Seattle School District, Decision 5755 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609,	)	
Complainant,	)	CASE 12680-U-96-3029
vs.	)	DECISION 5755 - PECB
SEATTLE SCHOOL DISTRICT,	)	
Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Schwerin, Burns, Campbell & French, by Cheryl French, Attorney at Law, and Kathleen Phair Barnard, Attorney at Law, appeared on behalf of the complainant.

Perkins Coie, by Lawrence B. Hannah, Attorney at Law, and Ruth Todd Chattin, Attorney at Law, appeared on behalf of the employer.

On September 3, 1996, International Union of Operating Engineers, Local 609 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Seattle School District (employer) refused to bargain concerning the effects of implemented layoffs on certain employees represented by the union; that the employer unilaterally changed work schedules, work locations, duties, time allocation standards; and that the employer refused to provide financial information requested by the union. The complaint was reviewed by the Commission's Executive Director, for the purpose of making a preliminary ruling under WAC 391-45-110.[1] In a letter

[1] In making a preliminary ruling, all of the facts alleged in a complaint are assumed to be true and provable.

issued on September 6, 1996, the Executive Director found the union's complaint stated a cause of action for further proceedings before the Commission.[2] On September 23, 1996, the undersigned was assigned as Examiner. Hearings in this matter were conducted on December 17 and 18, 1996 and February 4, 5, 6, 1997. The parties filed briefs to complete the record.

BACKGROUND

IUOE, Local 609 is the exclusive bargaining representative of custodians and groundskeepers employed by the Seattle School District.[3] At the time pertinent to this case, Dale Daugharty was the business manager of the union and David Westberg was a union representative.

Bargaining unit members are assigned to each elementary school, middle school, alternative school and high school operated by the employer, as well as to an administration building, a stadium, a

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[2] The union filed a motion for temporary relief and a supporting affidavit, asking the Commission to file suit in the superior court to obtain injunctive relief that would reverse the layoffs. See, WAC 391-45-430. On September 10, 1996, the union filed a memorandum and four declarations in support of its motion for temporary relief. On September 13, 1996, the employer filed a memorandum in response to the motion for temporary relief. At a regularly-scheduled meeting on September 17, 1996, the Commission took argument on, considered and denied the motion for temporary relief. The Commission did, however, direct that the assignment of an Examiner be expedited.

[3] The union represents three bargaining units at the Seattle School District. The custodian/groundskeeper unit is frequently referred to as "609-A" in the parties' correspondence, to distinguish it from the other units.

warehouse, and a facilities/maintenance building. Bargaining unit members are responsible for cleaning buildings, upkeep of the grounds, minor repairs and maintenance, and operation of boilers that provide heat and hot water in the buildings.

The parties' collective bargaining agreement contains the following language related to layoff and recall:

> **ARTICLE XV: BUILDING RECLASSIFICATION AND STAFF ADJUSTMENTS**
>
> ...
> SECTION B: Staff Adjustments
>
> 1. When a school building or department (including gardeners) is closed or reorganized, or a program is ended, the District will make every effort to transfer employees displaced by such action(s) to comparable positions.
> 2. The parties to this Agreement will convene no later than June 1 of each year to explore and try to reach agreement on alternatives to layoff.
>   a. This process shall include, but is not limited to, specific procedures calling for reassignment, promotion, demotion, transfer, retirement, worksharing, free time, or other methods directed towards the employees either directly or indirectly affected.
>   b. If no alternatives are agreed to by July 30 of each year, the layoff and bumping procedure will be implemented as described items 1, above, and 3, below.
>   c. The District does not grant voluntary days off without pay except in unusual circumstances.
> 3. Should staff adjustments become necessary, the following criteria will be used to determine the employees to be affected:
>   a. Selection of employees for layoff and recall shall take into account affirmative action policies relating to ethnic groups to the extent consistent with State and Federal Law.

b. Seniority within job titles will govern for all gardener job titles. Bumping will begin with the highest affected job title and continue through the lowest job title to the least senior employee who is subject to layoff if there are no alternatives fond in item 2 above.

c. Seniority within job title will govern for all custodial job titles. Bumping will begin with he highest affected job classification and continue through the G classification to the least senior employee who is subject to layoff if there are not alternatives found in item 2 above; as follows:

1) The layoff and recall of part-time employees who have worked for the District fewer than six (6) consecutive working months in positions represented by IUOE, Local 609, shall be at the discretion of the District: provided that, all such employees shall be laird off prior to the implementation of c-2) below; and, provided further, that such employees shall not be recalled prior to the implementation of c-2) below.

2) The layoff and recall of part-time employees who have worked for the District six (6) consecutive working months or more, in positions represented by IUOE, Local 609, shall be accomplished in seniority order (i.e., least senior = first laid off); provided that, all such employees shall be laid off prior to the implementation of c-3) below; and, provided further, that such employees shall be recalled prior to the implementation of 1) above. Such employees will have recall rights for a period of twelve (12) months, provided that the employee keeps the District appraised of his/her current address.

3) The layoff and recall of full-time employees in the G classification who have worked for the District fewer than six(6) consecutive working months in positions represented by IUOE, Local 609, shall be at the discretion of the District; provided that, all

such employees shall be laid off prior to the implementation of c-4) below; and, provided further, that such employee shall not be recalled prior to the implementation of 4) below.

4) Seniority within job title will govern the layoff and recall of full-time employees in the G classification who have worked for the District at least six (6) consecutive working months in positions represented by IUOE, Local 609. Such employees will have recall rights for a period of twelve (12) months, provided that the employee keeps the District appraised of his/her current address.

4. It is recognized that Facilities' Area Supervisors shall be eligible to return to 609-A bargaining unit positions comparable to bargaining unit positions held prior to becoming Area Supervisors, based on their seniority within the appropriate job titles. Facilities' Area Supervisors shall not accrue bargaining unit seniority for time spent as a Facilities' Area Supervisor.

