STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMERICAN FEDERATION OF TEACHERS, LOCAL 4254, Complainant, vs. EDMONDS COLLEGE, Respondent.	CASE 133333-U-21 DECISION 13412 - CCOL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On February 17, 2021, the American Federation of Teachers, Local 4254 (union) filed an unfair labor practice complaint against Edmonds College (employer). The complaint alleges that the employer violated its bargaining obligation by unilaterally reducing certain employees' compensation.

On February 24, 2021, an Unfair Labor Practice Administrator issued a preliminary ruling finding a cause of action. The undersigned held a hearing conducted by videoconference in the matter on July 15, 2021. The parties filed briefs on September 9, 2021, to complete the record.

ISSUE

The sole issue in this proceeding is whether the employer refused to bargain in violation of RCW 28B.52.073(e), and derivatively RCW 28B.52.073(a), by unilaterally changing employee pay without fulfilling its bargaining obligation.

The employer changed a long-standing past practice concerning the manner in which pay for certain part-time faculty was calculated, resulting in a substantial decrease in compensation.[1] It did so prior to bargaining with the union to impasse or agreement. The union did not waive its right to bargain by contract or by inaction. The complaint is timely, and the employer's conduct constitutes a refusal to bargain within the meaning of RCW 28B.52.073(e).

BACKGROUND

The employer operates a community college. Its main campus is located in Lynnwood, Washington. The union has represented a bargaining unit of academic employees as defined in RCW 28B.52.020(2) for many years. The parties have signed a series of successive collective bargaining agreements, the most recent of which is effective July 1, 2019, through June 30, 2022.

Employees in the bargaining unit hold either full-time or part-time positions. Part-time employees are also called associate faculty.[2] Some associate faculty are classified as quarterly faculty. They do not receive an appointment for a particular academic year; instead, they receive a new appointment each quarter. Their compensation for each particular quarter is set forth in a personnel action form (PAF). Prior to issuance, the PAF is reviewed and signed by the department head or another administrator.

The employer uses the concept of a full-time equivalent faculty (FTEF) to measure employee workload.[3] The manner in which quarterly FTEF calculations occur for most faculty is described in Article 7.5 of the 2019–22 contract. Full-time faculty are assigned as close to an annualized 1.0 FTEF as is reasonably possible during the three quarters of the school year. Associate faculty

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[1] The union filed a grievance concerning the same issue underlying the unfair labor practice complaint. Although its position on deferral was requested in the preliminary ruling, the employer did not request the matter be deferred to the parties' grievance and arbitration procedure. *Cf. Shoreline Community College*, Decision 12973-A (CCOL, 2020).

[2] These terms are used interchangeably.

[3] The FTEF number for a given employee is also referred to as the load factor.

are assigned a load factor depending on the number and type of classes they teach. Despite their designation as part-time, associate faculty may be assigned a full-time course load. Courses contribute to an employee's FTEF depending, at least in part, on the number of instructor contact hours. Classes with more contact hours increase the employee's load factor. Courses designated as falling into the category of "lab" or "20-hour" mode add more to a FTEF than other types of classes.[4]

Faculty pay is calculated in a number of different ways depending on status and academic quarter. The contract contains a multistep wage scale for full-time faculty. Generally, associate faculty are paid a percentage of the full-time faculty rate. Pursuant to the collective bargaining agreement for the 2020–21 academic year, associate faculty were paid 64 percent of the full-time faculty rate. That increased to 65 percent for the 2021–22 academic year. Pay for most quarterly associate faculty is determined by multiplying the part-time rate by their FTEF for the quarter. As noted below, however, there is an exception to this general rule.

The Corrections Program

The employer provides adult education to individuals incarcerated at the Monroe Correctional Complex through an agreement with the Washington State Department of Corrections. Classes are taught by faculty employed by the employer at the correctional facility. In light of their unique working arrangements, the collective bargaining agreement contains a separate appendix addressing issues specific to bargaining unit faculty assigned to the corrections program.

The parties made certain changes to the wage rates for corrections employees during negotiations for the 2012–15 contract. Kristyn Whisman was the dean of the corrections program from roughly 2012 to 2017, and she was a participant in bargaining as the interim dean in 2011. Whisman testified concerning the wage rate changes. Whisman explained that the parties agreed to begin calculating the pay for part-time faculty in the corrections program by utilizing lab mode, rather than some other method. This resulted in increasing the FTEF for those employees. The FTEF for

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[4] Hereinafter referred to as the lab mode.

a part-time employee in corrections who was teaching a full load went from around 1.0 to roughly 1.3 per quarter. This change in load factor increased their pay so that it became approximately 80–85 percent of the rate of full-time staff—significantly higher than that for other part-time faculty employed at the main campus. Whisman elaborated that this was done in order to try to make the pay for the part-time corrections staff more equitable as compared to full-time staff. It also helped to compensate the corrections faculty for the fact that they were required to have more student contact hours per day than those working on the main campus.

Whisman testified that the parties also agreed to use the lab mode to calculate pay for full-time corrections faculty during the summer. This addressed a problem where full-time staff in corrections were paid less per hour during the summer than during the other three quarters of the regular academic year. The agreement was memorialized in a note contained at the end of the appendix to the contract dealing with issues specific to the corrections program. It provided that "[c]orrections faculty [would] be paid at the 30-hour (lab) mode for the summer quarter." The reference to the 30-hour mode was a typographical error. The parties intended it to be read as "20-hour (lab) mode."

Although the change in practice regarding pay for part-time corrections staff was not similarly reduced to writing, it was recognized by both the union and employer. Following execution of the parties' 2012–15 contract, the employer utilized the lab mode when calculating the FTEF for part-time corrections employees for every academic quarter, including summer. Successive deans of the corrections program signed off on PAFs for part-time corrections employees each quarter containing the lab mode as part of the FTEF calculation from at least 2013, through summer 2020. Most recently, on March 23, 2020, Associate Dean of Corrections Education Kristen Morgan sent an email to corrections employees describing in detail the manner in which pay for part-time staff was to be calculated for the spring 2020 quarter. The email explicitly noted that the lab mode was included within the FTEF calculation.

Part-Time Faculty Compensation Is Reduced to Correct a Projected Budget Deficit

Also during spring 2020, the employer began developing its corrections program budget for the following fiscal year. Morgan learned during the process that the program was projected to be

roughly $200,000 over budget. The majority of the program's budget involved staff and faculty salaries, so Morgan began reading the 2016–19 collective bargaining agreement in detail to evaluate various options. Morgan noticed the note in Appendix B, which clarified that summer pay for corrections faculty should be calculated using the lab mode. She was relatively new to the institution, not employed by the employer during the negotiations for the 2012–15 contract, and was unaware of the bargaining history behind the practice. Given the other provisions of the contract requiring that part-time faculty be paid at 64 percent of the full-time rate, Morgan reasoned that the contract meant that the lab mode was required for the summer quarter only, and not for any other. She concluded that the previous practice of utilizing the lab mode year-round must have been done in error. By no longer utilizing the lab mode to calculate pay for part-time faculty for the fall, winter, and spring quarters, Morgan determined that the employer would be able to balance the program's budget for the upcoming fiscal year. Morgan then shared this information with various people within the employer's administration.

Then-Executive Director of Human Resources Mushka Rohani similarly testified that she believed the original decision to pay part-time corrections faculty utilizing the lab mode outside of the summer quarter was an error. Rohani speculated that "an administrator copied the summer PAFs into the fall period, and that mistake kept getting carried on." I do not find Morgan or Rohani's explanations credible. Both have limited tenure with the employer and lack personal knowledge of the parties' bargaining history for the 2012–15 contract. Also, neither explained how they reached the conclusion that the long-standing pay practice was the result of an inadvertent error. In contrast, Whisman was personally involved in bargaining the contract that resulted in the new pay structure for certain corrections personnel. She testified in a direct and straight-forward manner that I found credible, and I credit Whisman's testimony concerning the practice's origins.

In addition to the projected budgetary shortfall in the corrections program, in spring 2020 the employer was also forced to evaluate its response to predicted campus-wide budget deficits stemming from the impact of the COVID-19 pandemic. On May 13, 2020, Rohani sent a letter to the union's president, Kay Latimer, demanding to bargain the impact of those deficits.

On the following day, May 14, Rohani sent a separate letter to Latimer demanding to bargain the impacts of the predicted budget deficit in the corrections program. Latimer responded on May 15, agreeing to bargain corrections compensation issues. The parties subsequently requested the assistance of a mediator to help resolve some of the campus-wide issues related to the impact of COVID-19. The first meeting with a mediator was scheduled for June 2, 2020.

On June 1, the employer's Director of Human Resources, Casey King, sent an email to the union outlining the financial problems facing the corrections program. In order to address the budget deficit and pursuant to Morgan's determination, King suggested no longer using the lab mode when calculating FTEF for associate faculty in corrections for fall, winter, and spring quarters. Instead, he proposed those faculty be paid at 64 percent of the full-time salary as described in Appendix A of the 2016–19 contract. Latimer responded, "[The union is] not prepared to bargain Corrections at the first mediation meeting tomorrow. We intend to finish the spring quarter issues and discuss what is next." The employer did not object to the union's suggestion to first bargain issues relating to the projected overall budget deficit and later take up other items. Consistent with the union's suggested process, the parties did not discuss issues related specifically to the corrections program on June 2. They met for additional mediation sessions on July 1 and 2. They did not discuss corrections issues during those meetings either.

The parties had another mediated bargaining session scheduled for July 22, 2020. Rohani requested to cancel the meeting because the union was "unwilling to discuss a reduction in COLA or Non-instructional days until the Legislature [made] a determination on the state budget."

Despite the union's request for bargaining over the matter, during summer 2020 the employer decided to move forward with its planned change to part-time corrections compensation. On Friday, August 14, 2020, at 4:33 p.m., Morgan sent an email to corrections program staff notifying them that the employer would be implementing a change to the manner in which pay for certain employees was calculated. The email explained that in light of the projected budget deficit for the program the employer would no longer use the lab mode for calculating part-time employees' FTEF for the fall, winter, and spring quarters. The result would be a substantial reduction in pay for those staff, but doing so allowed the employer to balance the program's budget for the year.

Latimer was forwarded a copy of the email, but given that it was sent late in the day on a Friday, Latimer did not read it until Monday, August 17. Latimer responded to Morgan's email on August 17, objecting to the change as, among other things, it was not negotiated with the union. Rohani replied the same day noting, "This is a pay correction based on the language in the CBA, we are correcting overpayment to PTF for Fall, Winter and Summer quarters. We sent you notice of the change in May and June but we are not obligated to bargain over it."

Rohani's testimony concerning the intent behind the employer's written communications in May and June mirrors the language used in the August 17 email. Rohani repeatedly testified that the May 2020 demand-to-bargain letter and subsequent email from King were not intended as proposals for negotiation. Rather, they were notice of the employer's intent to change its practice regarding calculating pay for part-time corrections staff. Rohani further testified that the employer was only willing to discuss the effects of its decision to change pay. Rohani did not indicate a willingness to negotiate the decision itself.

The parties continued to exchange emails regarding the employer's decision to change the formula for calculating corrections pay into September 2020. In response to continued objections from the union, Rohani sent the union another email on September 29. The email explained the efforts taken by the employer to notify the union of its intent to effectuate the change. It also noted

> The basis for the administration making this change is to be in compliance with the CBA. The CBA, agreed to by AFT, is the documentation that indicates AFT's agreement to the changes. Enforcing the [contract] is not an unfair labor practice and the administration does not have to bargain its impact. The administration's attempts to discuss the issue with the union was an effort to work collaboratively and provide the faculty with as much notice to the change as possible.

