Clover Park Technical College, Decision 8534 (PECB, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286,	)	
Complainant,	)	CASE 16668-U-02-4352
vs.	)	DECISION 8534 - PECB
CLOVER PARK TECHNICAL COLLEGE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Rene Jankiewicz, Business Representative, for the union.

Christine O. Gregoire, Attorney General, by *Terrance J. Ryan*, Assistant Attorney General, for the employer.

On September 4, 2002, International Union of Operating Engineers, Local 286 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Community College District 29 d/b/a Clover Park Technical College (employer) as respondent. The complaint was reviewed under WAC 391-45-110, a deficiency notice was issued on July 23, 2003, and the union filed an amended complaint on August 13, 2003. A preliminary ruling was issued on August 19, 2003, finding a cause of action to exist on allegations summarized as:

> 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)], by its unilateral change in parking fees, without providing an opportunity for bargaining.

The employer filed an answer. A hearing was held on December 4, 2003, before Examiner Starr H. Knutson. The parties filed briefs.

On the basis of the evidence presented at the hearing, the Examiner holds that the employer violated 41.56.140(4) and (1), by declining to engage in collective bargaining with the union regarding employee parking.

BACKGROUND

The employer is a state institution of higher education located in Lakewood, Washington. It provides educational opportunities for approximately 8,800 students enrolled for vocational and/or technical training beyond high school. Sharon McGavick is the president of the college.

International Union of Operating Engineers, Local 286 (union), is the exclusive bargaining representative of a bargaining unit of custodial, maintenance, warehouse, shipping and receiving, grounds and security employees of the employer. James Wren is the union business agent responsible for representation of that bargaining unit.

The parties to this proceeding are parties to a collective bargaining agreement in effect for the period from July 1, 2001, to June 30, 2004.

Several witnesses testified that the availability of parking on the employer's campus has been problematic for a number of years. At one time, numbered parking spaces were assigned to each employee. In June 2002, the employer announced both a fee increase and a change of parking arrangements for its employees.

ANALYSIS

Applicable Legal Principles

The collective bargaining relationship between these parties is governed entirely by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.[1]

Parking as a Mandatory Subject of Bargaining -
The scope of bargaining under Chapter 41.56 RCW is discerned from the definition of "collective bargaining" set forth in the statute:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement *with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions,* which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.030(4) (emphasis added). The Commission recently affirmed an Examiner's decision finding that another state institution of higher education "did commit an unfair labor

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[1] Although the classified employees of community colleges have historically had only limited collective bargaining rights under the State Civil Service Law, Chapter 41.06 RCW, and its predecessor Chapter 28B.16 RCW (and will have full-scope collective bargaining rights under the Personnel System Reform Act of 2002 only when Chapter 41.80 RCW fully goes into effect on July 1, 2004), the employer involved in this proceeding and other "technical colleges" were covered under Chapter 41.56 RCW when they were operated by school districts, and they retained that coverage when they became state-operated. RCW 41.56.024.

practice when it refused to bargaining on the issue of parking for bargaining unit employees at their work sites." *Western Washington University*, Decision 8256-A (PSRA, 2004).[2] The Commission's decision cited, and was consistent with, precedents developed under other collective bargaining statutes, which clearly establish that parking is a mandatory subject of bargaining.[3] In *City of Pasco*,

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[2] The fact that *Western Washington University* case involved employees covered by the State Civil Service Law does not diminish or negate the importance of the precedent. The case was decided by the Commission under the same unfair labor practice provisions that are applicable here (RCW 41.56.140 through 41.56.160). Moreover, the duty of this employer to bargain under the full-scope provisions of Chapter 41.56 RCW is certainly at least as broad as the duty of that employer to bargain under the limited-scope provisions of Chapter 41.06 RCW.

[3] For example:

In *United Parcel Service and International Brotherhood of Teamsters, AFL-CIO*, 336 NLRB 1134 (2001), the National Labor Relations Board (NLRB) ruled that employee parking is a mandatory subject of bargaining. In a footnote, the NLRB stated: "We continue to adhere to the principle that a change in an employer's parking policy is a mandatory subject of bargaining. . . ."