At a Labor/Management Relations Committee meeting held on April 26, 1996, the employer informed the union of impending budget reductions. Minutes of that meeting recorded and maintained by the union reflect the following discussion concerning the budget:

> **Custodial Services Budget Reductions 96/97**: Per the negotiated contract, the District must inform 609 of budget reductions by June 1. The Logistics Department is targeted for a $1.8 million budget reduction. The total District-wide reduction is $9.5 million. Special Needs funds are also being reduced.
>
> Local 609 inquired if Custodial Services was taking the entire reduction for the Logistics Department. Custodial Services is targeted for a $1,025,000 budget reduction. Dan Gracyk indicated that there are other sections within Logistics involved with reductions which include nonrepresented personnel.

> Mike DeMonbrun provided a document with information on various options to meet these targeted amounts. Dependent on which option is used will determine the actual number of custodial personnel to be laid off. Part-time custodians will be laid off first, then least senior Apprentices. Hourly custodial money will still be available in 96/97. FTE'd [sic] Assistant Custodians will bump into hourly Part-time Custodial positions.
>
> If custodial services went from every other day cleaning to every third day cleaning, 22 FTE'd Assistant Custodian positions would be reduced for a dollar amount of $752,114. If Custodial Services went to fifth (5th) day cleaning, 33 FTE'd Assistant Custodian positions would be reduced for a dollar amount of $1,025,610.
>
> Dale Daugherty indicated that cleaning frequency modifications are within the negotiated contract language. Reduction of "block time", however, would be a contract bargaining issue. Dale indicated he would be exploring response to this issue within other avenues. Previously, he has requested information form upper management and has had no response.
>
> Dan Graczyk indicated the City of Seattle is taking $25 million budget reduction. Some of their reductions being discussed include the D.A.R.E. Program and Officer Friendly.
>
> Dave Westberg expressed concern that the cleanliness of District buildings might impact the voters decision on the Charter School issues this Fall. Dale Daugharty posed the question since all employees being laid off would be eligible for unemployment, would the District really save any monies?

Larry Miner, who was then the employer's director of labor relations, sent the following letter to the union on May 15, 1996:

> Please be advised that the District contemplates layoffs in the custodial / gardener bargaining unit. This letter will serve as official notice

> in conformance with the terms of the collective bargaining agreement.
>
> I am agreeable to meet to discuss ideas that you may have as alternatives to layoff. I would like to suggest the following potential meeting dates:
>
> Thursday morning, May 23
> Friday morning, May 24
> Thursday afternoon, May 30
>
> ...

Daugharty replied, in writing, on the next day. He indicated the suggested dates did not work for him, and he suggested alternative dates.

The issue of budget reductions was revisited at the parties' Labor/Management Committee meeting held on May 17, 1996, when the following minutes were recorded:

> BUDGET UPDATE:
>
> Dan [Graczyk] indicated the numbers have not changed from the Boss or Budget. He asked for any ideas for different cuts. Dale [Daugharty] indicated he was not convinced there was a need for cuts. He stated there was $4 million dollars for teachers above the costs and he would like an accounting as to where it went. Dan suggested that Dale request a meeting with Budget to discuss the issue. Dan indicated he would set up a meeting with the Budget Staff.

The parties discussed alternatives to budget reductions and layoffs during at least nine meetings during June and July of 1996.

Union's Focus on Number of Employees to be Laid Off

During the meetings in June, the union attempted to persuade the employer to avoid laying off any employees. That effort was not successful, however, and the employer's final budget included

changing the classroom cleaning standard from "every other day" cleaning to "every third day" cleaning. The budget change resulted in the layoff of seven "assistant engineer" positions from the employer's middle schools, 22 "full time equivalent" (FTE) assistant custodians, and 1 central office supervisory position.[4]

During the course of the joint meetings, the union shifted its focus from denying that any layoffs were necessary to proposals limiting the number of full-time bargaining unit positions that would actually be lost. In July, the union presented the employer with the following proposal:

> Alternatives to Layoff
>
> First and foremost, we continue to believe that the District's recommended budget contains ample funds to keep schools on the current cleaning schedule, and have seen no proof that the planned cuts in Operations Department services are necessary. However, that being stated, if the District intends to carry through this layoff, the following are some proposed alternatives. These proposals are intended for discussion purposes.
>
> In order to minimize the effects of displacement on affected full-time employees who remain after available benefitted part-time positions have been filled, Local 609 proposes the following alternatives:
>
> **- PAIRING OF SHORT HOUR OPERATIONS POSITIONS WITH SHORT HOUR CHILD NUTRITION POSITIONS**
> The latest District projected cleaning schedules leave 7 short hour part-time positions in the Operations Department. The Child Nutrition Department has a relatively large turnover in positions of 3 hours or less. This option would require that the Child Nutrition Department give priority consideration for their available

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[4] Depending upon the final staffing configuration, this could mean an actual layoff of approximately 53 persons.

positions to displaced Operations employees. There currently exist a minimum of 4 such known CNS positions. An example of such pairing could be: the vacant 2.5 hour CNS position at Sealth to the Operations Dept. 3 hour 5 minute position at Madison Middle School. By the start of the school year, there will be a greater number of vacant CNS short hour positions.

- PAIRING OF 2 SHORT HOUR PART TIME OPERATIONS POSITIONS

The District has expressed a willingness to consider placing one person in two part-time positions. Keeping in mind the contractual bar (in the 609A agreement) to part-time Operations positions of more than 6 hours, this option currently would appear to be only available for one such pairing, that would be the 3 hour 10 min. position at Lowell Elementary to the 2 hour 25 min. position at Meany Middle School. Updated configurations may offer others of these.

