STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MUKILTEO ASSOCIATION OF CLASSIFIED PERSONNEL, an affiliate of the PUBLIC SCHOOL EMPLOYEES OF WASHINGTON,	)	CASE 8579-U-90-1860
Complainant,	)	DECISION 3795-A - PECB
vs.	)	
MUKILTEO SCHOOL DISTRICT 6,	)	DECISION OF COMMISSION
Respondent.	)	

Eric T. Nordlof, Attorney at Law, appeared on behalf of the complainant.

Montgomery, Purdue, Blankenship & Austin, by Christopher L. Hirst and Fred J. Foss, Attorneys at Law, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by Mukilteo School District 6, which seeks to overturn a decision issued by Examiner Walter M. Stuteville.[1]

BACKGROUND

The Mukilteo School District (employer) operates schools in a portion of Snohomish county, to the south of the city of Everett. In addition to administrative employees and certificated teachers,[2]

1 Mukilteo School District, Decision 3795 (PECB, June 28, 1991).

2 The employer's non-supervisory certificated employees are represented by the Mukilteo Education Association for purposes of bargaining under Chapter 41.59 RCW.

a variety of classified employees assist in fulfilling the employer's mission of providing public education.

For many years, the Mukilteo Association of Classified Personnel (MACP), an affiliate of Public School Employees of Washington (PSE), has represented classified employees of the Mukilteo School District working in data processing, crossing guard, food service, secretarial/bookkeeping, transportation, custodian, maintenance, and professional-technical functions. That unit includes approximately 211 employees.[3]

The "regular" work year for employees in the MACP bargaining unit varies according to classification. Some employees, such as bus drivers, food service employees and educational services personnel, work only the 180 days per year that students are in attendance. Other bargaining unit employees may be compensated for 200, 220, 240, or 260 days per year.

The parties' 1988-91 collective bargaining agreement contained the following provisions:

ARTICLE VII

> Section 7.5 In the event of an unusual school closure due to inclement weather, plant inoperation, or the like, the District will make every effort to notify each employee to refrain from coming to work. Employees reporting to work shall receive a minimum of two (2) hours pay at base rate in the event of such a closure; provided, however, no employee shall be entitled to any such compensation in the event of notification by the District. Notification normally will be made by radio stations KRKO, KWYZ and KING.
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> ...

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3 PSE also represents a separate unit of educational assistants at the Mukilteo School District.

ARTICLE XVIII

> Section 18.7. The parties hereto agree that they have fully bargained with respect to wages, hours and other terms and conditions of employment and that all wages, conditions of employment and other benefits to be received are contained in this Contract.

The contract did not contain any provision specifying the school calendar for any year within its term.

The Mukilteo School District had a school calendar for the 1989-90 school year,[4] and that calendar provided for March 16, 1990 to be an "inservice day". The usual and customary practice for such in-service days was that students would not attend classes, and the 180-day classified employees would not be scheduled to work.

Beginning in November of 1989, both employer officials and classified employees were aware that the certificated employees of the Mukilteo School District were discussing the possibility of joining with others across the state for a state-wide teachers' "strike".[5] PSE was aware of this situation by January 21, 1990, when PSE's state president wrote a letter to the PSE membership. That letter advised leaders of local PSE chapters that, if a school district decided to close its schools in the event of a "teacher strike", such an altering of the school calendar should be

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4 The school calendar had been negotiated between the employer and the Mukilteo Education Association.

5 The event was not a "strike" in the usual sense of that term in labor-management relations. The announced intent of the one-day event was to mobilize teachers across the state to rally at the state capital, to protest the level of funding provided for public education by the state Legislature. Thus, the Mukilteo teachers were joining many of their colleagues and education administrators, largely from Western Washington, in a massive, one-day lobbying effort. The event was not related to a dispute concerning wages, hours or working conditions between the school district and the Mukilteo Education Association.

negotiated in advance of the decision.[6] The president's letter went on to say:

> If your district proceeds with a school closure without negotiating, your chapter may pursue either an unfair labor practice charge or a contractual grievance based upon the no lockout provision.

