STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WAPATO PUPIL PERSONNEL ASSOCIATION/WEA, Complainant, vs. WAPATO SCHOOL DISTRICT, Respondent.	CASE 22726-U-09-5809 DECISION 10743-A - PECB DECISION OF COMMISSION

James A. Gasper, Attorney at Law, for the union.

Stevens, Clay & Manix, P.S., by *Gregory L. Stevens*, Attorney at Law, for the employer.

On September 18, 2009, the Wapato Pupil Personnel Association (union) filed a complaint alleging that the Wapato School District (employer) interfered with employee rights and refused to bargain by skimming attendance clerk work without providing an opportunity to bargain. Examiner Jamie L. Siegel conducted a hearing and issued a decision[1] finding that the work in dispute belonged to the bargaining unit, that the employer was required to bargain before transferring the work, but that the union waived its right to bargain by failing to request bargaining over the transfer of work. The Examiner dismissed the union's complaint. The union filed a timely appeal.

ISSUES PRESENTED

1. Did the Examiner err in finding that the general denials in the employer's answer were sufficient?

[1] *Wapato School District,* Decision 10743 (PECB, 2010).

2. Did the union waive its right to bargain by failing to request bargaining over the transfer of work?

For the reasons set forth below, we affirm the Examiner's decision. A party may answer a portion of an answer by stating "deny." Such an answer will not be deemed to be an admission of the alleged facts. The employer provided the union notice of the employer's intent to transfer some of the attendance clerk job duties. The union waived its right to bargain by failing to request bargaining over the transfer of work.

ISSUE 1:

APPLICABLE LEGAL PRINCIPLES

After the Unfair Labor Practice Manager issues a preliminary ruling, the responding party is instructed to file an answer in compliance with WAC 391-45-210.

> An answer filed by a respondent shall specifically admit, deny or explain each fact alleged in the portions of a complaint found to state a cause of action under WAC 391-45-110. A statement by a respondent that it is without knowledge of an alleged fact, shall operate as a denial. An answer shall assert any affirmative defenses that are claimed to exist.

WAC 391-45-210(1).

ANALYSIS

The employer answered paragraphs 11, 12, 13, and 14 of the complaint "deny." The union argues that these "general denials" should be deemed admissions because they do not comply with WAC 391-45-210 and the Unfair Labor Practice Manager's direction to "specifically admit, deny or explain each fact alleged in the complaint. . ." The union urges that we deem the employer's answers to paragraphs 11-14 admissions because, absent provisions for discovery under the agency rules, pre-hearing disclosure is essential to presenting a case.

The employer's answer complied with WAC 391-45-210(1). Under the rule, answering "deny" is sufficient. A party answering a complaint is not required to supply additional facts in support of a denial of a particular paragraph of a complaint.

ISSUE 2:

APPLICABLE LEGAL PRINCIPLES

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake Washington Technical College*, Decision 4712-A (PECB, 1995). To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of formal notice, it must shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A.

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College,* Decision 4712-A.

If the employer's action has already occurred when the employer notifies the union (*a fait accompli)*, the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

When given notice of a contemplated change affecting a mandatory subject of bargaining, a union desiring to influence the employer's decision must make a timely request for bargaining.

Washington Public Power Supply System, Decision 6058-A. Waiver is an affirmative defense. *Lakewood School District,* Decision 755-A (PECB, 1980). A key ingredient to finding a waiver by inaction is a finding that the employer gave adequate notice to the union. *Washington Public Power Supply System*, Decision 6058-A. An employer asserting that a union waived by inaction its bargaining rights bears a heavy burden of proof. The employer must prove that the union's conduct is such that the only reasonable inference is that the union has abandoned its right to negotiate. *Clover Park Technical College,* Decision 8534-A (PECB, 2004).

ANALYSIS

The Examiner's decision sets forth the facts, but a brief recitation is necessary to provide context for this decision.

The union represents a residual unit of classified employees, which includes attendance clerks. During the 2008-2009 school year, attendance clerks were responsible for compiling student attendance records, ensuring accuracy of attendance records, and processing attendance documents and materials, among other duties. The Wapato Association of Educational Office Personnel represents a bargaining unit of secretaries at the employer.

Prior to the 2009-2010 school year, the employer assigned each attendance clerk to one school. The secretaries began their work day earlier than the attendance clerks. Secretaries performed some attendance clerk work prior to the attendance clerks arriving at work. The employer transferred some of the attendance clerk duties to the secretaries for the 2009-2010 school year.

In the spring of 2009, the employer faced a budget shortfall. On March 25, 2009, the school board approved a resolution directing the superintendent to develop a reduced educational program for the 2009-2010 school year. In March or April of 2009, the employer met with union representatives to discuss possible budget cuts and the rationale for the proposed cuts. The employer presented the union with a document that proposed "Decrease attendance clerks by $100,000."

On May 15, 2009, the employer's Executive Director of Support Operations, Charles Wheaton, sent a memorandum to union representatives. The memorandum listed possible budget reductions and requested suggestions by May 20, 2009. Reductions to the attendance clerks were not listed on the memorandum, but were listed in an attached document.

