Washington State University, Decision 12385 (PSRA, 2015)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. WASHINGTON STATE UNIVERSITY, Respondent.	CASE 26857-U-14 DECISION 12385 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jason MacKay, Assistant General Counsel, for the Public School Employees of Washington.

Attorney General Robert W. Ferguson, by *Donna J. Stambaugh*, Senior Counsel, for Washington State University.

On November 18, 2014, the Public School Employees of Washington (union) filed an unfair labor practice complaint against Washington State University (employer). The union alleged the employer refused to bargain since October 10, 2014, by unilaterally reducing bargaining unit employees' wages, without providing an opportunity for bargaining. On November 26, 2014, the Unfair Labor Practice Manager issued a preliminary ruling stating a cause of action existed. Examiner Emily Whitney held a hearing on May 5, 2015. On June 26, 2015, the parties submitted post-hearing briefs to complete the record.

ISSUE

As framed by the preliminary ruling, the issue presented by the complainant is as follows:

Did the employer refuse to bargain in violation of RCW 41.80.110(1)(e) and (a) when it reduced bargaining unit employees' wages?

Wages are a mandatory subject of bargaining, and the employer had a duty to bargain employee wages. The union failed to prove that the employer's change to the employees' wages was not in conformance with the applicable 2013-2015 collective bargaining agreement (2013-2015 agreement). The employer proved that the union clearly waived its right to bargain. Based on the clear language of the agreement, the parties intended the 2013-2015 agreement to apply to the Pullman campus bargaining unit. Additionally, the parties agreed to Article 1 – Recognition, Section 1.5, which clearly states that the parties bargained in good faith and waived their right to bargain any subjects covered in the agreement during the term of the agreement.

BACKGROUND

Union and Employer Collective Bargaining History

A brief review of background information on the bargaining history between the union and employer is relevant. On April 20, 2011, the Commission certified the union as the exclusive bargaining representative of all full-time and regular part-time custodians and maintenance custodians employed at Washington State University's Tri-Cities campus.[1] After the union was certified, the union and employer negotiated a 2012-2013 collective bargaining agreement. They also agreed to extend the 2012-2013 agreement through the 2013-2015 biennium. The extension resulted in a collective bargaining agreement effective from July 1, 2013, through June 30, 2015.

The parties' 2013-2015 agreement included language regarding how the agreement would apply to any newly certified bargaining unit members during the term of the agreement. Article 1 – Recognition, Section 1.2 states:

> The provisions of this Agreement will apply to classified employees in bargaining units for which the Union has been certified as the exclusive representative during the term of this agreement.

Both the union and employer testified that they each understood this language to mean that all positions represented by the union, including any newly represented positions, were covered under the 2013-2015 agreement. The parties also clearly isolated Article 23 – Vacancies & Position

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1 *Washington State University*, Decision 11039 (PSRA, 2011).

Allocations, Section 23.2.3 and Article 26 – Seniority, Section 26.5 to apply only to those employees at the Tri-Cities campus.

In the 2013-2015 agreement, the parties also agreed to a specific wage scale. According to Article 44 – Compensation, Section 44.1 the parties agreed to "follow the Office of the State Human Resources Director General Service Higher Education Salary Schedule in effect July 1, 2011 through June 30, 2013 for classified positions" (2011-2013 Higher Education Salary Schedule). This salary schedule included Steps A through L. In 2013 the Washington State Legislature passed an operating budget which included a new longevity step, Step M, on the Office of Financial Management state salary schedule for non-represented civil service employees. Step M was included in the state salary schedule effective July 1, 2013. Step M was not included in the 2013-2015 agreement between the parties.

Pullman Campus Bargaining History

The employer's workforce includes 120-130 employees in the Facilities Operations, Custodial Services Unit at the Pullman campus. Prior to representation, these employees were paid according to the state salary schedule for non-represented employees, which included Step M. Thirty-four of the employees in the Pullman campus Facilities Operations, Custodial Services Unit qualified for and received Step M wages.

On October 10, 2014, the Commission certified the union as the exclusive bargaining representative of all full-time and regular part-time non-supervisory employees in the Facilities Operations, Custodial Services Unit at the Pullman campus.[2] On October 14, 2014, the employer sent letters in accordance with the 2013-2015 agreement to the newly represented employees. The letters notified the employees about the October 10 certification and explained that the terms and conditions of the 2013-2015 agreement applied to them. One of the changes to the terms and conditions applicable to 34 of the employees was that, effective October 10, 2014, they would be moved from Step M to Step L on the salary schedule. This change created a loss of wages for these 34 employees. The parties agree that the letters were sent directly to the employees, and the union did not receive a copy of these letters from the employer. The 2013-2015 agreement states

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2 *Washington State University*, Decision 12143-A (PSRA, 2014).

that the employer will "inform all employees entering such bargaining unit of the Union's exclusive representation." No evidence was provided to show that the employer was required to send this same notification directly to the union.