In *U.S. Department of Labor Washington, D.C. and the American Federation of Government Employees Local 12, AFL-CIO*, 44 FLRA 988 (1992), the Federal Labor Relations Authority (FLRA) ruled that "parking arrangements for unit employees are conditions of employment, and that management was not free to make changes in those arrangements without giving the Union an opportunity to bargain over the substance, impact, and implementations of the changes."

In *Southern Illinois University and the Southern Illinois University Edwardsville Professional Staff Association*, Nos. 97-CA-0016-S, 97-CA-0017-S (1998), the Illinois Educational Labor Relations Board found the employer failed to bargain in good faith by refusing to bargain changes in parking fees. The parking fees were found to be "terms and conditions of employment" and thus a mandatory subject of bargaining.

Decision 3368-A (PECB, 1990), *aff'd*, 119 Wn.2d 504 (1992), both the Commission and the Supreme Court of the state of Washington affirmed an Examiner's decision finding "ample case precedent from the NLRB and other state labor relations boards holding that parking practices . . . are a mandatory subject of bargaining."

The Law Restricts Unilateral Changes -

Under countless Commission precedents dating back to at least *Federal Way School District*, Decision 232-A (PECB, 1978), *aff'd*, WPERR CD-57 (King County Superior Court, 1978), and federal precedents cited therein, an employer commits an unfair labor practice if it changes the wages, hours, or working conditions of union-represented employees without first: (a) giving notice to the union;[4] (b) providing an opportunity for bargaining before making the decision on a proposed change;[5] and (c) bargaining in good faith to agreement or impasse prior to unilaterally implementing any change.[6]

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[4] This is an affirmative obligation. The notice must be directed to the organization, "not just communicated through a member of the bargaining unit." *Clover Park School District,* Decision 3266 (PECB, 1989).

[5] The purpose of requiring an employer to give a union advance notice of proposed changes in mandatory subjects of bargaining is to afford the union an opportunity to negotiate the proposed changes in advance. *City of Vancouver,* Decision 808 (PECB, 1980). The notice must be given in such a manner to allow time for the union to "explore all the possibilities, provide counter-arguments and offer alternative solutions or proposals regarding issue raised by the proposed change." *Clover Park School District*, Decision 3266.

[6] This three-component obligation applies to most employees covered by Chapter 41.56 RCW. Bargaining units covered by the statutory interest arbitration process must submit any impasse issues for resolution under RCW 41.56.430 through .490. *City of Seattle*, Decision 1667-A (PECB, 1984).

The Law Prohibits Circumvention -

When employees exercise their right to organize for collective bargaining, the employer must deal with the "exclusive bargaining representative" recognized or certified under RCW 41.56.080, to the exclusion of direct dealings with bargaining unit employees.[7]

Application of Standards

Was There Circumvention of the Union? -

The history of discussion and debate about employee parking on the employer's campus dates back several years:

President McGavick testified that the employer experienced a financial crisis in the late 1990's, and that she initiated discussion of a parking fee or a facility fee as a method to help improve facilities and/or increase security on the campus.[8] She thus began talking to a number of people in 1999, exploring various ideas in an attempt to gain support for one or both of the fees.

In an e-mail message sent to all faculty and staff members in the summer of 2000, the employer's vice-president of operations and facilities, Tony Robinson, proposed a change to a system in which employee parking spaces would no longer be specifically assigned to individuals, and the existing numbered spaces would be re-labeled as "Staff Parking" available to all employees.

On opening day of the 2000-2001 academic year, in September 2000, McGavick raised the idea of a parking or facility fee in her

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[7] The Commission has long held that the "principals" in the negotiation process are the bargaining agents for each side. See *Royal School District,* Decision 1419 (PECB, 1982), and cases cited therein.

[8] Up to that time, the employer had not charged employees any fees for parking on the campus.

annual state-of-the-college presentation to the staff. An absence of evidence suggests that the idea was not pursued at that time.

The events of September 11, 2001, exacerbated the need for increased security measures on the campus. McGavick decided to form a task force to investigate the feasibility of parking fees as way of paying for the increased security. Robinson was chosen to head up the task force, and he put out an invitation to all staff and students for participation and/or input.[9]

Robinson held a meeting of his task force later in September 2001, and he testified that four college employees attended that meeting. None of those employees was a member of the bargaining unit represented by the union party to this case.

Robinson testified that he continued to emphasize at monthly staff meetings that his task force wanted comments from anyone interested in the formation of the new parking policy. He recalled talking to bargaining unit employees about the parking fees issue.

