North Franklin School District, Decision 5945 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, NORTH FRANKLIN CHAPTER,	)	
Complainant,	)	CASE 12665-U-96-3022
vs.	)	DECISION 5945 - PECB
NORTH FRANKLIN SCHOOL DISTRICT,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER

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

Robert D. Schwerdtfeger, Labor Relations Consultant, appeared on behalf of the respondent.

On August 19, 1996, Public School Employees of Washington (PSE or union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the North Franklin School District (employer) violated RCW 41.56.140(4) when it laid off 11 employees. The complaint was processed pursuant to the preliminary ruling procedure of WAC 391-45-110, and was found to state a cause of action. The employer did not file an answer to the complaint. A hearing was held on January 9, 1997, before Examiner Frederick J. Rosenberry. At the outset of the hearing, the union waived a motion for default and any claim of prejudice arising from the employer's failure to answer. Accordingly, the employer was allowed to defend itself in all respects against the complaint. The parties filed post-hearing briefs.

BACKGROUND

The North Franklin School District, located in Franklin County, operates under the direction of Superintendent Otis Fall. The employer operates a high school, a junior high school, and three elementary schools, providing public education to approximately 1,770 students in kindergarten through 12th grade.[1]

For an undisclosed period of time, the North Franklin chapter of Public School Employees of Washington has been the exclusive bargaining representative for several categories of classified employees of the North Franklin School District. There are approximately 125 employees in the bargaining unit, which includes about 25 employees in the traditional "aide" category. These employees are referred to by the job title of "paraeducator".

PSE and the employer are parties to a collective bargaining agreement effective from September 1, 1994 to August 31, 1997. That contract contained provision for reopeners to address limited issues. The relevant part of that agreement states:

> [T]he Agreement shall be reopened annually to negotiate salaries, benefits and legislative changes. Provided further, that each party shall have two (2) section openers in the second year of the Contract, and one (1) section opener the third year.

Thus, although their overall agreement was still in effect, the parties had occasion to engage in negotiations each year.

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[1] Statistical data based on information reported in Washington Education Directory (1996-97), compiled and produced by Barbara Krohn and Associates from data collected by the office of the Washington State Superintendent of Public Instruction.

The Special Education Budget Shortfall

Among the services offered by the employer is a special education program that is designed to help students who have instructional needs different from those generally required. The employer receives revenue from outside sources to fund the special education program, but payment of the additional revenue is contingent on the employer meeting certain prerequisites and standards. Several paraeducators are employed in that program, and a portion of the employer's special education revenue was earmarked to pay the labor costs for those paraeducators.

In early 1996, the employer learned that it could expect its special education revenues for the 1996-97 student year would be reduced by approximately $70,000. This change was due to the manner in which the employer had operated its special education program.

Notice to the Union

According to the employer, it notified the union of the special education funding reduction, and of possible paraeducator staff reduction implications. Employer witnesses recalled that notice first being provided at a regularly-scheduled monthly labor/ management meeting in April of 1996.

Concurrent with the discovery of the special education revenue shortfall, the employer and PSE were negotiating under the reopener provision for the third year of their collective bargaining agreement. According to employer witnesses, the special education revenue shortfall problem and paraeducator staff level implications were raised on more than one occasion during those negotiations:

- Superintendent Fall, who was the employer's chief spokesperson in those negotiations, testified that he suggested that the special education revenue reduction be offset by reducing the length of the daily shift of the paraeducators. Fall recalled that Lee Buzzard, who was the union's chief spokesperson, commented that seniority controlled, and that the last employee hired should be the first employee to be released. Fall further recalled that Buzzard rejected the idea of work hours reductions, and responded that the implications of the special education funding problems should be addressed as a separate matter outside of the negotiations regarding the contract reopener.

- Employer negotiating team member Mary Pruitt recalled that the implications of the special education budget shortfall came up more than once during the mid-term negotiations. Pruitt testified that the employer provided a memorandum reflecting the subjects of discussion with the union when the parties met for negotiations on July 24, 1996.[2]

- Employer negotiating team member Cindy Sital also recalled that the special education issue was discussed in the negotiations on the reopener.

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[2] That memorandum bore the heading "PSE Negotiations Interim Bargaining Session Issues", and identified "agency shop", "salary adjustments", "district policies and procedures", "seniority", "creation of a new classification", and "special education" as subjects of discussion and interest to the parties. Regarding special education, it stated:

> Budget shortfall expected at $70,000. We [employer] suggested a salary cut for all paraeducators, contract says last hired, first fired. No cut in salary for the remaining employees.