At that time, the local PSE chapter president for the MACP unit, Pearl Taylor,[7] began talking with the employer's administrators concerning various contingency plans if such an event should take place.

On February 7, 1990, the employer notified PSE that it had received notice that the Mukilteo Education Association intended to conduct a one-day "strike" on February 13, 1990. Superintendent James Shoemake, the employer's principal representative in discussions with the union, wrote:

> Due to the walkout by members of the Mukilteo Education Association union scheduled for Tuesday, February 13, it appears that I must take emergency action. Without necessary staff availability, it would be an unsafe condition for students in our schools that day. Therefore, please accept this notice that I, as superintendent of schools, am invoking the emergency closing procedures for February 13, 1990. This will mean that all 180-day employees will not work on that date and an appropriate makeup day will be sched-

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[6] Such discussions would be held against the background of RCW 28A.58.754(5), which requires that the basic educational program of each school district shall consist of a minimum of 180 days per school year in such grades as are provided by the school district.

[7] Taylor was a mechanic assigned to the employer's school bus operation. He was the principal PSE representative in discussions with the employer.

> uled. If you have any further questions, please call.

Shoemake also sent a letter to all Mukilteo School District staff members, as follows:

> As I am sure you are all aware, the MEA has voted to conduct a work stoppage on Tuesday, February 13, 1990. The School District has determined that it would not be in the best interest of the children to hold school on that day. Due to this condition, I am invoking the emergency closing provisions for the District. All classified employees who work 180 days or less should **not** report to work. This will include bus drivers, food service employees, educational services personnel, and any others not working more than 180 days. All certificated, non-administrative employees, should not report to work.
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> While we regret this situation has occurred, we must react this way at this time. The facilities will be closed on February 13 to everyone except administration staff and those classified employees who work in excess of 180 days.
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> If you have any questions about your personal work schedule, please contact your immediate supervisor to the Personnel Office for clarification.
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> I will be meeting with the union representatives to discuss a makeup [sic] day and will make a recommendation to the Board of Education so we can notify all concerned as soon as possible.

PSE did not contact the employer for the purpose of negotiating the "make-up" day. A one-day stoppage of all classroom activity occurred on February 13, 1990, as announced.

On March 6, 1990, the employer notified its employees, as well as its students and their parents, that it was scheduling March 16, 1990 as the "make-up" day for the school day lost because of the

February 13 school closure. Although there is no evidence that a copy of the notice was sent directly to the union,[8] the union president became aware of the "make-up" day and made no effort to negotiate the matter with the employer.

Because of the March 16 "make-up" day, the classified employees represented by PSE lost neither wages nor benefits as a result of the February 13, 1990 school closure. Some of the classified employees represented by PSE had, however, previously scheduled inservice training or continuing education programs for the March 16 "inservice" day. Those programs were not attended, because those employees were required to be at work on their regular jobs on that day, and some employees therefore lost registration costs or other prepaid expenses that were not refundable.

The local PSE official testified, candidly, that PSE had not proposed to bargain the school calendar with the employer.[9] While the employer candidly admitted that it had not bargained the school closure with PSE, it asserted that it talked with PSE about changing the calendar so that no employees would lose any pay.

On May 4, 1990, PSE filed the unfair labor practice complaint in this case, alleging that the employer violated RCW 41.56.140(4) by failing to bargain with the union concerning a change of the work schedule for certain classified employees. The employer's answer alleged that its actions were authorized by the parties' collective

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[8] The complaint alleges that the union leadership learned that March 16 had been scheduled as a make-up day when the notice was posted, on March 6, on the bulletin board in the transportation department lounge. Pearl Taylor testified at the hearing that he first knew about the make-up day after a copy of the March 6 notice, left on a school bus, was brought to his attention at the shop by one of the drivers.