On October 21, 2014, the union sent a demand to bargain letter to the employer. The union demanded to bargain "on remaining status quo on all current wages and benefits . . . ." The union wanted the employer to bargain about the wages of the employees who had just been lowered from Step M to Step L. On October 29, 2014, the employer issued a letter responding to the union's demand to bargain. The letter notified the union that the employer would not bargain with the union over the change from Step M to Step L. The employer explained that Article 1 – Recognition, Section 1.2 of the 2013-2015 agreement stated that the newly represented employees in Pullman were governed by the provisions of that agreement. The employer further explained that it made the change to the 34 employees' salaries because the union and employer bargained the salaries and had agreed to use the 2011-2013 Higher Education Salary Schedule in the governing 2013-2015 agreement. Additionally, the employer pointed to Article 1 – Recognition, Section 1.5 alleging the union waived its right to re-bargain the wages. Section 1.5 states:

> During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. Therefore, each part [sic] voluntarily and unqualifiedly waives the right and will not be obligated to bargain collectively, during the term of this Agreement, with respect to any subject or matter referred to or covered in this Agreement. Nothing contained in this Agreement will be construed as a waiver of the Union's or University's collective bargaining rights with respect to matters that are mandatory subjects not referred to or covered by this Agreement.

Because the employer believed the union had waived its right to bargain during the term of the agreement, it refused to bargain.

APPLICABLE LEGAL STANDARDS

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees concerning wages, hours, and other terms and conditions of employment. *University*

of Washington, Decision 11600-A (PSRA, 2013); RCW 41.80.005(2); RCW 41.80.020(1). The determination as to when the duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer commits an unfair labor practice when it refuses to engage in collective bargaining. RCW 41.80.110(1)(e).

"[P]ersonnel matters, including wages, hours and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *University of Washington,* Decision 11600-A, *citing International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977). Employee salaries are wages, and wages are mandatory subjects of bargaining. *Yakima Valley Community College*, Decision 11326-A (PECB, 2013).

A finding that a party has refused to bargain in good faith is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining. *University of Washington*, Decision 10726-A (PSRA, 2012), *citing Spokane School District*, Decision 310-B (EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. *University of Washington*, Decision 11600-A, *citing Yakima Valley Community College*, Decision 11326-A.

Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment. *Port of Anacortes*, Decision 12160-A (PORT, 2015), *citing Griffin School District*, Decision 10489-A (PECB, 2010). An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *University of Washington*, Decision 11600-A, *citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995). It must also provide the union an opportunity to bargain. *Id.*

A complainant alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *University of Washington*, Decision 10726-A, *citing Municipality of Metropolitan Seattle (Amalgamated*

Transit Union, Local 587), Decision 2746-B (PECB, 1990); *Port of Anacortes*, Decision 12160-A, *citing Whatcom County*, Decision 7288-A (PECB, 2002). The status quo ante must be maintained regarding all mandatory subjects of bargaining, except where changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *University of Washington*, Decision 10726-A, *citing 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). No unfair labor practice will be found if a party makes changes in a manner consistent with the agreement.

An employer commits an unfair labor practice under RCW 41.80.110(1)(e) if it changes an existing term or condition of employment, or if it imposes a new term or condition of employment upon its represented employees, without having exhausted its bargaining obligation under Chapter 41.80 RCW. *University of Washington*, Decision 10726-A; *University of Washington*, Decision 10608-A (PSRA, 2011), *citing City of Tacoma*, Decision 4539-A (PECB, 1994). An employer also violates RCW 41.80.110(1)(e) if it presents an exclusive bargaining representative with a *fait accompli*, or if it fails to bargain in good faith upon request. *Federal Way School District*, Decision 232-A.

Waiver by Contract

The Commission reiterated the legal standard for waiver by contract in *University of Washington*, Decision 11600-A. A party may waive its right to bargain through the language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *University of Washington*, Decision 11600-A, *citing City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). The Commission has long held that typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

ANALYSIS

There is no dispute between the parties that the employees' wages are a mandatory subject of bargaining. The Commission has reiterated that employee wages are a mandatory subject of bargaining. *Yakima Valley Community College*, Decision 11326-A. Thus, the employer had a duty to bargain the employees' wages with the union.