Union witnesses also acknowledged that there was some discussion of the special education funding problem:

- Buzzard recalled that the employer did comment, on one occasion, about the possibility of a funding problem that might necessitate a reduction of hours for paraeducators. Buzzard confirmed that the union responded that the matter should be addressed outside of the negotiations that were underway pursuant to the reopener, and that any reductions should be by seniority, and that he did not initiate a request to negotiate with the employer regarding the matter.[3] Buzzard placed that exchange as occurring in about July of 1996.

- Mary Ehrhart, who was president of the local PSE chapter, recalled that the employer raised a concern about a special education budget shortfall at one of the negotiations meetings. The $70,000 figure was confirmed, as well as the possibility of a reduction in hours of work for paraeducators. According to Ehrhart the union negotiating team discussed the matter among themselves, after being advised of the matter, but considered the employer's remarks to be generalized and expressing possibilities, so that there was nothing certain. Ehrhart recalls that she heard about the budget shortfall on more than one occasion, but never raised it with the employer.

The Special Education Program Change

In early August of 1996, the employer reorganized how it would provide for special education students. Building principals

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[3] Buzzard explained that the union viewed the employer's comments as speculative, and as not being specific or "formal" notification of impending layoff of members of the bargaining unit.

participated in making that decision, which included a decrease of the size of the paraeducator workforce as a means of reducing the cost of the special education program.

By way of a common letter dated August 12, 1996, the employer notified 11 paraeducators that they would not be recalled for employment at the beginning of the 1996-97 school year. That letter stated:

> Due to an unexpected reduction in district revenue, in particular, the exigency of funding for special education programs, the District has had to reevaluate personnel costs in the Para Educator group of classified employees.
>
> To be consistent with PSE contract restrictions, employment seniority must apply in most cases where reduction of personnel is necessary (refer to Sections 10.6 and 10.7). Therefore, it is with deep regret that, at this time, we cannot offer you employment for the upcoming school year and do hereby give you such notification.
>
> When student enrollment numbers are more accurate, especially those students to receive special education services, we may find ourselves in need of additional staff. The District will rehire in accordance with Section 10.10 of the PSE contract.
>
> If you have questions regarding this action, or require assistance, please contact our office. We wish you luck in your future endeavors.

The union filed the complaint to initiate this unfair labor practice proceeding on August 19, 1995. Although the parties' collective bargaining agreement contains a grievance and arbitration procedure, there is no evidence that the union ever filed a grievance protesting the layoffs as a violation of that contract.

The record indicates that the employer's circumstances changed after the layoffs were imposed, and that all of the employees who desired reinstatement with the employer have been recalled.

POSITIONS OF THE PARTIES

According to PSE, both the decision to lay off employees and the effects thereof are mandatory subjects of bargaining. PSE concedes that the employer mentioned the possibility of a reduction of paraeducator work hours, but it characterizes the employer's comments as being speculative, rather than an "official" announcement of significant personnel action. The union claims that it advised the employer that it desired to negotiate any decision and the effects of such personnel action, but that it was provided no reasonable opportunity to negotiate with the employer regarding the matter prior to the actual imposition of the layoff. PSE acknowledges that the parties' collective bargaining agreement addresses the matter of layoffs, but denies that it grants the employer authority to act unilaterally, or that it is a waiver of the union's right to negotiate with the employer regarding the matter. The union rejects the employer's claim that the management rights clause contained in their agreement gives the employer the authority to act unilaterally in personnel matters such as this. The union argues that the management rights clause does not contain a clear, express, and conscious waiver of the union's right to bargain over the employer's decision and the effects of how it would resolve its revenue shortfall problem, a necessary prerequisite to such personnel action.

The employer claims that it exercised its inherent management prerogative to establish or revise policies and operational

procedures for its special education program and determine the district's staffing needs, without submitting the matter to collective bargaining with the union. While contending it was not legally required to do so, the employer asserts that it provided PSE with advance notice of the special education program revenue shortfall and the possibility of a reduction of its workforce, and suggested how it could be accomplished. The employer claims that PSE rejected its idea, and suggested layoffs by seniority, and that it implemented the seniority layoffs suggested by the union. The employer denies that PSE ever requested negotiations with it, and that the personnel action was allowed by and was in accordance with the terms of the parties' collective bargaining agreement. The employer specifically points to the managements rights and seniority provisions of the agreement, which address the operation of the district and employee layoffs. According to the employer, the union's complaint is without merit and should be dismissed.

DISCUSSION

The Standards to Be Applied

These parties bargain collectively pursuant to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. It defines the parties obligations as:

> RCW 41.56.030 DEFINITIONS. As used in this chapter:
>
> ...
>
> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to

> execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ...

