STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Complainant,

vs.

WASHINGTON STATE - SOCIAL AND HEALTH SERVICES,

Respondent.

CASE 20172-U-06-5140
DECISION 9551-A - PSRA

CASE 20188-U-06-5148
DECISION 9552-A - PSRA

DECISION OF COMMISSION

Younglove Lyman & Coker, by *Edward E. Younglove III*, Attorney at Law, for the union.

Attorney General Rob McKenna, by *Donna J. Stambaugh*, Assistant Attorney General, for the employer.

This case comes before the Commission on a timely appeal filed by the Washington Federation of State Employees (union) seeking to overturn specific Findings of Fact, Conclusions of Law, and Order issued by Examiner Karl E. Nagel dismissing its complaint.[1] The Washington State Department of Social and Health Services (employer) supports the Examiner's decision.

ISSUES PRESENTED

1. Did the employer have an obligation to bargain the transfer of the cottage remodeling and PAT Center flooring projects to contractors outside of the bargaining unit?

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[1] *State - Social & Health Services*, Decision 9551, 9552 (PSRA, 2007).

2. Did the union waive its right to bargain the contracting out of the work?

For the reasons set forth below, we reverse the Examiner's findings and conclusions and find that the cottage remodeling was bargaining unit work, that the employer had an obligation to bargain, and that the union did not waive its bargaining right. By contracting out bargaining unit work without giving notice of its intent and providing an opportunity for bargaining, the employer violated its statutory bargaining obligation and interfered with the rights of bargaining unit members. However, we affirm the Examiner's conclusions that the PAT Center flooring project was not bargaining unit work. We issue the appropriate remedial order.

FACTUAL OVERVIEW

This case presents a detailed fact pattern which we include to provide a proper context for our decision.

The employer maintains two facilities at Medical Lake: Eastern State Hospital and Lakeland Village. The employer has centralized its trades and crafts employees who work at these facilities in a group referred to as Consolidated Support Services (CSS). CSS employees perform traditional skilled construction trades and craft work at Eastern State Hospital and Lakeland Village, including repairing and maintaining the physical plants, construction, and remodeling. The size and makeup of the CSS staff allows it to perform large and specialized construction and maintenance tasks.

The employer and union representing the employees at CSS had a long-established practice of discussing projects at the Medical Lake facilities, discussing the union's interest in doing the work, and then deciding how to proceed with the projects. In some

instances, the union declined the work because it recognized a project needed to be completed by a deadline that CSS employees could not meet with existing resources or required expertise they did not have. In such situations, the union agreed that the work should be contracted out. If the employees wanted to do the work, the parties would discuss more of the details of the project, including costs and time lines. Work was not contracted out absent the above-described communication between the union and the employer.

The particular work at issue in this case was remodeling four residential cottages and replacing flooring in the PAT Center, both at Lakeland Village.

Cottage Remodeling

In 1999 and 2000, CSS employees remodeled four residential cottages at Lakeland Village. CSS employees did most of the work with outside contractors doing some of the work. The employer and the union agreed the 2000 remodeling "sets no precedent at CSS or anywhere else within DSHS regarding how capitol (sic) projects are accomplished."[2]

In November of 2003, the employer began the design phase of additional cottage remodels. In the spring of 2004, the union learned that the employer planned to remodel the remaining four cottages. The employer and the union discussed the project and the union indicated that the CSS employees wanted to do the work. The employer required a short time line for the work to be completed due to the pending closure of another facility. The union informed the employer that CSS employees could not do the whole project because of the time deadline, but wanted to do the work on one of

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[2] Exhibit 19.

the cottages while the agency contracted out the work on the others.[3] An employer representative emailed the union on August 24, 2004, requesting that the union review if it still wanted to do the work on one of the cottages. "If there is still the opinion from staff they still want to do this project then the project will be delayed till [sic] July 2005."[4] The union confirmed its interest in completing one of the cottages.