In the spring of 2002, Robinson submitted a rough draft of a "rudimentary policy" to the employer's vice-president for human resources and employee relations, Ben Lastimado.

An employer committee responsible for review of policies and procedures, which was chaired by Lastimado,[10] discussed the parking policy at a meeting in April 2002. Several bargaining unit

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[9] Robinson testified the first public discussion of parking fees occurred at the opening-day staff meeting in September 2001.

[10] Lastimado testified the committee existed to gather input from all college staff regarding any policy before it was implemented. He expected each committee member to take policy drafts to the members of the group they represented, and return to the committee with feedback.

employees were present at their own initiative or as members of the policy committee.

Robinson testified that the parking policy was submitted to the president's cabinet after it went through the committee process.[11]

Most of the foregoing sequence of events occurred more than six months prior to the filing of the complaint in this case, and thus cannot be the basis for a "circumvention" finding or any remedy in this proceeding.[12] What is distinctly missing from the foregoing sequence of events is any indication that the employer gave notice of the union that it was considering a change of parking arrangements for bargaining unit employees.

Was There Sufficient Notice to the Union? -
Lastimado testified that he and McGavick had regular monthly meetings with the chairpersons of all three of the employer's bargaining units. He recalled the subject of parking fees being brought up at the meetings on February 10, 2000; April 17, 2000; March 12, 2001; March 15, 2001; and September 14, 2001.

No evidence was presented indicating that any employer official talked with any union business agent about the contemplated changes of parking arrangements or the imposition of a parking fee. There

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[11] The feedback provided to the policy committee would then be presented to the president's cabinet, which would review and discuss the input before a decision was made on whether to implement the policy. If a policy was approved, the cabinet would inform those affected.

[12] RCW 41.56.160 imposes a six-month "statute of limitations" on the filing of unfair labor practice complaints. The complaint filed in this case on September 4, 2002, was only timely for events that occurred on or after March 4, 2002.

is no evidence that the employer sent any written notification to the union office at any time prior to the new policy being implemented in June 2002.

The employer argues that it gave notice to the exclusive bargaining representative, since the bargaining unit chairman was included in the committee discussions concerning the proposed parking changes. Lastimado also cited the meetings he and the college president held with various unions. The Examiner declines to hold that the employer gave sufficient notice, however.

Acceptance of the employer's view would dangerously compromise the concept of exclusive representation, whereby an employer must deal with the union selected by its employees and no longer bargain directly or indirectly with the employees. Formal written notice is not absolutely required, but an employer which relies upon lesser forms of communication does so at its peril. An employer cannot rely on indirect communication by means of rumor, conjecture, or mention in a public meeting. An employer is required to take the initiative in giving such an organization notice of contemplated changes affecting the employees it represents. *Lake Washington Technical College*, Decision 4721 (PECB, 1994) and cases cited therein.[13] In the case at hand, the employer clearly did not provide sufficient notice to the union, as an institution separate and apart from its individual employee members.

Waiver by Contract Defense -

At the outset of the hearing, the employer moved for dismissal of the complaint on the basis that the union had waived its right to

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[13] The Examiner's decision was affirmed by the Commission as to the sufficiency-of-notice issue, even though it was reversed as to other issues. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

bargain over parking by the terms of the parties' collective bargaining agreement. Specifically, the employer cited Article 3, *Management Rights and Responsibilities*, which states in part:

> The Union recognizes that the Board of Trustees is legally responsible for the operation of the College, and that the Board of Trustees has the necessary authority to discharge all of its responsibilities subject to the laws above mentioned, and the provisions of this Agreement to include the following:
>
> a. Utilize within the judgment of the Employer, the most appropriate, effective and enlightened methods to operate the College.
>
> b. To hire, promote, transfer, assign, train, direct the work of, and appraise the performance of employees with due regard to fairness, objectivity, and the dignity of the individual employee.
>
> c. To establish and communicate well designed rules, regulations, and policies which shall be uniformly applied.
>
> d. To suspend, demote, discharge, and take other appropriate remedial action for just cause.
>
> e. To determine the methods and means necessary to effectively carry out the mission and goals as determined by the Employer.
>
> f. To determine size and composition of the work force, and to lay off employees in the event of lack of work or funds.
>
> . . . .

