STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WAPATO PUPIL PERSONNEL ASSOCIATION, Complainant, vs. WAPATO SCHOOL DISTRICT, Respondent.	CASE 128988-U-17 DECISION 12894-A - PECB DECISION OF COMMISSION
WAPATO ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL, Complainant, vs. WAPATO SCHOOL DISTRICT, Respondent.	CASE 128989-U-17 DECISION 12895-A - PECB DECISION OF COMMISSION

James A. Gasper, Attorney at Law, Washington Education Association, for the Wapato Pupil Personnel Association and the Wapato Association of Educational Office Personnel.

Gregory L. Stevens and *Jon B. Dalley*, Attorneys at Law, Stevens Clay, P.S., for the Wapato School District.

Washington State's collective bargaining laws allow for reactive methods of settling labor disputes. *See* RCW 41.56.160. However, the laws encourage proactive labor relations through "mutual obligations" to negotiate in good faith. RCW 41.56.030(4). Proactive labor relations, including early communications about decisions that may impact employees, harm neither party. Instead, proactive labor relations can improve the bargaining relationship and eliminate the need to take reactive measures, such as filing unfair labor practice complaints.

The Washington Education Association is affiliated with two unions that represent bargaining units at the Wapato School District (employer): the Wapato Pupil Personnel Association (WPPA) and the Wapato Association of Educational Office Personnel (WAEOP) (collectively, "unions"). The WPPA represents classified employees, including two attendance clerks. The WAEOP represents secretaries. This is not the first time these sister bargaining units have been involved in competing unfair labor practice complaints. *See Wapato School District*, Decision 10743 (PECB, 2010).

In this case, the employer assigned secretaries to prepare a two-to-four unexcused absences letter for the principals' signatures to be distributed at parent-teacher conferences. Both the WPPA and WAEOP objected and asserted that the letter was WPPA bargaining unit work that should have been assigned to the attendance clerks. The parties met once but did not reach agreement. The employer offered to bargain the impacts, but the unions did not request bargaining. Instead, they filed unfair labor practice complaints.

Examiner E. Matthew Greer conducted a hearing. During the hearing, the WPPA moved to amend its complaint to conform to the evidence that building administrators were contacting parents about students' unexcused absences. The Examiner allowed the amendment. The Examiner issued a decision concluding that the letter was not WPPA bargaining unit work and dismissed the WPPA's complaint. *Wapato School District*, Decision 12894 (PECB, 2018). The Examiner concluded that the new assignment did not have a material impact on the secretaries' work and dismissed the WAEOP's complaint. *Id.* The unions jointly appealed.

There are three issues before the Commission:

1. Did the employer skim bargaining unit work when it assigned employees other than the attendance clerks to perform attendance work?

2. Did the employer unilaterally change job duties by assigning attendance work to the secretaries in the WAEOP bargaining unit without providing an opportunity for bargaining?

3. Did the Examiner err by not enforcing the unions' subpoena?

We affirm the Examiner. The WPPA did not meet its burden to prove that the two-to-four unexcused absences letter was attendance clerk and WPPA bargaining unit work. We also affirm the Examiner's decision that the employer did not unilaterally change the job duties of the secretaries in the WAEOP bargaining unit. The letter was similar to other work performed by the secretaries; therefore, the employer did not unilaterally change the secretaries' job duties. The Examiner did not err by refusing to enforce the subpoena.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

The Commission reviews findings of fact for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is especially appropriate in fact-oriented appeals. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

Decisions issued by examiners include numbered findings of fact and conclusions of law and an order. *Puyallup School District*, Decision 12814-A (PECB, 2018). When appealing an examiner's decision, the appellant "shall identify, in separate numbered paragraphs, the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error." WAC 391-45-350(3). A party may comply with WAC 391-45-350(3) by identifying the numbered findings of fact and conclusions of law it is appealing. *Puyallup School District*, Decision 12814-A. Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Brinnon School District*, Decision 7210-A (PECB, 2001).

Skimming

The threshold question in a skimming case is whether the work that the employer assigned to non-bargaining unit employees was bargaining unit work. If the work was not bargaining unit work, then the analysis stops and the employer would not have had an obligation to bargain its decision to assign the work. If the work was bargaining unit work, then we apply the *City of Richland* balancing test to determine whether the decision to assign bargaining unit work to non-bargaining unit employees was a mandatory subject of bargaining. *Central Washington University*, Decision 12305-A (PSRA, 2016).