The project was delayed until after July of 2005. From the end of August 2004 to September of 2005, the evidence shows the employer had many internal discussions about this project and about how it would communicate with the union about it. The record does not show any communication about the project from the employer to the union during this time. Some of the internal employer discussions are detailed below under "employer's internal communications."

After July 1, 2005, the employer let bids for the remodeling of the four cottages. On September 1 2005, the employer sent the successful bidder an unsigned draft of the contract which was ultimately signed on October 24, 2005.

Flooring Project

The Lakeland Village PAT Center flooring project involved the replacement of the vinyl flooring and coving in an area of a therapy building. The project included leveling the floor and abating the old adhesive and asbestos. The specifications for the job required the use of a particular leveling compound. Carpenters in CSS had previously laid flooring but CSS employees had not done asbestos abatement work nor were they certified to apply the

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[3] We note, however, that the employer never enforced this self-imposed deadline.

[4] Exhibit 35.

leveling compound. The union told the employer that the installation of the flooring was bargaining unit work but acknowledged that the asbestos abatement work was not. On September 21, 2005, the employer gave the union formal notice that the flooring had been contracted out with work to begin on October 7, 2005.

Union's August 2005 Request to Bargain

On August 5, 2005, the union inquired in writing about negotiations on the flooring and the cottage remodel. On August 17, 2005, the employer responded that it was not going to bargain, citing various reasons including: the requirements of the public works law and the language of the new collective bargaining agreement. The letter stated that the parties' previous practice was contrary to the law and should have been discontinued previously.

By letters dated September 16 and 22, 2005, the union requested to bargain the contracting out of the cottage remodeling and flooring and directed that the employer cease and desist its contracting out of the work. The union expressed concern about the employer ignoring its cease and desist demands and, in its September 29, 2005 letter, requested that the employer communicate with the union. In its letter dated October 11, 2005, the employer's legal representative responded that he had reviewed the capital project history which showed that the employer had a long history of contracting with outside vendors and that no current employee would be displaced by contracting out the work in question. The letter directed that the union identify the impacts to bargaining unit employees of the contracting out and that the employer would meet its bargaining obligations.[5]

The union responded on October 25, 2005, as follows:

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[5] Exhibit 31.

> Quite frankly your request for clarification is confusing at best and obtuse at worst. You acknowledge you have contracted out the work our members perform and if that is not an impact then provide us with your definition of an impact and your source for said definition so we can better understand your position. Since you have prepared a review please provide us with a copy of the review Steve mentioned in his letter, without it I cannot respond to your conclusions about this project and the work of our members and it may shed some light upon your idea of what constitutes an impact.[6]

Employer's Internal Communications

The following represents some of the pertinent communication among the management employees from the spring of 2004 through the summer of 2005 concerning the projects at issue:

- An email dated May 12, 2004, from Kathleen Brockman to Robert Hubenthal, Office of Capital Programs Chief, instructed him that if he was going to CSS to meet with the union "to call and cancel," leaving the rescheduling vague, *i.e.*, "sometime in the next 2-3 weeks." You can just tell them you have a newly assigned priority assignment that precludes your travel and that the discussion cannot move forward without you.[7]

- An email dated May 12, 2004, from Bob Hubenthal to several management employees, indicated that legal counsel advised them:

> to hold to the opinion that cottage remodel and renovation work is not 'maintenance work' and is not the work typically done by state employees, and to publicly bid all four cottages. This position may be difficult to defend because CSS has undertaken the remodel of four of the eight cottages we have renovated at Lakeland Village. But she though

[6] Exhibit 32.

[7] Exhibit 34.