- OFFERING OF ANTICIPATED GROUNDS APPRENTICE POSITION(S)

This option would probably be most attractive to displaced custodial apprentices. There may be some transferable curriculum to allow these employees to continue two year training rather than beginning again in a new program from square one.

- PRIORITY HIRING CONSIDERATION FOR CHILD NUTRITION POSITIONS

All open Assistant positions of the Child Nutrition Department would be offered to displaced 609A members. This option would save the District money as all current employees have had background checks thereby saving the costs of such checks as well as attendant administrative savings.

- HIRING DISPLACED EMPLOYEES FOR TEMPORARY GARDENING WORK

The District has agreed to offer 3 (8 hour) positions for a limited period of time (about 6 to 8 weeks) in the fall, to continue Grounds Department functions left uncompleted by summer crews, such as tree trimming, leaf raking and "bank crew" work. These positions could be

> either 3 (8 hour) or 6 (4 hour) etc., and as such could also be paired with the CNS option.
>
> **- Full-time SUBSTITUTE POOL FOR BOTH DEPARTMENTS** This proposal has not been discussed in bargaining previously, however is included here for the purposes of upcoming discussions. This option would be available only to employees displaced by this layoff. As a condition, the District would have to commit to at least 4-½ hours a day employment for participants and first day substitutions in both departments.
>
> The rationale behind, and goal of this proposal is that Local 609 members subject to recall could continue to earn wages and benefits and at the same time benefit the District by minimizing its Unemployment Compensation costs for the period of displacement. This would benefit both the District and these members. It is hoped that through attrition and the above methodology, all displaced employees would be called back in some form, within the 1996-97 school year.
>
> It would be understood that the most senior (G classification) affected employee would be allowed her/his choice of option. As options fill up, less senior employees would have the remaining options to choose from. It would further be understood that employees recall rights would be unaffected by their choice of option.
>
> **FUNDAMENTAL TO REACHING AGREEMENT ON THIS 'CHOICE OF OPTION' PROPOSAL IS THAT THE DISTRICT (OR IT'S [sic] AGENTS) WOULD NOT LEGALLY DISPUTE UNEMPLOYMENT COMPENSATION BENEFITS BEING PAID TO THOSE WHO HAVE TURNED DOWN ALL OF THE ABOVE OPTIONS.**

[Emphasis by **bold** and underlining in original.]

On July 29, 1996, the parties signed a written agreement concerning the implementation of the employer's decision to lay off custodians. It reads:

LETTER OF AGREEMENT BETWEEN OPERATING ENGINEERS LOCAL 609 and SEATTLE SCHOOL DISTRICT NO. 1 CONCERNING ALTERNATIVES TO LAYOFF

This Letter of Agreement is entered into by the Seattle School District No. 1 (District) and the Operating Engineers Union, Local 609 (Union). The parties agree that this Agreement shall expire on June 18, 1997 or the last student day of the 1997 school year.

The goal of this agreement is that Local 609-A members subject to recall could continue to earn wages and benefits and at the same time benefit the District by minimizing its Unemployment Compensation costs for the period of displacement. This would benefit both the District and these members.

In order to minimize the effects of displacement on affected 609-A full-time employees who remain after available benefitted part-time positions have been filled, Local 609 and the District agree to the following alternatives:

1. **HIRING DISPLACED EMPLOYEES FOR TEMPORARY GARDENING WORK**
   The District will offer three (8-hour) positions for a limited period of time, at least six weeks, in the fall to continue Grounds Section functions left uncompleted by summer crews. Duties may include, but are not limited to, tree trimming, leaf raking, and bank crew responsibility.

2. **PAIRING OF SHORT-HOUR CUSTODIAL SERVICES POSITIONS WITH SHORT-HOUR CHILD NUTRITION (CNS) POSITIONS**
   The revised District cleaning schedules leave seven part-time positions in the Custodial Services Section that are under 3.5 hours. The Child Nutrition Section has experienced a relatively large turnover in positions of three hours or less. The District will provide to qualified displaced 609-A employees priority consideration for those who meet minimum qualifications. There are four known CNS positions paired with Custodial Services positions: 1) 2.5 CNS position at Sealth with a 3.05-hour Custodial Services position at

Madison; 2) 2.0-hour CNS position at Emerson with a 2.0-hour position at Stevens with a 3.2-hour Custodial Services position at South Shore; and 3) 2.0-hour CNS position at Northgate with a 3.33-hour position at Wilson Pacific. By the start of the school year if there are additional vacant CNS short-hour positions that would allow pairing with custodial part-time positions, these will be considered. Travel time will not be paid between assignments.

3. **PAIRING OF TWO (2) SHORT-HOUR PART-TIME CUSTODIAL SERVICES POSITIONS**
There is at least one opportunity for placement of one person in two part-time positions. Keeping in mind the contractual bar in the 609-A Collective Bargaining Agreement to part-time Custodial Services positions of more than six hours, this option currently is available for only one such pairing: 3 hour 10 minute position at Lowell Elementary with the 2 hour 25 minute position at Meany Middle School. By the start of the school year, if there are additional opportunities, they will be considered.

4. **OFFERING OF GROUNDS APPRENTICE POSITION**
The District will open one grounds apprentice position. Some apprenticeship curriculum may be transferrable and will allow this employee to continue two-year training rather than beginning again in a new apprenticeship program. If a laid-off Custodial Services employee selects this option, he/she is no longer eligible for recall into a custodial position.

5. **PRIORITY HIRING CONSIDERATION FOR CHILD NUTRITION POSITIONS**
Displaced 609-A members who meet the minimum qualifications will be given consideration for all unbid Assistant positions (after option 2, above, is implemented) in the Child Nutrition Section.