The *City of Richland* balancing test weighs the competing interests of the employees in wages, hours, and working conditions against "the extent to which the subject lies 'at the core of [the employer's] entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). Recognizing that public-sector employers are not "entrepreneurs" in the same sense as private-sector employers, when weighing entrepreneurial control the Commission considers the right of a public-sector employer, as an elected representative of the people, to control the management and direction of government. *See Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission*, 81 Wis.2d 89, 95 (1977).

If the decision was a mandatory subject of bargaining, then the next question is whether the employer provided the union with notice and an opportunity to bargain the decision. If the employer did not, then the union will have met its burden of proving that the employer refused to bargain by skimming bargaining unit work. *King County*, Decision 12632-A (PECB, 2017).

A bargaining unit need not have lost work for an employer to be found to have skimmed bargaining unit work. The "actual loss of work is not, and should not be, the yardstick by which 'skimming' of bargaining unit work is to be measured." *Battle Ground School District*, Decision 2449-A (PECB, 1986). It is detrimental to a bargaining unit when an employer assigns bargaining unit work to non-bargaining unit employees, because any such assignment erodes the union's work jurisdiction, and "[u]nions have a strong interest in maintaining bargaining unit work." *Central Washington University*, Decision 12305-A. The extent of the impact on the union or its members is therefore an important factor. On the other side of the scale, the burden is not heavy: if the topic is found to be a mandatory subject of bargaining, the employer must notify the union and, upon request, bargain with the union in good faith to agreement or impasse.

Unilateral Change

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

The Commission focuses on the circumstances as a whole to assess whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A

(PECB, 1998). 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 would be excused from the need to demand bargaining. *Id.* If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining that could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, then a *fait accompli* will not be found. *Id.*, *citing Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

Application of Standards

The unions' notice of appeal asserted that the Examiner erred as a matter of law, but the notice of appeal did not assign error to any of the findings of fact. Therefore, the Examiner's findings of fact are verities on appeal. We review the application of the law to those facts de novo.

The attendance clerks' work includes a truancy process when students have five or more unexcused absences. The attendance clerks refer students to the community truancy board; prepare petitions for truancy court; and ensure a student's absences, the employer's efforts to improve attendance, and the steps taken in the truancy process are properly documented. Early in the school year, the attendance clerks may work with students and their parents or guardians before the students reach five unexcused absences. The attendance clerks may send letters to parents or guardians to schedule meetings when students reach their third unexcused absence. The attendance clerks sign the letters they send.

The employer's secretaries work in school buildings. Often, more than one secretary is assigned to a building. The secretaries support the buildings and building administrators by, among other things, sending letters for the principals. The secretaries also send flyers, newsletters, and letters to families.

The employer takes a village approach to student attendance. Various staff—including attendance clerks, school counselors, and administrators—contact parents or guardians about students' unexcused absences. As part of its effort to improve attendance, the employer decided to send

letters to the parents or guardians of students who had two-to-four unexcused absences. The employer decided that these letters should be given to parents or guardians at the parent-teacher conferences in the spring of 2017. If parents or guardians were unavailable, then the secretaries were to mail the letters to the students' homes.

When the employer assigned the secretaries to produce the two-to-four unexcused absences letter, the WAEOP objected. On March 8, 2017, Assistant Superintendent of Human Resources Kelly Garza, WAEOP president Diana Salinas, WPPA president Adelaida Therriault, and UniServ representative Sue Laib met and discussed the two-to-four unexcused absences letter. During the meeting, the WPPA and WAEOP took the position that the work belonged to the WPPA bargaining unit. The parties did not reach an agreement.

On March 29, 2017, Garza sent Salinas and Therriault a letter stating that "populating the letter for the principal, printing the letters, mailing the letters it [*sic*] home, and inputting parent notification of the absence into Skyward" was secretarial work. Garza closed the letter by writing, "If you would like to meet to discuss any impact these attendance letters have on your members, please let me know and I would be happy to schedule a meeting."