On its face, that language is insufficient to support the employer's "waiver by contract" argument, however. Under consistent Commission precedent, the cited management rights clause is too broad to predicate a waiver by contract with respect to parking fees. *See Mason General Hospital*, Decision 7203 (PECB, 2000).

Nor does the history of bargaining behind the current contract support the employer's "waiver by contract" claim. The employer

and union began negotiations for a successor agreement some time in June 2001. That was the period of apparent inaction between the opening-day speech in 2000 and the tragic events that were to come months later, and neither party brought up parking as a subject for negotiations at that time. The parties' explanations in this proceeding are markedly different from one another:

The employer claims it had asked several bargaining unit employees for input on the parking issue, and that the chairperson of the bargaining unit was a participant in the monthly labor-management meetings where the issue had been discussed frequently. The employer's assertion that the union had knowledge of the proposed changes because bargaining unit members participated on various employer committees has already been rejected above, and need not be revisited to reject this variant of the argument.

The union has credibly claimed that it had no knowledge that the employer was considering implementing changes concerning parking arrangements for bargaining unit employees. Waivers must be knowingly made, and this record does not support any finding of a waiver based on the contract negotiations in 2001.

It is the very essence of the collective bargaining process that employers and the unions representing their employees are to bargain in advance of decisions that affect the wages, hours, or working conditions of bargaining unit employees. Implementation of changes in advance of notice and an opportunity to bargain presents the union with a fait accompli, and excuses the union from having to request bargaining on the matter. Union official Wren testified he did not receive any information from the employer concerning the implementation of parking changes. Wren further testified that he first learned of those changes from a bargaining unit employee in June 2002, after the changes had been implemented by the employer.

The record thus supports a conclusion that the union was presented with a fait accompli.

Request for Bargaining? -

Upon learning of the parking changes in June 2002, Wren set up a meeting with the employees' supervisor. The supervisor told Wren he had no authority in the matter, and referred Wren to the human resources office. There was then both an exchange of correspondence and at least one face-to-face meeting between Wren and Lastimado on this subject matter.

Wren sent a letter to Lastimado under date of June 27, 2002, stating in part:

> A decision by the Public Employment Relations Commission states that an employer may not unilaterally change its parking facilities without first bargaining with the union.
>
> This change materially affects our members' terms and conditions of employment, because the college has implemented a new fee structure, which requires faculty and staff to pay a quarterly fee for parking. Because parking is a mandatory subject of bargaining, the college actions institute an unfair labor practice; in violation of RCW 41.56.140(4).

Lastimado responded with a letter to Wren under date of July 8, 2002, stating in part:

> I have again looked into this matter and would like to share the following information:
>
> 1. According to our Assistant Attorney General, Bill Stephens, based on the provisions in the IUOE Contract, Section 3.2, the College would have the right to establish a parking fee without giving "veto power" to the staff.
> 2. The Assistant Attorney General indicated that Section 3.2(c) of the Agreement provides that the

> administration has authority to "establish and communicate well designed rules, regulations and policies which shall be uniformly applied." Section 3.2(a) gives the administration the authority to utilize within its own judgment, "the most appropriate, effective and enlightened methods to operate the College." Section 3.2(e) gives the administration the authority to determine the methods and means necessary to effectively carry out the mission and goals" determined the College. [sic]
>
> As you can see, I do not believe the College created an unfair labor practice. Nonetheless, I would like to meet with you again for lunch to discuss this and other issues.

Thus, the employer's written response totally precluded any collective bargaining on the parking subject matter.

Lastimado testified he did not believe Wren requested bargaining when they met for lunch before Wren's June 27 letter, that he did not consider Wren's June 27 letter to be a request for bargaining, and that he did not have any indication from the union that it wanted to bargain until he received a copy of the unfair labor practice complaint. The Examiner does not credit those claims, however. While Wren's letter does not specifically use the words, "request to bargain" the employer's claim that it was not recognized as a request for bargaining is belied by Lastimado's letter response, which clearly asserted that the employer had the authority to change parking arrangements without bargaining.

