. If the guild thought that "the [preliminary ruling] failed to address one or more causes of action the complainant sought to advance in the complaint" then the guild could have, "before the issuance of a notice of hearing, [sought] clarification from the person who issued the [preliminary ruling]." *Id.* A preliminary ruling "may only be appealed to the commission by a notice of appeal filed after issuance of an examiner decision under WAC 391-45-310(2)." WAC 391-45-110(2)(a).

The guild did not seek clarification from the ULP Administrator about the cause of action statement or otherwise contest the preliminary ruling before the Examiner issued the notice of hearing. Nor did the guild appeal the preliminary ruling in its notice of appeal. By raising the issue for the first time in its appeal brief, the guild's appeal is untimely.

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[1] When the guild filed the unfair labor practice complaint, WAC 391-45-110 referred to this document type as a "preliminary ruling." WAC 391-45-110 has since been amended to identify this document type as a "cause of action statement."

The City's Decision to Require the COVID-19 Vaccine During the Covid Pandemic Was a Permissive Subject of Bargaining

Under the Public Employees' Collective Bargaining Act, chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). Subjects of bargaining fall along a continuum. At one end of the spectrum are mandatory subjects of bargaining including grievance procedures and "personnel matters, including wages, hours, and working conditions." 41.56.030(4); *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 200 (1989); *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 341 (1986). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives, which are permissive subjects of bargaining. *City of Richland*, 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of each case. One case may result in finding that a subject is mandatory, while the same subject, under different facts, may be considered permissive. The decision focuses on which characteristic predominates. *Id.*

"Whether a particular subject is mandatory or nonmandatory is a question of law and fact to be determined by" the Commission. WAC 391-45-550. To decide, 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." *City of Richland*, 113 Wn.2d at 203; *Kitsap County v. Kitsap County Correctional Officers Guild, Inc.*, 179 Wn. App. 987, 998 (2014); *Yakima County v. Yakima County Law Enforcement Officers' Guild*, 174 Wn. App. 171, 183 (2013). While the balancing test calls upon the Commission to balance managerial and employee considerations, the application of this test is more nuanced and is not strictly black and white. *City of Seattle*, Decision 12102-A (PECB, 2014).

On appeal, and before the Examiner, the guild has argued that the city made two unilateral changes each of which must be separately balanced under *City of Richland*. Those changes are (1) the requirement that employees be fully vaccinated against the COVID-19 virus by December 3, 2021, as a condition of employment and (2) employees who did not comply with the new condition

of employment would be terminated from employment. In addressing the guild's argument, the Examiner concluded, "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.'" Decision 13826 at 9.

We agree with the Examiner that requiring the vaccine with the consequence of termination for failing to comply with the mandate is one decision to be balanced under the *City of Richland*. The September 21, 2021, executive order "required" employees "to be fully vaccinated against the COVID-19 virus as a condition of employment no later than December 3, 2021."[2] The executive order clearly communicated that the COVID-19 vaccine was a condition of employment. Reading the executive order in the context of a global pandemic, if an employee did not fulfill the vaccine mandate in a timely manner, then they would not have met the conditions for employment and would be terminated.

To apply the balancing test, we must identify the parties' interest in the COVID-19 vaccine requirement. The Examiner accurately captured the guild's, the city's, and the public's interests. Decision 13826 at 11-17. The guild has a strong interest in being able to negotiate the city's decision to implement the COVID-19 vaccine mandate because the mandate created a new working condition with a consequence of termination for noncompliance. The guild has a strong interest in employees' continuing employment under the working conditions that existed before the city implemented the vaccine order. The guild's other interests included maintaining the existing working conditions and the employee's autonomy over their medical decisions and interests in safety and workload.

On the other side of the balance is the city's interest in preserving and protecting the health and safety of city employees and the public by limiting the spread of COVID-19 and by ensuring

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[2] Employer (ER) Ex. 41 at 3; Decision 13826 at 5.

the continuity of city services.[3] The city had a strong interest in being able to act decisively in the face of a declared emergency and historic pandemic.

Next, we balance the guild's, the city's, and the public's interests as they existed in 2021 while the state of Washington and the city of Bellingham had declared states of emergency.[4] We do not, in reaching our decision, use the benefit of hindsight or refer to our current understanding about COVID-19. Thus, the Examiner was correct to consider the circumstances that existed in 2021 when the city decided to require the COVID-19 vaccine as a condition of employment. Decision 13826 at 18-19.