On May 28, 2009, the employer provided layoff notices for the 2009-2010 school year to three of the five attendance clerks. The employer provided union President Adelaila Therriault copies of each of the layoff letters.

Wheaton and Therriault discussed the new attendance clerk job description. On June 24, 2009, Wheaton provided Therriault a copy of a June 24, 2009 letter notifying an attendance clerk of a modified job assignment for the 2009-2010 school year and the updated job description.

The Examiner found that the record did not support a finding that the employer provided the union notice of its intent to transfer some of the attendance clerk work to another bargaining unit in March, April, or May 2009. The Examiner found that when Wheaton provided Therriault the June 24, 2009 letter notifying an employee of a modified job assignment and a copy of the updated job description, the employer provided notice of its intent to transfer some of the attendance clerk work to another bargaining unit. The Examiner did not credit Therraiult's testimony that Therriault believed the attendance clerks' duties would not change.

The Examiner found that the employer provided notice to the union at the end of June 2009, and the union had an opportunity for meaningful bargaining. Although the union asserted that the employer and union did not discuss transferring the attendance clerk work prior to laying off the attendance clerks, the Examiner found that the employer placed the union on notice of its intent to transfer the work when it provided the union with the lay-off notices and updated job description. We attach considerable weight to the factual findings and inferences made by our examiners. Examiners have had the opportunity to personally observe the demeanor of the witnesses. *City of Pasco,* Decision 3307-A (PECB, 1990). We find nothing in the record that would cause us to disturb Examiner Siegel's credibility finding.

Notice

The modified attendance clerk job description that Wheaton provided to Therriault constituted notice of the employer's intent to assign attendance clerk duties to another bargaining unit. The Examiner compared the two job descriptions in her decision. For example, in the 2007 job description, one of the essential functions was "Compile student records (e.g. attendance) for purposes of meeting state, federal and/or district requirements." In the updated 2009 job description, one of the essential functions was "Assist building staff in compiling student records (e.g. attendance) for purposes of meeting state, federal and/or district requirements." The change in duties from compiling to assisting in compiling should have put the union on notice of the employer's intent to change the attendance clerks' duties.

Opportunity to Request Bargaining

The union had sufficient opportunity to request bargaining. The employer notified the union in June 2009 of the contemplated change. School did not begin until September 1, 2009. The union had sufficient notice of the change to request and engage in bargaining to potentially impact the employer's decision.

In its brief, the union asserts that because the bargaining unit members work during the school year, and not during the summer, "the prospect that union representatives would contact and negotiate with the District during that time-frame is greatly attenuated compared with a regular, year-round operation." The fact that bargaining unit employees may not be present at the worksite does not excuse the union from requesting bargaining when the employer provides the union notice of a proposed change to a mandatory subject of bargaining. A union that receives such a notice and fails to act runs the risk of waiving by inaction its right to bargain.

In this case, the employer provided clear and timely notice to the union, and the union did not request bargaining. Therriault testified she did have conversations with Wheaton about the modified job description. Even in August, after Therriault and Assistant Superintendent Daniel Murray discussed what duties the attendance clerks would be performing, Therriault did nothing. As she testified, "Well, at that time I was just concerned about my attendance clerks, because being only two left, and knowing how much work an attendance clerk does, I just said, "Well,

let's see how this works." At that time I was not concerned with what the secretaries were going to do."

CONCLUSION

The employer provided the union with notice of its intent to transfer some attendance clerk duties to another bargaining unit when it provided the union president with an updated attendance clerk job description in June 2009. The union had sufficient opportunity to request bargaining after receiving notice and before the transfer of duties went into effect. The union waived its right to bargain by failing to request bargaining over the transfer of attendance clerk duties.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Jamie Siegel are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 15th of December, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 12/15/2011

The attached document identified as: DECISION 10743-A - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	22726-U-09-05809	FILED:	09/18/2009	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	MISCELLANEOUS				
DETAILS:	See 22797-S-09-0131				
COMMENTS:					

EMPLOYER: WAPATO S D
ATTN: BECKY IMLER
PO BOX 38
WAPATO, WA 98951
Ph1: 509-877-4181

REP BY: GREGORY STEVENS
STEVENS CLAY MANIX
PAULSEN CENTER
421 W RIVERSIDE STE 1575
SPOKANE, WA 99201-0409
Ph1: 509-838-8330

PARTY 2: WAPATO PUPIL PERSONNEL ASSN/WEA
ATTN: LOLLIE THERRIAULT
711 N KEYS RD
YAKIMA, WA 98951
Ph1: 509-877-2768

REP BY: JAMES GASPER
WASHINGTON EDUCATION ASSN
PO BOX 9100
FEDERAL WAY, WA 98063-9100
Ph1: 253-765-7023 Ph2: 206-854-4609

REP BY: SUE LAIB
WASHINGTON EDUCATION ASSN MIDSTATE
711 N KEYS RD
YAKIMA, WA 98901-1171
Ph1: 509-452-6559