Wren set up a luncheon meeting with Lastimado shortly after he was referred to Lastimodo by the supervisor. Wren credibly testified that he asked to bargain the parking issue on that occasion, and the Examiner accepts that Wren considered his June 27 letter to follow up on a request for bargaining he made to Lastimodo over lunch. Finally, the record supports a finding that Lastimado gave

no indication during the conversation that the employer was willing to bargain the parking matter. Thus, the employer's response in face-to-face meetings also totally precluded any collective bargaining on the parking subject matter.

Conclusions

The evidence in this case demonstrates the employer unlawfully failed to provide timely notice to the exclusive bargaining representative of its employees concerning its plan to change employee parking, that it unlawfully presented the exclusive representative a fait accompli when it unilaterally implemented the changes, and that it unlawfully failed and refused to bargain with the union when the union requested bargaining on on the matter.

Any facts or arguments presented a the hearing that are not cited within this decision are immaterial or not persuasive.

FINDINGS OF FACT

1. Community College District 29, d/b/a Clover Park Technical College, is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Union of Operating Engineers, Local 286, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of custodial, maintenance, warehouse, shipping and receiving, grounds, and security employees of the employer.

3. Prior to June 2002, the employer provided employees in the bargaining unit represented by the union assigned parking spaces on the college campus at no charge to the employees.

4. As early as 1999, the employer began internal discussions concerning potential changes of parking policies affecting its employees. That subject matter was discussed from time to time in labor-management meetings attended by employer officials and bargaining unit employees, but the employer did not provide the union with notice of an opportunity to bargain from any specific proposal. The college president created a task force to review that subject matter, and a vice-president of the college was given responsibility for that task force.

5. The parties to this proceeding negotiated a successor collective bargaining agreement between June 2001 and November 2001. There was no discussion of parking policies or parking fees in those negotiations. The parties then signed a collective bargaining agreement which is effective for the July 1, 2001, to June 30, 2004, period.

6. The employer made a draft policy concerning parking available to its employees some time during or about April 2002, but did not provide notice of that draft policy directly to the union or offer to bargain on the matter.

7. In June 2002, the employer unilaterally implemented a change of policy concerning parking by employees on its campus, including that employees in the bargaining unit represented by the union were required to complete a parking application and were charged a fee to park on the campus.

8. The union business agent responsible for representing the bargaining unit described in paragraph 2 of these findings of fact first learned of the change of parking policies after its implementation as described in paragraph 7 of these findings of fact, and then only from a bargaining unit employee.

9. In June 2002, the union business agent made both oral and written requests to the employer for collective bargaining on the subject of parking for bargaining unit employees.

10. By and during July 2002, the employer refused to bargain with the union concerning the implemented changes of parking for bargaining unit employees.

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. By failing to engage in collective bargaining with International Union of Operating Engineers, Local 286, concerning changes of parking arrangements for employees in the bargaining unit represented by the union, Clover Park Technical College committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

ORDER

Community College District 29, d/b/a Clover Park Technical College, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with the International Union of Operating Engineers, Local 286, as the exclusive bargaining representative of the appropriate bargaining unit described in paragraph 2 of the foregoing findings of fact.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Restore the *status quo ante* by reinstating the parking practices which were in effect immediately preceding the changes implemented in June 2002.

   b. Make employees whole, by refunding all parking fees collected from employees in the bargaining unit represented by the union since June 2002.

   c. Give notice to and, upon request, bargain in good faith with, International Union of Operating Engineers, Local 286, prior to implementing any future change regarding the parking arrangements for employees in the bargaining unit represented by that union.

   d. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized

representative of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Read the notice attached to this order into the record at a regular public meeting of the Board of Trustees of Clover Park Technical College, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

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

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

ISSUED at Olympia, Washington, on the 26th day of April, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Starr H. Knutson

STARR H. KNUTSON, 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

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL restore the parking arrangements in effect prior to June 2002 for all employees represented by International Union of Operating Engineers, Local 286, and will make employees in that bargaining unit whole by refund of any parking fees collected from them since June 2002.

WE WILL give notice to and, upon request, bargain in good faith with International Union of Operating Engineers, Local 286, regarding any future change of parking policy affecting employees in the bargaining unit represented by that union.

WE WILL read this notice into the record at the next public meeting of the Board of Trustees of Clover Park Technical College, and append a copy thereof the official minutes of such meeting.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

DATED: _____

CLOVER PARK TECHNICAL COLLEGE

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 711 Capitol Way, Suite 603, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.