STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES NTERNATIONAL UNION, LOCAL 925, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 24580-U-12-6191 DECISION 11600-A - PSRA DECISION OF COMMISSION

Schwerin Campbell Barnard Iglitzin & Lavitt, L.L.P., by *Kathleen Phair Barnard*, Attorney at Law, and *Danielle Franco-Malone*, Attorney at Law, for the union.

Attorney General Robert W. Ferguson, by *Mark K. Yamashita*, Assistant Attorney General, for the employer.

On February 21, 2012, Service Employees International Union, Local 925 (union) filed an unfair labor practice complaint alleging that the University of Washington (employer) refused to bargain by unilaterally changing shift schedules and circumvented the union. Pursuant to WAC 391-45-110, the Unfair Labor Practice Manager reviewed the complaint and issued a preliminary ruling.

Examiner Lisa A. Hartrich conducted a hearing and issued a decision.[1] The Examiner concluded that the union waived by contract its right to bargain the decision to change from fixed shifts to rotating shifts, that the employer did not breach its good faith bargaining obligation, and that the employer did not circumvent the union. The union appealed.

[1] *University of Washington*, Decision 11600 (PSRA, 2012).

ISSUES

1. Was the decision to change from fixed shifts to rotating shifts a mandatory subject of bargaining?
2. If the employer unilaterally changed shift assignments, did the union waive by contract the right to bargain the change?
3. Did the employer breach its good faith bargaining obligations with the union over the change in shift assignment?
4. Did the employer circumvent the union when the employer discussed changes to shift assignment with bargaining unit employees?

We affirm the Examiner. The decision to change from fixed shifts to rotating shifts was a mandatory subject of bargaining; the union waived by contract its right to bargain the decision. The employer did not breach its good faith bargaining obligation over the change in shift assignment. There is no evidence that the employer circumvented the union.

APPLICABLE LEGAL PRINCIPLES

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees concerning wages, hours, and other terms and conditions of employment. RCW 41.80.005(2); 41.80.020(1). The determination as to when the duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer commits an unfair labor practice when it refuses to engage in collective bargaining. RCW 41.80.110(1)(e).

"[P]ersonnel matters, including wages, hours and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *Fire Fighters, Local Union 1052 v. Public Empl't Relations Commission*, 113 Wn.2d 197, 200 (1989) (*City of Richland*); *Federal Way School District*, Decision 232-A (EDUC, 1997), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The scheduling of work shifts falls within the broad ambit of

"hours" and is a mandatory subject of bargaining. *City of Yakima*, Decision 767 (PECB, 1979), *aff'd*, Decision 767-A (PECB, 1980).

Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which parties may negotiate. *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

The bargaining obligation applies to a decision on a mandatory subject of bargaining and the effects of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University*, Decision 10413-A (PSRA, 2011). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decision could be mandatory subjects of bargaining. *See Wenatchee School District*, Decision 3240-A (PECB, 1990).

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 be shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A.

A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining on mandatory subjects of bargaining. *See Spokane School District*, Decision 310-B (EDUC, 1978). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of the employer and employees. *Yakima Valley Community College*, Decision 11326-A (PECB, 2013).

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. 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. 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.

Waiver

A party may waive its right to bargain through the language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). The Commission has long held that typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

RELEVANT FACTS

The union represents dispatchers in the employer's police department in a university-wide, non-supervisory bargaining unit. The employer and the union were parties to a collective bargaining agreement that expired June 30, 2012.

The employer hired Sue Carr to be the supervisor of the dispatch center in March 2011.[2] The dispatchers were working two 12-hour days and two 8-hour days. In June 2011, the dispatchers began working four 10-hour days.

Carr began to explore ways to improve service and safety in the dispatch center. One of the areas she considered was shift assignments. The dispatchers bid for shift assignments every three months. Employees consistently bid for the same shift assignment. Carr determined that it would be beneficial for dispatchers to rotate shifts instead of consistently bidding on the same shift. Carr discussed the potential of changing to rotating shifts with employees at meetings and during one-on-one conversations.