6. **QUALIFICATIONS**
NOTE: Individuals must be able to meet the minimum qualifications for the position

they would be interested in working; the position identifies the salary classification and wages paid; individuals will follow the probationary guidelines for gardeners and child nutrition employees. The starting salary of Child Nutrition Services employees shall be determined on the employees' Seattle School District Child Nutrition Service experience.

7. **STAFF ADJUSTMENTS**

Staff adjustments are covered in the 609-A Collective Bargaining Agreement in Article XV, Section B.

The most senior person within job title whose position is eliminated will have the right to select a vacant position or bump into a position held by a person whose seniority is less than his/her own. In turn, that person, who has been displaced, can select a vacant position or bump into a position held by a less senior person in that job title.

For example, if a person's position is eliminated, being the most senior person in the Assistant Engineer job title, he/she would have the right to select a vacant position or bump into any Assistant Engineer position. If he/she chooses to bump the person with the sixth most seniority, then that person would have the right to select a vacant position, or bump a person with less seniority. In this example, those with seniority two through five are not affected and would not be bumped nor would they have the right to select a vacant position.

8. **RECALL**

It is understood that the most senior (G classification) affected employee will be allowed her/his choice of option. As options fill up, less senior employees will choose from the remaining options. It is further understood that employee recall rights would be unaffected by his/her choice of option, unless Option 4 is selected.

> Custodial employees who are laid off or reduced in hours will not be required to apply for or accept Child Nutrition Services positions, and the District agrees not to contest any unemployment compensation claim for laid-off custodians who choose not to accept a CNS position.
>
> Those employees who secure employment between July 29, 1996 and August 31, 1996 may leave District employment and retain their seniority in accordance with the terms of the Collective Bargaining Agreement.
>
> The parties agree that this Letter of Agreement sets no precedent, and neither party shall use this agreement as a defense in any grievance or arbitration proceeding.
>
> To the extent this Letter of Agreement conflicts with any provisions of the Collective Bargaining Agreements between the parties, the agreements set forth in this Letter of Agreement shall control, and any inconsistent provisions of the negotiated Agreements shall be deemed modified for the duration of this Letter of Agreement.

[Emphasis by **bold** in original.]

This agreement, and the negotiations which lead to it, are not at issue in these proceeding.

The Union's Shift of Focus

At the July 29 meeting when the parties signed the agreement quoted above, the union raised issues concerning the effects of the layoffs on the remaining members of the bargaining unit. The union then asserted, for the first time, that the employer had an obligation to bargain issues such as additional pay and rebidding of existing positions, because of changed job responsibilities. The employer responded that it believed that it had bargained the

effects of the layoffs, that it had fulfilled its legal obligation, and that remaining employees were covered by the terms and conditions of the existing collective bargaining agreement, so that there was nothing left to negotiate. Miner did, however, agree to meet and address the union's concerns. He requested that the union present a written proposal in advance of such a meeting, delineating all of the items that it wanted to negotiate concerning remaining employees. The union agreed to furnish such a proposal. After some heated discussion, the parties agreed to meet on August 15, 1996, to discuss these issues.

Subsequent to the July 29, 1996 meeting, the union sent the employer a list of questions concerning the working conditions of employees who would remain after the layoffs. On August 13, 1996, the union sent the employer the following letter:

> Re: Unilateral Changes in Members Working Conditions
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> The Unilateral Changes that the Seattle School District is implementing is [sic] creating major changes in the working conditions of the Members of local-609-A. We respectively request to negotiate the effects that these changes has [sic] on the workforce.
>
> The Custodian Engineers bid for Middle Schools for numerous reasons close to home, type of building and staffing. By eliminating the Assistant Engineer in these building [sic] you have changed their shift times, responsibility, duties and workload. When these Custodian Engineers bid for their current buildings they knew what their workshift [sic] would be. They knew how the building was staffed and what their duties would be. This has all changed. Therefore, we request to negotiate a new pay scale for the ones that have no Engineer and a bumping procedure for those who do not want to be in a building without an Engineer.

> The same holds true for the Licensed Assistant Custodian "I" Classification. They have bid for the specific building for the same reasons that the Custodian Engineer did. In this case their skill factors will be increased in all four criteria called out in Article XVIII: Job Description. Therefore, we request to negotiate a new pay rate for these Members and a bumping procedure for the ones that do not wish to work in building the does [sic] not have an Assistant Engineer?
>
> We request that the Assistant Engineers that are being bumped to a lower position retain their rate of pay for two years. We request the same for the Licensed Assistants "H" Classification. For the Assistant Custodians who accept a Part-time position we request that they remain in their increment step if they are at the top of the scale and receive the increments they [are] entitled to on the first of September. ...

Because of illness, Miner had to cancel the meeting scheduled for August 15, 1996. When Miner telephoned Daugharty on August 19 or 20 to reschedule the negotiations, he told Daugharty that he was being removed from his position as the employer's director of labor relations.

On August 21, 1996, Daugharty wrote to Superintendent John Stanford, requesting that "someone in authority" meet with the union concerning this issue. The response to that letter was made by Thomas Weeks, the employer's newly-appointed executive director of human resources. Weeks advised Daugharty that he should continue to deal with Miner until Miner was actually replaced.

Subsequently, the parties agreed to meet on September 6, 1996, to discuss the effects of the layoff on the remaining custodial

employees. Prior to that meeting, however, the union filed these unfair labor practice charges.

At the start of the 1996-1997 school year, the employer implemented the scheduled layoffs among its custodial staff. The employer's middle schools had theretofore been staffed by a custodian engineer and an assistant engineer who did all of the daytime cleaning and maintenance assignments, and responded to specific requests from building staff. As had previously been indicated to the union, the assistant engineer positions in seven middle schools were eliminated when the layoffs were implemented.