[9] Taylor testified that he was "not allowed" to discuss the calendar "because that's not a part of our bargaining".

bargaining agreement, as well as by past practice between the parties implementing that agreement, and that the union had failed to properly demand bargaining.

A hearing was held on February 19, 1991. After both parties filed post-hearing briefs, Examiner Stuteville issued a decision on June 28, 1991, finding that the employer had committed unfair labor practices. The Examiner held that the union had not been given notice of the proposed change in the calendar, nor had it negotiated the March 16, 1990 date as an additional work day for classified employees. In addressing the defenses raised by the employer, the Examiner found that neither Section 7.5 nor Section 18.7 of the collective bargaining agreement relieved the employer of the duty to bargain the "make-up" day subject not raised during negotiations. As part of the remedy, the employer was ordered to make whole any classified employee for any documented amounts expended and not refunded for educational inservice programs missed due to being required to work on March 16, 1990.

POSITIONS OF THE PARTIES

The employer takes issue with the Examiner's finding that the employer scheduled and implemented a make-up day "without consultation with the union". It objects to the Examiner's conclusions of law that: (1) The labor agreement does not regulate the rescheduling of work to make up time lost due to a strike by another organization, so that there was no contractual waiver of bargaining rights; (2) that the employer did not give notice to the union that it was considering the conversion of the March 16 "in-service" day into a make-up day, so that there had been no waiver by inaction of the bargaining rights secured by RCW 41.56.030(4); and (3) that the employer's unilateral alteration of the school calendar to make March 16, 1990 a "make-up" day, without giving notice to or providing opportunity for bargaining with the union,

constituted a refusal to bargain in violation of RCW 41.56.140(4). The employer also takes issue with the remedies ordered by the Examiner including the "make-whole" remedy.

PSE did not file a brief in opposition to the petition for review. It is assumed that PSE is in substantial agreement with the Examiner's decision.

DISCUSSION

Before addressing the employer's arguments, we choose to comment on certain conclusions by the Examiner that form the background for the disputed rulings:

The Examiner found that, although changes in the established school calendar affected the wages and hours of work of classified employees, the employer was relieved of its normal duty to bargain over the decision to close its schools for February 13 because of a "compelling need". On the record made here, we concur.

The Examiner also found that the employer had a duty to bargain over the effects of its school closure decision, having reached that result after reviewing both Commission precedent on the duty to bargain "school calendar" matters under Chapter 41.59 RCW and the fundamental similarity of Chapter 41.56 RCW to Chapter 41.59 RCW. We find no fault with that reasoning.

Waiver by Inaction

This case turns on whether the events constitute a fait accompli presented by the employer or a **waiver by inaction** by the union. The Examiner found that the employer breached its duty to bargain by failing or refusing to negotiate with PSE about the scheduling of the make-up day. For the reasons discussed below, we disagree with the Examiner's decision.

It is significant that PSE's state president made the union membership aware that "altering of the school calendar should be negotiated in advance". That was done in January of 1990, before the teachers' work stoppage took place and even before the Mukilteo School District announced the closure of its schools. Thus, when Mr. Taylor started "discussions" with the employer concerning various contingency plans, he was fully cognizant that unilateral action in regard to the school calendar could be an unfair labor practice.

The focus of Taylor's discussions with the school administrators was, in Taylor's own words, to "make sure our people were getting paid". The employer appears to have met Taylor's concerns when it advised him that PSE members would not lose any pay or benefits.