The Supreme Court of the State of Washington has endorsed interpretation of Chapter 41.56 RCW in a manner consistent with precedent developed by the National Labor Relations Board (NLRB) and the federal courts interpreting the similar provisions of the National Labor Relations Act (NLRA). Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981); IAFF v. PERC (City of Richland), 113 Wn.2d 197 (1989).

Federal and state precedents segregate the potential subjects of bargaining between an employer and union into categories described as "mandatory", "permissive", and "illegal". Federal Way School District, Decision 232-A (EDUC), 1977), citing NLRB v. Wooster Division of Borg Warner, 356 U.S. 342 (1958):

- Mandatory subjects of bargaining are those matters about which the parties are obligated to bargain in good faith, upon request of the other party to the relationship. RCW 41.56.030 (4) makes specific mention of "grievance procedures and ... personnel matters, including wages, hours and working conditions". Normally, both the number of hours worked by bargaining unit employees and the scheduling of that work are considered mandatory subjects of bargaining. With respect to mandatory subjects, an employer normally cannot implement changes "unilaterally", and must provide the union with

adequate notice of the contemplated change and a reasonable opportunity for bargaining regarding the matter prior to making the decision. The burden is on the union to demand negotiations over a proposed change it believes is a mandatory subject of bargaining. Where a union makes a request for bargaining, the employer must bargain in good faith to either an agreement or an impasse. Lewis County, Decision 3418 (PECB, 1990); Pierce County, Decision 1710 (PECB, 1983).

- Permissive subjects may be bargained, but parties are not required by law to do so. These are often matters of management or union prerogatives which may or may not directly affect employee wages, hours or working conditions. Management decisions regarding core entrepreneurial control are not mandatory subjects of bargaining, and the employer is free to do as it pleases on such subjects. Spokane County Fire District 9, Decision 3021 (PECB, 1988); King County Fire District 16, Decision 3714 (PECB, 1991). There is a notable distinction between a "decision" that has personnel implications and its "effects": Even where a managerial decision is a permissive subject of bargaining, the personnel effects of implementing that decision (e.g., layoffs) are a mandatory subject of bargaining. City of Richland, Decision 2448-B (PECB, 1987).

- Illegal subjects are matters which parties have an obligation to refrain from bargaining, because their agreement on the matter would produce an unlawful outcome.

The Balancing Test -

Some issues that arise at the workplace do not fall neatly into the "mandatory", "permissive", and "illegal" categories. The Commission has utilized a balancing approach to determine whether a

particular matter is a mandatory subject of bargaining, and that approach has been endorsed by the Supreme Court of the State of Washington:

> On one side of the balance is the relationship the subject bears to "wages, hours and working conditions". On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. [citations omitted] Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates.

IAFF Local 1052 v. PERC (City of Richland), supra.

Where a reduction of staff or of employee work hours is the result of a curtailment of the employer's operation, there is no bargaining obligation. First National Maintenance Corporation v. NLRB, 452 U.S. 666, 678 (1981). The Commission recently wrote:

> In [First National Maintenance], the United States Supreme Court said that management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business, and held that the decision to shut down part of a business purely for economic reasons is one for the employer to make. In the process of deciding that case, however, the Court considered that an employer's *desire to reduce labor cost alone* is a matter "peculiarly suitable for resolution within the bargaining framework". First National Maintenance Corporation v. NLRB, at 679-680.

City of Centralia, Decision 5282-A (PECB, 1996) [emphasis by *italics* in original.]

Conversely, the Commission has held, also consistent with federal precedent, that an employer has an obligation to bargain when a

desire to reduce employee work hours is motivated solely for the purpose of reducing its labor costs. City of Centralia, supra.

Waivers of Bargaining Rights -

A "waiver by inaction" defense is available to an employer where a union fails to request negotiations after being presented with notice of an opportunity for bargaining. Lake Washington Technical College, Decision 4721-A (PECB, 1985).

A "waiver by contract" defense is available to an employer where a collective bargaining agreement in effect between the parties controls the matter at issue in an unfair labor practice complaint alleging a unilateral change. The parties will have met their bargaining obligations as to the matters set forth in the contract and, in essence, they become permissive subjects of bargaining for the life of the contract. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

Application of Standard - The Budget/Curriculum Decisions

An employer has no obligation to bargain regarding a decision to reduce its operating budget. Spokane Education Association v. Barnes, 83 Wn.2d 366 (1974). Decisions concerning school district curriculum and basic education policy are similarly reserved to the employer. These are prerogatives of management, and permissive subjects of bargaining, so there is no requirement on the employer to provide notice or bargain with unions. Federal Way School District, Decision 232-A (EDUC, 1977), affirmed Federal Way Education Association v. PERC, WPERR CD-7 (King County Superior Court, 1978).