When balancing the interests, the Examiner considered transmissibility of COVID-19, the general lack of immunity to the disease, knowledge about the effectiveness of the vaccine in 2021, and the health care crisis that existed in 2021. Decision 13826 at 17-19. At the time that the City decided to require the COVID-19 vaccine as a condition of employment, "the Delta variant was creating a significant public health crisis," and the available vaccines "were understood to be highly effective at preventing infection, transmission, disease, and death." *Id.* at 18-19.

The Examiner also considered the nature of the work performed by the bargaining unit. *Id*. Police work requires close contact with fellow officers and the public and cannot be performed remotely. *Id*. COVID-19 is "extremely transmissible between people in close proximity." *Id*.

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3 *Id.* at 14-17; ER Post Hr'g Br. at 10-11; ER Ex. 41 at 3.

4 "The Legislature has delegated to PERC the delicate task of accommodating the diverse public, employer and union interests at stake in public employment relations." *City of Richland,* 113 Wn.2d at 203; *City of Everett v. Public Employment Relations Commission,* 11 Wn. App. 2d 1, 22 (2019) *City of Everett (International Association of Fire Fighters, Local 46),* Decision 12671-A (PECB, 2017)). As such, we must consider how the COVID-19 vaccine mandate impacted the public's interest as represented by elected officials. In most cases, the public acts through its elected representatives. *City of Yakima (Yakima Police Patrolman's Association),* Decision 1130 (PECB, 1981). There are times, however, when the Commission includes the public interest in the balance. *City of Everett (International Association of Fire Fighters, Local 46),* Decision 12671-A (considering the public's interest when determining that shift staffing was a mandatory subject of bargaining on the specific facts before the commission) (citing *City of Richland,* 113 Wn.2d at 203-204).

Additional safety measures that could be applied in other situations, including masking and social distancing, were not always available to the officers and the public.

It is undeniable that the city, by requiring employees to become vaccinated or face non-disciplinary termination, created a new working condition. Working conditions, including job security, are generally a mandatory subject of bargaining. RCW 41.56.030(4); *see Peninsula School District No. 401 v. Public School Employees of Peninsula*, 130 wn.2d 401 (1996) (finding that RCW 28A.400.300(1) did not preclude a provision in a collective bargaining agreement restricting the school district's nonrenewal authority). We balance the employees' interest in maintaining pre-pandemic working conditions with the city's interest in maintaining public health and safety and continuity of services by issuing a vaccine mandate during a declared state of emergency and global pandemic. The COVID-19 pandemic created an extraordinary situation that called for an extraordinary response. *See Matter of City of Newark*, 469 N.J. Super. 366, 382 (2021). The city's interests in the health and safety of employees and the public, continuity of services, and the need to act decisively during a pandemic are an urgent and powerful counterbalance to employees' interests in job security and maintaining pre-pandemic working conditions. We affirm the Examiner's conclusion that the balance tipped in favor of finding that the decision to require the COVID-19 vaccine as a condition of employment was a permissive subject of bargaining.

Relying on *Virginia Mason Hospital*, 357 NLRB 564 (2011), the guild argues that vaccine requirements are a mandatory subject of bargaining.[5] The city argues that *Virginia Mason* is distinguishable. We agree. While the *Virginia Mason* case, issued under the National Labor Relations Act (NLRA), represents persuasive authority to this body,[6] we find this situation distinguishable from that case. In *Virginia Mason*, the employer sought to guard against the endemic effects of the yearly influenza by requiring acute care nurses to receive an annual

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5 Guild Appeal Br. at 10-11.

6 "[D]ecisions construing the National Labor Relations Act (NLRA), while not controlling, are persuasive in interpreting state labor acts which are similar or based upon the NLRA." *Nucleonics Alliance, Local Union No. 1-369, Etc. v. Washington Public Power Supply System*, 101 Wn.2d 24, 32 (1984).

influenza vaccine, take antiviral medication, or wear a surgical mask at work during flu season. While the influenza virus produces a predictable yearly upsurge in infection, in the Virginia Mason case there was no public health emergency. Therefore, the balance of interests in the case before us is quite different. Here, the city implemented its vaccination policy in the face of a public health emergency, a once-in-a-century global pandemic, and a virus to which the population possessed limited immunity. For that reason, *Virginia Mason* does not provide a model for our decision in this matter.[7]

The City Complied with Its Obligation to Bargain Effects

The guild argues that the Examiner misapplied Commission precedent on decision and effects bargaining when he failed to enforce the requirement to negotiate terminations. In response, the city asserts that the parties negotiated and signed an MOU covering the effects of the decision to require the COVID-19 vaccine, including the potential for discipline. As discussed above, separation from employment was part of the city's decision to adopt a new working condition. The city met its bargaining obligation when it negotiated the MOU addressing the effects of the permissive decision to require the COVID-19 vaccine as a condition of employment.