> [sic] it was worth a shot and then see what fall-out follows. She was also concerned about setting precedence for future cottage renovation projects scheduled in 2005-2011.[8]

- An email dated November 16, 2004, from Terry LaFrance, CSS Administrator, to management employees expressed concern about the cottage remodel project being bid prior to July 1, 2005, "while we still have an obligation to talk to the union. . ." and the possibility of the union using the work "to claim that all capitol [sic] work should be theirs and we will be right back in the same fix we are now?"[9]

- An email dated May 16, 2005, attached information on the past practice of CSS bidding on capital projects and states it was suggested that they meet "to develop a strategy as to how to talk about this practice going away after July 1."[10]

- An email dated May 20, 2005 reviews the background information on the history of contracting out which the Human Resources administrator had requested so that she could write an analysis and concludes that the "eventual plan is to develop a recommendation from the analysis and share with OFM's Labor/Relations Board to get their buyoff and support. After that we will develop a plan as to what to say to the union and how to say it."[11]

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[8] Exhibit 34.

[9] Exhibit 36.

[10] Exhibit 38.

[11] Exhibit 39.

- An email dated July 20, 2005, from Chris Olsen, Director of the employer's Lands and Buildings Division, to other management employees stated: "Effective July 1st, the union will not participate in these capital projects. We need to follow the procedural process of soliciting bids. We have no need to provide them information ahead of the advertising, in that they would find out about the project as others would, via the advertising."[12]

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law and interpretations of statutes and contracts de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings support the Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the matter. *Renton Technical College*, Decision 7441-A (CCOL, 2002). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ANALYSIS

ISSUE 1: Duty to Bargain

Washington State law requires public employers to engage in collective bargaining with the exclusive bargaining representative concerning wages, hours, and other terms and conditions of

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[12] Exhibit 40.

employment. RCW 41.80.005(2), 41.80.020(1). Absent a union waiving its statutory right to notice and opportunity to bargain, the employer is prohibited from making unilateral changes in mandatory subjects. An employer commits an unfair labor practice if it fails to bargain concerning a mandatory subject of bargaining.

In determining whether a matter is a mandatory subject of bargaining, the Commission analyzes whether it directly impacts the wages, hours, or working conditions of bargaining unit employees. *Port of Seattle*, Decision 7271-B (PECB, 2003). When a subject does not directly affect wages, hours or working conditions, the Commission uses a balancing test, analyzing the employer's need for entrepreneurial judgment against the employees' interest in the terms and conditions of employment.

Both the decision to transfer bargaining unit work to non-bargaining unit employees of the employer or to contract out bargaining unit work are mandatory subjects of bargaining. *University of Washington*, Decision 9410 (PSRA, 2006).[13] As such, prior to any change, an employer must notify the union of the employer's intent and provide an opportunity for the union to request bargaining over both the decision and the effects of that decision. The Commission utilizes a two step approach to determine

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[13] It is important to stress that this is not a case regarding competitive contracting under the Personnel System Reform Act of 2002. RCW 41.06.142. Thus, an employer must still satisfy its bargaining obligation prior to contracting out bargaining unit work. Additionally, although Chapter 41.80 RCW specifically recognizes that work traditionally performed by state civil service employees may be contracted out under RCW 41.06.142, the Legislature nevertheless reserved the right for unions to demand bargaining before the employer implements such a change. RCW 41.80.020(7).

whether an employer has violated its bargaining obligations by contracting out work. The first step is to determine whether the work is bargaining unit work. We define bargaining unit work as work that bargaining unit employees have historically performed. Once an employer assigns unit employees to perform a certain body of work, that work attaches to the unit and becomes bargaining unit work. *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001).

If the work in question attaches to the bargaining unit, this Commission then considers the following five factors to determine whether the employer had a duty to notify the union of the intended change and provide an opportunity for bargaining:

1. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed the work before?);

2. Whether the transfer of work involved significant detriment to the bargaining unit members (*i.e.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities.);

3. Whether the employer's motivation was solely economic;

4. Whether there had been an opportunity to bargain generally about the changes in existing practices; and

5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

Skagit County, Decision 8746-A (PECB, 2006). In our analysis of these factors, no one factor is determinative.