The employer implemented the change to pay for part-time corrections faculty beginning fall quarter 2020. Employees were notified of the specific changes to their pay in their quarterly PAFs they received in September 2020. They were first paid at the reduced rates the following month. The change resulted in a substantial reduction in compensation for affected employees. An employee who would have earned $61,513 during the 2020–21 school year utilizing the lab mode

to calculate FTEF, for example, experienced a wage reduction by more than 25 percent—to $45,110.

ANALYSIS

Applicable Legal Standards

Timeliness

Consistent with the other statutes administered by the Public Employment Relations Commission, the statute covering academic employees of community colleges contains a six-month statute of limitations. RCW 28B.52.065. A cause of action accrues, and the statute of limitations begins to run at the earliest point in time that the complaint concerning the alleged wrong could be filed. *Municipality of Metropolitan Seattle (METRO)*, Decision 1356-A (PECB, 1982) (citing *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616 (1945)). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice" of the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

Duty to Bargain

Chapter 28B.52 RCW requires a community college to bargain with the exclusive bargaining representative of its faculty. The duty to bargain extends to mandatory subjects of bargaining. RCW 28B.52.020(7). The law limits the scope of mandatory subjects to those matters of direct concern to employees. *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197, 200 (1989).

Unilateral Change

Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, *City of Yakima v. International Association of Fire Fighters, Local 469*, 117 Wn.2d 655 (1991). To prove a unilateral change, the complainant must establish 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). The complainant must also prove 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).

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees before making the decision. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). To be timely, the 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. *Id*.

The Commission focuses on the circumstances as a whole to assess whether an opportunity for meaningful bargaining existed. *Id*. 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 was adequately notified of a contemplated change at a time when there was 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. *Lake Washington Technical College*, Decision 4721-A.

Waiver

Generally, for employees not eligible for interest arbitration, once a union requests bargaining over a proposed change the employer is obligated to maintain the status quo until the parties reach either an agreement or impasse. *Skagit County*, Decision 8746-A (PECB, 2006). An employer is not required to bargain prior to implementing a change if a union waives its statutory right to do so. A union may waive its right to bargain by either contract or by inaction. In either case, waiver is an affirmative defense that the employer bears the burden of proving. *City of Yakima*, Decision 11352-A (PECB, 2013).

When given notice of a contemplated change that affects a mandatory subject of bargaining, a union desiring to influence the employer's decision must make a timely request for bargaining or it waives its right to bargain by inaction. *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. *City of Yakima*, Decision 11352-A. The employer must establish 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).

A party may also waive its right to bargain through language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, clear, and unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contract 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).

Application of Standards

The union's complaint is timely. The employer changed a long-established past practice concerning the manner in which pay for certain bargaining unit members was calculated without bargaining to an agreement or impasse. The union did not waive its right to bargain the matter by either contract or inaction. The employer therefore refused to bargain in violation of RCW 28B.52.073(e) by unilaterally changing a mandatory subject of bargaining.

The Complaint Is Timely

The unfair labor practice complaint was filed within the statute of limitations period. The complaint in the instant case was filed on February 17, 2021. Events are timely if they occurred on or after August 17, 2020.

The employer's communications to the union in June and August 2020 concerning its intended change to pay for corrections staff did not start the clock running on the statute of limitations. The six-month period begins to run when a union has "actual or constructive" notice of the complained of action. *Emergency Dispatch Center*, Decision 3255-B. In the context of complaints alleging a unilateral change, the Commission has found that the statute of limitations period does

not begin when the employer merely communicates a desire to make a change. *Whatcom County*, Decision 7643-A (PECB, 2003) (finding that despite the employer's previous communication to the union that it would not bargain changes to a policy manual, "the union was entitled to file a complaint when the employer actually took unilateral action implementing the manual").[5] Instead, it begins when the employer implements the change. *Washington Public Power Supply System*, Decision 6058-A. The employer did not implement the revised pay calculations for part-time corrections faculty until fall quarter 2020. The part-time corrections faculty received PAFs showing their reduced wages in September 2020. The complaint alleges, and the employer admits, that they did not first receive the reduced paychecks until October 10, 2020. Both events occurred within the six-month period. An attempt by the union to file an unfair labor practice complaint alleging a unilateral change prior to the actual implementation of the new pay calculations would have been premature. *State – Office of the Governor*, Decision 10948-A (PSRA, 2011).

Morgan's August 14 email directly to corrections employees similarly does not constitute actual notice of the change in pay for statute of limitations purposes. Not only was it directed to members of the bargaining unit, rather than the union, but it also occurred during the summer quarter before new pay procedures actually took effect. Even if Morgan's email was sufficient notice, it was sent late in the day on a Friday afternoon and Latimer did not read it until Monday, August 17, within the statute of limitations period.

The Employer Changed a Past Practice Concerning a Mandatory Subject of Bargaining

There is no dispute that wages constitute a mandatory subject of bargaining or that the employer changed the wages of bargaining unit employees. Instead, the parties disagree as to whether

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[5] In light of the similarities between the statute of limitations periods contained in statutes administered by the Commission and those in the National Labor Relations Act, the Commission's approach is consistent with National Labor Relations Board precedent. *Howard Electrical and Mechanical, Inc.*, 293 NLRB 472, 475 (1989) ("Notice of an intent to commit an unlawful unilateral implementation, however, does not trigger the [statute of limitations] period with respect to the unlawful act itself."); *Harvard Folding Box Co.*, 273 NLRB 841 (1984); *American Distributing Co.*, 264 NLRB 1413 (1982), *enforced sub nom. American Distributing Co. v. National Labor Relations Board*, 715 F.2d 446 (9th Cir. 1983).

utilizing the lab mode in calculating pay for part-time corrections faculty was an established past practice.

The use of the lab mode to calculate pay for part-time corrections staff constitutes a past practice. A past practice is a course of dealing acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A. To be an established past practice, it must be consistent, known to all parties, and mutually accepted. *Snohomish County*, Decision 8852-A (PECB, 2007). Here, the employer used the lab mode to calculate part-time corrections faculty pay following the execution of the 2012–15 contract until the fall quarter of 2020. This multiyear history, approaching a decade in length, establishes a consistent prior course of conduct.

Use of the lab mode was also mutually accepted. Whisman credibly testified that the parties consciously adopted the practice in order to provide some additional compensation to part-time corrections faculty in light of their unique job duties and work environment. Successive deans of the corrections program acknowledged the use of the lab mode to calculate pay for certain staff when they approved PAFs for part-time employees each quarter. Most recently, in a March 2020 email, Morgan explicitly confirmed it was a component of the calculation for part-time corrections staff. The fact that the practice was not embodied in writing in the contract is not determinative of whether it was mutually accepted. *Kitsap County*, Decision 8292-B (PECB, 2007) ("Generally, the past practices of the parties are properly utilized . . . where the contract is silent as to a material issue."); *City of Wenatchee*, Decision 6517-A. The long-standing use of the lab mode coupled with the employer's repeated reaffirmation of its use are sufficient to render it a past practice. Absent a waiver, the employer had an obligation to provide the union with notice and an opportunity to bargain prior to changing the practice. In the event the union requested bargaining, the employer was required to engage in good faith negotiations until reaching an agreement or impasse.

The Union Did Not Waive Its Right to Bargain the Change

The employer's action was not privileged by either the terms of the collective bargaining agreement or the union's own conduct. The note in the parties' contract stipulating that corrections faculty would be paid at the lab mode during the summer quarter does not constitute a clear and

unmistakable waiver of the union's right to bargain changes to its established use during the other three quarters of the year. On its face, the contractual language does not specify when faculty will not be paid using the lab mode; rather, it identifies one circumstance when they will be.

The bargaining history concerning the provision also does not support finding a contractual waiver. Discussions surrounding the adoption of a contract provide important context and assist in interpretation of its terms. *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990) ("Extrinsic evidence is admissible as to the entire circumstances under which the contract is made, as an aid to ascertaining the parties' intent"). Whisman explained that the union and employer agreed to include the note in the corrections appendix in order to correct for a perceived inequity when full-time faculty were paid less per hour during the summer than when they were performing similar work during the normal academic year. It is thus inapposite to the situation faced by part-time staff. The employer's own conduct of utilizing the lab mode across successive academic years and leadership changes also undermines the argument that the parties intended that part-time corrections faculty would only be paid using the lab mode during the summer. *See Washington State Employment Security Department*, Decision 11962 (PSRA, 2013) (addressing employer conduct inconsistent with a contractual waiver defense); *Berg v. Hudesman*, 115 Wn.2d 657, 668. Neither the contract itself, nor the parties' bargaining history, nor their subsequent conduct supports the employer's position that the cited language was intended to waive the union's right to bargain changes to the method of calculating part-time faculty pay. Instead, the record evidence reveals that the employer seized on the language of the note and reinterpreted the long-standing provision in order to balance a projected budget deficit in the corrections program.

The union also did not waive its right to bargain the change to faculty pay by its own conduct. A union's inaction will be found to constitute a clear and unmistakable waiver of a bargaining right only when its conduct is "such that the only reasonable inference is that it has abandoned its right to negotiate." *Clover Park Technical College*, Decision 8534-A; *see also City of Walla Walla*, Decision 12348-A (PECB, 2015). In May 2020 the employer sent the union a notice demanding to bargain the impacts of the projected budgetary deficit in corrections. The union's president promptly responded, agreeing to bargain. The union's response was sufficient to put the employer

on notice of its desire to negotiate regarding any proposed changes. The response constitutes a timely request for bargaining.

The lack of a specific proposal from the union after it requested bargaining is not sufficient to establish a waiver. On June 1 the employer sent the union what it framed as a proposal to balance the program's budget. Given that the parties were already involved in mediated bargaining regarding campus-wide issues, the union suggested they wait to deal with corrections until after the main campus issues were resolved. The employer did not object to the union's suggestion and, in fact, tacitly accepted the approach. It did not attempt to raise issues specific to the corrections program at any point during the multiple mediated bargaining sessions held prior to August. It also did not raise the issue outside of that process. After the employer notified the union of its intention to change pay for certain corrections staff, the union sent a number of emails objecting, noting that the employer had not complied with its bargaining obligation. Objecting in this manner strengthens the conclusion that the union did not waive its bargaining rights. *City of Dayton*, Decision 2111-A (PECB, 1984). Finally, a knowing and willful waiver on the part of the union was even more implausible given the context of the parties' difficult contemporaneous negotiations regarding other economic issues. Under the circumstances present here, the employer has failed to prove that the only conclusion it could reasonably draw was that the union did not desire to engage in bargaining over the employer's plan to substantially reduce compensation for certain bargaining unit members.

Even if the union could be said to have "slept on its rights," it would be excused from aggressively pursuing the matter given the employer's presentation of the change as a *fait accompli*. After providing notice to a union of a proposed change in a mandatory subject of bargaining, an employer cannot enter bargaining with a predetermined outcome. *King County*, Decision 12451-A (PECB, 2016). The evidence here establishes that the employer did just that. Rohani's communications to the union throughout summer and fall 2020 consistently reflect the employer's belief that its actions to reduce employee pay were permitted by its reinterpretation of the collective bargaining agreement and not subject to bargaining. Rohani's testimony concerning the employer's intention to implement the changes proposed in the June 1 notice from King is

consistent with her subsequent emails to the union. She explained that King's email "was a notice. It was not a proposal. We gave the union notice that we were going to make changes." Although the email itself is framed as a proposal, the manner in which the communication is framed is not determinative. *Lake Washington Technical College*, Decision 4712-A. Rohani explained the employer was willing to discuss the effects of its decision to reduce wages. The decision itself, however, was a mandatory subject of bargaining. The employer was therefore required to negotiate the matter in good faith to either impasse or agreement prior to making any changes. *City of Yakima*, Decision 11352-A. Its presentation of the decision to reduce the wages of part-time corrections faculty in order to save money as a *fait accompli* is inconsistent with its statutory obligations. Any lack of diligence on the union's part in pursuing bargaining over the matter is excused.

CONCLUSION

The employer's long-standing use of the lab mode to calculate pay for part-time corrections faculty constitutes a past practice regarding a mandatory subject of bargaining. Neither the contract nor the union's own conduct waived its right to bargain changes to that practice. The complaint is timely, and the employer violated its bargaining obligation under chapter 28B.52 RCW when it reduced wages for certain bargaining unit employees without bargaining to an agreement or impasse.

FINDINGS OF FACT

1. Edmonds College (employer) is a public employer within the meaning of chapter 28B.52 RCW.

2. The American Federation of Teachers, Local 4254 (union) is an employee organization within the meaning of RCW 28B.52.020(1).

3. The employer operates a community college. Its main campus is located in Lynnwood, Washington. The union has represented a bargaining unit of academic employees as defined in RCW 28B.52.020(2) for many years. The parties have signed a series of

successive collective bargaining agreements, the most recent of which is effective July 1, 2019, through June 30, 2022.

4. Employees in the bargaining unit hold either full-time or part-time positions. Part-time employees are also called associate faculty. Some associate faculty are classified as quarterly faculty. They do not receive an appointment for a particular academic year; instead, they receive a new appointment each quarter. Their compensation for each particular quarter is set forth in a personnel action form (PAF). Prior to issuance, the PAF is reviewed and signed by the department head or another administrator.

5. The employer uses the concept of a full-time equivalent faculty (FTEF) to measure employee workload. Associate faculty are assigned a load factor depending on the number and type of classes they teach. Despite their designation as part-time, associate faculty may be assigned a full-time course load.

6. Courses contribute to an employee's FTEF depending, at least in part, on the number of instructor contact hours. Classes with more contact hours increase the employee's load factor. Courses designated as falling into the category of "lab" or "20-hour" mode add more to a FTEF than other types of classes.

7. The employer provides adult education to individuals incarcerated at the Monroe Correctional Complex through an agreement with the Washington State Department of Corrections. Classes are taught by faculty employed by the employer at the correctional facility. In light of their unique working arrangements, the collective bargaining agreement contains a separate appendix addressing issues specific to bargaining unit faculty assigned to the corrections program.

8. The parties made certain changes to the wage rates for corrections employees during negotiations for the 2012–15 contract. The parties agreed to begin calculating the pay for part-time faculty in the corrections program by utilizing lab mode, rather than some other method. This resulted in increasing the FTEF for those employees. The FTEF for a part-time employee in corrections who was teaching a full load went from around 1.0 to

roughly 1.3 per quarter. This change in load factor increased their pay so that it became approximately 80–85 percent of the rate of full-time staff—significantly higher than that for other part-time faculty employed at the main campus.

9. The parties also agreed to use the lab mode to calculate pay for full-time corrections faculty during the summer. This addressed a problem where full-time staff in corrections were paid less per hour during the summer than during the other three quarters of the regular academic year. The agreement was memorialized in a note contained at the end of the appendix to the contract dealing with issues specific to the corrections program.

10. Although the change in practice regarding pay for part-time corrections staff was not similarly reduced to writing, it was recognized by both the union and employer. Following execution of the parties' 2012–15 contract, the employer utilized the lab mode when calculating the FTEF for part-time corrections employees for every academic quarter, including summer. Successive deans of the corrections program signed off on PAFs for part-time corrections employees each quarter containing the lab mode as part of the FTEF calculation from at least 2013, through summer 2020. Most recently, on March 23, 2020, Associate Dean of Corrections Education Kristen Morgan sent an email to corrections employees describing in detail the manner in which pay for part-time staff was to be calculated for the spring 2020 quarter. The email explicitly noted that the lab mode was included within the FTEF calculation.

11. On May 14, Rohani sent a separate letter to Latimer demanding to bargain the impacts of the predicted budget deficit in the corrections program. Latimer responded on May 15, agreeing to bargain corrections compensation issues.

12. Despite the union's request for bargaining over the matter, during summer 2020 the employer decided to move forward with its planned change to part-time corrections compensation. On Friday, August 14, 2020, at 4:33 p.m., Morgan sent an email to corrections program staff notifying them that the employer would be implementing a change to the manner in which pay for certain employees was calculated. The email explained that in light of the projected budget deficit for the program the employer would

no longer use the lab mode for calculating part-time employees' FTEF for the fall, winter, and spring quarters. The result would be a substantial reduction in pay for those staff, but doing so allowed the employer to balance the program's budget for the year. Latimer was forwarded a copy of the email, but given that it was sent late in the day on a Friday, Latimer did not read it until Monday, August 17. Latimer responded to Morgan's email on August 17, objecting to the change as, among other things, it was not negotiated with the union. Rohani replied the same day noting, "This is a pay correction based on the language in the CBA, we are correcting overpayment to PTF for Fall, Winter and Summer quarters. We sent you notice of the change in May and June but we are not obligated to bargain over it."

13. Rohani repeatedly testified that the May 2020 demand-to-bargain letter and subsequent email from King were not intended as proposals for negotiation. Rather, they were notice of the employer's intent to change its practice regarding calculating pay for part-time corrections staff. Rohani further testified that the employer was only willing to discuss the effects of its decision to change pay. Rohani did not indicate a willingness to negotiate the decision itself.

14. The employer implemented the change to pay for part-time corrections faculty beginning fall quarter 2020. Employees were notified of the specific changes to their pay in their quarterly PAFs they received in September 2020. They were first paid at the reduced rates the following month. The change resulted in a substantial reduction in compensation for affected employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 28B.52 RCW and chapter 391-45 WAC.

2. By its actions described in findings of fact 3–14, the employer refused to bargain in violation of RCW 28B.52.073(e) and derivatively RCW 28B.52.073(a), by unilaterally reducing the pay for part-time corrections employees without bargaining to impasse or agreement.

ORDER

Edmonds College, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Unilaterally reducing the compensation of bargaining unit employees.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 28B.52 RCW:

   a. Make all affected bargaining unit employees whole by payment of back pay and benefits in the amounts they would have earned or received had the employer not reduced their compensation. Back pay shall be computed in conformity with WAC 391-45-410.

   b. Restore the *status quo ante* by reinstating the wages, hours, and working conditions that existed for the employees in the affected bargaining unit prior to the unilateral change in the compensation for certain bargaining unit employees.

   c. Give notice to and, upon request, negotiate in good faith with the American Federation of Teachers, Local 4254 before changing compensation for bargaining unit employees.

   d. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's

premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Read the notice provided by the compliance officer into the record at a regular public meeting of the Board of Trustees of Edmonds College, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

f. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

g. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 7th day of October, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL SNYDER, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

RECORD OF SERVICE

ISSUED ON 10/07/2021

DECISION 13412 - CCOL has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 133333-U-21

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