On September 14, 1996, the union sent the following letter to Superintendent Stanford:

> Thank you for arranging the meeting held yesterday, on such short notice. As you know we met with Joseph Olchefske, Julius Johnson, Geri Lim, Tom Weeks.
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> At that meeting we presented figures that in our opinion show that there is about $630,153 in the Operations Department's budget for salaries that is not currently being used. Geri Lim from the budget Department called our office later Friday to confirm that the money was there. She did not agree that our figure was exactly correct but it was agreed that there was over $500,061 to reinstate all custodial employees that were working eight hours a day to their original positions and still have funds available to hire part-time employees as well. We suggest this action be taken as it would have a very positive effect on the entire School District.

Lim replied to Daugharty's letter on September 24, 1996, as follows:

> I am responding to your letter of September 14, 1996 to Mr. Stanford in which you reference a conversation you and I had about the FY 1997 budget for the "Operations Department."
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> ...
>
> I wish to distinguish that what I said in our telephone conversation and what you have interpreted that conversation to mean are two different things. **For the record, I do not, and did not, agree that there is over "$500,000 remaining in unbudgeted salaries not being used."**
>
> As I relayed to you in that conversation, the District spent over $640,000 (I understand that the exact number is $677,282) for hourly salaries during FY 1996, responding to the custodial needs of the schools and central administration that were not being covered by regularly scheduled custodial staff. It was anticipated during development of the FY 1997 budget that the need for intermittent custodial support during summer and mid-year breaks (as well as times during the school year) would be greater than ever. It was and is management's belief that this work is best accomplished by the flexibility we have in hiring hourly employees to respond quickly and in a non-scheduled manner to the exceptional needs of the schools. ...

[Emphasis by **bold** included.]

There is no indication in this record that the parties have resolved their differences through subsequent negotiations.

POSITIONS OF THE PARTIES

The union argues the employer violated its duty to bargain by failing to "negotiate the substantial and material effects" that its decision to layoff custodial employees had on remaining

custodial employees. It asserts that the remaining employees suffered a "drastic restructuring" of wages, hours and working conditions that were clearly mandatory subjects of bargaining. Further, it asserts that although it demanded and indeed did have meetings with the employer on these issues, the employer denied that they were mandatory subjects of bargaining and refused to consider the issues that the union raised.

The employer argues that the issues that the union demands be negotiated in "effects" bargaining (i.e., wage rates and work assignments) were already set and governed by the parties' collective bargaining agreement. Therefore, it reasons that there was no obligation to renegotiate those matters during the term of the agreement. As an affirmative defense, the employer asserts that it did agree to meet with the union to discuss allegations that job duties had been increased as a result of the layoffs.

DISCUSSION

The Request for Information

The union's complaint included an allegation that the employer failed to supply financial information which the union requested during the course of bargaining. The employer responded in its answer, by stating that the union had asked for extensive information and that such information had been supplied. Neither the union nor the employer addressed this issue at the hearing or in their briefs. Accordingly, the Examiner deems the allegation of refusal to provide requested information to have been abandoned by the complainant.

Relevant Time Period

The union never amended the complaint it filed in this matter on September 3, 1996, but it sought during the course of the hearing to introduce evidence concerning events which postdated September 3, 1996. The employer objected, arguing that the evidence should be limited to the allegations of the complaint which clearly did not include actions by the parties subsequent to the filing of the complaint. The union responded that the employer's refusal to negotiate the effects of the layoffs continued following the filing of the complaint, and that such information was relevant and material to the case at hand. The Examiner reserved ruling on the objection at the hearing, and allowed the union to continue its direct examination.

Although evidence of events or conversations which occurred after the filing of an unfair labor practice complaint could not be the basis for finding an independent violation of the duty to bargain in good faith, such evidence is useful to assist the Examiner in obtaining a full and complete record and assessing the employer's conduct throughout the course of events. The complainant must prove its case based upon evidence of the events and circumstances called into question in the complaint. The complaint must be dismissed if it fails to do so, without regard to subsequent events. On that basis, the employer's objection is overruled.

Dismissal Prior to Hearing

In both its opening statement and in its brief, the employer argued that the union's charge would have been dismissed at the investigation stage as "wholly lacking in merit", if it had been filed

against an employer covered by the Taft-Hartley Act.[5] The union did not address this issue, which is tangential to unfair labor practice charges filed against a public employer under Chapter 41.56 RCW, but the Examiner chooses to address the employer's statement, albeit briefly.

The simple response to the employer's repeated argument is that this case does not arise under the Taft-Hartley Act. Chapter 41.58 RCW, which created the Public Employment Relations Commission, does not provide for a separately-appointed "general counsel" or a separation of prosecutorial and decision-making functions, as exist in Section 3(d) of the federal law. Chapter 41.56 RCW does not provide for "investigation" of unfair labor practice charges in the manner practiced under Section 10 of the federal law. Instead, a complaint filed by a party is subjected to a preliminary ruling by the Executive Director under WAC 391-45-110, in which the analysis is based upon the oft-repeated statement:

> At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

Under the state Administrative Procedure Act, Chapter 34.05 RCW, and the Commission's rules in Chapter 391-45 WAC, a complainant is generally entitled to a hearing, and the truth or falsity of the allegations in a complaint (and the weight of the evidence avail-

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[5] Reference is made to the National Labor Relations Act (1935), as amended by the Labor-Management Relations Act of 1947, and to administration of that statute by the National Labor Relations Board.

able to support such allegations) will be assessed for the first time on the basis of the evidentiary record made at the hearing.

Had the employer truly believed that there was no substance to the union's charges in this case, it could have moved for a dismissal at the close of the union's case-in-chief. The Examiner would then have had to evaluate the evidence to determine whether the complainant met its burden of proof on any or all allegations. Inasmuch as the employer did not make such a motion here, the Examiner presumes the employer recognized that the union did indeed have arguments that required responses and affirmative defenses.