The unions did not request additional meetings. Rather, the unions filed unfair labor practice complaints on May 17, 2017.

The WPPA alleged that the employer had skimmed bargaining unit work. The WAEOP alleged the employer had unilaterally changed working conditions when it assigned the secretaries the two-to-four unexcused absences letter. On appeal, the unions' jointly filed brief focused on the WPPA's skimming allegation and made scant mention of the WAEOP's appeal. The essence of the unions' argument is that all unexcused absence work belongs to the attendance clerks and thus the WPPA bargaining unit.

The Two-to-Four Unexcused Absences Letter Was Not WPPA Bargaining Unit Work

To determine whether the employer skimmed bargaining unit work, we must determine whether the two-to-four unexcused absences letter was WPPA bargaining unit work. We agree with the Examiner; preparing and sending the two-to-four unexcused absences letter "was similar in nature to sending other letters on behalf of building administrators" and was not WPPA bargaining unit work.

Bargaining unit work is work that has historically been performed by bargaining unit employees. When an employer assigns bargaining unit employees to perform a "certain body of work," that work attaches to the unit and becomes bargaining unit work. *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001). Attendance work is within the work jurisdiction of the WPPA, the WAEOP, and other school personnel. The attendance clerks work in conjunction with building staff on attendance matters. Counselors call the attendance clerks with questions about students and vice versa. Secretaries answer parent or guardian phone calls, collect excuse notes, and enter student absence excuses into the Skyward student information system. Counselors and one assistant principal have contacted parents or guardians when students have had fewer than five unexcused absences. There is overlap among employee classifications performing attendance work before a student accrues five unexcused absences. Thus, attendance work involving fewer than five unexcused absences has not attached exclusively to the WPPA bargaining unit.

An employer does not skim bargaining unit work when it assigns work outside of the scope of bargaining unit work to other employees. *King County*, Decision 12632-A. The two-to-four unexcused absences letter was a letter sent from the principals to parents or guardians under the principals' signatures. While the letter may have concerned unexcused absences, the attendance clerks' duties do not include assisting principals with letters and mailings. The attendance clerks send letters under their signatures. Sending letters from building administrators is WAEOP bargaining unit work. The two-to-four unexcused absences letter was WAEOP bargaining unit work and was not WPPA bargaining unit work. Therefore, the employer did not skim WPPA bargaining unit work.

The Employer Did Not Unilaterally Change the Job Duties of the Secretaries in the WAEOP Bargaining Unit

The WAEOP alleged the employer had unilaterally changed bargaining unit work when the employer assigned the two-to-four unexcused absences letter to the secretaries. As discussed above, the two-to-four unexcused absences letter was a letter that the secretaries would have been responsible for sending on behalf of the principals. We agree with the Examiner that the increase in the secretaries' workload was minimal.

The WAEOP asserted that the employer had presented the change as a *fait accompli*. However, the employer added a small amount of work that was within the scope of the secretaries' job duties and similar to work the secretaries already performed. By doing so, the employer did not present the WAEOP with a *fait accompli*.

The evidence shows that the employer was willing to bargain the impacts of the assignment with the WAEOP. The WAEOP did not request additional bargaining over the impacts; rather, the WAEOP filed this unfair labor practice complaint. If the WAEOP believed the employer's assignment of the letter to the secretaries impacted the secretaries, then the WAEOP should have sought bargaining in addition to filing its unfair labor practice complaint.

The Examiner Did Not Err by Not Enforcing the Unions' Subpoena

The hearing in this matter spanned three days. The unions presented their case on the first and second days of hearing. The employer presented its case on the second and third days of hearing. After the unions rested their case, the WPPA moved to conform the complaint to the evidence received during the employer's presentation. The Examiner granted the WPPA's motion to amend over the employer's objection. Thus, the preliminary ruling included an allegation that the employer skimmed WPPA bargaining unit work by assigning building administrators to contact parents or guardians and to send letters about unexcused absences.

