STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC,	)	
Complainant,	)	CASE 17153-U-03-4441
vs.	)	DECISION 8746-A - PECB
SKAGIT COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Schwerin Campbell Barnard, by *Robert H. Lavitt*, Attorney at Law, for the union.

Halvorson & Saunders, by *Larry E. Halvorson*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by Skagit County (employer), seeking to overturn a decision issued by Examiner Karyl Elinski.[1] The Inlandboatmen's Union of the Pacific (union) opposes the appeal. For the reasons set forth below, we conducted a de novo review of the record and conclude the employer committed unfair labor practices by failing to bargain a schedule change, and by unilaterally contracting out bargaining unit work. We enter Findings of Fact, Conclusions of Law, and an Order.

PROCEDURAL BACKGROUND

The employer operates a ferry carrying passengers and vehicles between Anacortes, Washington, and Guemes Island. Since at least 1976, the union has represented the employees who work on that

[1] *Skagit County*, Decision 8746 (PECB, 2004).

ferry.[2] The parties' January 1, 2000 through December 31, 2002 agreement governed the relevant events in this proceeding.

Rule 14 of the parties' contract provided for the sailing schedule published monthly by the employer. Although not specifically stated, Rule 14 also effectively dictated the number of hours in the employees' daily shifts:

- On Mondays through Thursdays, full-time employees worked a single 12.5-hour shift, including lunch and breaks.[3] When extra runs were operated, those full-time employees performed the work and were paid overtime in accordance with Rule 15 of the collective bargaining agreement.
- When full-time employees could not work scheduled shifts, they were filled by as-needed employees.[4] The as-needed employees selected Monday through Thursday shifts two different ways: (1) they selected shifts not taken by a full-time employee when the employer posted the monthly work schedule, and (2) they were called from a rotating list when full-time employees could not work shifts for which they had been scheduled.

The ferry operation is regulated by the United States Coast Guard (Coast Guard), and the parties' collective bargaining agreement also provided that the ferry would be manned according to the

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[2] *See Skagit County*, Decision 6348 (PECB, 1998) n. 3.

[3] The contract also provided for shifts to include one-half hour of paid time before and after the actual run times.

[4] Although the parties' contract envisioned "regular part-time" employees that would work regular shifts, no employees fit that category before November 1, 2002. The part-time employees who did work were referred to by the parties as "as needed" employees, and they were allowed to reject shifts they were unwilling or unable to work.

inspection certificate issued by the Coast Guard. Prior to 2002, the Coast Guard had a regulation that prohibited maritime employees like those working for the employer from working more than 12 hours in a 24-hour period, but it had permitted this employer to exclude lunch and break times so as to compute the actual work time during the 12.5-hour scheduled shifts as just under 12 hours.

In February 2002, the Coast Guard conducted an endurance study to determine if the ferry crew was overly fatigued by the 12.5-hour shifts.[5] In a telephone conversation on September 12, 2004, the Coast Guard notified the employer it would strictly enforce its regulation beginning November 1, 2002, and would no longer permit employee work shifts to exceed 12 hours. The Coast Guard memorialized that conversation in a letter issued on September 24, 2002.

On September 25, 2002, the employer informed the union of the Coast Guard decision, and scheduled bargaining sessions with the union concerning the employee work shifts. The parties met three times during October 2002. At the first of those meetings, the union rejected an employer proposal for two-shifts covering 13 hours, and countered with a proposal for employees to work two shifts covering 16 hours. At the second of those meetings, the employer rejected the union's proposal to increase the overall work time, and the union rejected a proposal for two shifts covering 13 hours while overlapping for one-half hour. Between the second and third meeting, the employer posted an overall sailing schedule for November 2002 with shifts matching its latest proposal, most of the as-needed employees declined the 3.5-hour shifts offered by the employer, and the employer advertised for new employees to fill

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[5] In 2001, some of the full-time employees began to complain that they were excessively fatigued. The employer, in conjunction with the union, brought these concerns to the Coast Guard in December 2001.

what the employer considered to be regular part-time shifts. At the parties' third meeting, on October 31, 2002, the union offered to accept the employer's earlier proposal with two conditions,[6] but the employer rejected that proposal. The employer went ahead with hiring additional part-time employees, but required training prevented them from working on the ferry immediately. The employer then had the full-time employees work up to 12-hour shifts, and it contracted for a vessel named *Paraclete* to cover the final few runs of those days.[7]

The union filed the unfair labor practice complaint in this case on January 29, 2003, alleging the employer unilaterally implemented the 10-hour and 3.5-hour shifts and illegally contracted out bargaining unit work. The union also alleged the employer discriminated against bargaining unit employees in reprisal for union activities, by preferring new employees over the previous incumbents in scheduling the 3.5-hour shifts. The Examiner held a hearing on October 15 and 16, 2003.

ISSUES

1. Should the Examiner have disclosed a previous interaction with the employer, or recused herself?

2. Were the parties at a lawful impasse when the employer implemented the new shift schedule?

3. Did the employer unlawfully contract out bargaining unit work?

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[6] One of the proposed conditions was that the employer agree to submit the dispute to interest arbitration.

[7] The *Paraclete* could carry passengers, but lacked the vehicle-carrying capacity of the employer's vessel.

4. Did the employer discriminate against a bargaining unit employee who exercised her statutory rights?

ISSUE 1 - SHOULD THE EXAMINER HAVE DISCLOSED OR RECUSED?

The employer asserts that the Examiner should have disqualified herself, because she had represented another union in an unfair labor practice case against the employer. That occurred while she was in private practice, before becoming a member of the Commission staff. We find the employer did not sustain its burden to warrant the Examiner's disqualification, but we review the evidence de novo in this case to avoid any question as to appearance of fairness.

The principles relating to disqualification are the same for courts and administrative agencies. *Hill v. Department of Labor & Industries*, 90 Wn.2d 276 (1978). Both the state Administrative Procedure Act, at RCW 34.05.425(3),[8] and Canon 3(D)(1)(a) of the Code of Judicial Conduct (CJC),[9] require disqualification if: the presiding officer or judge *is biased* against a party, *or their impartiality may reasonably be questioned*. *State v. Madry*, 8 Wn. App. 61 (1972)(emphasis added).

