Everett Community College, Decision 11135-B (CCOL, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMERICAN FEDERATION OF TEACHERS WASHINGTON, Complainant,	CASE 23327-U-10-5942
vs.	DECISION 11135-B - CCOL
EVERETT COMMUNITY COLLEGE (COMMUNITY COLLEGE DISTRICT 5), Respondent.	DECISION OF COMMISSION

The Rosen Law Firm, by *Jon Howard Rosen*, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Scott Majors*, Assistant Attorney General, for the employer.

The American Federation of Teachers Washington (union) filed a complaint charging employer discrimination and employer refusal to bargain against the Everett Community College (employer). The case was assigned to Examiner Karyl Elinski who conducted a hearing. She found that the employer did not terminate certain employees in reprisal for union activities and did not unilaterally change the wages, hours and working conditions of full-time tenured counselors. However, she did find that the employer skimmed bargaining unit work previously performed by full-time tenured counselors and full-time temporary counselors, without providing an opportunity for bargaining. It is that decision that the employer now appeals.

On appeal, Washington courts look for substantial evidence to support our findings. *Brinnon School District*, Decision 7210-A and 7211-A (PECB, 2001), *citing World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991), cert. denied, 118 L. Ed. 2d 391 (1992). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College,* Decision 7441-A (CCOL,

2002); *Brinnon School District*, Decision 7210-A and 7211-A, *citing World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382, cert. denied, 118 L. Ed. 2d 391.

We similarly review an examiner's findings of fact, to determine whether they are supported by substantial evidence and, if so, whether the findings in turn support the examiner's conclusions of law. *Brinnon School District*, Decision 7210-A and 7211-A, *citing Curtis v. Security Bank*, 69 Wn. App. 12 (1993). The Commission attaches considerable weight to the factual findings and inferences made by our examiners, and this deference, while not slavishly observed on every appeal, is even more appropriate in fact oriented appeals. *Brinnon School District*, Decision 7210-A and 7211-A. Additionally, the examiner generally is best situated to make credibility determinations because he or she had the opportunity to observe the demeanor of the witnesses. *Seattle School District*, Decision 9628-A (PECB, 2008). Most appeals to the Commission present mixed questions of law and fact. The Commission reviews an examiner's interpretation of the law de novo. *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504 (1992); *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

The appealing party who assigns error to the examiner's findings of fact has the burden of showing a challenged finding is in error and not supported by substantial evidence; otherwise findings are presumed correct. *Brinnon School District*, Decision 7210-A and 7211-A, *citing Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990) (citations omitted). It is not enough for an appealing party to merely disagree with an examiner's findings of fact as contrary to a version of events proffered by the appealing party. *Clark County*, Decision 9127-A (PECB, 2007). Rather, the party pursuing an appeal must demonstrate how the examiner's findings are not supported by substantial evidence through the evidence presented at hearing. *Clark County*, Decision 9127-A. As long as an examiner applies the correct legal standard to facts supported by substantial evidence, that decision should be upheld.

Here, the employer makes several arguments, none of which we find persuasive. To address those arguments we incorporate the Examiner's applicable legal standards, analysis and conclusions as we see no reason to restate them. We agree with the Examiner that from all the evidence presented the work performed by the tenured, probationary, and temporary counselors

was bargaining unit work. We also agree that when the employer assigned the same work to educational planners outside of the bargaining unit, without bargaining, it committed a skimming violation.

We have reviewed the entire record and fully considered the arguments of the parties. The Examiner correctly stated the legal standards. Thus, we find that substantial evidence supports the Examiner's challenged findings of fact, and the findings of fact support the challenged conclusion of law. We affirm the Examiner's decision. We find that the employer did skim bargaining unit work without first providing the opportunity for bargaining.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order of Examiner Karyl Elinski are AFFIRMED and ADOPTED as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 21st day of September, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

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