A coincidental reduction of operating costs does not automatically or categorically transform a school district's budget or educational program decision into a mandatory subject of bargaining:

> Decisions regarding the product or services to be provided by employers are often triggered by cost considerations, just as they often impact the wages and hours of employees. The same is true of general budget reductions. As the Supreme Court noted in Richland, supra, an employer need not bargain regarding an economically motivated nonmandatory subject of bargaining; it need only bargain over the effects caused by that decision.

Wenatchee School District, Decision 3240-A (PECB, 1990).

Thus, a question arises in this case as to whether the employer was ever obligated to give notice to PSE or to bargain with PSE.

Notwithstanding the union's argument to the contrary, the Examiner finds that employer had a legal right to unilaterally change the structure of its special education program. While it appears that the employer, and not some outside authority beyond the employer's control, made the decision to reduce the scope of the special education program, this aspect of the disputed actions still falls within the category of core managerial prerogatives. There is no question that the revenues used by the employer to fund its special education program were being reduced. Accordingly, the evidence supports a conclusion that the decision to reduce the work hours of the paraeducators was a result of (rather than a motivation for) the reduction or curtailment of the employer's special education funding and program. Under such circumstances, the facts do not support the union's argument that the employer's desire to reduce its labor cost transformed its decision to change its education program into a mandatory subject of bargaining. Based on federal

and state precedent, the employer had no obligation to notify or negotiate with PSE regarding its decision to change the nature and scope of its special education program.

Application of Standards - Waiver by Contract

Even if there was a duty under the statute to bargain the basic decision, a question arises here as to whether the parties waived their bargaining rights on layoff issues by the terms of their collective bargaining agreement. Like most parties, these parties have negotiated a complete contract rather than leaving their collective bargaining obligations open-ended and subject to the prospect of constantly submitting mandatory subjects of bargaining to negotiation on a piecemeal basis as incidents arise. This controversy arose during the time the contract was in effect.[4]

While collective bargaining agreements typically address wages, hours, and terms and conditions of employment, there are significant variations in their composition, ranging from simple and straightforward to extensive and complex. Clauses which are tantamount to bargaining waivers allow an employer the day-to-day authority to administer a cogent personnel system. Routine personnel actions, although frequently taken for granted, are based on predictability established by the terms of a collective bargaining agreement, e.g., salary schedule placement, paid holidays, paid vacation commensurate with length of service, employer contribution toward the cost of medical insurance, and a reasonable standard for the imposition of discipline. Collective

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[4] In the public sector most collective bargaining agreements are for a term of one, two or three years. RCW 41.56.070 , states in relevant part, "nor shall any agreement be valid if it provides for a term of existence for more than three years."

bargaining agreements also routinely establish standards for allocating and reducing hours of work or the size of the workforce.[5] Personnel actions taken in accordance with a negotiated collective bargaining agreement do not have to be re-submitted to bargaining. Rather, the agreement empowers the employer to take action within the confines of that agreement. If the union believes an employer action violates the agreement, it normally has recourse to the grievance procedure of the agreement. Thus, where bargaining has been completed and embodied in (waived by) a contract, unilateral personnel action may not be an unlawful "unilateral change". City of Yakima, Decision 3564-A (PECB, 1991).

Deferral to Arbitration Unavailable in This Case -
Proceedings on unfair labor practice complaints alleging a "unilateral change" are normally deferred by the Commission pending the outcome of grievance arbitration proceedings under the parties' collective bargaining agreement. This is not because of an absence or loss of jurisdiction, but rather to harmonize with the preference for arbitration stated in RCW 41.58.020(4). This also does not prevent the Commission from considering the parties' collective bargaining agreement to determine the merits of a respondent's waiver by contract defenses in cases where deferral to arbitration is inappropriate. Chelan County, supra. In this case, no deferral was considered because the employer failed to file an answer asserting a waiver by contract defense. The Examiner must therefore interpret the parties' collective bargaining agreement for the purpose of deciding the "waiver by contract" defenses which were asserted at the hearing. Aberdeen School District, Decision 3063 (PECB, 1988).

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[5] Layoff provisions are an example of such an issue. An employer's unilateral reduction of its unionized employees' hours of work would otherwise be a "refusal to bargain" unfair labor practice.