The union proved the relevant status quo for wages at the time the union filed a petition for representation of the 120-130 Pullman campus employees was the state salary schedule for non-represented employees. For 34 of those employees the relevant status quo was Step M. The relevant status quo is determined as of the date of the filing of the union's petition for representation, where a new bargaining unit is concerned. *Central Washington University*, Decision 10967-A (PECB, 2012), *citing Val Vue Sewer District*, Decision 8963 (PECB, 2005). The employer had a duty to maintain the status quo regarding mandatory subjects of bargaining until the parties bargained a change to the status quo. *City of Seattle*, Decision 9938-A (PECB, 2009).

After the Commission certified the union as the exclusive bargaining representative of the employees at the Pullman campus, the employer notified the affected employees by letter dated October 14, 2014, there would be changes to the conditions of their employment because they were now represented employees. The employer admitted it only sent these notices to the employees and not to the union. One of the changes the employer made was that 34 of the employees had their wages lowered from Step M to Step L effective October 10, 2014.

The employer argues that the change was made in conformance with the parties' bargained change to the status quo. The employer points to Article 1 – Recognition, Section 1.2 of the parties' 2013-2015 agreement, which states that the provisions of the agreement will apply to classified employees in bargaining units for which the union has been certified as the exclusive representative. Both parties testified that the 2013-2015 agreement would apply to the newly represented employees, including the 34 affected employees.

The employer also points to sections of the 2013-2015 agreement that only apply to bargaining unit members at the Tri-Cities campus. Because the parties negotiated individual sections that apply only to bargaining unit members at the Tri-Cities campus, it is implied that there are other sections of the agreement that apply to other bargaining units in addition to the Tri-Cities campus bargaining unit. Based on the totality of the circumstances, the 2013-2015 agreement applies to the newly represented employees at the Pullman campus.

The employer changed the employees' wages in conformance with the parties' 2013-2015 agreement. Under Article 44 – Compensation, Section 44.1 the parties agreed to use the 2011-2013 Higher Education Salary Schedule for the 2013-2015 agreement. That salary schedule did not contain Step M; the highest step was Step L. When the employer moved the employees back to Step L, the employer made the change in conformity with the parties' 2013-2015 agreement.

Finally, the employer admits it did not provide the union with an opportunity to bargain about the wages of the employees at the Pullman campus. The employer argues that the union waived its right to re-bargain the wages under Article 1 – Recognition, Section 1.5 of the agreement. Section 1.5 states the parties had the opportunity to bargain, and they agreed to voluntarily waive their right to bargain any subject covered in the 2013-2015 agreement.

The union argues that the employees at the Pullman campus were not covered in the initial agreement because the employees' classifications at the Pullman campus were different than those at the Tri-Cities campus. The union claims that because the new Pullman bargaining unit was not considered when bargaining the 2013-2015 agreement, it did not waive its right to bargain the wages for those employees. It also argues that there are classifications in the Pullman bargaining unit that were not in the Tri-Cities bargaining unit. The union asserts that because of these differing classifications, it should have had the opportunity to bargain for the Pullman employees' change in wages. The union's argument fails. Article 1 – Recognition, Section 1.5 clearly states that the parties bargained in good faith and waived their right to bargain any subjects covered in the agreement during the term of the agreement. The waiver was clear and unmistakable. The employer's changes to the employees' wages were in conformance with the 2013-2015 agreement.

CONCLUSION

Wages are a mandatory subject of bargaining, and the employer had a duty to bargain employee wages. The union failed to prove that the employer's change to the employees' wages was not in conformance with the applicable 2013-2015 agreement. The employer proved that the union clearly waived its right to bargain. Based on the clear language of the agreement, the parties intended the 2013-2015 agreement to apply to the Pullman campus bargaining unit. Additionally, the parties agreed to Article 1 – Recognition, Section 1.5, which clearly states that the parties bargained in good faith and waived their right to bargain any subjects covered in the agreement during the term of the agreement.

FINDINGS OF FACT

1. Washington State University (employer) is a public employer within the meaning of RCW 41.80.005(8).

2. The Public School Employees of Washington (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. On April 20, 2011, the Commission certified the union as the exclusive bargaining representative of all full-time and regular part-time custodians and maintenance custodians employed at Washington State University's Tri-Cities campus.

4. After the union was certified, the union and employer negotiated a 2012-2013 collective bargaining agreement. They also agreed to extend the 2012-2013 agreement through the 2013-2015 biennium. The extension resulted in a collective bargaining agreement effective from July 1, 2013, through June 30, 2015.

5. The parties' 2013-2015 agreement included language regarding how the agreement would apply to any newly certified bargaining unit members during the term of the agreement. Article 1 – Recognition, Section 1.2 states:

> The provisions of this Agreement will apply to classified employees in bargaining units for which the Union has been certified as the exclusive representative during the term of this agreement

Both the union and employer testified that they each understood this language to mean that all positions represented by the union, including any newly represented positions, were covered under the 2013-2015 agreement.

6. The parties clearly isolated Article 23 – Vacancies & Position Allocations, Section 23.2.3 and Article 26 – Seniority, Section 26.5 to apply only to those employees at the Tri-Cities campus.

7. In the 2013-2015 agreement, the parties agreed to a specific wage scale. According to Article 44 – Compensation, Section 44.1 the parties agreed to "follow the Office of the State Human Resources Director General Service Higher Education Salary Schedule in effect July 1, 2011 through June 30, 2013 for classified positions" (2011-2013 Higher Education Salary Schedule). This salary schedule included Steps A through L. In 2013 the Washington State Legislature passed an operating budget which included a new longevity step, Step M, on the Office of Financial Management state salary schedule for non-represented civil service employees. Step M was included in the state salary schedule effective July 1, 2013. Step M was not included in the 2013-2015 agreement between the parties.

8. The employer's workforce includes 120-130 employees in the Facilities Operations, Custodial Services Unit at the Pullman campus. Prior to representation, these employees were paid according to the state salary schedule for non-represented employees, which included Step M. Thirty-four of the employees in the Pullman campus Facilities Operations, Custodial Services Unit qualified for and received Step M wages.

9. On October 10, 2014, the Commission certified the union as the exclusive bargaining representative of all full-time and regular part-time non-supervisory employees in the Facilities Operations, Custodial Services Unit at the Pullman campus.

10. On October 14, 2014, the employer sent letters in accordance with the 2013-2015 agreement to the newly represented employees. The letters notified the employees about the October 10 certification and explained that the terms and conditions of the 2013-2015 agreement applied to them. One of the changes to the terms and conditions applicable to 34 of the employees was that, effective October 10, 2014, they would be moved from Step M to Step L on the salary schedule. This change created a loss of wages for these 34 employees. The parties agree that the letters were sent directly to the employees, and the union did not receive a copy of these letters from the employer. The 2013-2015 agreement states that the employer will "inform all employees entering such bargaining unit of the Union's exclusive representation." No evidence was provided to show that the employer was required to send this same notification directly to the union.

11. On October 21, 2014, the union sent a demand to bargain letter to the employer. The union demanded to bargain "on remaining status quo on all current wages and benefits . . . ." The union wanted the employer to bargain about the wages of the employees who had just been lowered from Step M to Step L.

12. On October 29, 2014, the employer issued a letter responding to the union's demand to bargain. The letter notified the union that the employer would not bargain with the union over the change from Step M to Step L. The employer explained that Article 1 – Recognition, Section 1.2 of the 2013-2015 agreement stated that the newly represented employees in Pullman were governed by the provisions of that agreement. The employer further explained that it made the change to the 34 employees' salaries because the union and employer bargained the salaries and had agreed to use the 2011-2013 Higher Education Salary Schedule in the governing 2013-2015 agreement. Additionally, the employer pointed to Article 1 – Recognition, Section 1.5 alleging the union waived its right to re-bargain the wages. Section 1.5 states:

> During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. Therefore, each part [sic] voluntarily and unqualifiedly waives the right and will not be obligated to bargain collectively, during the term of this Agreement, with respect to any subject or matter referred to or covered in this Agreement. Nothing

contained in this Agreement will be construed as a waiver of the Union's or University's collective bargaining rights with respect to matters that are mandatory subjects not referred to or covered by this Agreement.

13. Because the employer believed the union had waived its right to bargain during the term of the agreement, it refused to bargain.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-45 WAC.

2. Based upon Findings of Fact 3 through 13, the employer did not refuse to bargain in violation of RCW 41.80.110(1)(e) and (a) when it reduced bargaining unit employees' wages.

ORDER

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

ISSUED at Olympia, Washington, this 29th day of July, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 07/29/2015

DECISION 12385 - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 26857-U-14

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