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[8] RCW 34.05.425(3) reads: "Any individual serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified."

[9] CJC 3(D)(1) states, in part:

> Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Disqualification is required when a presiding officer or judge has represented a party in the case being adjudicated,[10] but no such facts are presented here. The Examiner represented a different union when she was in private practice, and the case she processed had nothing to do with the Guemes Island ferry or its operation.[11]

Disqualification is not required merely because a presiding officer or judge previously worked as a lawyer for or against a party in an *unrelated* case. *Mustafoski v. State*, 867 P.2d 824 (Alaska Ct. App. 1994) (cited in *State v. Dominquez*, 81 Wn. App. 325) (emphasis added); CJC 3(d)(1). A party claiming bias or prejudice must support the claim; prejudice is not presumed. *State v. Dominguez*, 81 Wn. App. 325 (1996). Evidence of actual or potential bias is also required before the appearance of fairness doctrine will be applied. *State v. Post*, 118 Wn.2d 596 (1992). In this case, the employer does not point to the Examiner's conduct of the hearing or any rulings she made at the hearing. The issue was raised for the first time in this appeal and, other than disagreeing with the Examiner's decision on the merits, the employer claims no evidence of actual or potential bias by the Examiner. We are satisfied the employer would (or could) not have met its burden under RCW 34.05.425(3), even if the Examiner had disclosed her previous interactions with the employer in the unrelated case.

The mission of this Commission under RCW 41.58.005 includes providing "impartial" resolution of labor-management disputes, and we encourage our staff members to disclose potential conflicts as early as possible in case processing, in order to avoid any

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[10] *See* CJC Canon 3(d)(1)(a).

[11] The Commission takes administrative notice of *Skagit County*, Decision 7554 (PECB, 2001), and its docket records concerning that case.

question as to their impartiality. In this instance, and based only on the narrow fact that the lack of disclosure about the previous interaction may have prevented the employer from having a meaningful opportunity to voice any concern, we have chosen to avoid even an appearance of a conflict of interest by reviewing this record *de novo*. Instead of applying a "substantial evidence" analysis to findings of fact appealed to the Commission, we apply the "preponderance of the evidence" standard applied by examiners.[12]

ISSUE 2 - WERE THE PARTIES AT A LAWFUL IMPASSE ON THE SHIFTS?

The employer asserts that it was free to take action when it posted a new shift schedule in October 2002 and implemented changes on November 1, 2002, because the parties were at impasse in their negotiations. The union claims the new shift schedule was an unlawful unilateral change. We find a lawful impasse did not exist, so the employer committed an unfair labor practice.

Scope of Bargaining

In every case where a unilateral change is alleged, the first step for an examiner or this Commission is to determine whether the duty to bargain existed as to that change. The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires employers to bargain collectively with unions representing their employees. *Peninsula School District v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407 (1996). The scope of bargaining under Chapter 41.56 RCW encompasses "grievance procedures and . . . personnel matters, including wages, hours and working conditions." RCW 41.56.030(4). Both Commission and judicial precedents identify three broad categories of subjects of bargaining. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958)(cited in *Pasco Police*

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[12] *See City of Bellingham*, Decision 7322-B (PECB, 2002).

Association v. City of Pasco, 132 Wn.2d 450 (1997); *Federal Way School District*, Decision 232-A (EDUC, 1977)).

- Mandatory subjects, including the "wages, hours and working conditions" of bargaining unit employees, are matters over which employers and unions must bargain in good faith. It is an unfair labor practice for either of them to fail or refuse to bargain to a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).

- Permissive subjects are management and union prerogatives, along with procedures for bargaining mandatory subjects, over which the parties may negotiate, but are not obliged to do so. As to permissive subjects, each party is free to bargain or not to bargain, and to agree or not to agree. *City of Pasco*, 132 Wn.2d at 460.

- Illegal subjects are matters that parties may not agree upon, because of statutory or constitutional prohibitions. Neither party has an obligation to bargain such matters. *City of Seattle*, Decision 4687-B (PECB, 1997), *aff'd* 93 Wn. App. 235 (1998), *review denied* 137 Wn.2d 1035 (1999).

In deciding whether an issue is mandatory or permissive, two principal considerations must be taken into acount: (1) the extent to which the action impacts upon the wages, hours and working conditions of employees, and (2) the extent to which the action is deemed to be an essential management or union prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989)(*City of Richland*). The Supreme Court held in *Richland* that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are

classified as non-mandatory subjects." *City of Richland*, 113 Wn.2d 197. The "scope" of bargaining is therefore a question of law and fact for the Commission to determine on a case by case basis. *City of Richland*, 113 Wn.2d 197; WAC 391-45-550.

Level of Service Was a Permissive Subject

This case presents two competing theories regarding the work shifts: The employer urges this Commission to recognize its entrepreneurial right to set the level of service it offers. The union puts its focus on the employee work hours, and explained its proposal for longer work shifts as necessary to make the jobs economically feasible for the as-needed employees. We conclude the employer was not obligated to bargain an increase of the level of service in order to accommodate employee interests.

The National Labor Relations Act (NLRA) and collective bargaining laws in various states are generally interpreted to accept the type and level of service to be offered by an employer as management prerogatives and, as such, permissive subjects of bargaining. *See, e.g., Federal Way School District*, Decision 232-A. This Commission recognizes that public employers have the right to "entrepreneurial" control over such matters. *Federal Way School District; Snohomish County Fire District 1*, Decision 6008-A (1998). In *City of Richland*, the Supreme Court of the State of Washington held that the number of people to be employed on fire department shifts went to a core management right (determining the level of service to be provided), and was a permissive subject of bargaining. 113 Wn.2d at 205-206. Here, there is no question that the employer has the right to determine (perhaps after consultation with Skagit County citizens in general and Guemes Island residents in particular) the level of ferry service to be provided. The Skagit County Commission can set the overall sailing schedule without bargaining under Chapter 41.56 RCW.