The Management Rights Clause -

Management rights clauses are a typical component of collective bargaining agreements. The Roberts Dictionary of Industrial Relations, BNA Books, Revised Edition (1971), contains a definition of management rights clauses, as follows:

> **Management Clause** - A provision in the collective bargaining agreement which sets out the scope of management rights, functions, and responsibilities. The clause sets forth those functions of management which are not subject to contractual limitations. The union's rights are protected in the grievance machinery and in those particular contract provisions which modify the management rights clause. ... An illustrative management clause might read as follows:
>
> > The management of the company and the direction of the working force, including the right to plan, direct, curtail, determine, and control plant operations, hire, suspend, discipline, or discharge for proper cause, layoff, transfer, or relieve employees from duties because of lack of work, to promote efficiency or for other legitimate reasons, and all rights and powers customarily exercised by an employer, except as may be specifically limited by this agreement, are vested exclusively in the company.

Management rights clauses can contain waivers of bargaining rights, but waivers must be clear and intentional. Thus, general management rights provisions are frequently found insufficient to serve as a waiver under that high standard. In City of Yakima, Decision 3564-A (PECB, 1991), the Commission held:

> 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.

The Commission found no waivers in Yakima, because the contract provisions were either ambiguous or added no substance to the matters at issue.

The terms of a collective bargaining agreement will be scrutinized and interpreted in a literal manner. A waiver was found in Chelan County, Decision 5469-A (PECB, 1996), where the Commission interpreted the parties' agreement under the general legal standards used by the courts for contract interpretation:

> The Washington Courts have adhered to an objective manifestation theory in construing the words and acts of contractual parties, and **impute to a person an intention corresponding to the reasonable meaning of the words and acts.** Plumbing Shop v. Pitts, 67 Wn.2d 514 (1965).

[Emphasis by **bold** supplied.]

The cited case continued with: "Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties", citing Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510 (1923). Contract interpretation is also discussed in Everett v. Estate of Sumstad, 95 Wn.2d 853 (1981), where the court commented that, "[C]ourts have found the subjective intention of the parties is irrelevant", and quoted from Judge Learned Hand, as follows:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. **A contract is an obligation attached by the mere force of law to certain**

> **acts of the parties, usually words, which ordinarily accompany and represent a known intent**. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, ...

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), as quoted in Everett v. Estate of Sumstad, supra [emphasis by **bold** supplied].

Waiver by contract is an affirmative defense, and the employer has the burden of proof where it makes such a claim. Lakewood School District, Decision 755-A (PECB, 1980).

These parties have negotiated a sophisticated collective bargaining agreement that contains the following management rights clause:

> ARTICLE II
>
> RIGHTS OF THE EMPLOYER
>
> Section 2.1. It is agreed that the customary and usual rights, powers, functions, and authority of management are vested in management officials of the District. Included in these rights in accordance with applicable laws and regulations is the right to direct the work force, the right to hire, promote, retain, transfer, and assign employees in positions, the right to suspend, discharge, demote, or take other disciplinary action against employees; and **the right to release employees from duties because of lack of work or for other legitimate reasons.** The District shall retain the right to maintain efficiency of the District operations by determining the methods, the means, and the personnel by which such operation is conducted.

(Emphasis by **bold** supplied.)

The union claims that the management rights clause lacks sufficient clarity to serve as an express and conscious waiver of the union's right to bargain, but that argument fails in this case. A layoff is a "release from duty". The terms "lack of work" and "other legitimate reason" are sufficiently clear and concise that they can be intelligently evaluated. Moreover, those terms are no more subjective than the "just cause" standard for discipline which unions frequently seek to have included in collective bargaining agreements, and which unions support as sufficiently clear to bind the employer during the life of such contracts.

The record fairly reflects that the paraeducators were laid off because of a lack of work after the employer curtailed its special education program. In turn, that curtailment was caused by the reduction of revenue from outside sources, which was a "legitimate reason" for the employer's action. The disputed layoffs were thus effected within the scope of authority reserved to the employer in the management rights clause of the parties' agreement.

The "Substantive" Clauses

Provisions regulating the layoff and recall of employees are also a typical component of collective bargaining agreements. The Roberts' Dictionary of Industrial Relations, supra, contains the following definitions:

> **Layoff Policies** - Normally provisions in a contract usually found in the seniority sections which indicate the procedure to be followed in a layoff. Protection is frequently set up on the basis of length of service ... The procedure is designed to provide a reasonable practice fair to the employees and to the continued efficient operation of the company when layoffs are made necessary either by a decline in need for the product or occasionally for retooling or design of new products.

> ...
> **Seniority** - The length of service an individual employee has in the plant. Length of service frequently determines his position when layoffs and rehires take place. ... The seniority principle rests on the assumption that the individuals with the greatest length of service within the company should be given preference in employment.

Such provisions are common even where a management rights clause mentions layoff and/or recall.

