STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| ARLINGTON NON-REP GROUP,<br>Complainant,<br>vs.<br>ARLINGTON SCHOOL DISTRICT,<br>Respondent. | CASE 137434-U-23<br>DECISION 13995 - PECB<br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

*Mardine Aske*, Representative, for Arlington Non-Rep Group.

*Curtis M. Leonard*, Attorney at Law, Pacifica Law Group, for Arlington School District.

On August 30, 2023, the Arlington Non-Rep Group (NRG or union) filed an unfair labor practice complaint against Arlington School District (employer or district). An Unfair Labor Practice Administrator issued a cause of action statement certifying claims for further processing on October 2, 2023. The employer filed an answer on October 23, 2023. The undersigned Examiner conducted a hearing via videoconference on June 5, 2024, and the parties filed post-hearing briefs on August 30, 2024, to complete the record.

Throughout these proceedings the employer argued that the NRG is not a union or labor organization. Whether the NRG is a labor organization and the exclusive bargaining representative of a group of employes of the district is a threshold issue that must be resolved before considering allegations related to bargaining obligations. The evidence and arguments surrounding the status of the NRG as a labor organization are addressed at the beginning of the decision. The name of this bargaining unit, the non-rep group, is unconventional and may give the initial impression that this is not a labor organization representing a group of employees. However, based on the record and case precedent, I find that the NRG is a labor organization for the purpose of collective bargaining that was voluntarily recognized by the employer.

The issues in this case are described in the cause of action statement as,

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so, derivative interference in violation of RCW 41.56.140(1)], within six months of the date the complaint was filed, by
>
> (a) Skimming and/or contracting out of Executive Assistant to Operations work previously performed by bargaining unit employees, without providing the union an opportunity for bargaining.
> (b) Unilaterally changing BPAC Coordinator hours and days per year, without providing the union an opportunity for bargaining.
> (c) Unilaterally changing the retirement stipend, without providing the union an opportunity for bargaining.

The employer refused to bargain with the NRG by the skimming of Executive Assistant to Operations (EAO) work and by unilaterally changing BPAC (Byrnes Preforming Arts Center) Coordinator work hours. The allegation of unilateral change to the retirement stipend is dismissed.

## BACKGROUND ON STATUS OF LABOR ORGANIZATION

The district is a public employer in the state of Washington. Non-certificated employees of the district are within the jurisdiction of RCW 41.56.

The Arlington Non-Rep Group consists of non-supervisory district employes that are excluded from the certificated teachers bargaining unit and the Public School Employees (PSE)[1] bargaining unit.

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[1] The record repeatedly refers to the "PSC" in error. Where PSC appears it should read PSE, which stands for Public School Employees union.

The first agreement between the "classified supervisors & district office personnel" and the district that was offered into evidence was effective from 1985 to 1988. Article II - "Recognition," stated,

> The Board of Directors recognizes the Exempt Classified Supervisors and Exempt District Office Personnel as a legal bargaining unit in the District with the exception of the Superintendent, Assistant Superintendent and those covered under the Public School Employees Contract.[2]

In the 1989-1990 agreement between the "classified supervisors & district office personnel" and the district, article II - "Recognition," stated, "The Board of Directors recognizes the Exempt Classified Supervisors and District Office Personnel as a legal bargaining unit in the District."

The 1990-1991 and 1992-1993 agreements between "classified exempt employees" and the district contained the same recognition language as the 1989-1990 agreement.

The 1993-1994 agreement between "classified exempt employees" and the district contained slightly different recognition language stating, "The Board of Directors recognizes the Exempt Classified Supervisors and District Office Personnel as a separate bargaining unit in the District."

Bargaining notes and a tentative agreement document were provided for 1994-1995, but these documents did not constitute a complete collective bargaining agreement (CBA) and did not contain recognition language.

The 1996-1997 and 1997-1998 CBAs between "classified exempt employees" and the district contained the same recognition language as the 1993-1994 CBA.

In the 1998-2001 CBA the language and title of the group changed to exclude supervisors. The 1998-2001 CBA between the "Classified Exempt Non-Supervisory Employees" and the district stated in article II, "The Board of Directors recognizes the Classified Exempt Non-Supervisory

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[2] The same recognition language appeared in the 1988-1989 agreement.

Employees as a separate bargaining unit in the District." The CBA refers to the union as "Classified Non-Represented."

In the 2003-2004, 2004-2005, and 2007-2010 CBAs between the "Classified Non-Represented Employees" and the district, article II states, "The Board of Directors recognizes the Classified Non-Represented Employees as a separate bargaining unit in the district."

There were no CBAs signed by both parties that were offered into the record from any year after 2010.

In 2014, the employer created a new job position titled "Administrative Assistant to Executive Director." Later, the working title became "Secretary to the Executive Director of Operations." The position was exempt from the PSE bargaining unit, which made it part of the NRG by default. Katherine Ray,[3] who had previously held a Facilities Secretary 3 position in the PSE unit, was selected for the new position.