Even if there were room for debate about whether the overall sailing schedule is a mandatory subject of bargaining, the parties' collective bargaining agreement specifically acknowledges that the level of service is a management prerogative. Rule 14.05 of the contract reads in part:

> For the purpose of monthly shift scheduling, the published sailing schedule will be used to prepare the monthly shift schedule. This is to include one-half (½) hour prior to the first scheduled run and one-half (½) past the last scheduled run for the purpose of preparing and securing the vessel for service.

The employer has posted a sailing schedule for Mondays through Thursdays as 6:00 a.m. to 6:30 p.m. Applying the standards set forth in the parties' contract, we find the union clearly and unmistakably waived any right to bargain shifts longer than the 12.5 hours per day envisioned by the overall sailing schedule.[13]

Employee Work Shifts Are a Mandatory Subject

The employer would have us interpret management prerogatives expansively, so as to encompass the scheduling of employees to fit the level of service decided upon by the employer. The union cites long-standing National Labor Relations Board (NLRB) and Commission precedents holding that work shifts are a mandatory subject of bargaining. We agree with the union on this issue.

Shift schedules directly affect the "hours" of work listed as a mandatory subject of bargaining in RCW 41.56.030(4). As with broad interpretation of the statutory term "wages" to include alternate

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[13] This is not to say that the a union could not *propose* a longer sailing schedule in negotiations for a future collective bargaining agreement. The waiver would expire with the contract, and analysis would shift back to the statutory framework under the *City of Richland* case.

forms of compensations such as insurance benefits and payment for holidays and vacations, the term "hours" in RCW 41.56.030(4) is broadly interpreted to encompass time off for vacations and holidays in addition to setting the days and times when employees are to work. As was noted in *City of Auburn*, Decision 901 (PECB, 1980), if limitations on management flexibility were the criteria for determining whether union proposals on work hours were a mandatory subject of bargaining, most proposals, as such, would be subject to challenge, and RCW 41.56.030(4) would be rendered meaningless. Thus, the shifts worked by employees are generally accepted as a mandatory subject of bargaining, and an employer that desires to change employee work shifts is obligated to bargain that change with the union representing its employees.

Where a subject could be mandatory or permissive under the general "personnel matters" and "working conditions" terms in RCW 41.56.030(4), this Commission examines the record presented to determine the dominant characteristic. As to the more specific "wages" and "hours" components in that definition, an employer would need to make a compelling case that the dispute concerns a management prerogative. No such showing has been made concerning the shift schedule at issue in this case.

The duty to bargain effects provides an alternate basis for analysis in this case. The effects of a decision on the wages, hours and working conditions of bargaining unit employees will be a mandatory subject of bargaining, even if the decision itself is not a permissive subject of bargaining. *City of Richland*, Decision 2846-A (PECB, 1986). Before November 2002, the employer staffed the ferry with a single 12.5-hour shift on Mondays through Thursdays. When obligated by a Coast Guard change of the interpretation or application of the Coast Guard rule, this employer did not exercise its management right to reduce the ferry schedule

(level of service) by the amount needed to accommodate the Coast Guard rule with a single shift of employees. Through the sailing schedule it posted for November 2002 (together with Rule 14.05 of the parties' collective bargaining agreement, as described above), this employer obligated itself to staff the ferry from 6:00 a.m. until 6:30 p.m. (a total of 12.5 hours per day), on Mondays through Thursdays. The scheduling of employees to fit the overall sailing schedule was an effect, rather than an integral part, of the employer's decision. Just as the Supreme Court held that the number of employees assigned to each piece of fire equipment on any given shift was a mandatory subject of bargaining, even though it left the ultimate decision concerning what level of service to the municipality,[14] we find the arrangement of employee work hours to fit the ferry schedule was a bargainable effect of the management decision to retain the same sailing schedule. The employer was obligated to bargain with the union about those work shifts.

Waiver by contract is claimed by the employer concerning the work shifts, but the union disputes that claim. We agree with the union on this issue. This Commission has consistently evaluated waiver by contract claims under a "clear and unmistakable" standard,[15] so that the contract language being relied upon must be specific, or it must be shown that parties fully discussed the matter and that the party alleged to have waived its rights consciously yielded its interest in the matter.[16] Our precedents are consistent with interpretation and application of the NLRA. *See Allison Corporation*, 330 NLRB 1363, 1365 (2000). The contract provisions cited by the employer do not meet that standard:

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[14] *City of Richland*, 113 Wn.2d 197, 207.

[15] *Whatcom County*, Decision 7244-B (PECB, 2004).

[16] *Lakewood School District*, Decision 755-A (PECB, 1980).

- Rule 1.02(3) only defines an "as-needed" employee as a part-time employee "who works an irregular schedule of hours of less than fifty percent (50%) of full-time and is generally called upon to fill in shifts that cannot be covered by regular full-time or part-time employees." That falls short of waiving the union's right to bargain the shifts actually worked by as-needed employees.

- Rule 14.05 only acknowledges, as discussed above, the right of the employer to establish the overall sailing schedule on a monthly basis. It does not limit or waive the union's bargaining rights on the employee work shifts.

- Rule 23.01 preserves management rights, but broadly worded management rights clauses are not sufficient to constitute a waiver of a union's right to bargain mandatory subjects. *City of Sumner*, Decision 1839-A (PECB, 1984).[17]

We find no explicit waiver of the union's right to bargain the lengths of shifts to be worked by bargaining unit employees. Neither party presented any evidence demonstrating a waiver by means of discussions that occurred when the contract in effect during 2002 was negotiated in 2001. Accepting that the employer had to schedule two shifts if it wanted to continue the same level of service it operated before November 2002, there is no basis to

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[17] In this case, the management rights clause includes a vague "right to unilaterally modify any employment condition not covered by the terms of [the] agreement without bargaining either the decision to do so, or its impact on the bargaining unit" and "ability to determine the specific programs and services offered" by the employer. It also gives the employer the general right to determine the nature and qualification of the work to hire, promote, lay off and retain employees, to discipline, suspend, demote and discharge employees for just cause, and to modify rules and regulations for the operation of the department and conduct of its employees and performance standards.

rule that either tighter enforcement of the Coast Guard rule or a change to two shifts per day was even contemplated when the contract was negotiated. There is thus no basis to rule that the union waived its right to bargain over the length of employee work shifts.