In this case, the parties' contract contains the following additional clauses which mention or bear on layoffs:

> ARTICLE V
>
> APPROPRIATE MATTERS FOR
> CONSULTATION AND NEGOTIATION
>
> Section 5.1. The parties have an obligation to bargain in good faith as directed by State Law.
>
> Section 5.2. It is further agreed and understood that the District will consult with the Association, and meet with the Association upon its request, in the formulation of any changes being considered in existing benefits, policies, practices and procedures directly related to work assignments of positions within the unit.
>
> ...
> Section 5.4. **In the event of anticipated layoff of classified employees** in the bargaining unit subject to this Agreement, **the District will consult with the Association concerning the implementation of the reduction in the work force.**

[Emphasis by **bold** supplied.]

...

ARTICLE X

PROBATIONARY PERIOD AND SENIORITY

...

Section 10.3. Seniority shall be established as of the date the employee began continuous daily employment.

...

Section 10.5. Seniority rights shall be lost for the following reasons, without limitation:

...

D. Time spent in layoff status, as herein provided.

Section 10.6. Seniority rights shall be effective within the following general job classifications: Clerical/Secretarial; Aides; Transportation; Food Service; Custodial; Maintenance; Home Visitor; Records Clerk; Computer Specialist; Accounting Specialist and Family Literacy Educator.

Section 10.7 The employee with the earliest hire date shall have absolute seniority rights regarding vacation periods. **The employee with the earliest hire date shall have preferential rights regarding** shift selection, promotions, and **layoffs when ability and performance are substantially equal** with those individuals with less seniority. If the district determines that seniority rights should not govern because a junior employee possesses ability and performance substantially greater than a senior employee, or senior employees, the District shall set forth in writing to the employee or employees and to the Association's president its reasons why the senior employee or employees have been bypassed.

...

Section 10.10. **In the event of layoff, employees so affected are to be placed on a reemployment list maintained by the District according to layoff ranking by seniority.** Such employees are to have priority in filling an opening ninth classification held immedi-

> ately prior to layoff. Names shall remain on the reemployment list for one (1) year.
>
> **Regular classified employees receiving notices of intent not to rehire for the following school year,** for other than performance-related reasons, **shall be considered on layoff status.**

[Emphasis by **bold** supplied.]

Article V calls for the employer to consult with the union, at the union's request, regarding organizational changes and anticipated layoffs. PSE offered no evidence that it requested consultation on the changes to the special education program, or that the employer declined a union request for such consultation. The union acknowledges that it did not request bargaining regarding the matter. To the contrary, it was the employer that attempted to include the special education program changes on the agenda for the negotiations which were underway pursuant to the reopener provision of the parties' contract, and it was PSE which wanted the matter dealt with separately at some unspecified time.

The operative sections of Article X specifically address the subject of layoffs, establishing categories of employees to exercise their seniority and calling for layoffs to be imposed on the basis of the "last hired = first released" approach that is typical under seniority provisions in collective bargaining agreements.[6] There can be no reasonable doubt that these parties considered the matter of layoffs and the possibility of a reduction of the size of the workforce when they negotiated those contract provisions, and that the contract provisions quoted above set forth

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[6] There is no indication that the "ability and performance are substantially equal" concept found in the contract had any application or bearing in this case.

their agreement on the standards to be used for dealing with such circumstances. In fact, there would have been no reason for the parties to have included such provisions in their contract unless the possibility of layoffs was contemplated by their negotiators. The employer had no obligation to resubmit those contractual layoff procedures to re-negotiation when the occasion arose to implement them, and it was free to follow the standards already in place. A finding that the union waived its right to negotiate on how layoffs during the life of the collective bargaining agreement were to be implemented is thus supported by the literal terms of the parties' contract. Notwithstanding the union's arguments, the words of the contract mean what they say. Contract language is not drafted and accepted in a vacuum.

The union argues that the contractual rules regarding layoff procedure are not relevant, and that the threshold matter of the decision to lay off must be subjected to bargaining before the agreed layoff procedure can be implemented. Even without considering the operative language in the management rights clause of this contract, there would be no incentive for employers to agree to union proposals on seniority and other related issues if the decision to lay off remained open for bargaining. The two concepts go hand-in-hand. It is illogical to say that there is a bargaining waiver regarding the implementation, but no bargaining waiver of the decision to lay off.