On November 1, Carr sent an e-mail to the dispatchers notifying them of a mandatory staff meeting to be held on November 9. On November 3, Carr sent the dispatchers a tentative schedule for the next shift bid. On November 5, Carr sent the dispatchers a more detailed shift bid chart. Carr included guidelines for the shift bid: (1) 4 – 3 month rotations, total of 12 months; (2) the first bid could not be the employee's current shift; (3) the employee could not bid for the same shift during two consecutive rotations; and (4) the bid needed to be completed by November 9.

As a result of the new bid guidelines, employees were no longer on a fixed schedule. On November 7, the union sent the employer an e-mail demanding to bargain the change to shifts.

On November 9, Carr conducted the staff meeting. Employees bid in accordance with the new guidelines.

On November 21, the employer and the union met to discuss the rotating shifts. The union requested to bargain the decision. The employer maintained that it did not have to bargain the decision.

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2 All dates are in 2011 unless otherwise noted.

<u>ISSUES 1 AND 2:</u> Was the decision to change from fixed shifts to rotating shifts a mandatory subject of bargaining? If the employer unilaterally changed shift assignments, did the union waive by contract the right to bargain the change?

The Examiner properly concluded that the change from fixed shift schedules to rotating shift schedules is a mandatory subject of bargaining. Absent the union waiving by contract its right to bargain, the employer would have been obligated to notify the union that it intended to change from fixed shift schedules to rotating shift schedules and bargain the decision.

The employer asserted, and the Examiner agreed, that the union waived its right to bargain by contract. The union argues that the right to assign employees to shifts does not give the employer the right to implement rotating shifts.

Two clauses in the parties' collective bargaining agreement, Article 8 Hours of Work and Overtime and Article 32 Management Rights and Responsibilities, clearly waived the union's right to bargain the decision to change from fixed shift schedules to rotating shift schedules. The relevant portions of the articles provide:

ARTICLE 8 – HOURS OF WORK AND OVERTIME

8.1 General.
(a) Hours of work for regular monthly employees in the bargaining units listed in Appendix 1 shall be established by the employing official.
. . .

8.8 Change in Work Schedule Notification. The Employer agrees to provide a minimum of fourteen (14) calendar days notice to an employee in the event of an Employer-directed permanent change in the employee's shift assignment or work schedule. For temporary changes in work assignment occurring within the employee's assigned work week, the Employer will provide two (2) calendar days notice with the day of notification consisting of the first day of notice.
. . .

The assignment of employees in various shifts within each work group or department shall be determined by the employing official, provided that when qualifications are substantially equal in the judgment of the

> employing department, seniority shall be a factor in determining shift assignment. This criteria does not apply to positions deemed by the employer to require a rotational shift.

ARTICLE 32 – MANAGEMENT RIGHTS AND RESPONSIBILITIES

> The Employer through its designated management personnel or agents has the right and responsibility, except as expressly modified by this Agreement, to control, change, and supervise all operations and to direct and assign work to all working forces. Such rights and responsibilities shall include by way of illustration but not be limited to: the selection and hiring; training; discipline and discharge; classification; reclassification; layoff; promotion and demotion or transfer of employees; the establishment of work schedules; the allocation of all financial and other resources; the control and regulation of the use of all equipment and other property of the Employer. The Employer shall determine the methods, technological means and qualifications of personnel by and for which operations are to be carried out. The Employer shall take whatever action as may be necessary to carry out its rights in any emergency situation.
>
> . . .

The language in Articles 8.1, 8.8, and 32 is clear and specific enough to give the employer the right to establish work shifts, and to conclude that the union waived its right to bargain changes to work shifts. Article 8.1 gives the employer the right to determine hours of work. Article 8.8 requires advanced notice of "employer-directed" changes to employee shift assignment. Article 32 gives the employer the right to establish work schedules. The assignment of employees to shifts "shall be determined by the employing official" clearly gives the employer the right to change from fixed to rotating shift schedules. Articles 8 and 32 clearly contemplate the employer unilaterally establishing and changing employees' work schedules.