The Duty to Bargain

The Public Employees' Collective Bargaining Act provides, in RCW 41.56.140(4), that it is an unfair labor practice for a public employer, "To refuse to engage in collective bargaining." Collective bargaining is defined in RCW 41.56.030(4) as:

> [T]he 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.

The Commission's policy relating to the "scope" of collective bargaining is outlined in WAC 391-45-550, as follows:

> COLLECTIVE BARGAINING — POLICY. It is the policy of the commission to promote bilateral collective bargaining negotiations between employers and the exclusive representatives of their employees. Such parties are encouraged to engage in free and open exchange of proposals and positions on all matters coming into dispute between them. The commission deems the determination as to whether a particular subject is mandatory or nonmandatory to be a question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction. It is the policy of the commission that a party which engages in collective bargaining with respect to any particular issue does not and cannot thereby confer the status of a mandatory subject on a nonmandatory subject.

There may be instances where there is no duty to bargain on a particular subject, because it is within the scope of "entrepreneurial decision-making",[6] or "fundamentally affects the scope and direction of the enterprise".[7]

Even where a management decision is itself excluded from mandatory bargaining, the effects of that decision on employee wages, hours and working conditions will nevertheless be a mandatory subject of collective bargaining. Lake Chelan School District 129, Decision 4940-A (EDUC, 1995) includes the following:

> Where a decision is a permissive subject of bargaining, parties may still be required to bargain the effects of a decision, if the results of the decision impact wages, hours, or working conditions. See, Wenatchee School District, Decision 3240-A (PECB, 1990).

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[6] City of Kelso, Decision 2633-A (PECB, 1988).

[7] Federal Way School District, Decision 232-A (EDUC, 1978), affirmed WPERR CD-57 (King County Superior Court, 1978).

The object of the collective bargaining process is the signing of a written collective bargaining agreement which will control the matters negotiated by the parties for the term of that contract. In essence, mandatory subjects of bargaining that are negotiated to a conclusion by an employer and union will not be mandatory subjects for bargaining while controlled by their contract; the parties will have waived their statutory bargaining rights by having dealt with the issue(s) in their collective bargaining agreement.

The rubrics for implementation of the statutory bargaining obligation are well established:

- Numerous decisions by the Commission and its Examiners have faulted employers for unilateral implementation of decisions involving employee wages, hours or working conditions, without having first given notice to a union or providing an opportunity for the collective bargaining process to operate. Federal Way School District, supra; City of Brier, Decision 5089-A (PECB, 1995).

- Several decisions by the Commission and its Examiners have faulted unions for failing to request bargaining when notified of an occasion for collective bargaining, so that the union is found to have waived its statutory bargaining rights by inaction. The most recent of that type appears to be Lake Washington Technical College, Decision 4721-A (PECB, 1995).

- If an employer gives notice that it intends to implement changes involving employee wages, hours or working conditions, and the union representing those employees demands bargaining over the decision and/or its effects, the parties are obligated to bargain in good faith on matters that are mandatory

> subjects of bargaining, until either an agreement or an impasse is reached. Pierce County, Decision 1739 (PECB, 1983); Spokane County, Decision 2377 (PECB, 1986); Bates Technical College, Decision 5140-A (PECB, 1996).

Thus, variables exist and close attention to the facts of each case is necessary.

Application of Precedent

The Decision to Lay Off -

As to the layoff decision, the instant case does not fall into the "unilateral change" category. The parties recognized their respective bargaining obligations, and they bargained to finality over the issues raised by the union concerning whether there was to be a layoff and concerning the employees who would be laid off. There is no question that the employer fulfilled its bargaining obligation when it engaged in the extensive meetings it had with the union in June and July of 1996, concerning the layoff decision. That bargaining was clearly "issue focused", as illustrated by the comprehensive "Alternatives to Layoff" proposal presented by the union in July.

Effects on Laid Off Employees -

Likewise, the evidence indicates that both parties bargained in good faith concerning the "effects" of the layoff on those employees whose positions were being eliminated. Evidence of that bargaining is found in the parties' joint "Letter of Agreement" of July 29, 1996, which constituted the resolution of those issues.

Effects on Remaining Employees -

The union's point of contention in this case is that the employer only fulfilled a "first part" of its bargaining obligation (i.e.,

bargaining the decision) with respect to the employees who were not laid off. The union thus charges that the employer did not bargain in good faith in regard to all of the "effects" of the layoff, particularly as to the remaining custodial engineers and the night shift Licensed Assistants. It asserts that "... as a result of the loss of the Assistant, the nature of the Custodian Engineer job changed dramatically", and that the previously negotiated detailed job schedules and detailed time standards for the custodial employees had all been altered as a result of the layoffs.

The employer defends the positions taken at the July 29 meeting and thereafter, by arguing several theories: First, it asserts that the union waived its rights in specific language in the parties' collective bargaining agreement; second it argues that the union's conduct during the summer negotiations constituted a waiver of its right to demand bargaining; finally, the employer argues that it was, in fact, willing to meet further with the union and fulfill its bargaining obligation.

The employer's "Waiver by Contract" defense is based upon explicit language in Article XV, Section B, of the parties' collective bargaining agreement, titled "Staff Adjustments":

> 1. When a school building or department (including gardeners) is closed or reorganized, or a program is ended, the District will make every effort to transfer employees displaced by such action(s) to comparable positions.
> 2. The parties to this Agreement will convene no later than June 1 of each year to explore and try to reach agreement on alternatives to layoff.
>
> a. This process shall include, but is not limited to, specific procedures calling for reassignment, promotion, demo-

> tion, transfer, retirement, work-sharing, free time, or other methods **directed towards the employees either directly or indirectly affected.**
>
> [Emphasis by **bold** supplied]

The employer argues that this language *requires* that the union act on the impact of layoffs for both employees directly affected and employees indirectly affected, only within this contractual process.