Employer Could Not Reasonably Believe a Lawful Impasse Existed

The employer defends that the parties bargained to an impasse. The union contends no impasse existed. We rule in favor of the union.

An employer violates RCW 41.56.140(4) and (1) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligations.[18] As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or impasse concerning any mandatory subjects of bargaining.

The "impasse" concept grows out of the premise that the duty to bargain does not impose a duty to agree upon the parties. There are times when a party may lawfully conclude that further collective bargaining negotiations will not produce an agreement. If the party declaring the impasse has bargained in good faith, and if its conclusion about the status of negotiations is justified by

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[18] The Commission generally finds any "refusal to bargain" violation under RCW 41.56.140(4) inherently interferes with the rights of bargaining unit employees, and so routinely finds a "derivative" interference violation under RCW 41.56.140(1) whenever a "refusal to bargain" violation is found. *See Washington State Patrol*, Decision 4757-A (PECB, 1995).

objectively established facts, then that party's duty to bargain is satisfied. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1998). Even then, a lawful impasse only creates a temporary hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982). Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404.

The impasse doctrine is not, however, a device to allow any party to continue to act unilaterally or ignore the collective bargaining process in determining the conditions of employment. *McClatchy Newspapers*, 321 NLRB 1386 (1996). There is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situation. *Dallas General Drivers, Warehousemen and Helpers, Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). Even when an impasse is "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process" under *Charles D. Bonanno Linen Service v. NLRB*, the duty to bargain remains part of the overall environment. The existence or non-existence of a lawful impasse is thus a legal determination to be made by the Commission, not a matter controlled by the statements made by parties in the heat of negotiations. When called upon to make such determinations, we are often (similar to the NLRB) hampered by the "inherently vague and fluid . . . standard" applicable to the concept of "impasse". *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 352 (1958).

Several factors guide us in deciding whether a party has properly declared impasse, including:

1. The bargaining history;

2. The parties' good faith in the negotiations;

3. The length of the negotiations;

4. The importance of the issue(s) on which the parties disagree; and

5. The contemporaneous understanding of the parties as to the state of the negotiations.

See Taft Broadcasting Co., 163 NLRB 475, 478 (1967), *enforced sub nom. American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). While the factors outlined in *Taft* are by no means exclusive, they provide a useful basic framework for guidance in determining our ultimate conclusion.

The concept of "impasse" is even more critical in the public sector, because public employees are generally denied the right to strike. RCW 41.56.120; *South Kitsap School District*, Decision 1541 (PECB, 1983). Because public employees are left no recourse other than the filing of an unfair labor practice complaint, this Commission closely scrutinizes any declaration of impasse. Applying the five *Taft Broadcasting* factors to the record in the particular case, we will find an impasse exists (so that unilateral changes based on that impasse are lawful) only if there was no realistic possibility that continued negotiations would have been fruitful for the parties. *Mason County*, Decision 3706-A (PECB, 1991). *See also American Fed'n of Television & Radio Artists v. NLRB,* 395 F.2d 622, 628 (D.C. Cir. 1968).

Our review of this record clearly demonstrates that the parties were not at a valid impasse with regard to the length of the short shifts offered by the employer for Mondays through Thursdays.

As to the bargaining history, the parties already had a collective bargaining agreement in effect, and were only back at the bargaining table because the employer wanted to continue the same level of service after the Coast Guard tightened enforcement of its 12-hour rule.

- The employer was delinquent in commencing the negotiations, because it did not act promptly after receiving telephonic notice from the Coast Guard on September 12, 2002. By waiting until it received the confirming letter from the Coast Guard on September 25,[19] the employer wasted more than 25 percent of the time that elapsed between the telephonic notice and the November 1 effective date of strict enforcement of the Coast Guard regulation.
- The "reopener" context inherently limited the options available to both parties, because other contractual provisions and benefits were not open to be renegotiated or balanced to offset a changed work schedule.

As to the good faith of the parties, RCW 41.56.030(4) requires employers and unions to meet and confer in good faith with respect to all wages, hours, and other terms and conditions of employment. *City of Snohomish*, Decision 1661-A (PECB, 1984). While the good faith obligation does not compel either party to agree to the proposals made by the other, or even to make concessions, it does require parties to communicate the reasons why they do not agree

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[19] Exhibit 4 in this record is the September 24 letter from Lt. Commander T.C. Miller, United States Coast Guard, to Chal Martin.

with the other party's proposals. The proper test for determining subjective good faith is not whether, based on hindsight, an impasse was reached as a matter of fact. Instead, we examine whether the party declaring impasse had reasonable cause to believe, and did in fact believe that an impasse had been reached. *City of Fircrest*, Decision 5669-A (PECB, 1997) *quoting Cheney Lumber Co. v NLRB*, 319 F.2d 375 (9th Cir. 1963). A party cannot take advantage of its own misconduct in negotiations when declaring impasse. *Federal Way School District*, Decision 232-A. Where the totality of its conduct reflects a rejection of the collective bargaining process, the party will not have acted in good faith. *City of Snohomish*, Decision 1661-A. In this case, the record demonstrates no better than a mix of reasoned responses, false starts, and breakdowns attributable to both parties:

- A healthy exchange followed the employer's proposal to have full-time employees work 10-hour shifts, and to have as-needed employees work the remaining 3 hours. The union rejected that proposal at the first meeting, citing that: (1) the 3-hour shifts were not financially feasible for the as-needed employees, and (2) working a 3-hour shift would prevent the as-needed employee from working a 10-hour shift that might be or become available the next day because the Coast Guard requires a rest period between shifts. The employer responded to one of the union's concerns at the second meeting, by increasing the length of the short shifts to 3.5 hours, and it responded to the union's other concern at the third meeting, by stating it would allow as-needed employees who work a 3.5-hour shift to work up to 8.5 hours the next day, if that did not violate the Coast Guard regulation.

- The union would have been guilty of over-reaching if it had gone to impasse on the demand for 6-hour short shifts that it made at the first meeting, and only dropped after the employer

made its well-reasoned response that such a shift went far beyond the overall sailing schedule of the ferry.