The parties clearly and unmistakably agreed to allow the employer to change employee work schedules, including change from fixed to rotating shifts, and removed the assignment of hours from the scope of mandatory subjects of bargaining for the life of the agreement.

<u>ISSUE 3:</u> Did the employer breach its good faith bargaining obligations with the union over the change in shift assignment?

The employer was not obligated to bargain the decision to change from fixed shift schedules to rotating shift schedules because the union waived by contract its right to bargain the decision. The obligation to bargain the effects of the decision remained.

The union argued that the employer was required to bargain the effects of its decision before it could implement the change. We disagree. An employer is not required to delay implementation of a decision it legally made while the parties bargain the effects of that decision. *City of Bellevue*, Decision 3343-A (PECB, 1990); *Federal Way School District*, Decision 232-A (EDUC, 1977).

In this case, the employer did not breach its good faith bargaining obligation with the union over the decision to change in shift assignment or the impacts of the decision. Upon request, the employer met with the union to bargain. The union wanted to bargain the decision. The employer was unwilling to bargain the decision, but remained willing to bargain the effects. The parties agreed to schedule labor management committee meetings to address the effects of the change to rotating shifts.

After the employer implemented the rotating shifts, a staffing issue arose. Due to the staffing issue, the employer did not continue rotating shifts. The union did not request further bargaining. The employer did not breach its good faith bargaining obligations.

ISSUE 4: Did the employer circumvent the union when the employer discussed changes to shift assignment with bargaining unit employees?

Applicable Legal Standards

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations

with one or more employees concerning a mandatory subject of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

Where an employer's workforce is organized for purposes of collective bargaining, Chapter 41.80 RCW does not preclude direct communications between employers and their union represented employees. *City of Seattle*, Decision 3566-A. Employers retain the right to communicate directly with employees who are represented, provided that the communication does not amount to bargaining or other unlawful activity. *University of Washington*, Decision 10490-C (PSRA, 2011), *aff'd on other grounds*, __ Wn. App. __ (2013), 303 P.3d 1101 (2013).

Sharing information or listening to employee concerns does not rise to the level of circumvention. *See Kitsap* Transit, Decision 11098-A (PECB, 2012), *aff'd on other grounds*, Decision 11098-B (PECB, 2013) (employer memorandum to employees announcing a unilateral change was not circumvention); *Vancouver School District*, Decision 10561 (EDUC, 2009), *aff'd*, Decision 10561-A (EDUC, 2011)(employer communication of the employer's bargaining proposal to bargaining unit employees was not circumvention or direct dealing); *University of Washington*, Decision 10490-C (employer did not circumvent the union when it met with bargaining unit employees and listened to their concerns).

Analysis

There is no evidence that the employer bargained with, or offered to bargain with, represented employees. Carr met with bargaining unit employees and discussed the potential change. Carr e-mailed the employees notice of a mandatory meeting. Carr e-mailed the employees guidelines for shift bidding. Carr convened a staff meeting at which employees bid on shifts. None of these actions rise to the level of direct dealing.

Circumvention is separate from the waiver. Finding that the union waived by contract its right to bargain the change to rotating shifts meant that the employer did not have to bargain with the union about the decision. Finding a waiver by contract does not automatically lead to a conclusion that an employer does not circumvent a union. The potential exists that a union could

waive by contract its right to bargain and an employer could circumvent the union. In this case, there is no evidence of circumvention.

CONCLUSION

The decision to change from fixed to rotating shifts was a mandatory subject of bargaining. The union waived by contract its right to bargain the decision. The employer did not breach its good faith bargaining obligations. The employer was excused from bargaining the decision to change from fixed to rotating shifts and remained willing to bargain the effects of the decision. The employer did not circumvent the union when the employer communicated with the employees about changing to rotating shifts.

NOW, THEREFORE, it is

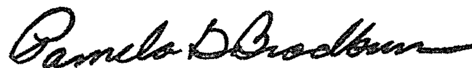
ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Lisa A. Hartrich are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this _6th_ day of September, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson



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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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CASE NUMBER: 24580-U-12-06291 FILED: 02/21/2012 FILED BY: PARTY 2

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