In Chelan County, Decision 5469-A (PECB, 1996) the Commission discussed the standard for assessing the validity of a waiver by contract defense:

> If a union waives its bargaining rights by contract language, an action may not be an unlawful "unilateral change". City of Yakima, Decision 3564-A (PECB, 1991). Waiver by contract is an affirmative defense, and the employer has the burden of proof. Lakewood School District, Decision 755-A (PECB, 1980). It relies on City of Yakima, supra, where the Commission said:
>
> > In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer.
>
> In Yakima, the Commission found no waiver on certain issues because contract provisions were either ambiguous or added no substance to the matter at issue. Here, the contract provisions are not ambiguous. When the contract terms themselves evidence a meeting of the minds, we need go no further to determine what was intended.

In contrast, the Commission's standard is not met by single phrase in this collective bargaining agreement which states "either directly or indirectly affected". There was no showing by the employer that the union understood that it had agreed that it was required to bargain layoff effects for both laid off and remaining employees at the same time. Indeed, the union's entire bargaining schedule was predicated on the premise that the parties would first bargain for the laid off employees and then bargain for the remaining employees. Such a bargaining schedule has some basis in logic, in that some effects of laying off a significant number of employees might only be realized after the layoff decision is finalized.

The employer's "Waiver by Conduct" defense is that the parties' negotiations in June and July of 1996, and the eventual signing of the July 29 "Letter of Agreement" embodying the results of those negotiations, dealt with the effects of the layoff on at least some of the remaining employees. The employer asserts that the union waived its right to demand further bargaining by signing that agreement. It states that, "Undeniably, ... continuing employees is [sic] covered by the Letter of Agreement" because the agreement recites that it has application to "employees who remain."

Although it states that it is intended to minimize the effects of displacement on "affected 609-A full-time employees who remain after available benefitted part-time positions have been filled", a close reading of the July document reveals that, it does not actually deal with any substantive impacts on remaining employees. By section, the document deals with:

(1) Hiring displaced employees for temporary gardening work;

(2)&(3) Pairing of short-hour positions;

(4) Opening a new position;

(5)&(6) Hiring priority for displaced employees; and

(7)&(8) Bumping and recall procedures.

The union did not waive bargaining rights concerning remaining employees in the specific language of the July 29 agreement.

The Employer's "Waiver by Inaction" defense is that the union did not raise any "effects on remaining employees" issues at any time during the meetings held in June and the first part of July.

It is clear that, following what it avers to have been its own plan for effects bargaining, the union raised the "effects on remaining employees" issues for the first time at the July 29, 1996 meeting when the parties signed an agreement covering all of the matters which had been raised and discussed up to that time. Under the circumstances, that cannot be characterized as a timely request by the union for bargaining a new set of issues.

Based upon the union's arguments, it is inferred that the union filed the instant charge because of statements made by the employer on July 29. Witnesses for both sides concurred that Miner reacted in what was described as "a lather" to the union's declaration that it wanted to commence bargaining concerning the effects of the layoffs on remaining employee. Having just concluded two months of bargaining on the layoff decision and its effects on laid-off employees, Miner apparently believed that the employer had fulfilled its legal obligation. Nevertheless, Miner agreed to meet to discuss the issues raised by the union and he specifically asked that the union present a written proposal presented in advance of the next scheduled meeting. The Examiner looks beyond the immediate response, and at the employer's subsequent actions.

The employer agreed to schedule a meeting for August 15, 1996. The purpose of that meeting was characterized by Daugharty in his

contemporaneous letter as, "... to start negotiations on the changes being ... made to the Members [sic] of Local 609-A working conditions". For a variety of reasons, including the illness of the employer's chief negotiator, the union's backing away upon learning of the impending departure of the employer's chief negotiator, and a discussion between the parties as to who would represent the employer, the meeting was not held until September 6, 1996. Under the circumstances, those facts do not evidence a failure or refusal of the employer to meet at reasonable times and places prior to the filing of the instant unfair labor practice case on September 3, 1996.

The union asserts that the employer raised questions during the September meetings concerning its affirmative duty to bargain layoff "effects" other than what had already been bargained, but as those questions were raised after the filing of this charge, they are not presently before this Examiner. The employer did schedule a meeting in response to the union's request and appeared to be following the recent practice of the parties when they resolved the earlier layoff issues. Although the employer might be subject to some criticism for the timing of the changes it made in its negotiation staff, inasmuch as that apparently caused some delay in the discussions, there was no allegation or showing by the union that the employer was deliberately evading its duty to bargain. Furthermore, the evidence shows it was actually the union that delayed the negotiations while questioning who had the authority to bargain for the employer.

No Refusal to Bargain

The union argues that "the district repeatedly refused to bargain the effects of the layoff after the July 29 agreement had been reached on the alternatives to layoffs". In fact, the record is

clear that Miner only stated that he did not believe the employer had "a legal obligation" to bargain the newly-raised issues. Such a statement is entirely different from refusing to bargain. If made in relation to a permissive subject of bargaining, such a statement does not indicate whether (or not) the party is actually going to engage in bargaining. Miner may have been giving an opinion as to the responsibilities of the employer, but he did not foreclose discussion of the issues raised. Indeed, he was asking a legitimate question: If the issues being raised by the union were already covered by the parties' collective bargaining agreement, would the employer have an obligation to rebargain those issues?