- There was a breakdown of communication because the employer did not communicate the consequences of a failure to reach an agreement. At no time during either the parties' first or second meetings did the employer communicate to the union that failure to agree upon the new shift schedule would result in immediate implementation of the employer's proposal. Failure to communicate the paramount importance of proposals in bargaining, or to explain that a failure to achieve concessions will result in a deadlock, evidences the absence of a valid impasse. *Hotel Roanoke*, 293 NLRB 182, 185 (1989).

- The employer prejudiced the possibility of reaching an agreement when, on the day after the parties' second meeting, it both: (1) posted the November sailing schedule far earlier than called for by past practice and the parties' collective bargaining agreement, and (2) the announced 10-hour and 3.5-hour work shifts differed from past practice.

- The union contributed to the breakdown of communications when the employer asked the union about getting referrals from the union hiring hall after the incumbent as-needed employees rejected the 3.5-hour shifts. Dennis Conklin, a business agent for the union, testified that it was the employer's responsibility to go to the hiring hall, but nothing in the parties' contract obligated the employer to seek new employees from the hiring hall. Conklin also testified that the hiring hall would have contacted him for approval before sending people to work on this ferry.[20] Had the union worked with the employer without waiting for the employer to jump through

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[20] Transcript 135:24 - 137:7.

unfamiliar hoops when faced with the November 1 Coast Guard deadline, it would have evidenced more desire on the part of the union to find an amicable solution to the problem.

- The employer clearly failed to adequately inform the union that a failure to reach an agreement would necessitate contracting out bargaining unit work by having the *Paraclete* cover the late runs until the training requirements for any newly-hired employees could be satisfied. The employer started advertising for new part-time employees a week before the parties' third meeting, and knew or should have known as of October 31 that any newly-hired employee would need at least 40 hours of training before they could fill shifts on the ferry. Nevertheless, the employer did not communicate either a further revision of the shift schedule (substituting 12-hour shifts for the 10-hour full-time employee shifts it had announced after the parties' second meeting) or that the *Paraclete* would cover the late afternoon ferry schedule.[21]

Taking the evidence as a whole, we find the employer did not fulfill its good faith obligation.

As to the length of the negotiations, it is clear that the parties only met three times over the course of a month.

- Their first meeting on October 2 appears to have included some healthy exchange of ideas, as described above.
- Their second meeting on October 9 appears to have been hampered by the employer's failure to communicate either its urgency or its intentions, as described above.

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[21] For example, Exhibit 15, a news release issued by the employer regarding informing the public that new hires required 40 hours of training.

- Their third meeting was not held until the last day before the Coast Guard regulation was to be strictly enforced, and only after another lapse equal to another 44 percent of the time between the telephonic notice from the Coast Guard and the effective date of strict enforcement. Moreover, even though the record supports an inference that the employer was fully aware of the developments that had occurred since the parties' second meeting (including the posting of the November sailing schedule 11 days earlier than required by Rule 14.05 of the parties' contract, the announcement of the 10-hour and 3.5-hour shifts, the rejection of the short shifts by four of the five as-needed employees, the advertising for new employees, and the need to have the *Paraclete* provide part of the service),[22] the employer failed to fully communicate its intentions.

We are not convinced that the employer put forth the full effort required by the collective bargaining law.

As to the importance of issues to the parties, we accept that the employer was under pressure because of an external force (stricter enforcement by the Coast Guard of its rule) that was not of its own making. At the same time, we accept that the union was seriously concerned that the short shifts proposed by the employer would be unworkable and/or prejudicial to the interests of the as-needed employees. We do not exclude a valid impasse from the range of possibilities, but the breakdowns of communications by both parties and the unilateral actions taken by the employer lead us to conclude that a valid impasse did not exist in November 2002.

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[22] We omit the actual hiring of new employees from this list, because the record only indicates they were hired in "late October and early November" of 2002.

As to the understanding of the parties about an impasse, we note that the parties' own perceptions regarding the state of negotiations are of central importance to the inquiry. *See, e.g., Saunders House v. NLRB*, 719 F.2d 683, 688 (3rd Cir. 1983) (a finding of an impasse "often depends on the mental state of the parties"); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) (a finding of no impasse was supported by the fact that the union's chief negotiator never felt the parties were at impasse). In this case, the testimony of the employer's negotiator that the parties had plenty of room to move following the October 31 session clearly indicates that the employer could not have reasonably believed an impasse existed.[23] A valid impasse could not exist under such circumstances.

Conclusion

We conclude that the employer implemented changes of employee work shifts without having fulfilled its bargaining obligations under Chapter 41.56 RCW, and that it thereby committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

ISSUE 2: CONTRACTING OUT OF BARGAINING UNIT WORK

The continued availability of an employee's job is at the core of the employer-employee relationship, and any decision to transfer the work of bargaining unit employees to persons outside of the bargaining unit directly affects the wages, hours and working conditions of bargaining unit employees. Transfers of bargaining unit work to employees of other entities (contracting out) or to other employees of the same employer (skimming) can thus be a

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[23] In its brief on appeal, the employer asserts that Steve Cox did not understand the meaning of the "legal term" impasse. This argument is not supported by the record and has no merit.

mandatory subject of bargaining. This Commission has considered five factors when determining whether a duty to bargain exists concerning the transfer of bargaining unit work. *Port of Seattle*, Decision 7271-B (PECB, 2003); *City of Anacortes*, Decision 6863-B (PECB, 2001); *Spokane County Fire District 9*, Decision 3482-A (PECB, 1991). They include:

1. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed such work before?);

2. Whether the transfer of work involved a significant detriment to bargaining unit members (*e.g.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);

3. Whether the employer's motivation was solely economic;

4. Whether there had been an opportunity to bargain generally about the changes in existing practices; and

5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

There is no claim or argument questioning the applicability of those factors, and we apply them in this case.

The first, third, fourth, and fifth factors influence whether a violation occurred; the second affects the remedy we order:

1. Bargaining unit employees traditionally performed the work that was contracted out. The record clearly demonstrates ferry service between Anacortes and Guemes Island has historically been the work of bargaining unit employees. The employer has only used other vessels rarely, in emergency

situations. Even then, this employer paid bargaining unit employees to operate vessels contracted to substitute while the employer's vessel was unavailable due to mechanical problems. There is no history of operating two vessels to cover the sailing schedule announced by the employer.

2. Significant detriment to bargaining unit employees clearly existed as a long-term proposition. Employees' interests in the work assigned to their bargaining unit is substantial, and this Commission closely examines fact situations to determine potential losses as well as immediate losses. *See City of Kennewick*, Decision 482-B (PECB, 1980) *aff'd* 99 Wn.2d 832 (1983), where a violation was found as to the work of entry-level positions which were vacant at the time of the disputed action. Although the record presented here supports a finding that the incumbent as-needed employees affirmatively gave up their rights to be scheduled for the 3.5-hour shifts during the month of November, that goes to the remedy to be ordered in this case, rather than to the existence of a violation.[24]

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[24] We decline to order any back pay to incumbent as-needed employees for the work they lost in November 2002. Any back pay award based on the 3.5-hour shifts offered by the employer would wrongly reward those employees for rejecting available work opportunities, and would punish the employer for facts that never occurred:

- Having full-time employees work 12-hour shifts starting November 4 (the first Monday after the Coast Guard began strictly enforcing its regulation) reduced the loss to the bargaining unit.
- Even though incumbent as-needed employees refused the 3.5-hour shifts offered by the employer, they continued to accept shifts as substitutes for absent full-time employees. The record demonstrates that bargaining unit employees Jane Favors, Mark Antioch, and Michael Straub each worked at least one 12-hour shift during early November.
- Bargaining unit employee Carol Ballsmider worked at least one three-hour shift.

3. The employer's motive was not solely economic, since this record amply demonstrates that the employer only decided to have the *Paraclete* cover some runs when it was unable to schedule as-needed employees for the short shifts it had unilaterally announced. If anything, the record suggests the employer spent more money on having the *Paraclete* provide service than it would have paid to bargaining unit employees. We therefore discount any economic considerations in our ultimate conclusion.

4. The employer did not adequately bargain the change, because it failed to communicate with the union about the contracting out of unit work. The incumbent as-needed employees declined the 3.5-hour shifts well in advance of the October 31 bargaining session, so the employer knew or should have known that contracting for some runs was a real possibility. At no time during October 2002 did the employer notify the union that contracting the *Paraclete* to cover some of the runs was even a possibility. Had the employer given adequate notice to the union, the union might have taken a different approach at the bargaining table. On the basis of what actually happened, we find the record supports a finding that the employer failed to bargain the issue.[25]

5. The work performed by employees is substantially the same on the employer's vessel and the *Paraclete*. Both vessels trans-

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- At the time the employer unlawfully contracted out bargaining unit work, bargaining unit employee Kathleen Faulkner was on extended leave, and so could not have been affected by the employer's unlawful actions.

[25] *Cf. Cowlitz County*, Decision 7007 (PECB, 2000), *aff'd* Decision 7007-A (employer communicated the gravity of the situation to the union, including the ramifications of the failure to reach an agreement).

ported people between Anacortes and Guemes Island; both required Coast Guard-qualified crew members to operate. The employer's attempt to distinguish the operations on the basis that the *Paraclete* lacks the capacity to carry motor vehicles would put the focus on the equipment, rather than the people, and is not persuasive.

Taking all of these factors into consideration, we find that the employer unlawfully contracted out bargaining unit work without bargaining the change to impasse with the union.

The Employer's Business Necessity Defense

The employer defends that it was compelled to act, while the union disputes the necessity to act. We reject the employer's argument.

An employer can raise a "business necessity" defense when compelling practical or legal circumstances necessitate a unilateral change of employee wages, hours or working conditions, but such an employer is still obligated to bargain the effects of the unilateral change.[26] This Commission examines all of the relevant facts and circumstances surrounding the event before ruling on the merits a decision to implement unilaterally change.

We recognize that the November sailing schedule announced by the employer obligated it to offer service beyond what the full-time employees could perform, and that several of its incumbent as-needed employees declined the shorter shifts it had offered. We reject the business necessity defense, however, because the short shifts were themselves unlawfully announced/implemented by the

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[26] *See Cowlitz County*, Decision 7007-A (PECB, 2000) (business necessity defense sustained where employer contacted union regarding change of health insurance).

employer, and because of the employer's failure to give notice of the potential for contracting to the union, as described above.

ISSUE 3: THE DISCRIMINATION CLAIM

The union alleged that the employer discriminated against incumbent employees. We reject the union's claim in this case.

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. In *Educational Service District 114*, Decision 4361-A (PECB, 1994), the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;

2. The employee is deprived of some ascertainable right, benefit or status; and

3. There is a causal connection between the exercise of the legal right and the deprivation action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions, and does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by

showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standard

We find, with some hesitation, that the union made out a prima facie case on this record:

- A certain tension exists in this record between the historical right of the as-needed employees to refuse opportunities and the strike prohibitions contained in RCW 41.56.120 and Rule 11 of the parties' collective bargaining agreement. There could be a basis to infer that the rejection of the 3.5-hour shifts was a concerted activity by the incumbent as-needed employees. Our hesitation in going that far stems from our finding that the rejected shifts were unlawfully implemented/offered by the employer.

- The employer's October 23, 2002, job posting and actual practices contribute further confusion to this situation. Rule 1.02(2) of the parties' contract envisions the use of part-time employees, and Rule 23.01(3) acknowledges the right of the employer to hire employees. However, the employer advertised in October 2002 for "on-call" purser deck-hand positions that closely resembled the as-needed employees, but then scheduled the new employees more like the regular part-time employees contemplated by the parties' contract.[27]

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[27] The new hires were scheduled for almost all 3.5-hour shifts on Mondays through Thursdays, but were also given the longer shifts that had historically been worked by as-needed employees. *See, e.g.*, Exhibit 40, showing that new hire Chris Hartman worked 10-hour shifts on 1/06/03 and 1/07/03, even though Exhibit 37 demonstrates he was not regularly scheduled to work those days.