Application - Cottage Remodel Project

With respect to the first factor, whether the work in question is bargaining unit work, CSS employees have historically performed trades work, including repairing and maintaining facilities, laying flooring, and remodeling cottages. Outside contractors have also performed similar trades work, including remodeling cottages. However, prior to contracting out trades work that CSS employees would have otherwise performed at Eastern State Hospital or Lakeland Village, the employer asked whether the bargaining unit employees wanted to do the work. It is important to note that the employer did not contract out such work without the union's consent, and the parties negotiated each project on a case-by-case basis.

The Examiner found that the work in question was not solely bargaining unit work because outside contractors performed the same work. We disagree. The fact that the work was not performed exclusively by bargaining unit employees in every instance is not the starting point for the analysis in this case. The parties' agreement to contract out certain projects or portions of projects on a case-by-case basis did not cause the work to lose its characterization as bargaining unit work.

Finding the cottage remodel project to be historical bargaining unit work, we next apply the five factors to the cottage remodel project to determine if the employer was required to bargain the change, as follows:

Practice

As previously described, the employer and the union operated under a long-established practice of discussing projects and giving the union the opportunity to express whether bargaining unit employees wanted to do the work. If the union decided not to undertake the

work, the project would be contracted out. If the union wanted to do the work, the union would perform the work. This practice occurred with smaller projects as well as larger projects, such as cottage remodels.

In 1999 and 2000, CSS employees remodeled four cottages at Lakeland Village. The minutes from the labor-management meeting held on July 26, 2000, stated that they were setting no precedent at CSS or anywhere else within the employer's work sites regarding capital projects.[14] After that time and until the projects at issue in this case, the parties continued to utilize the same practice of negotiating on a case-by-case basis whether bargaining unit employees would take on various projects.[15] The employer's actions with respect to the 2005 cottage remodel and flooring was inconsistent with this long-established past practice.

Significant Detriment

The Examiner correctly found that bargaining unit employees suffered no significant detriment as a result of the employer contracting out work in this case. The employer did not eliminate jobs or reduce employee hours. The union argued that the bargaining unit suffered a reduction in staffing over the years, but failed to establish a causal connection between the employer's actions in this matter and an erosion of bargaining unit work.

While the union may not have suffered job erosion in this particular instance, this fact is not determinative to the outcome of this case. In *City of Kennewick*, Decision 482-B (PECB, 1980), for example, the employer contracted out two vacant custodial position. Even though no employees were displaced and, in fact,

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[14] Exhibit 18.

[15] Examples of projects the union declined include Exhibits 45-50.

the number of bargaining unit positions increased, the Commission still found that the employer failed to bargain over a mandatory subject of bargaining. *See also Skagit County*, Decision 8746-A (PECB, 2006).

Motivation

This Commission's cases analyze the employer's motivation for contracting out work and ask the question whether the decision was motivated by economics or other factors, such as anti-union animus. The Examiner found that the union did not demonstrate anti-union animus or any other improper motivation for the employer's action. With respect to the cottage remodel, we disagree.

The record in this case contains substantial evidence to support finding that the employer made a strategic decision to contract out the cottage remodel work to avoid dealing with the union. This record demonstrates that although the employer was prepared to move forward with the project by early April of 2005, the employer delayed it until after July 1, 2005, because it thought such a delay would enhance its ability to contract out the work with impunity.

As early as May of 2004, the employer developed excuses for not meeting with the union to discuss the projects. Such avoidance characterized the employer's approach for over one year.

The Examiner's decision cites the employer's justifications for its action, including concern that the Association of General Contractors might sue if the employer did not bid the remodeling as a public works project, concern about setting a precedent with the new collective bargaining agreement, and the interest in warranty periods provided by outside contractors guaranteeing their work.