Perhaps most important is that Miner's request that the union provide a written proposal in advance of such a meeting is entirely inconsistent with a refusal to bargain. Whatever was said by employer representatives in the heat of argument or raised as a legal question, the employer's subsequent actions clearly state a willingness to continue to discuss the issues raised by the union.[8]

Finally, there was no showing by the union that it had communicated any timetable for the effects bargaining in August or why bargaining on the effects on remaining employees could not have started earlier. Having given the employer no notice of a timeframe in which it expected the bargaining on "effects on remaining employees" to be conducted, the union is not in a position to complain because the employer did not comply with its unspoken agenda. Centralia School District, Decision 2757 (PECB, 1987).

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[8] Although the employer objected to the admission of evidence concerning events which occurred after the filing of this complaint, the fact that the parties met on these issues thereafter reinforces the conclusion that the employer was not refusing to bargain.

FINDINGS OF FACT

1. The Seattle School District is a public employer within the meaning of RCW 41.56.030(1). The district superintendent is John Stanford. The employer's human resources director is Tom Weeks and its labor relations director during most of the time pertinent to this case was Lawrence Miner.

2. International Association of Operating Engineers, Local 609, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of approximately 340 Seattle School District employees holding gardener and custodial engineer positions. At all times pertinent to this proceeding, Dale Daugharty was the business manager of the union.

3. Within the general classification of custodial engineer covered by the parties' collective bargaining agreement, there are several categories of employees including assistant custodian, custodial engineer, and licensed assistant. These employees are responsible for cleaning buildings, equipment and facility repairs, and the operation of hot water boilers. The employees work at elementary, middle, alternative, and high schools, as well as the central administration building, memorial stadium, a warehouse, and a facilities/maintenance building.

4. On April 26, 1996, the employer orally informed the union that it was looking at a potential budget reduction of $1,025,000 which would impact its custodian bargaining unit as well as non-represented employees within the logistics department.

5. The employer sent the union a written notice of impending layoffs on May 15, 1996. During June and July of 1996, the parties met nine times to specifically discuss and negotiate alternatives to the layoff of logistics department employees.

6. The employer's final budget included changing from an "every other day" cleaning schedule to an "every third day" schedule. That decision resulted in the layoff of 7 assistant engineer positions from the district's middle schools, 22 full time equivalent positions from the ranks of the assistant custodians and 1 central office supervisory position. A total of approximately 53 persons were to be laid off.

7. On July 29, 1996, the parties signed an agreement which provided for some alternatives to the scheduled layoffs. It included hiring displaced workers in temporary gardening positions, the pairing of short-hour custodial employees with short-hour nutrition positions and the pairing of short-hour custodial positions. The agreement also provided for the bumping of senior employees into the positions of less senior employees and for the recall of laid-off employees.

8. Also at the July 29, 1996 meeting, the union gave notice to the employer that it wished to begin bargaining the "effects" resulting from the departmental layoffs. Specifically, it wanted to focus on changed work loads and responsibilities on remaining custodial employees, and new and additional issues concerning effects of the layoffs. The timing of that request was apparently the fulfillment of a bargaining strategy and timetable which was developed by the union, but was not disclosed to the employer. The union did not present any concrete proposals at that time.

9. Miner's initial reaction was to question whether the employer had a duty to bargain, but he agreed to schedule a meeting and requested that the union put its proposals in writing.

10. On August 13, 1996, the union sent the employer a written demand to bargain concerning unilateral changes in the working conditions of remaining custodial employees. The demand included a new pay scale for some employees, and a bumping procedure for employees who remained in positions impacted by the loss of the laid off employees.

11. The cancellation of a scheduled bargaining session in August of 1996 was due to the illness of the employer's negotiator.

12. A delay in rescheduling of bargaining sessions in August was due to the union's making contact with the district superintendent upon learning that the employer's negotiator was to be replaced, to which the employer responded that the union should deal with Miner until he was actually replaced.

13. The scheduled layoffs did occur in September 1996, at the start of the school year. Subsequent to the filing of this charge of unfair labor practices on September 3, 1996, the parties met to discuss the impact of the layoffs.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW.

2. The Seattle School District met its bargaining obligations under RCW 41.56.030(4), by giving timely notice to International Union of Operating Engineers, Local 609, of its

proposal to lay off employees from the bargaining unit represented by the union in response to a budget cut, and of its proposal to change the school cleaning schedule to accommodate the reduced staffing, and by bargaining with Local 609 concerning that decision and its effects upon the bargaining unit employees to be laid off, so that the employer did not commit any unfair labor practice under RCW 41.56.140 in regard to those matters.

3. The employer gave notice and bargained in good faith, as required by RCW 41.56.030(4), concerning its layoff decision and the effects of that decision on the employees who were actually laid off, so that it did not commit any unfair labor practice under RCW 41.56.140.

4. By failing to either make a timely request for bargaining on the "effects on remaining employees" issues or to inform the employer of its desire to delay bargaining on such issues until a later time, Local 609 waived its bargaining rights under RCW 41.56.030(4) by inaction, so that the Seattle School District did not commit any violation of RCW 41.56.140 by failing or refusing to bargain on the issues raised by the union in an untimely manner.

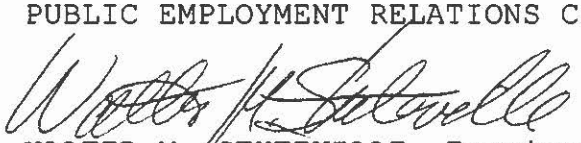
5. International Union of Operating Engineers, Local 609, has failed to sustain its burden of proof with respect to its allegation that, by its actions as described in paragraphs 4 through 11 of the foregoing Findings of Fact, the Seattle School District failed or refused to bargain in good faith concerning the effects of the layoff on remaining employees, so that the Seattle School District has not committed, and is not committing, any unfair labor practice under RCW 41.56.140 in regard to such matters.

ORDERED

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

Issued at Olympia, Washington, this 8th day of September, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.