An employer must bargain the effects of a permissive decision on mandatory subjects. *Port of Seattle*, Decision 11763-A (PORT, 2014); *Wenatchee School District*, Decision 3240-A (PECB, 1990). The employees are eligible for interest arbitration; therefore, the parties must bargain the mandatory effects of a permissive decision to agreement or impasse and proceed through statutory interest arbitration as required before implementing the mandatory effects. RCW 41.56.430 - .470; *Port of Seattle*, Decision 11763-A; *City of Yakima*, Decision 11352-A (PECB, 2013). The city was not required to delay the implementation of the COVID-19 vaccine requirement, a permissive

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[7] It is important to note here that the NLRB, in a later decision, concluded that bargaining was waived by the terms of the parties' collective bargaining agreement. *Virginia Mason Hospital*, 358 NLRB 531 (2012). Because we find that, in this circumstance, the vaccination policy was a permissive subject, we need not reach the question of a collective bargaining waiver.

subject of bargaining, while impact or effects bargaining occurred. *City of Bellevue*, Decision 3343-A (PECB, 1990); *Federal Way School District*, Decision 232-A (EDUC, 1977).

As evidenced by the MOU that the parties signed, the parties negotiated the effects of the COVID-19 vaccine requirement.[8] For employees who complied with the vaccine requirement by the deadline in the executive order, the parties agreed to an additional leave benefit and to allow employees to use administrative leave if they were required to isolate or quarantine due to a work-related exposure or side-effects of receiving the vaccination. The MOU provided an option for employees who initiated the vaccine but did not complete the process by the date the city established. Further, the MOU specifically addressed termination of employment if an employee did not submit proof of vaccination by a certain date. The parties agreed employees could resign or retire in lieu of termination if an employee did not comply with the vaccine requirement. The MOU covered other impacts including the possible rehiring of employees who were separated. We therefore conclude that the city satisfied its collective bargaining obligation and negotiated the effects of its decision to require the COVID-19 vaccination as a condition of employment.

CONCLUSION

In the context of a state of emergency and a historic pandemic, we conclude that the balance tips in favor of finding that the decision to require employees to receive the COVID-19 vaccine or be separated from employment was a permissive subject of bargaining. The city did not have an obligation to bargain the decision to impasse and obtain an award through interest arbitration before imposing the vaccine mandate because the decision was a permissive subject of bargaining. The city did not refuse to bargain either the permissive decision to implement the COVID-19 vaccine requirement or the mandatory effects of the decision.

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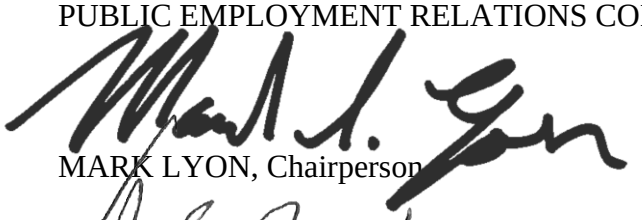
[8] ER Ex. 56.

ORDER

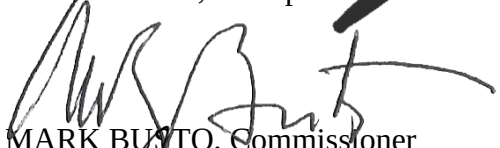
The findings of fact, conclusions of law, and order issued by Examiner Sean Leonard are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission.

ISSUED at Olympia, Washington, this 27th day of September, 2024.

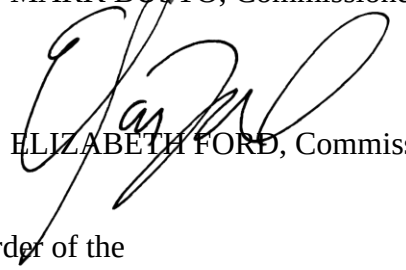
PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK LYON, Chairperson



MARK BUSTO, Commissioner



ELIZABETH FORD, Commissioner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under RCW 34.05.542.