We recognize that an employer's interest in complying with public works laws, avoiding lawsuits, and obtaining warranty periods is legitimate and worthwhile. We also recognize that employers and unions alike will engage in internal discussions and strategy sessions to plan how they will approach a matter with the other party. What raises concern in this case, however, is the employer's avoidance of discussions with the union for over one year about these projects as well as the incongruity between such avoidance and the employer's position. The employer developed its strategy on how it was going to approach the issue of contracting out. In several emails, the employer strategized about how it would talk with the union about the issue. Then the employer said nothing. The employer let the months pass without discussion. Only after being confronted by the union, and only after the work was nearly contracted out did the employer share its position.

The way the employer chose to approach this causes this Commission to question the employer's motives. If the employer's motives were as it has asserted, why would it not openly share that with the union?

Opportunity to Bargain Generally

Although the parties discussed the subject of contracting out while negotiating the collective bargaining agreement, they included no language on the topic in the agreement. The Examiner found that collective bargaining agreement language eliminated the parties' past practices of discussing whether bargaining unit employees wanted to do various projects. However, as discussed in more detail below, the union did not agree to waive its right to bargain prior to the employer making changes to matters that are mandatory subjects of bargaining. The employer did not provide the union an opportunity to bargain prior to contracting out the 2005 cottage remodels.

Work Fundamentally Different

The cottage remodel work at issue is not fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, and working conditions. Rather, the work at issue is the same as the employees' regular work. Even if the past practice relating to the earlier cottage remodels were not considered, the work involved in the remodeling continues to be the same type of work that the CSS employees engage in on a regular and ongoing basis, as defined in their job descriptions.[16] Furthermore, although the Examiner distinguished between capital projects and non-capital projects, we find the source of the funds used for the project to be irrelevant when determining whether the employer satisfied its bargaining obligation. Bargaining unit work issues have not been driven by the funding source.

Conclusion - Cottage Remodel Project

Balancing the previously detailed factors, we conclude that the decision to contract out the cottage remodels was a mandatory subject of bargaining and the employer failed to bargain with the union.

This Commission has previously articulated that the bargaining obligation is not onerous and does not mandate agreement. As we said in *Port of Seattle*, Decision 7271-B (PECB, 2003):

> The prohibition of "refusal to bargain" conduct as unfair labor practices under RCW 41.56.140(4) and 41.56.150(4) is aimed at protecting the process of communication between labor and management, rather than at prescribing particular results. There is no duty to agree, but the desired communications cannot result in an agreement unless the process is given a chance to operate.

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[16] Exhibits 1 - 17.

In *Port of Seattle*, we also quoted the National Labor Relations Board's (NLRB) decision in *Awrey Bakeries, Inc.*, 217 NLRB 730 (1975), which is particularly apt here:

> [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.

Application - PAT Center Flooring Project

When applying the Commission's two step approach to determine whether the employer has violated its bargaining obligations by contracting out the flooring project, we find no need to move to the second step. CSS employees had historically performed work involving the laying of flooring. They had not, however, removed adhesive using the particular compound specifically called for in the employer's specifications for the project. Additionally, they had not performed asbestos abatement work. The uniqueness of that work distinguishes it from the remodeling work.

Conclusion - Flooring Project

The PAT Center flooring project is not bargaining unit work and, as a result, the employer does not have an obligation to bargain with the union prior to contracting out this project.

ISSUE 2: Waiver

The employer raises the defense of waiver. The Examiner found that the union waived by contract its right to negotiate the employer's

decision to contract out bargaining unit work. The Examiner also found that the union waived by inaction its right to negotiate the impacts of the employer's decision to contract out the work. We disagree with both of the Examiner's findings.

Waiver by Contract

Through the collective bargaining process, parties make agreements relating to mandatory subjects of bargaining, sometimes waiving or altering their statutory bargaining rights. To effectively waive statutory collective bargaining rights, the parties must consciously agree to the waiver and the waiver must be clear and unmistakable; it cannot be implicit. *City of Wenatchee*, Decision 8802-A (PECB, 2006). When parties agree to a knowing, specific and intentional contractual waiver, the parties may lawfully make unilateral changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The party alleging a waiver bears the burden of proof. *City of Wenatchee*, Decision 8802-A.

Waiver by Inaction

A party may also waive its statutory bargaining rights by inaction. Unions waive their right to bargain by inaction when they fail to request bargaining in a timely manner after receiving adequate notice of the proposed changes. However, an employer must provide notice of the intended change sufficiently in advance of the actual implementation of that change to allow a reasonable opportunity for bargaining. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). If an employer presents its decision to transfer bargaining unit work as a final decision, or *fait accompli*, then the union is excused from its obligation to request bargaining. *University of Washington*, Decision 8878-A (PSRA, 2006).

Collective Bargaining Agreement

The parties negotiated "mandatory subject" and "entire agreement" clauses in their collective bargaining agreement which took effect on July 1, 2005. Section 38.1 of the mandatory subject clause states:

> The Employer will satisfy its collective bargaining obligation before making a change with respect to a matter that is a mandatory subject. The Employer will notify the Executive Director of the Union of these changes in writing, citing this Article, and the Union may request negotiations on the impact of these change on employee's working condition. In the event the Union does not request negotiations within twenty-one (21) calendar days of receipt of the notice, the Employer may implement the changes without further negotiations. There may be emergency or mandated conditions that are outside of the Employer's control requiring immediate implementation in which case the Employer will notify the Union as soon as possible.

Section 46.1 of the entire agreement clause states:

> This Agreement constitutes the entire agreement and any past practice or past agreement between the parties - whether written or oral - is null and void, unless specifically preserved in this Agreement.

Section 46.4 of the entire agreement clause 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 party 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 herein will be construed as a waiver of the Union's collective bargaining rights with respect to matters that are mandatory subjects/topics under the law.

Application of Collective Bargaining Agreement Language

The collective bargaining agreement language cited above clearly and unequivocally states that the employer will satisfy its collective bargaining obligation before making changes to mandatory subjects of bargaining. The agreement also clearly and unequivocally states that nothing in the agreement will be construed as a waiver of the union's rights to bargaining concerning mandatory subjects.

The Examiner found that Section 46.1 of the bargaining agreement eliminated written and oral past practices that are not included in the agreement. Even if that conclusion is correct, the parties' agreement did not eliminate or waive the employer's obligation to notify the union of intended changes to mandatory subjects of bargaining, such as contracting out bargaining unit work, and to provide a reasonable opportunity for the union to request bargaining. Furthermore, in Section 38.1 of the agreement, the parties provided a process to use when the employer wished to make a change to a mandatory subject of bargaining. In July of 2005, the employer used the process to notify the union of its interest in contracting out high voltage work. Although the employer articulated its belief that contracting out the work would have no impact on the bargaining unit employees, the employer followed the process.[17]

Fait Accompli

The Examiner's decision states that the employer asked the union to identify what effects should be bargained and the union did not respond. The Examiner's description leaves out significant details, including the written communication between the parties and the timing of that communication.

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[17] Exhibit 27.

The record supports a finding that when the union learned of the contracting out, it promptly requested bargaining. After several attempts by the union to discuss the issues with the employer, the employer responded by letter dated October 11, 2005, inviting bargaining on union-identified impacts. The union responded to the letter on October 25, 2007, identifying some confusion about the employer's letter and position, asking for clarification of the employer's stance and definition of impacts, and providing a general statement about the impacts.

Although the contractor did not receive official notice to proceed with the work on the cottages until November 2, 2005, the evidence demonstrated that by the end of September issues between the employer and the contractor were resolved and the contract was signed on October 24, 2005. The contract was originally sent to the contractor on September 1, 2005.