The Examiner also disagrees with PSE's claim that Aberdeen School District, Decision 3063 (PECB, 1989), supports its position in this case. In fact, a PSE complaint regarding an hours reduction was dismissed in that case, based on a "waiver by contract" conclusion, and the only violations found there related to "circumvention" and "refusal to provide information" issues which are not present in this case. Contrary to PSE's argument here, the parties' collec-

tive bargaining agreement gives the employer the authority to unilaterally reduce the size of its workforce and is a waiver of the bargaining obligation. The employer's defense that it acted within the confines of the parties' contract is creditable, so that the the employer has met its burden of proof on its affirmative defense. Lakewood School District, supra.

Application of Standards - Waiver by Inaction

Regardless of the foregoing conclusions concerning the duty to bargain the layoff decision and the waiver by contract defense, this record also supports a conclusion that the employer provided the union with advance notice of the contemplated personnel action, and that the union did not make a timely request for bargaining.

Collective bargaining is a process of communication, not some mystic ritual. The evidence clearly shows that the employer attempted to give notice to the union in this case:

- The testimony of union witnesses confirmed that they heard the employer's statements that a $70,000 revenue shortfall was anticipated, and that a reduction of special education staff was being contemplated. Notice need not be in writing or denominated as "formal" or "official" to be sufficient,[7] so long as it achieves the statutory purpose of effecting communications between the parties.

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[7] The term "formal" does not appear in Chapter 41.56 RCW, and the word "official" only appears in RCW 41.56.120 in reference to employees refusing to perform "their official duties". It is thus interesting to reflect on the number of times when parties purport to attach the adjectives "formal" or "official" to notices given, positions taken, or status claimed in the collective bargaining process.

- The record fairly reflects that the employer both raised the matter and viewed it as a potential area for discussion in conjunction with the negotiations on the contract reopener. This was not a reference made in passing, as was the insufficient notice first given in Lake Washington Technical College, supra. In fact, a more opportune time or setting for bargaining the layoff issue can hardly be imagined. The record reflects that the union felt then (and still maintains) that bargaining regarding the staff implications of the special education program cutback should be conducted separately from the bargaining on the reopener. A similar argument by PSE was rejected by the Commission in Wenatchee School District, supra.[8] Thus, even if the employer was obligated to bargain the effects of its decision to reduce its workforce, the opportunity was provided for the union to demand negotiations. The employer was under no obligation to schedule a different series of meetings with the union to negotiate the matter.

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[8] In Wenatchee School District, the Commission wrote:

> The union argues that bargaining a routine wage and benefit reopener is not the same as bargaining over the effects that the "REP" decision had upon members of the bargaining unit. The fact that the parties would have engaged in bargaining in any event does not preclude the employer from meeting its bargaining obligation on "effects" through the same meetings. This is particularly true if the employer received and bargained in good faith regarding union proposals designed to address the "effects" problem. We find the record persuasive that this fact occurred.
>
> ...
> To hold that a separate series of negotiations dedicated only to "effects" bargaining was required would exalt form over substance. The record indicates there was an opportunity to bargain the effects of the "REP" and kindergarten change, and we hold that the employer satisfied its bargaining obligation even though that bargaining occurred in the context of regular contract negotiations.

- The employer even made a specific suggestion that the reduction be spread among all of the employees in the program. The union's representative heard and responded to that suggestion by reference to the seniority provisions of the parties' existing collective bargaining agreement. The waiver by contract principle works both ways, and the employer was not in a position to insist on bargaining its suggested variance from the contractual "layoff by seniority" standard, once the union stood on its contract rights.

Having rejected both the forum and the solution suggested by the employer, it was incumbent upon the union to request bargaining. The Commission found a waiver by inaction on subsequent communications in Lake Washington, supra, where a union official who had received notice of a contemplated change remained silent after asserting contractual rights. The same conclusion is apt here.

In addition to the notice which the employer provided to the union in the context of the "reopener" negotiations, the employer gave written notice of the layoffs prior to the start of the new school year. Even then, there was adequate time to negotiate the effects of the employer's layoff decision before the adverse personnel action became effective or any employees actually lost work. It was not too late for the union to raise the matter, but both the local PSE president and the PSE area representative testified that they did not ask the employer for negotiations regarding the reduction in force. There is no evidence that any other union representative requested negotiations with the employer regarding the matter. The union had an obligation to speak up if it believed the employer was acting improperly.

Finally, it is not an unfair labor practice for an employer to implement a non-mandatory management decision without having first

concluded bargaining concerning its effects on mandatory subjects of bargaining. Wenatchee School District, supra. A union that puts its focus on bargaining a decision does so at its peril, where only the effects of that decision are actually bargainable.

CONCLUSIONS

As the charging party, the union had the burden to prove that an unfair labor practice occurred. See, City of Pasco, Decision 4694-A (PECB, 1994); King County, Decision 2553-A (PECB, 1987). The union has failed in this regard, and the complaint must be dismissed.

FINDINGS OF FACT

1. North Franklin School District is operated pursuant to Title 28A RCW, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public School Employees of North Franklin, an affiliate of Public School Employees of Washington (PSE), a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of classified employees of the North Franklin School District which includes paraeducators.

3. The employer and PSE are parties to a collective bargaining agreement covering the period from 1994 to 1997. That contract reserves authority to the employer to lay off employees for lack of work or other legitimate reasons, and prescribes that layoffs are to be based upon seniority. That

contract called for reopening of the contract in 1996 for negotiations regarding salaries, benefits, legislative changes, and any one section of that agreement.

4. In early 1996, the employer discovered that it could expect a reduction of approximately $70,000 to $75,000 of its revenues for operation of its special education program during the 1996-97 student year. A significant portion of the employer's special education revenue was earmarked to pay the labor costs for paraeducators employed in the program.

5. On more than one occasion during and after April of 1996, the employer notified PSE of the funding reduction in the special education program, and of possible paraeducator staff reduction implications.

6. The employer raised the special education revenue shortfall problem and paraeducator staff level implications in the context of the parties' negotiations pursuant to the contract reopener for the third year of their collective bargaining agreement. The union rejected the idea of work hours reductions, and responded generally that the implications of the special education funding problems should be addressed as a separate matter outside of the negotiations regarding the reopener of the collective bargaining agreement.

7. Superintendent Fall suggested, on behalf of the employer, that the special education revenue reduction be offset by reducing the length of the daily shifts of all of the paraeducators. Chief union spokesperson Lee Buzzard responded that seniority controlled, and that the last employee hired should be the first employee to be released. The employer then ceased its pursuit of a variance from the contractual seniority rule.

8. On July 24, 1996, the employer provided a memorandum reflecting the subjects of discussion between the parties. That memorandum again identified the special education funding shortfall and staff implications as a subject of discussion and interest to the parties.

9. PSE local president Mary Ehrhart acknowledged that she heard about the budget shortfall on more than one occasion, and that the employer raised a concern in negotiations that it was faced with a $70,000 special education budget shortfall and the possibility of a reduction in hours of work. Ehrhart further acknowledged that the union negotiations committee discussed the budget shortfall and staff level implications.

10. The union did not request to negotiate with the employer regarding the layoffs of paraeducators associated with the special education program. The union's leaders and representative mistakenly considered the employer's remarks to be generalized and expressing uncertain possibilities, and/or mistakenly believed the employer's concerns were "speculative", and/or mistakenly believed that the communications received from the employer were insufficient to constitute notice of an impending layoff of members of the bargaining unit.

11. In August of 1996, the employer reorganized how it would provide for special education students and decided to reduce the size of its paraeducator workforce.

12. By letter dated August 12, 1996, the employer notified 11 paraeducators that they would not be recalled for employment at the beginning of the 1996-97 school year. The employees were informed that the action was based upon the reduction in

revenue. The employer cited the parties' collective bargaining agreement as authority for its the personnel action.

13. The layoffs described in paragraph 12 of these findings of fact were authorized by, and appear to have been implemented in conformity with, the management rights, seniority and layoff/recall provisions of the parties' collective bargaining agreement.

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 decision of the North Franklin School District to reorganize its special education program in response to a reduction of revenues was an entrepreneurial decision which was not a mandatory subject of collective bargaining under RCW 41.56.030(4).

3. By the terms of the 1994-1997 collective bargaining agreement which was in effect between the parties at the time pertinent to this proceeding, PSE waived its bargaining rights concerning the employer's decision to reduce its paraeducator staff for lack of work after the reorganization decision described in paragraph 2 of these conclusions of law was made and/or for legitimate reasons based on the lack of funds, and waived its bargaining rights concerning the procedures for layoff, so that the employer had no obligation under RCW 41.56.030(4) to bargain those matters for the duration of that contract.

4. By failing to engage in collective bargaining when requested to do so, and by failing to make a timely request for bargain-

ing after having been notified of the funding shortfall and impending layoffs in the special education program, PSE waived its bargaining rights by inaction, so that the employer had no further obligation under RCW 41.56.030(4) to bargain those matters.

5. By the actions described in the foregoing findings of fact, PSE has failed to sustain its burden of proof to establish that North Franklin School District has failed or refused to bargain collectively, or that the employer has violated RCW 41.56.140(4) by its actions regarding the reduction of its paraeducator staff.

ORDER

The complaint charging unfair labor practices filed in this matter is DISMISSED on its merits.

Dated at Olympia, Washington, this 5th day of June, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

FREDERICK J. ROSENBERRY, 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.