In 2015, the employer and PSE developed a letter of agreement (LOA) to govern the transition of some PSE job duties to the recently created "Secretary to the Executive Director of Operations" position in the NRG. The agreement moved two hours of the Facilities Secretary 3 duties to Ray's position. As part of the agreement, these Facilities Secretary 3 duties would return to PSE when Ray vacated the "Secretary to the Executive Director of Operations" position. The NRG was not a party to this agreement. The LOA expired on August 31, 2018.

Eric DeJong became the Executive Director of Human Resources for the district in 2017. DeJong is an agent of the employer. DeJong explained, "I would say in a typical year, we'd meet [with the NRG] maybe three, maybe four times for, you know, half an hour or something like that . . . if we

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[3] Katherine Rynning and Katherine Ray are the same person. In some of the meeting minutes her name is misspelled and is written as Kathryn.

had some issues we wanted to discuss prior to a new contract or, you know, before each person got their contract. . . ."

In July 2019 the NRG met with the district to bargain.

In August 2019 the NRG met with the district again, primarily to negotiate employee compensation. The document that the NRG provided to the employer explained, "Our agreement has not been looked at for over 10 years. We think it is important to be brought up to the same value and respect as the other District Office Employees." The document outlined economic disparities and proposed requests for additional benefits.

On August 30, 2019, the employer provided a response, which contained proposals on economic items that were raised in the NRG's document.

The NRG and employer also met to bargain on September 4, 2019.

On September 26, 2019, the employer provided the NRG with a document titled "District Response Non-Rep Discussions" that contained updated economic proposals.

The following year, the superintendent signed a document on September 17, 2020, which was titled "Arlington School District Non-Represented/Exempt Classified Employees Benefit Provision Schedule Effective September 1, 2020," that stated, "This document replaces any prior agreements or contracts with the non-represented classified employees of the Arlington School District." The document outlined employee compensation and benefits and was signed only by the superintendent. There was no signature line for the NRG.

On April 22, 2022, Payroll Supervisor and NRG representative Mardine Aske sent employees in the NRG an email with a questionnaire about bargaining wants. The document explained, "We didn't sit down with the District last year to 'bargain for' our enon-rep[sic], thanks for COVID chaos. So it's that time again. I would love to hear from you what you want addressed. . . ." The

survey encouraged employees to voice their "wants and concerns" so the NRG could "address them in bargaining."

Aske sent a meeting invite labeled "Non-Rep Meeting with Eric and Brian" to the employer (DeJong and Executive Director of Operations Brian Lewis) and Ray for June 7, 2022. The invitation stated, "We would like to start the bargaining process for this year and bring our proposal."

On August 17, 2022, DeJong provided the NRG with a document titled "District Response Non-Represented Classified Employees." The document contained proposals on wages, professional development, VEBA (voluntary employees' beneficiary association) contributions, and remote work.

On the same day, DeJong sent an email to Aske and Ray explaining the employer's position on the NRG's retirement stipend proposal:

> Attached is our proposal based on our recent conversation and feedback I received from the cabinet team.
>
> We did not put anything in writing about a "10-day project." Since classified employees are hourly, a 10-day contract/stipend that happens on normal work days gets complicated since it would need to be overtime hours in most cases. So, our feeling is that employees can work with their supervisor to agree on overtime hours that may be needed prior to retirement (or resignation for that matter) date. Also, there really isn't a hard and fast date that retirement needs to happen for a classified employee and so if the employee would like to work an additional 10 days, the employee could state the retirement date to be inclusive of those 10 days. We can certainly discuss this further. Thanks--
>
> Eric

On August 23, 2022, DeJong emailed Aske and Ray again. The email, titled "Draft Compensation and Benefits Bulletin," stated, "Take a look at this draft. I included language we discussed except that we will note the salary language for next year on the salary schedule. It is going to the board on Sep. 8. Thanks- - Eric." The attachment described compensation and benefits.

On September 14, 2022, the superintendent signed a final version of the "Compensation & Benefits Bulletin for Non-Represented Staff," effective September 1, 2022. The document described the compensation that employees in the NRG would receive and was signed only by the superintendent. There was no signature line for the NRG.

In the spring of 2023, the district was forced to make serious budget cuts. As DeJong explained, the district was cutting over $5 million for the 2023-2024 school year. When any job position was vacated the district evaluated it to see if it could be reduced or eliminated to reduce expenditures.

On March 24, 2023, the employer posted a vacant job position titled "Executive Assistant to Operations" that would be part of the PSE bargaining unit. According to Ray, this posting described the job position that she was vacating due to her retirement. The position hours were listed as "7.0 hr/day, 5 day/wk, 260 day/yr." The employer points out that this posting described duties that were contained in the PSE Administrative Assistant job description. DeJong explained that this "Executive Assistant to Operations" job position combined duties from Ray's position and from a PSE administrative assistant position that was previously held by Sheila Shoemaker. Facing budget cuts, the employer decided to take the duties previously performed by Ray and Shoemaker and combine them into one PSE unit position. The net result was the elimination of one position at the district office.

On May 23, 2023, the employer posted a vacant job position titled "Byrnes Performing Arts Center Coordinator Exempt/ Non-represented." The position hours were listed as "8.0 hr/day, 5 day/wk, 190 day/yr." The NRG noted that the posting represented a reduction in the number of work days. The incumbent in the position, Vickie Johnson, was working 260 days a year. The employer explained that due to budget cuts it had decided to reduce the days and hours for this position.

On June 8, 2023, Aske sent an email to DeJong and included Lewis, Gina Zeutenhorst, Laura Bailey, Kathleen Kowalczik, and Mary Parker:

> Can we set a meeting to discuss the progress of the Executive Assistant to Operations job posting? We see that the job is still posted as Administrative Assistant in PSE as of today, and is set to close tomorrow June 9th
>
> We would like to continue the discussion and hopefully resolve this issue quickly.
>
> Thank you.

DeJong responded the next day writing, "I will look for a time for us to meet and send out an invite. Thanks-- Eric"

The parties scheduled a meeting for 8:30 a.m. on June 16, 2023. The invitation was titled "Non-rep discussion."

The employer subsequently canceled the meeting. Aske sent the employer an email on behalf of the NRG on that day at 8:34 a.m. writing,

> I was not aware that this meeting today at 8:30am was cancelled. The last communication I saw was Laura asking for another day because of her absence, but no response or communication occurred nor email sent that showed it was cancelled. Getting ready to go into the meeting just now, I noticed it disappeared from my calendar.
>
> Today, interviews are being held for the Administrative Assistant (Executive Assistant to Operations) position that we feel is being skimmed to PSE. I am concerned that this process is moving forward, even though we are trying to bargain in good faith over this (and several other items that we view as skimming with our unit members). As you requested from me, I gave you the response from PERC (in regards to our unit being a recognized bargain [sic] unit by a history of bargaining and the Board of Directors) on Monday. I had hoped this would stop the process from advancing as we try to work on these details.
>
> Please provide us with the next available time to meet. I hope we can resolve this through the bargaining process.

DeJong responded, "We are waiting on more information from our attorney. We are interviewing today but will not be hiring until we hear back. I will set a meeting when I feel we have enough information to have a productive meeting. . . ."

On July 12, 2023, the employer and the NRG met to negotiate compensation. DeJong and Lewis represented the employer. Kowalczik, Aske, and Bailey represented the NRG. The parties took meeting minutes.

The parties discussed the Executive Assistant of Operations position that had recently been vacated by Ray. DeJong explained, "We have talked with the lawyer, and we do not believe you are a union and have the say in negotiating the Kathryn [Ray] position." DeJong further stated, "We don't believe the legality issue of union vs 'group.' We don't believe you are a union. There isn't a disagreement with skimming of that position. We are not treating you like a union. We do not agree. This would put the district in an awkward position."

Aske also asked to "talk about Vickie's 10-day retirement contract that was denied."

DeJong explained, "We do not think that 10-day contract is appropriate and it never should have happened."

Aske responded,

> But it did. You gave it to Julie Davis. It was offered to Margaret but she chose not to do it because she wanted to retire to her grandbaby that was being born. Kathryn was offered, but then restrictions put on it (such as requiring all hours of the contract be done on site which made it uninviting) and so she declined it. Vickie was told no and I don't even think Cheryl now was offered . . . . she doesn't even know it's an option.

DeJong responded:, "It never should have been an option."

Bailey said, "But it IS and should still be there."

Aske said, "And since it is past practice, Vicki being told NO is the issue."

Lewis said, "I took the 10 day idea to HR, and HR said no."

DeJong said, "We had discussion, and Cabinet denied Kathryn's 10 day."

After some discussion about the employer's concerns with additional hours putting employees into overtime status, DeJong said, "We need to bargain with teachers because it's in their contract. We do not need to bargain with you. You are not a union."

Aske responded, "You have fait accompli those positions. Made changes without notice to us, and we find out after the fact and when we can't do anything about it."

DeJong responded, "You are not a union. We do not have to do that."

## ANALYSIS OF STATUS AS LABOR ORGANIZATION

### Applicable Legal Standard(s)

*Voluntary Recognition*

An employer may extend voluntary recognition under chapter 41.56 RCW to representatives of groups of employees for the purposes of collective bargaining. *Toppenish School District*, Decision 10394-B (PECB, 2011). Voluntary recognition is not precluded under chapter 41.56 RCW. RCW 41.56.050 requires submission of a representation matter to the Commission only where there is a dispute regarding representation. If such recognition is extended, the employer is then obligated to bargain with the union. *City of Kennewick*, Decision 482-B (PECB, 1980).

*Labor Organization*

A bargaining representative is "any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers." RCW 41.56.030(2). This agency has previously rejected formal requirements for adoption of formal bylaws or constitutions to qualify as a labor organization. *King County*, Decision 5910-A (PECB, 1997) (citing *Kitsap County*, Decision 2116 (PECB, 1984)). As long as the organization allows employee participation, is established to represent employees, and intends to carry out its representation function, it is a bargaining representative even if it has not created bylaws or collected dues. *Southwest Washington Health District*, Decision 1304 (PECB, 1981).

An organization was found to be qualified where it had held organizational meetings, was working on amending its existing bylaws, had filed the petitions to initiate the representative proceedings, and had engaged legal counsel to represent it in the hearing process. *Kitsap County*, Decision 2116. An organization without any constitution or bylaws was found qualified where it had held meetings, elected officers, and engaged in collective bargaining with the employer. *Edmonds School District*, Decision 3167 (PECB, 1989).

For example, in *Edmonds School District*, Decision 13555 (PECB, 2022), Prof-Tech was voluntarily recognized by the employer and had been representing employees at the district since at least 1975. PERC recognized Prof-Tech as the exclusive bargaining representative of 40 positions or classifications in *Edmonds School District*, Decision 3167. Prof-Tech has been identified as Professional Technical Employees, Professional Technical Group, or Professional Technical Employee Organization in various documents presented in evidence and previous PERC decisions.

Prof-Tech was found to be a labor organization because it conducted membership meetings to elect officers, reviewed proposals in negotiations, discussed bargaining issues, and voted on tentative agreements reached by its representatives with the employer. Additionally, Prof-Tech utilized a grievance procedure contained in a school board policy to assist its members in resolving several employment matters with the employer. Prof-Tech has continued many of these duties and taken additional actions to show that its primary purpose is to represent employees. *Edmonds School District*, Decision 13555.

Application of Standards

*The Employer's Position*

The employer argues that the NRG is not a union. DeJong testified that the employer treats the NRG "like [its] principals group . . . which is also meet and confer." In describing the employer's interactions with the NRG, DeJong explained,

> We would meet with them and talk with them about issues. You know, we would talk about salary, and we did some things with salary surveys occasionally. It was

> a collaborative process, I would say. I mean we tried to -- we tried to be fair. We tried to talk with them. We tried to -- typically, they got the same raises as our PS[E] group. You know, we typically would wait and meet with them until afterwards, just like we did with our principals.

DeJong also explained that the NRG does not participate in many of the union activities that PSE participated in, such as collection of union dues, new employee orientation, or regularly scheduled labor-management meetings. When the employer posts open positions within the non-rep group, the postings include a designation of exempt. The exempt designation on the posting defines the position as exempt from PSE or exempt from the union.

In its brief the employer argues,

> Not one witness at the hearing testified about the composition of the previous group – and if that non-rep group is the same today as in 1985.The District ceased conversations with that group [NRG] in 2007 and those agreements expired. The District did initiate new conversations with the non-rep group in 2019, resulting in the compensation bulletin. No witness could substantiate any details about the voluntary recognition, and all of those agreements predated any involvement of any of the parties at the hearing, and those currently employed in the District. Testimony at the hearing focused on the recent history, with no substantial discussions occurring between 2007-2019, and the District providing increases without any discussions. *See* Exhibit C-2. Voluntary recognition is disputed by the district, and the non-rep group did not show adequate proof that voluntary recognition occurred.

*The NRG's Position*

The NRG argues that the employer voluntarily recognized it as a bargaining entity by engaging in a history of discussions and agreements with it. The NRG points out that the written agreements going back to 1985 are written proof of this voluntary recognition and that the submitted evidence shows over 30 years of negotiations between the district and the NRG, which was previously known as the Exempt Group. The NRG cites the 2004-2005 contract where the employer specifically recognized this group with the words, "The Board of Directors recognizes the Classified Non-Represented Employees as a separate bargaining unit in the District. . . ." The NRG points out that only in the recent past did the employer change the format of the CBA and not offer a signature line on the CBA to the NRG.

In its brief the NRG argues,

> The District cannot choose to just stop negotiating with a voluntarily recognized group. To cease negotiations lawfully, the employer must either reach an agreement with the union, prove that the union has abandoned its role, or the employer must declare an impasse following all legal requirements related to declaring and handling an impasse. The District has not reached an agreement, the union has clearly not abandoned its role, and neither side has declared an impasse. The District must continue bargaining in good faith with the Non-Rep Group.

*Analysis*

The CBAs from 1985 through 2007 demonstrate the employer voluntarily recognized the NRG as an exclusive bargaining representative for non-certificated, non-supervisory employees of the district who are excluded from the PSE bargaining unit.

Although the NRG lacks the formal structure used by the PSE union, the NRG's primary purpose is the representation of employees in employment relations with the employer. The NRG solicits input from the employees in the bargaining unit on what topics to address with the employer. The NRG makes proposals to the employer and advocates on behalf of employees in the bargaining unit.

As the Commission's Executive Director explained in *Edmonds School District*, Decision 13555, "A labor organization is not required 'to collect dues, have a constitution, bylaws, or any particular level of formality.'" *Edmonds School District,* Decision 3167; *see also Southwest Washington Health District,* Decision 1304; *Kitsap County,* Decision 2116; *North Mason School District,* Decision 2428 (PECB, 1986). An "organization qualifies as an exclusive bargaining representative even if it only represents employees in grievances and in informal complaints with the employer." *Id.*; *see also Port of Seattle (IAFF Local 1257),* Decision 1624 (PECB, 1983).

The situation in *Edmonds School District* with the Prof-Tech union seems rather analogous to the NRG. In both cases we have employee-formed organizations that, although not as formally structured as many unions, are clearly organized and acting to represent employees for the purpose of negotiating terms and conditions of employment with the employer.

The NRG meets with the employer to bargain over wages, hours, and working conditions. Although the employer describes these as "meet-and-confer" meetings, it is the whole course of conduct between the parties that matters. The conduct of exchanging proposals until an agreement is reached is an act of bargaining.

While the gap in time between the CBA that expired in 2010 and the resumption of negotiations with the employer in July 2019 seems highly unusual, there is no evidence that the NRG ever disclaimed interest or ceased to represent employees in the NRG. The fact that the employer resumed bargaining with the NRG when it requested to meet in 2019 indicates a continued acknowledgement by the employer that the NRG represented this group of employees.

The fact that the 2020 and 2022 benefits documents did not contain a signature line for the NRG is not typical but is not dispositive of its status as an agreement between the parties. In *Brown v. C. Volante Corp*, 194 F.3d 351 (1999), the court held that missing signatures alone do not mean a CBA is invalid. In that case, the court emphasized that even without a signed agreement, the employer's conduct, including submitting reports and payments, manifested an intent to be bound by the terms of the bargaining agreement. When both sides act on the terms of an agreement, such as working conditions, implementing salaries, and conduct at work, the contract is accepted and agreed upon, even without signatures on the bargaining agreement. Although the NRG did not have the opportunity to sign the 2020 and 2022 benefits documents, the documents contained the terms the NRG expected to see after it completed negotiations with the employer.

I find that the employer has an ongoing obligation to bargain with the NRG concerning the terms and conditions of employment for employees in the NRG bargaining unit. We will now move on to evaluate the refusal to bargain allegations in this case.

ANALYSIS OF REFUSAL TO BARGAIN ALLEGATIONS

Applicable Legal Standard(s)

*Duty to Bargain*

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *Vancouver School District*, Decision 11791-A (PECB, 2013).

A party may violate its duty to bargain in good faith by one per se violation, such as a refusal to meet at reasonable times and places or refusing to make counterproposals. *Snohomish County*, Decision 9834-B (PECB, 2008). A party may also violate its duty to bargain in good faith through a series of questionable acts that, when examined as a whole, demonstrate a lack of good faith bargaining but none of which by itself would be a per se violation. *Id.* When analyzing conduct during negotiations, the Commission examines the totality of the circumstances to determine whether an unfair labor practice has occurred. *Kitsap County*, Decision 11675-A (PECB, 2013) (citing *Shelton School District*, Decision 579-B (EDUC, 1984)).

Whether a particular item is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.* The Supreme Court held in *City of Richland* that "[t]he scope of mandatory bargaining thus is limited to matters of direct concern to employees" and that "[m]anagerial decisions that only remotely

affect 'personnel matters,' and decisions that are predominantly 'managerial prerogatives,' are classified as nonmandatory subjects." *Id.* at 200.

*Skimming*

Skimming involves the transfer of work from bargaining unit employees to non-bargaining unit employees. As a general principal, once work is assigned to a bargaining unit, the work attaches to the unit as a whole. An employer may not assign a bargaining unit's work to employees outside of that bargaining unit or contract out bargaining unit work without first providing the union with notice and an opportunity to bargain. In the event the union demands bargaining, the employer is obligated to bargain to agreement or impasse. *Kitsap Transit*, Decision 9667-A (PECB, 2008) illustrates this concept. The employer had historically provided 'take-home' service from the Port Orchard, Bremerton, and Bainbridge Island ferry docks to passengers' homes or other destinations. Work operating the vehicles that provided the take-home service was performed by represented employees. After a brief hiatus in the Port Orchard ferry service, the Commission found that the employer unlawfully assigned the take-home work to other transit employees not represented by the union without providing notice and an opportunity to bargain.

*Unilateral Change*

The parties' collective bargaining obligation requires that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes to mandatory subjects of bargaining are made in conformity with the statutory collective bargaining obligation or a term of a collective bargaining agreement. *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); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

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 complainant 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)).

Application of Standard(s)

As discussed below, the union has proven that the employer refused to bargain over concerns about the skimming of NRG bargaining unit work previously performed by the EAO position. The union has also proven that the employer unilaterally changed the BPAC Coordinator position work hours without providing the union an opportunity for bargaining.

The union failed to meet its burden of proving that the employer unilaterally changed the retirement stipend.

*Did the Employer Skim Bargaining Unit Work?*

The NRG argues that the employer unlawfully skimmed bargaining unit work by removing the work of the EAO position from the NRG bargaining unit and reassigning it to the PSE bargaining unit. Katherine Ray was the incumbent in the EAO position and retired in the spring of 2023.

The employer argues that Ray's position included duties that previously belonged to the PSE bargaining unit. In 2015 the employer negotiated an LOA with the PSE to temporarily remove the work performed by Ray from the PSE bargaining unit and assign it to the NRG. The LOA was effective through August 31, 2018, and specified,

> The current bargaining unit work of two (2) hours done by the Facilities Secretary 3 will be included with the duties of the exempt Secretary to the Executive Director of Operations as listed in Section 1.4 of the Collective Bargaining Agreement. If the current incumbent, Katherine Rynning [Ray] has her hours increased from the current six (6) hours to eight (8) hours or she vacates the position, the Facilities Secretary 3 duties will return to the Bargaining Unit.
>
> In exchange for agreement by PSE, the District is adding an additional six and one-half (6.5) hours of bargaining unit work at the District Office.

Based on the language in the 2015 LOA, it appears that the EAO position involved work in addition to Facilities Secretary 3 duties. There is no evidence that this LOA was renewed or incorporated into other agreements after its expiration in 2018.

The threshold question is whether the work in question is bargaining unit work. If the bargaining unit work has historically been performed by other employees, then skimming may not be found. In *City of Kalama*, Decision 6773-A, the police chief was not a member of the bargaining unit. The mayor directed the police chief to cover open shifts instead of calling out bargaining unit members. The police chief was hired as a "working chief" and had always covered shifts. The employer therefore did not skim bargaining unit work. As time increases between the performance of unit work by non-unit employees and the alleged unlawful skimming its precedential value diminishes, but the Commission may still find a violation. *See City of Snoqualmie*, Decision 9892-A (PECB, 2009).

Ray had been working in the NRG bargaining unit in the EAO position from 2015 until she retired in the spring of 2023. The amount of time that had passed since the 2015-2018 LOA with the PSE union is significant. In this case, the NRG and the employer never engaged in substantive conversations over removing the work performed by the EAO position and assigning it to a PSE position, because the employer asserted that it did not have an obligation to bargain with the NRG. In a meeting with the NRG on July 12, 2023, DeJong explained, "We have talked with the lawyer, and we do not believe you are a union and have the say in negotiating the Kathryn [Ray] position." DeJong went on to explain, "We don't believe the legality issue of union vs 'group.' We don't believe you are a union. There isn't a disagreement with skimming of that position. We are not treating you like a union. We do not agree." This clearly stated position was a refusal to bargain over allegations of skimming.

Although the employer's expired 2015 LOA with the PSE may provide evidence that some of the work performed by Ray was work that historically belonged in the PSE unit, the LOA does not alleviate the employer of its bargaining obligations with the NRG over removing NRG unit work tasks. There is no evidence that the NRG ever waived its right to bargain over removing bargaining unit work historically performed by the EAO position.

The employer refused to bargain in violation of RCW 41.56.140(4) and (1) by skimming the EAO work previously performed by bargaining unit employee Ray and assigning the work to the PSE bargaining unit, without providing the NRG an opportunity for bargaining. I am ordering the employer to return the EAO work to the NRG bargaining unit.

*Did the Employer Unilaterally Change BPAC Coordinator Position Work Hours?*

The union alleges that the employer unilaterally announced a reduction of 70 workdays for the BPAC Coordinator position when it posted the vacant position on May 23, 2023. The employer does not dispute that it reduced the number of work hours for this position. The employer explained that it was making cuts throughout the organization in response to a significant budget shortfall and that this was one of many positions with reduced hours.

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 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 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. *Id*. (citing *Lake Washington Technical College*, Decision 4721-A (PECB, 1995)).

Work hours are a mandatory subject of bargaining. By announcing the reduction of hours in the BPAC Coordinator job posting without first notifying the NRG, the employer presented this change as a *fait accompli.* The NRG never had the opportunity to bargain over this reduction of hours. The employer refused to bargain in violation of RCW 41.56.140(4) and (1) by unilaterally reducing BPAC Coordinator hours without providing the NRG an opportunity for bargaining.

*Did the Employer Unilaterally Change the Retirement Stipend for NRG employees?*

The NRG argues the employer unilaterally stopped offering NRG employees a 10-day retirement contract, which was a historically granted benefit for employees who retired from their

employment. There is no contract language between the parties addressing these supplemental 10-day retirement contracts. The union argues that offering retiring employees the option of a 10-day retirement contract is past practice. The employer explained that some NRG employees have been offered 10-day retirement contracts to complete special transition projects, but this is evaluated on a case-by-case basis. The employer argues there is no past practice covering all NRG employees.

The past practices of the parties are properly utilized to construe provisions of an agreement that may rationally be considered ambiguous or where the contract is silent as to a material issue. *Kitsap County*, Decision 8402-B (PECB, 2007). 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 (citing *City of Pasco*, Decision 4197-A (PECB, 1994)).

For a "past practice" to exist, two basic elements are required: (1) an existing prior course of conduct; and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances. *See generally Whatcom County*, Decision 7288-A (finding no unilateral change violation where the employer lacked knowledge of a past practice).

In this case, the union failed to establish that a past practice existed between the parties. While the union was able to identify some employees who had retired and worked on an additional 10-day retirement contract (Julie Davis), testimony also showed that there had been NRG employees who had not been offered an additional 10-day retirement contract (Vickie Johnson and Cheryl Power). The dispute around if and when Ray could work an additional 10-day retirement contract was not the first time that the parties disagreed over a retirement contract. On August 17, 2022, a little more than a year before this complaint was filed, DeJong sent an email to Aske and Ray expressing disagreement about offering retirement contracts to NRG employees. This is clear evidence that there was no meeting of the minds between the parties, and the union was on notice of the employer's position.

It does not appear that the parties had a consistent course of conduct or mutual understanding as to how and when additional contracts would be offered to retiring employees and how those hours could be worked. A unilateral change cannot be found with regard to retirement contracts or stipends because there is no clear past practice. The allegation concerning unilateral change of retirement stipends is dismissed.

## CONCLUSION

The employer has an obligation to continue its long-established bargaining relationship with the NRG.

The fact that the employer is now questioning previous district administrators' decisions to recognize the NRG as the exclusive bargaining representative for this group of otherwise excluded job classifications is not a lawful justification for the employer to cease bargaining with the NRG.

The employer is ordered to restore the status quo as it existed prior to the skimming of NRG bargaining unit work and restore BPAC Coordinator work hours. The employer is also ordered to bargain in good faith with the union.

The unilateral change allegation concerning the offering of a retirement stipend is dismissed.

## FINDINGS OF FACT

1. The Arlington School District (employer) is a public employer within the meaning of RCW 41.56.030(13).

2. The Arlington Non-Rep Group (NRG) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The NRG is the exclusive bargaining representative of a bargaining unit consisting of non-supervisory district employes that are excluded from the certificated teachers bargaining unit and the Public School Employees (PSE) bargaining unit.

4. In 2015, the employer and PSE developed a letter of agreement (LOA) to govern the transition of some PSE job duties to the recently created "Secretary to the Executive Director of Operations" position in the NRG. The agreement moved two hours of the Facilities Secretary 3 duties to Katherine Ray's position. As part of the agreement, these Facilities Secretary 3 duties would return to PSE when Ray vacated the "Secretary to the Executive Director of Operations" position. The NRG was not a party to this agreement. The LOA expired on August 31, 2018.

5. Eric DeJong, the Executive Director of Human Resources, is an agent of the employer. On August 17, 2022, DeJong sent an email to Mardine Aske and Katherine Ray explaining the employer's position on the NRG's retirement stipend proposal:

> Attached is our proposal based on our recent conversation and feedback I received from the cabinet team.
>
> We did not put anything in writing about a "10-day project." Since classified employees are hourly, a 10-day contract/stipend that happens on normal work days gets complicated since it would need to be overtime hours in most cases. So, our feeling is that employees can work with their supervisor to agree on overtime hours that may be needed prior to retirement (or resignation for that matter) date. Also, there really isn't a hard and fast date that retirement needs to happen for a classified employee and so if the employee would like to work an additional 10 days, the employee could state the retirement date to be inclusive of those 10 days. We can certainly discuss this further. Thanks—
>
> Eric.

6. On March 24, 2023, the employer posted a vacant job position titled "Executive Assistant to Operations" that would be part of the PSE bargaining unit. DeJong explained that this "Executive Assistant to Operations" job position combined duties from Ray's position and from a PSE administrative assistant position that was previously held by Sheila Shoemaker. Facing budget cuts, the employer decided to take the duties previously performed by Ray and Shoemaker and combine them into one PSE unit position. The net result was the elimination of one position at the district office.

7. The NRG and the employer never engaged in substantive conversations over removing the work performed by the EAO position and assigning it to a PSE position, because the employer asserted that it did not have an obligation to bargain with the NRG.

8. Although the employer's expired 2015 LOA with the PSE may provide evidence that some of the work performed by Ray was work that historically belonged in the PSE unit, the LOA does not alleviate the employer of its bargaining obligations with the NRG over removing NRG unit work tasks. There is no evidence that the NRG ever waived its right to bargain over removing bargaining unit work historically performed by the EAO position.

9. On May 23, 2023, the employer posted a vacant job position titled "Byrnes Performing Arts Center (BPAC) Coordinator Exempt/ Non-represented." The position hours were listed as "8.0 hr/day, 5 day/wk, 190 day/yr." The incumbent in the position, Vickie Johnson, was working 260 days a year.

10. Work hours are a mandatory subject of bargaining. By announcing the reduction of hours in the BPAC Coordinator job posting without first notifying the NRG, the employer presented this change as a *fait accompli.* The NRG never had the opportunity to bargain over this reduction of hours.

11. On June 8, 2023, Aske sent the employer an email on behalf of the NRG at 8:34 a.m. writing,

> Today, interviews are being held for the Administrative Assistant (Executive Assistant to Operations) position that we feel is being skimmed to PSE. I am concerned that this process is moving forward, even though we are trying to bargain in good faith over this (and several other items that we view as skimming with our unit members). As you requested from me, I gave you the response from PERC (in regards to our unit being a recognized bargain [sic] unit by a history of bargaining and the Board of Directors) on Monday. I had hoped this would stop the process from advancing as we try to work on these details.
>
> Please provide us with the next available time to meet. I hope we can resolve this through the bargaining process.

DeJong responded, "We are waiting on more information from our attorney. We are interviewing today but will not be hiring until we hear back. I will set a meeting when I feel we have enough information to have a productive meeting. . . ."

12. On July 12, 2023, the employer and the NRG met to negotiate compensation. DeJong and Lewis represented the employer. Kowalczik, Aske, and Bailey represented the NRG. The parties took meeting minutes.

The parties discussed the Executive Assistant of Operations position that had recently been vacated by Ray. DeJong explained, "We have talked with the lawyer, and we do not believe you are a union and have the say in negotiating the Kathryn [Ray] position." DeJong further stated, "We don't believe the legality issue of union vs 'group.' We don't believe you are a union. There isn't a disagreement with skimming of that position. We are not treating you like a union. We do not agree. This would put the district in an awkward position."

Aske also asked to "talk about Vickie's 10-day retirement contract that was denied."

DeJong explained, "We do not think that 10-day contract is appropriate and it never should have happened."

After some discussion about the employer's concerns with additional hours putting employees into overtime status, DeJong said, "We need to bargain with teachers because it's in their contract. We do not need to bargain with you. You are not a union."

Aske responded, "You have fait accompli those positions. Made changes without notice to us, and we find out after the fact and when we can't do anything about it."

DeJong responded, "You are not a union. We do not have to do that."

13. The union failed to establish that a past practice existed between the parties for offering a 10-day retirement contract.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. As described in findings of fact 6 through 8, removal of EAO position work from the Arlington Non-Rep Group (NRG) bargaining unit is a mandatory subject of bargaining under RCW 41.56.030(4).

3. As described in findings of fact 9 and 10, work hours for the Byrnes Performing Arts Center (BPAC) Coordinator is a mandatory subject of bargaining under RCW 41.56.030(4).

4. By not bargaining in good faith and unilaterally reassigning bargaining unit work to employees outside of the bargaining unit, as described in findings of fact 6, 7, 8, 11, and 12, the employer breached its good faith bargaining obligation to the NRG in violation of RCW 41.56.140(4), and derivatively, RCW 41.56.140(1).

5. By not bargaining in good faith and unilaterally changing a mandatory subject of bargaining as described in findings of fact 9 and 10, the employer breached its good faith bargaining obligation to the NRG in violation of RCW 41.56.140(4), and derivatively, RCW 41.56.140(1).

6. By the actions described in findings of fact 5, 12, and 13, the NRG failed to prove that the employer unilaterally changed retirement stipends in violation of RCW 41.56.140(4), and derivatively, RCW 41.56.140(1).

## ORDER

Arlington School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Refusing to bargain with the Arlington Non-Rep Group (NRG).

b. Unilaterally changing the wages, hours, or working conditions of employees in the NRG without providing the union an opportunity to bargain the decision or effects.

c. 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 41.56 RCW:

a. Upon request, negotiate in good faith with the NRG and its designated representatives.

b. Restore the *status quo ante* by returning the work which was done by the Executive Assistant to Operations (EAO) position to the NRG bargaining unit.

c. Give notice to and, upon request, negotiate in good faith with the NRG, before transferring bargaining unit work to job positions that are outside the bargaining unit.

d. Give notice to and, upon request, negotiate in good faith with the NRG before changing a bargaining unit position's work hours or removing work from the bargaining unit.

e. Restore the *status quo ante* by reinstating the wages and hours that existed for the BPAC Coordinator position prior to the unilateral change found unlawful in this order.

f. Contact the 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.

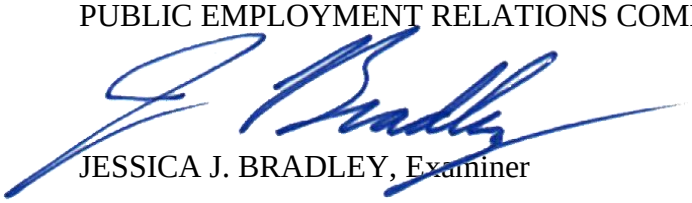
g. Read the notice provided by the compliance officer into the record at a regular public meeting of the Arlington School District's Board of Directors, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

h. 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.

i. 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 26th day of November, 2024.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, 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.