Between the second and third days of the hearing, the unions issued a subpoena for documents, including any unexcused absence plans that building administrators had prepared and copies of

unexcused absence letters generated by the different schools that may have been similar to union exhibit 2. The employer objected to and refused to comply with the subpoena. The employer argued that a subpoena was not the proper method to request documents. The employer asserted that the request was unduly burdensome and would take more time than the unions had allotted in the subpoena. Finally, the employer asserted that it would be improper to allow the unions to call additional witnesses after they had rested their case. The unions moved to enforce the subpoena. After hearing argument, the Examiner denied the unions' motion.

The unions appealed the Examiner's ruling, arguing that their attorney was unable to effectively cross-examine the employer's witnesses because the employer did not provide the subpoenaed evidence. The unions asserted that full disclosure of all relevant facts and issues contemplated under RCW 34.05.449(2) did not occur.

We affirm the Examiner's ruling denying enforcement of the subpoena. A motion to amend a complaint may be allowed to conform the pleadings to the evidence received at the hearing. WAC 391-45-070(2)(c). Therefore, amending a complaint to conform to the evidence does not allow a party to later obtain and present new evidence in the hearing after that party has rested its case. In an e-mail to the parties confirming his ruling granting the WPPA's motion to amend its complaint, the Examiner noted that the alleged bargaining unit work at issue was the same for the original and amended complaints. The Examiner intended the ruling to limit the parties to the evidence that was in the record at the time.

CONCLUSION

The two-to-four unexcused absences letter was not WPPA bargaining unit work. The letter was similar to other documents the secretaries prepare in the course of their duties. We affirm the Examiner's conclusion that the employer did not unilaterally change WAEOP bargaining unit job duties. The findings of fact, which were verities on appeal, support the Examiner's conclusions of law. We affirm the Examiner and dismiss the unfair labor practice complaints.

ORDER

The findings of fact, conclusions of law, and order issued by Examiner E. Matthew Greer are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission.

ISSUED at Olympia, Washington, this 30th day of January, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

SPENCER NATHAN THAL, Commissioner

RECORD OF SERVICE

ISSUED ON 01/30/2019

DECISION 12894-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: VANESSA SMITH

CASE 128988-U-17

EMPLOYER: WAPATO SCHOOL DISTRICT

REP BY:
BECKY IMLER
WAPATO SCHOOL DISTRICT
212 W 3RD ST
WAPATO, WA 98951
beckyi@wapatosd.org

GREGORY STEVENS
STEVENS CLAY, PS
PAULSEN CENTER
421 W RIVERSIDE STE 1575
SPOKANE, WA 99201-0409
gstevens@stevensclay.org

JON DALLEY
STEVENS CLAY, PS
PAULSEN CENTER
421 W RIVERSIDE AVE STE 1575
SPOKANE, WA 99201
jdalley@stevensclay.org

PARTY 2: WAPATO PUPIL PERSONNEL ASSOCIATION

REP BY:
JAMES A. GASPER
WASHINGTON EDUCATION ASSOCIATION
PO BOX 9100
FEDERAL WAY, WA 98063-9100
jgasper@washingtonea.org

LOLLIE THERRIAULT
WAPATO PUPIL PERSONNEL ASSOCIATION
1780 CAMPBELL RD
WAPATO, WA 98951
lollietherriault@yahoo.com

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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BY: VANESSA SMITH

CASE 128989-U-17

EMPLOYER: WAPATO SCHOOL DISTRICT

REP BY:
BECKY IMLER
WAPATO SCHOOL DISTRICT
212 W 3RD ST
WAPATO, WA 98951
beckyi@wapatosd.org

GREGORY STEVENS
STEVENS CLAY, PS
PAULSEN CENTER
421 W RIVERSIDE STE 1575
SPOKANE, WA 99201-0409
gstevens@stevensclay.org

JON DALLEY
STEVENS CLAY, PS
PAULSEN CENTER
421 W RIVERSIDE AVE STE 1575
SPOKANE, WA 99201
jdalley@stevensclay.org

PARTY 2: WAPATO ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL

REP BY:
JAMES A. GASPER
WASHINGTON EDUCATION ASSOCIATION
PO BOX 9100
FEDERAL WAY, WA 98063-9100
jgasper@washingtonea.org

DIANA SALINAS
WAPATO ASSOCIATION OF EDUCATIONAL OFFICE PERSONNEL
2008 S. 3RD AVE
UNION GAP, WA 98903
salinas49er@gmail.com