This record demonstrates that the union was presented with a *fait accompli*, and we find that the employer contracted out bargaining unit work without providing the union the opportunity to bargain. In *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998), we concluded that the union had been presented with a *fait accompli* because the employer approached the issue from the beginning as if its policies were outside the collective bargaining process. That description aptly describes the employer's approach in this matter. Additionally, as we stated in *Skagit County*, Decision 6348-A (PECB, 1998):

> In those instances where an employer contemplates a change and takes action toward the goal of introducing the change without allowing the union an opportunity for bargaining which could influence the employer's planned course of action and the employer's behavior seems inconsistent with a willingness to bargain, a *fait accompli* could be found.

The employer's actions in this case demonstrated an unwillingness to bargain with the union.

Conclusion

The union did not waive its right to bargain with the employer concerning the contracting out of bargaining unit work. At the point the employer finally expressed a willingness to negotiate the impacts of its contracting out, it was too late. It presented the union with a *fait accompli*. As a result, the employer violated its duty to bargain by failing to give notice to the union and an opportunity for bargaining with the union prior to transferring bargaining unit work to persons outside the bargaining unit.

Remedy

In refusal to bargain cases such as this, the typical remedial order directs the employer to cease and desist from failing and refusing to bargain with the union, take affirmative action to rectify the damage done, and to post notices to inform the employees of the violation of state law that has occurred. With respect to the found violations, those typical remedies are appropriate.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner Karl E. Nagel are AFFIRMED and ADOPTED as the Findings of Fact of the Commission, except paragraphs 14 and 16, which are amended to read as follows:

    14. The agency and the union maintained a long history of discussing whether CSS employees would complete particu-

lar projects or whether the project would go out to bid. The language the parties placed in the 2005-2007 master agreement did not eliminate the employer's obligation to bargain concerning mandatory subjects of bargaining, including contracting out bargaining unit work.

16. The cottage remodel work contracted out by the employer was bargaining unit work. The fact that the parties agreed on a case-by-case basis to allow outside contractors to perform the same types of work does not change the characterization of the work.

2. The Conclusions of Law issued by Examiner Karl E. Nagel are AFFIRMED and ADOPTED as the Conclusions of Law of the Commission, except paragraphs 3 and 4, which are amended as follows:

 3. The employer failed to fulfill its obligation to bargain the decision to contract out the cottage remodel work under RCW 41.80.005(2) and 41.80.020. Consequently the employer committed an unfair labor practice under RCW 41.80.110(1)(e).

 4. The employer committed interference by contracting out bargaining unit work without bargaining. Consequently the employer committed an unfair labor practice under RCW 41.80.110(1)(a).

3. The Order issued by Examiner Karl E. Nagel is amended as follows:

 1. CEASE AND DESIST from:

a. Refusing to bargain with the Washington Federation of State Employees the decision to contract out bargaining unit work, including cottage remodeling work, at Lakeland Village.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

a. Give notice to and, upon request, negotiate in good faith with Washington Federation of State Employees, before contract out bargaining unit work, including cottage remodeling projects, at the Lakeland Village facility.

b. Post copies of the notice attached to this order in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached to this order into the record at a regular public meeting of the Washington State Department of Social and Health Services,

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.

d. 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.

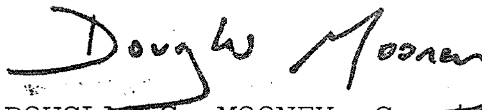
e. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this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

Issued at Olympia, Washington, the 25th day of April, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner



DOUGLAS G. MOONEY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY contracted out remodeling work at the Lakeland Village Facility without giving a timely notice to the Washington Federation of State Employees to allow the union to request bargaining about the decision and the effects of the decision to contract out that work.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL give notice and, upon request, bargain with the Washington Federation of State Employees regarding the decision and the effects of the decision to contract out remodeling work.

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: ________________

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BY: ______________________________
Authorized Representative

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

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.