Shoemake's February 7 letter advised Taylor that an appropriate make-up day would be scheduled for the 180-day employees who would not work on February 13th. Shoemake also indicated in that letter that he was willing to answer "any further questions". Moreover, Shoemake's separate letter to staff members stated the employer's intention to meet with union representatives to discuss a make-up day. Nevertheless, there is absolutely no evidence that any PSE representative attempted to meet with Shoemake to submit questions or to discuss a make-up day.[10]

There is no evidence that Taylor, or any other PSE representative, sought to meet with the employer <u>after</u> March 6th, when the employer announced that the make-up day was scheduled for March 16, 1990. Apparently, PSE only became concerned about the selection of March 16th as the make-up date when it learned that some of its members might lose registration fees paid to attend workshops on that date.

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10 There is certainly no evidence that Shoemake sought to meet with the union for the purpose of scheduling a make up day. While that fact does tend to support the Examiner's approach, we do not look at it in isolation.

An employer has a duty to give notice to the exclusive bargaining representative of its employees, prior to making a change of their wages, hours or working conditions. It is undisputed that PSE had full notice, on and after February 7, 1990, that a make-up day would have to be selected to replace the school day missed on February 13th. Thus, the record supports a conclusion that the employer met its "notice" obligation under the statute.

Once having given notice of a change of wages, hours or working conditions, an employer has a duty to provide opportunity for bargaining. Clearly, there was time for discussion of the make-up day, and it is undisputed that the employer's announcement of the school closure contemplated meetings with union representatives. Taylor and other PSE officials are employed within the bargaining unit, and apparently received the individual "employee" notices, as well as the letter sent to the organization. Thus, the record also supports a conclusion that the employer met its "opportunity" obligation under the statute.

Faced with notice of a contemplated change and an opportunity for collective bargaining, a union has the option to accept the change or request bargaining on the matter. This situation arose in the context of a state law which requires that schools be operated for 180 days each year. It is undisputed that the school calendar showed only two likely possibilities for scheduling a make-up day: (1) March 16, 1990, which was the only scheduled inservice day remaining in the school year; or (2) after the end of the school year. The union was therefore on notice as early as February 7th that the choice of a make-up day was limited, and that March 16th was a likely prospect. Admittedly, the employer did not directly notify the union of the actual date proposed as a make-up day but, under the circumstances, we conclude that the union had adequate notice and sufficient time to press its bargaining rights. The union did nothing to raise a "scheduling" issue prior to the March 6th announcement of the make-up day, and clearly did nothing

between March 6th and March 16th. The record does not reveal the reason for the union's silence at that time.[11] As stated by the Commission in an earlier case:

> RCW 41.56.030(4) imposes a mutual obligation on the employer and on the bargaining representative of employees. It cannot be assumed that the burden of taking the lead in a given situation falls solely on one party or the other. The union certainly was or should have been aware of the mutuality of the obligations of RCW 41.56.140, and we conclude that it was aware of what was being considered by the city council sufficiently in advance of implementation that meaningful bargaining could have taken place. ...

City of Yakima, Decision 1124-A (PECB, 1981), at page 4.

We conclude that, by virtue of its own inaction in failing to make a timely request for bargaining, while having actual knowledge that March 16th was a likely date to be selected as a make-up day, PSE waived its right to bargain on the matter. We thus reverse the Examiner's decision that PSE was confronted with a fait accompli.

Waiver by Contract

A union may waive its statutory bargaining rights by contract. This occurs where the language of a collective bargaining agreement gives the employer the right to make changes concerning one or more mandatory bargaining subjects while the contract is in effect, without providing the union with the notice or opportunity for bargaining that would ordinarily be required by the collective

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[11] Given Taylor's narrow focus in earlier discussions on there being no loss of pay for PSE members, one can speculate that the reason the union made no attempt to meet with the employer at any time after the closure announcement was because it then had no interest in the matter beyond the already-given assurance that its members would not lose any pay or benefits.

bargaining statute.[12] Given our conclusion, above, that the union failed to request bargaining in this case after having due notice and opportunity to discuss the scheduling of the make-up day, we find it unnecessary to discuss the employer's argument that Section 7.5 of the parties' collective bargaining agreement would have given it the right to reschedule work to make up time lost because of the "strike".