- The record demonstrates, however, that the employer directly asked newly-hired employees if they would be available to work the 3.5-hour shifts that were at issue with the union.

We find that the union did not satisfy its ultimate burden of proof. The record demonstrates that incumbent as-needed employee Favors worked an abundance of shifts in November 2002 (98 total hours worked), December 2002 (85 total hours worked), and January 2003 (97 total hours).[28] Although those hours are less than she worked in some months before she rejected the 3.5-hour shifts, that is not sufficient to demonstrate discrimination on the part of the employer in a situation where the employee had a right to reject work opportunities.[29] We conclude that the union has failed to prove the employer discriminated against Favors.[30]

REMEDY

RCW 41.56.160 empowers this Commission to issue remedial orders when an unfair labor practice violation occurs. The typical remedy

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[28] Exhibit 41.

[29] The record demonstrates a substantial drop-off in Favor's hours for the month of February. However, the union did not amend its complaint filed on January 29, 2003, to allege any further violations. Thus, actions by the employer after January 29, 2003, are beyond the scope of this proceeding. *See City of Seattle*, Decision 8313-B (PECB, 2004).

[30] Because the union did not make an independent interference violation concerning "employee loyalty" comments attributed to the employer in this record, we decline to rule on that matter. This does not condone or excuse any unlawful conduct by the employer. *See, e.g., Grant County Public Hospital Dist. 1*, Decision 8378-A (PECB, 2004) (employer's negative comments about protected actions of bargaining unit employees supports an interference violation under RCW 41.56.140(1).)

orders the offending party to cease and desist from its illegal activity and, if necessary, return the aggrieved party to the conditions that existed before the unfair labor practice occurred.

This Commission may exercise some creativity when crafting remedial orders, and the Washington courts have upheld extraordinary remedies issued by this Commission in specific cases. Attorney fees have been awarded where frivolous defenses are advanced, or where a respondent has engaged in a pattern of conduct showing patent disregard of the statute. *See Lewis County,* Decision 644-A (PECB, 1979), *aff'd,* 31 Wn. App. 853 (1982), *review denied,* 97 Wn.2d 1034 (1982). Interest arbitration has been ordered to confront an ongoing refusal to bargain. *Municipality of Metropolitan Seattle*, Decision 2845-A (PECB, 1988), *aff'd,* 118 Wn.2d 621 (1992). Any remedial order needs to fit the violation found, and extraordinary remedies are still granted sparingly. We also take responsibility for fully explaining the basis for an extraordinary remedy, so parties understand the Commission's logic, and we demand the same of our examiners.

We Create a New Floor For Bargaining

Generally, the starting place for bargaining is the status quo. *Shelton School District*, Decision 589-A (EDUC, 1978). However, in this case, the Coast Guard regulation prevents us from ordering a remedy that would be illegal under the law. Any remedy crafted by this Commission should be mindful of other enforcement agencies' jurisdictions, and should not impermissibly require a party to violate another agency's rules and regulations.

In this case, in order to best effectuate the purposes of Chapter 41.56 RCW, the as-needed employees who were employed before November 1, 2002, should have the first opportunity to be assigned to vacant 10-hour Monday through Thursday shifts, and only after

those senior employees have affirmatively rejected the work opportunity should any new hire then be given the chance to work those shifts until the parties bargain an agreement that states otherwise.

We reject the union's proposal to compensate as-needed employees for a 10-hour shift they would have lost as result of the Coast Guard regulation. Instead, if an employee loses the opportunity to work a 10-hour shift because the employee worked a 3-hour shift the previous day, that employee should be the first eligible employee for the next 10-hour shift.[31] This remedy allows as-needed employees to fill in for the 3.5-hour shifts if they so choose and thus they need not worry about losing an opportunity to work the longer (and more lucrative) 10-hour shifts.[32]

We also suggest that the employer and the union bargain in good faith the actual status of all of the as-needed and regular part-time employees. The employer clearly has a need for regular part-time employees, but from the October 23, 2002, job announcement and the employer's actual practice, the line between the as-needed employees and the regular part-time employees has become blurred. Any contract that the parties agree upon should clearly define the scheduling rights of each type of employee to avoid further disputes.

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[31] If the Coast Guard regulation still prevents the employee from accepting that shift, that employee still remains the first eligible as-needed employee for a 10-hour shift until that employee actually works a 10-hour shift.

[32] It appears from the record that if it is an as-needed employee's turn to fill in a shift and the employee was unavailable, that employee would lose their turn and move to the end of the list.

NOW, THEREFORE, the Commission makes the following:

FINDINGS OF FACT

1. Skagit County is a "public employer" within the meaning of RCW 41.56.030(1). Among other services, the employer operates a single vessel ferry service from Guemes Island to Anacortes, Washington.

2. Inlandboatmen's Union of the Pacific, ILWU, AFL-CIO, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of the employees that operate the employer's ferry.

3. During the relevant time, the union and employer were parties to a collective bargaining agreement. Rule 7.01 of the agreement provides that the ferry must be manned to conform to the United States Coast Guard's certificate of inspection. Rule 14.05 states that shift scheduling will be governed by the sailing schedule. Rule 23.01 states that the employer has the right to unilaterally modify any employment condition not covered by the terms of the agreement without bargaining the decision or its impact on the bargaining unit. Rule 23.01(1) grants the employer the exclusive right to determine the specific programs and services offered and how such programs are offered.

4. In October 2002, the employer had two types of employees: full-time employees and on-call employees. The parties' collective bargaining agreement also envisioned regular part-time employees, but no employee fit that description. The on-call employees in the bargaining unit were Jane Favors,

Kathleen Faulkner, Mike Straub, Carol Ballsmider, Mark Antoncich, and Jeremy Pinson.

5. Prior to November 2002, the employer used a single 12.5-hour shift for the ferry workers every Monday through Thursday. Part-time employees had irregular and sporadic opportunities to work all or part of the 12.5-hour shifts. The part-time employees also did not have a set shift, and were allowed to refuse shifts.

6. Prior to September 2001, the Coast Guard permitted the employer's full-time employees to work longer than 12 hours in a 24-hour period in violation of a Coast Guard regulation because the actual amount of time worked within the 12.5-hour shift did not exceed 12 hours.

7. On September 12, 2002, the Coast Guard informed the employer through a telephone conversation that beginning November 1, 2002, it was strictly enforcing its regulations and would no longer permit full-time employees to work more than 12 hours, including breaks, in a 24-hour period. The Coast Guard memorialized this conversation in a September 24, 2005, letter.

8. On September 25, 2002, the employer notified the union of the Coast Guard's decision to strictly enforce the 12-hour regulation, and asked the union to bargain the change in employee scheduling necessitated by strict enforcement.

9. The employer and the union met on October 2, 2002, to negotiate the effects of the Coast Guard regulation. The employer proposed two shifts of 10 hours and 3 hours to cover the Monday through Thursday shifts. The union rejected this

proposal. At the same meeting, the union proposed two shifts of 10 hours and 6 hours.

10. At a second meeting held on October 9, 2002, the employer rejected the union's proposal described in Finding of Fact 9 and modified its own proposal to allow for two shifts of 10 hours and 3.5 hours. The union rejected this proposal.

11. Following the October 9, 2002, meeting, the employer posted the November schedule. That schedule created shifts of 10 hours and 3.5 hours for the Monday through Thursday ferry runs.

12. After the employer posted the November schedule described in Finding of Fact 11, several of the on-call employees informed the employer that they were unwilling to work the 3.5-hour shifts, but were willing to work any 10-hour shifts that came available. The employer had previously permitted these on-call employees to reject shifts they were unwilling to work.

13. On October 23, 2002, the employer posted a job announcement that it was hiring "on-call" purser deck-hands.

14. On October 31, 2002, the employer and union met for a third time. The union offered to accept the employer's proposal provided the employer pay on-call employees for lost opportunities due to the Coast Guard regulation and submit the dispute to interest arbitration. The employer rejected the union's proposal, but offered to allow on-call employees to work up to 12 hours within a 24-hour period as required by the Coast Guard regulation. The union rejected that proposal.

15. Although neither the employer nor the union agreed upon what the new shift schedule should be, both parties' statements demonstrate that there was still room for negotiation.

16. In late October and early November, the employer began hiring more employees to fill the "on-call" purser deck-hand position it advertised in Finding of Fact 13. Once those employees were hired, they required several weeks of training before they could work on the ferry.

17. Starting November 1, 2002, the employer had its full-time employees work up to 12 hours of the scheduled ferry run. In order to cover the final few runs of the sailing schedule, the employer contracted the ferry *Paraclete*. The employer utilized the *Paraclete* until the recently hired "on-call" purser deck-hands were trained. The employer never informed the union that it would contract the *Paraclete* if the parties did not reach an agreement.

18. Once the "on-call" purser deck-hands were trained, the employer unilaterally implemented a Monday through Thursday schedule consistent with its October 9, 2002, proposal.

CONCLUSIONS OF LAW

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

2. Rules 1.02(3), 14.05, and 23.01 of the parties' collective bargaining agreement do not provide specific contractual waivers that relieve the employer of its Chapter 41.56 RCW bargaining obligations.

3. By implementing a change to the shift schedule described in finding of fact 11 without first bargaining to impasse, the employer has failed to bargain in good faith in conformity to RCW 41.56.030(5) and has committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

4. By contracting out bargaining unit work to a third party without first bargaining to an impasse, the employer has not bargained in good faith in conformity to RCW 41.56.030(5), and has committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

5. The employer did not face a business necessity that relieved it of its bargaining obligations under Chapter 41.56 RCW, because the employer's implementation of the shift schedule was unlawfully implemented and the employer failed to properly give notice to the union of the potential need for temporarily contracting out of bargaining unit work if the parties did not reach an agreement.

6. The union failed to sustain its burden of proof demonstrating how the employer discriminated against Jane Favors who affirmatively rejected being assigned to the 3.5-hour shifts in violation of RCW 41.56.140(1).

ORDER

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

1. CEASE AND DESIST from interfering with, restraining, discriminating against, or coercing its employees in the exercise of

their collective bargaining rights secured by 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. Negotiate in good faith the changes to employee shift schedules subject to the following conditions:

i. Continue using the 10-hour and 3.5-hour shifts consistent with the employer's offer as described in Finding of Fact 10.

ii. Permit the on-call employees described in Finding of Fact 4 to have the first opportunity to work all 10-hour shifts, if they come available.

iii. If an employee described in Finding of Fact 4 is unable to work a 10-hour shift because of the Coast Guard regulation, that employee shall be the first eligible employee to be assigned the next available 10-hour shift. That employee shall remain as the first eligible on-call employee to be assigned a 10-hour shift until that employee actually works a 10-hour shift.

b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall be duly signed by an authorized representative of the employer, and shall remain posted for 60 days. Reasonable steps shall be taken by the

employer to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached to this order into the record at a regular public meeting of the Board of Commissioners of Skagit County, 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.

d. Notify the union, 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 union with a signed copy of the notice attached to this order.

e. Notify the Executive Director of the Public Employment Relations Commission, 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 Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, the 13th day of February, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

Commission Douglas G. Mooney did not participate in the consideration or decision of this case.

Appendix

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY made a unilateral change to employee wages, hours and working conditions, by implementing employee work shifts of 10 hours and 3.5 hours, without first bargaining to impasse with the Inlandboatmen's Union of the Pacific.

WE UNLAWFULLY made a unilateral change to employee wages, hours and working conditions, by contracting out bargaining unit work without first bargaining to impasse with the Inlandboatmen's Union of the Pacific.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL meet and bargain in good faith with the Inlandboatmen's Union of the Pacific concerning any changes to the mandatory subjects of wages, hours and working conditions, including employees shift lengths.

WE WILL meet and bargain in good faith with the Inlandboatmen's Union of the Pacific before we contract out bargaining unit work.

WE WILL permit on-call bargaining unit employees who were employed before November 1, 2002, the first opportunity to work 10-hour shifts, if one comes available.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ SKAGIT COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.