NOW, THEREFORE, the Commission makes the following amended findings of fact, amended conclusions of law and amended order:

AMENDED FINDINGS OF FACT

1. Mukilteo School District 6 is a school district operated under Title 28A RCW, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Mukilteo Association of Classified Employees, an affiliate of Public School Employees of Washington (PSE), is a "bargaining representative" within the meaning of RCW 41.56.030(3).

3. The employer and PSE have an existing bargaining relationship under which PSE is recognized as exclusive bargaining representative of certain of the employer's classified employees, pursuant to Chapter 41.56 RCW.

4. The bargaining unit represented by PSE includes a variety of employee classifications who are compensated for either 180, 200, 220, 240, or 260 days each year. The work of 180-day employees is directly tied to the school calendar and to the presence of students in the schools.

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[12] See, for example, City of Yakima, Decision 3564-A (PECB, 1991), where "waiver by contract" and "deferral to arbitration" were extensively discussed.

5. On or before February 7, 1990, the Mukilteo Education Association notified the employer that its certificated teachers intended to absent themselves from work on February 13, 1990.

6. On February 7, 1990, the employer notified PSE that its schools would be closed on February 13, 1990, and that the 180-day classified employees should not report for work on that date. The employer invited questions from PSE. In a letter sent to employees on the same date, the employer indicated an expectancy that it would be meeting with union representatives to discuss scheduling of a make-up day. PSE knew or should have known at that time that the likely make-up days were either: (1) conversion of an inservice day previously scheduled for March 16, 1990 to a school day, or (2) adding a school day at the end of the 1989-90 school year.

7. The employer and PSE discussed what the employer intended to do in reaction to the teachers' "strike", and what plans would be made to make up the time lost. The focus and interest of PSE in those discussions was limited to being certain that none of its members would lose pay or benefits.

8. The employer's teachers absented themselves from work on February 13, 1990, and the employer's schools were closed on that day. The 180-day classified employees represented by the union did not work on that day.

9. PSE did not make inquiry or request bargaining concerning the scheduling of the make-up day.

10. On March 6, 1990, the employer announced that the inservice day previously scheduled for March 16, 1990 had been designated as the make-up day to replace the school day lost on February 13, 1990. No employee represented by PSE lost wages

or benefits as a result of the February 13, 1990 school closure or the March 16, 1990 make-up day.

11. As a result of the rescheduling of March 16, 1990 as a make-up day, certain employees represented by PSE were unable to participate in previously scheduled inservice programs, and some employees lost tuition or prepaid expenses related to those programs. Only then did PSE seek to raise any issue concerning the selection of the make-up day to replace the school day lost on February 13, 1990.

AMENDED 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. The school calendar impacts the wages and hours of school district classified employees and is, in general, a mandatory subject of collective bargaining under RCW 41.56.030(4).

3. The announced intention of its non-supervisory certificated employees, acting as and through the Mukilteo Education Association, to refuse to perform their normal duties on February 13, 1990, presented the employer with a compelling need to make a decision concerning closure of its schools, so that the employer did not violate RCW 41.56.140(4) by failing to give notice to PSE or provide opportunity for bargaining with PSE concerning its decision to close its schools on February 13, 1990.

4. The employer gave adequate notice to PSE that it was considering the scheduling of a make-up day to replace the school day lost on February 13, 1990, and it held open the possibility of collective bargaining on that matter under RCW 41.56.030(4).

5. By failing to make a timely request for bargaining concerning the scheduling of the make-up day, PSE waived its bargaining rights under RCW 41.56.030(4).

6. By its scheduling and implementation of a make-up day for March 16, 1991, after the union, with adequate prior information, failed to request bargaining on the issue, the employer has not committed, and is not committing any unfair labor practice under RCW 41.56.140(4).

AMENDED ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is DISMISSED.

Entered at Olympia, Washington, the 21st day of May, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner