Seattle School District, Decision 5733-B (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609,	)	
Complainant,	)	CASE 12079-U-95-2844
vs.	)	DECISION 5733-B - PECB
SEATTLE SCHOOL DISTRICT,	)	
Respondent.	)	DECISION OF COMMISSION

Schwerin, Burns, Campbell and French, by Kathleen Phair Barnard, Attorney at Law, appeared on behalf of the union.

Perkins Coie, by Lawrence B. Hannah, Attorney at Law, and Paul E. Smith, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on a petition for review filed by Seattle School District, seeking to overturn a decision issued by Examiner William A. Lang.[1]

BACKGROUND

The Seattle School District (employer) and International Union of Operating Engineers, Local 609 (union) are parties to a collective bargaining relationship involving food service workers. A

[1] Seattle School District, Decision 5733-A (PECB, 1997).

collective bargaining agreement was in effect between the parties from September 1, 1994 through August 31, 1997.

As far back as 1988, the parties have debated an issue of one-period versus two-period lunch schedules at the employer's high schools. In 1988, union Business Manager Dale Daugharty filed a discrimination charge under Title VI of the federal Civil Rights Act of 1964, protesting claimed ill effects of a one-period lunch on poverty-level students and minority groups. In a letter sent to the U.S. Department of Agriculture in September of 1988, Daugharty noted that the Seattle School District had gone to a one-period lunch in 7 of its 10 high schools, and cited a drop in participation by students. We infer that Daugharty and the union were motivated, at least in part, by concerns about preserving work opportunities for employees in the food services bargaining unit.

Daugharty and the employer had many discussions over the years about increasing the number of lunches served in high schools, and about the increased revenues that would generate. The employer appointed Daugharty to serve on a budget advisory committee for the school district during the 1994-1995 school year. In that committee process, Daugharty recommended that two lunch periods be scheduled in all of the employer's high schools, because that would generate more total income by increasing the number of students eating lunch.

In the spring of 1995, the employer's budget development team forwarded a recommendation favoring the scheduling of two lunch periods to Superintendent William Kendrick. Daugharty was also active on this subject in that period, and had provided the budget committee with documents showing the losses that resulted from moving to one lunch period in eight of the high schools. Daugharty

also provided those documents to Superintendent Kendrick at about the same time.

On May 24, 1995, Superintendent Kendrick sent the following memorandum to seven employer officials:

> ...
> One of the recommendations of the Budget Development Team was to implement two lunch periods at all high schools which will assure every student the opportunity to buy lunch at school, while at the same time helping to reduce the budget gap. **While I have made every effort to keep reductions as far from the classroom as possible, I feel it is necessary for us to implement this recommendation in order to move us closer to a balanced budget.**
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> I realize that for some of your schools **this move may create some disruption due to scheduling problems, and I know it will be difficult for you and your staff to address those problems.** However, as I review the options for preparing the recommended budget, **I am challenged to address all areas which can result in increased revenue or reduced costs, particularly those not requiring FTE reductions.**
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> I would therefore like you to begin preparations immediately to implement two lunch periods beginning in September ....

Cleveland High school had a two-period lunch schedule in effect during the 1994-1995 school year, but its building principal, Theodore Howard was provided with a copy of Kendrick's May 24 memo.

A representative council existed at Cleveland High School in the spring of 1995, as an advisory body regarding decisions affecting that building. Principal Howard retained authority to accept or

reject recommendations of that body. At a meeting of the representative council held on May 3, 1995, a vote was taken on whether to have two or one lunch periods. The two-period lunch schedule was favored at that time. The principal claimed that not enough council members were present at the May 3, 1995 meeting, however, and he conducted another vote on the same question at a meeting of the representative council held on May 24, 1995. The second vote favored the one-period lunch schedule.

Notwithstanding the superintendent's May 24, 1995 directive on the subject, Principal Howard asked Director of Child Nutritional Services Carol Anne Johnson and Cleveland High School Kitchen Manager Erela Banay to meet with him and the vice principal on June 16, 1995, to discuss implementing a one-period lunch schedule. Banay thought the meeting was to be of a disciplinary nature, and she asked Daugharty to attend. At the meeting, Howard informed Banay and Daugharty that the representative council had made a "decision" to go to a one-period lunch schedule as of September 1, 1995, and that retaining the two-period lunch schedule was not an option. Daugharty stated that the decision would have a negative impact on the lunchroom employees, and that the union would file a grievance and an unfair labor practice. Daugharty stated that Howard should consider the meeting as the first step of the grievance process.

On June 29, 1995, Daugharty filed a grievance under the contractual procedure, stating:

> The Site Council at Cleveland High School Voted [sic] to reduce lunch periods. This action will reduce the number of meals served causing a reduction in Student [sic] participation resulting in less work hours being assigned to the Kitchen Staff [sic].

> This is a violation of, misapplication of, and misinterpretation of [the collective bargaining agreement]. ...

That grievance was advanced to Step II of the contractual procedure, and a meeting was set for August 31, 1995.

By August 30, 1995, John H. Stanford had replaced Kendrick as superintendent of the Seattle School District. On that date, Stanford sent an e-mail message to the high school principals, "concurring with the May 24 memorandum from Bill Kendrick". That memo suggests Cleveland High School had the smallest lunchroom capacity (approximately 166) among nine of the high schools.

Two related events occurred on August 31, 1995: First, a meeting was held under Step II of the contractual grievance procedure, at which Daugharty presented arguments about the change of lunch periods to employer official Susan Byers.[2] Second, Principal Howard sent an e-mail message to Superintendent Stanford, outlining his views supporting a one-period lunch schedule, including: "I have extended my old gym to accomodate [sic] up to 200 more eating spaces if needed" and "[t]here are no eaterys close by Cleveland so I am not concerned about losing students as a result of going to one lunch".

On September 6, 1995, Superintendent Stanford issued a memo approving the one-period lunch schedule for several buildings. At Cleveland High School a new schedule was implemented consisting of four 80-minute class periods and one 40-minute lunch period.

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[2] Byers' title was listed as "Coordinator, Southeast Region" in a subsequent letter which implies she was the only employer official in attendance at the Step II meeting.

After Cleveland High School changed to the one-period lunch schedule, student participation in the lunch program dropped. That resulted in a reduction of scheduled staffing hours from 21.5 hours per day to 16.5 hours per day (a 23.25% decrease). While there were no layoffs of kitchen staff, two vacancies resulting from employee turnover were not filled.

On September 15, 1995, Byers sent a letter to the union in which she denied the grievance on the basis that no contract provisions were violated. In particular, she cited Article V. of the contract as allowing the employer to make changes of the number of lunch periods "where fiscally appropriate". She acknowledged:

> The reduction to one lunch period may very well reduce the number of Kitchen Assistant employees, or reduce their work days to less than 3½ hours, placing them in a non-benefitted status. However, the District has both the right and responsibility to keep the Food Service program in existence as a self-sustaining process. If the reduction to one lunch period is fiscally warranted and there are no other crucial management reasons for keeping the number of lunch periods at two, this decision must be made and is consistent with Article V. Moreover, employees can continue to receive benefits coverage by seeking other hourly Kitchen Assistant positions to raise their workdays to 3½ or more hours.
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> ...
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> Finally, the reduced staffing which may occur as a result of the reduction of lunch periods from two to one is a business consequence having nothing to do with interference with union membership or representation of its members. Articles II. and VI. are therefore not violated by this decision.

Byers concluded her letter with indication that she had been "commissioned" by Superintendent Stanford to make a thorough evaluation regarding the one lunch period issue, and she acknowledged that concerns had been voiced by the union and the Department of Agriculture about the adequacy of the lunch program.

On September 28, 1995, the union filed the complaint charging unfair labor practices to initiate this proceeding, alleging that the employer interfered with employee rights in violation of RCW 41.56.140(1), and refused to bargain in violation of RCW 41.56.140(4). It alleged that the lunch periods at Cleveland High School were unilaterally reduced from two to one without prior notice to the union and without bargaining the decision or its effects. The union alleged that the change of lunch periods reduced the work hours available to employees, altered their working conditions, and ultimately affected the wages of bargaining unit employees. The union alleged that issues of work hours had been handled centrally by the school district in the past, and that the involvement of a school site council altered the decision-making process without notice and bargaining with the union, and had direct impact on the working conditions of employees.

The employer answered the unfair labor practice complaint on November 9, 1995, requesting that the case be deferred to arbitration. Deferral was ordered on March 12, 1996, under the policy set forth by the Commission in City of Yakima, Decision 3564-A (PECB, 1991).

On September 14, 1996, Arbitrator Jane R. Wilkinson ruled that the parties' contract neither prohibited nor protected the employer's reduction of the number of lunch periods at Cleveland High School. The processing of this unfair labor practice was then re-activated.

Examiner William A. Lang held a hearing and issued his decision on September 16, 1997. Examiner Lang held that the employer unilaterally changed working conditions without prior notification to the union and without providing an opportunity for bargaining on either the decision to reduce the lunch periods and employee work hours at Cleveland High School or the effects of that decision. The Examiner held that the employer failed to sustain its burden of proof that the union waived its right to demand bargaining, and that the employer committed unfair labor practices in violation of RCW 41.56.140(4) and (1). He ordered the employer to bargain collectively upon request, and to pay to food service employees who remained a sum equal to monies lost through the reduction of hours for each day of operation from September 1, 1995 until the date the two-period lunch schedule was re-established and/or personnel are added to restore the work opportunities existing prior to the unlawful change.[3] The Examiner also imposed an extraordinary remedy, in the form of attorney fees to the union.

POSITIONS OF THE PARTIES

The employer argues that the Examiner mistakenly transformed the student lunch schedule issue into an hours of work issue, and that the student lunch schedule is an integral part of the educational program so as to be the prerogative of management and a non-mandatory subject of bargaining. It contends the decision to implement a one-lunch schedule was not final as of June 16, 1995, and that the union waived bargaining by inaction. In addition, it asserts that the Examiner ignored the arbitrator's waiver by

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[3] The back pay was to be prorated among the employees in proportion to the hours worked during the period of time in question.

contract conclusion concerning hours of work, and that the parties' contract authorizes the employer to change student lunch schedules. Finally, the employer argues there was no unilateral change, because a single lunch period was the predominant practice in its high schools in 1995. It contends its defenses are not frivolous, that an extraordinary remedy is not warranted, and that the union's complaint should be dismissed.

The union argues that lunch period scheduling is a mandatory subject of bargaining, and that the employer's decision had little to do with academic concerns. It contends that the employer's decision was made in May of 1995, and that the employer presented the change to the union as a fait accompli, without notice and opportunity for bargaining. The union contends that the management rights clause of the collective bargaining agreement had already been construed by an arbitrator adversely to the district. The union supports the Examiner's award of attorney fees, and requests attorney fees for the appeal as well.

DISCUSSION

The Duty to Bargain

The duty to bargain is defined in the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, as follows:

> RCW 41.56.030 Definitions.
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> ...
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> (4) "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on

> personnel matters, including **wages, hours and working conditions,** which may be peculiar to an appropriate bargaining unit ...
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> [Emphasis by **bold** supplied.]

That definition is patterned after the definition found in the National Labor Relations Act (NLRA). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA are persuasive in interpreting state labor laws which are similar to the NLRA. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984).

The potential subjects for bargaining between employers and unions are commonly divided into "mandatory", "permissive" and "illegal" categories. Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or which are regarded as prerogatives of employers or of unions have been categorized as "nonmandatory" or "permissive". See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, WPERR CD-57 (King County Superior Court, 1978).

In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which the issue affects personnel matters. Where a subject relates to both conditions of employment and managerial prerogatives, the focus of inquiry is to determine which of those predominates. International Association of Fire Fighters, Local 1051 v. Public Employment Relations Commission (City of Richland), 113 Wn.2d 197 (1989). A balancing test is most often applied to disputes raised under the "working conditions" term of the statute. See, e.g., King County, Decision 5810-A (PECB, 1997). The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of

the impact on the bargaining unit. Spokane County Fire District 9, Decision 3661-A (PECB, 1991). A member of the Supreme Court of the State of Washington has paired "wages, hours and working conditions" with "nearly all workplace controversies".[4]

The duty to bargain includes a duty to give notice and provide opportunity for bargaining prior to changing mandatory subjects of bargaining. A party to a bargaining relationship commits an unfair labor practice if it fails to give notice of such changes (i.e., presents the other party with a fait accompli), or fails to bargain in good faith upon request.[5]

In order for there to be a "unilateral change" giving rise to a duty to bargain, there must be some change in the status quo. No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours or working conditions.[6] To be part of the status quo, a policy must have been used during the relevant past, not merely something which is pulled off the shelf just in time to fend off an unfair labor practice charge. Pierce County Fire District 3, supra.

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[4] See concurring opinion of Justice Talmadge in Pasco Police Officers' Association v. City of Pasco, 131 Wn.2d 450 (1997).

[5] Federal Way School District, supra. See, also, NLRB v. Katz, 369 U.S. 736 (1962); Green River Community College, Decision 4008-A (CCOL, 1993); City of Brier, Decision 5089-A (PECB, 1995).

[6] Clark County Fire District 6, Decision 3428 (PECB, 1990); City of Yakima, Decision 3564-A (PECB, 1991); Evergreen School District, Decision 3954 (PECB, 1991); Green River Community College, supra. The decisions in Kitsap County Fire District 7, Decision 2872-A (PECB, 1988) and Pierce County Fire District 3, Decision 4146 (PECB, 1992) distinguish between restatements of old policies and new policies.

The Mandatory/Non-mandatory Subject of Bargaining Issue

The "No Change" Defense -

The employer points to what it describes as "the predominant practice" in its high schools in 1995, which was a single lunch period. From its perspective, the lunch schedule at Cleveland High School was conformed to long-established practice beginning with the 1995-96 school year, so that the implementation of the single lunch schedule did not constitute a unilateral change. From the outset, the union's focus has been on the two-period lunch schedule which had been in effect (the status quo) at Cleveland High School, and on the change to a one-period lunch schedule in 1995.

We find the employer's argument is without merit.[7] The record clearly reflects that a two-period lunch schedule practice had existed at Cleveland High School for a long time. For the bargaining unit employees affected by the disputed change, the status quo was the two-period lunch schedule historically in effect at Cleveland High School.

The fact that a different practice exists in a majority of the employer's other schools does not necessarily make that the "status quo" for the entire school district. Moreover, the one-period lunch practice relied upon by the employer was countermanded by its own budget committee and former superintendent, and was subjected to conditional approval by its new superintendent. We thus find no evidentiary support for an employer-wide policy favoring a one-period lunch schedule.

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[7] This is among the employer defenses which the Examiner characterized as "frivolous", and as support for award of an extraordinary remedy in this case.

The One-Lunch versus Two-Lunch Decision -

This case involves whether the decision to change the lunch schedule at Cleveland High School was within either or both: The "hours" term of the statute (which would make it of direct concern to employees); or the "working conditions" term of the statute (which could be less straightforward and require application of the balancing test of City of Richland, supra). The Supreme Court has cautioned the Commission that "scope of bargaining" disputes should be decided on a case-by-case basis, and we find the evidence in this case supports a conclusion that the lunch hour decision was tied to both hours and working conditions of bargaining unit employees, so that the issue was a mandatory subject of bargaining.[8]

The employer argues that the student lunch schedule, rather than hours of bargaining unit employees, is at issue in this case. It contends that the academic class schedule encompasses the student lunch schedule, and that the employer need not bargain over the education program it provides to students.[9] The union responds that the factors that went into the decision were not academic in nature, and had to do with the logistics of providing lunches, so that the scheduling of lunch periods was a mandatory subject of

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[8] A decision and its effects are sometimes inextricably intertwined. For example, in City of Auburn, Decision 901 (PECB, 1980), each element of a disputed union proposal on shift schedules directly and intimately impacted the working hours of bargaining unit employees, so an employer complaint that the union was insisting on bargaining a non-mandatory subject was dismissed.

[9] The employer cites Federal Way School District, Decision 232-A (EDUC, 1977); Renton School District, Decision 706 (EDUC, 1979); and Wenatchee School District, Decision 3240-A (PECB, 1990), in support of its position.

bargaining.[10] The union contends the decisions on the academic schedule and the lunch schedule were separate, and that the latter was influenced by the effect the lunch schedule would have on cleaning schedules, the preferences of security personnel, and the ease of monitoring students during the lunch period(s). The union also contends the benefits of the lunch schedule change are not of such educational or academic nature that they outweigh the employees' statutory right to bargain their working conditions.[11]

The Commission has long held that the educational program of a school district is a managerial prerogative. See, Federal Way School District, Decision 232-A (EDUC, 1977), affirmed, Federal Way Education Assn. V. PERC, WPERR CD-57 (King County Superior Court, 1978). In this case, however, the employer's assertion that the change in lunch schedule was driven by educational considerations is belied by the evidence. The employer now cites numerous policy grounds for having a one-period lunch schedule,[12] but that

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[10] It cites Edmonds School District, Decision 207 (EDUC, 1977); Lower Snoqualmie Valley School District, Decision 1602 (EDUC, 1983); South Kitsap School District, Decision 896 (EDUC, 1980); Pasco School District, Decision 1053 (EDUC, 1980), in support of its position.

[11] The union contends that when the employer projected the effect of its decision, it projected both a loss of hours, and possibly benefits to bargaining unit members, core terms and conditions of employment.

[12] The employer now argues that a one-period lunch reduces classroom absenteeism, tardiness, class schedule changes, security incidents, and the resources needed for security and supervision. The employer argues that one lunch period eliminates disruptions of classes by students at lunch, since no classes are in session during the lunch period, and that extracurricular activities can occur when all students have lunch at the same time. It claims the one-lunch allows a wider range of class offerings, but application of that claim is not apparent in a context of having only four academic periods per day.

constitutes a significant change of direction for the employer in this particular situation.

From a district-wide perspective, the debate on one versus two lunch periods goes back to the employer's involvement of Daugharty in its budget process, to the recommendations of the budget writing team, and to Superintendent Kendrick's May 24, 1995 memo citing financial considerations which are closely tied to labor costs. Byer's letter denying the grievance also cited the need to maintain the food service program as self-sustaining. Such financial and business considerations are clearly more closely tied to employee work hours and labor costs than to educational policy.

Even at Cleveland High School, the record shows that the decision to move to a one-period lunch schedule was motivated to a great degree by concerns other than curriculum. Howard testified that the one-period lunch was easier to monitor: Two administrators, two security guards, and Howard now only have to monitor one 50-minute lunch period. As the union states, however, benefits such as lightening administrative workloads and eliminating a 20-minute period set aside for club meetings and other extracurricular activities are not core academic issues.

The employer relies on Wenatchee School District, supra, where the Commission held that a decision to convert from half-day kindergarten to full-day kindergarten concerned the educational program to be offered and, as such, was not a mandatory subject of bargaining. Different from that case, where a recommendation from that employer's curriculum department had some effect on labor costs, we are confronted here with a claimed "educational" decision at the building level which was directly at odds with a recommendation coming out of the employer's budget department. The

Commission cannot disregard the superintendent's comments which subordinated school scheduling concerns to increasing revenues, or the regional coordinator's comments about the need for a self-sustaining program.

The employer cites Renton School District, supra, where the Commission found a classroom visitation policy did not directly relate to employee wages, hours or working conditions, but we find that case inapposite. The policy at issue there concerned the employer's basic product, and only remotely related to terms and conditions of employment. Moreover, the union there had not specified how the policy impacted employee working conditions, while we have clear evidence here that positions were left vacant and employees lost benefits.

We find support for a "mandatory subject" characterization in this case from the several decisions where Commission staff members have found aspects of the school calendar to be a mandatory subject of collective bargaining.[13] The record provides a basis to infer that the processes used to decide whether to have a one-period or two-period lunch schedule would affect many constituent elements of the institution, and would be similar to the processes used to decide the starting date of the school year or the length of winter vacation. Such operational decisions are separate and apart from the school curriculum and the processes used to decide curriculum.

We are mindful, here, of the fact that the subject of lunch hours had been a much-discussed topic for these parties at the district

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[13] Edmonds School District, Decision 207 (EDUC, 1977); Lower Snoqualmie Valley School District, Decision 1602 (EDUC, 1983); South Kitsap School District, Decision 896 (EDUC, 1980); and Pasco School District, Decision 1053 (EDUC, 1980).

level for some time before the manager at one building took two tries before obtaining an advisory vote approving a change. The union and employer had been involved for years in discussions about lunch hours. In the spring of 1995, even employer officials at the district level concurred with the union about the profitability (or at least reduced losses) of a two-period lunch schedule. The employer should have known its employees had a deep and significant interest in any decision affecting lunch schedules.

The Supreme Court of the State of Washington sanctioned a dominant construction of Chapter 41.56 RCW in Rose v. Erickson, 106 Wn.2d 420 (1986). The hours of bargaining unit employees are driven by student participation in the school lunch program, so the decision at issue reduced work opportunities for bargaining unit employees. Even an employer official posed the possibility that the reduction of work hours would cause some employees to lose benefits (thereby impacting their bargainable "wages", since employer-paid benefits are merely an alternative form of wages), or force them to transfer to other schools (thereby impacting their rights under seniority and transfer provisions which are bargainable "working conditions"). The Examiner found the loss of nearly one-quarter of the available hours to be significant, and we agree. A five-hour per day reduction in work opportunities for food service workers cannot be characterized otherwise. The statute required the employer to bargain "hours". Even if we confine the analysis to the balancing test usually reserved for "working conditions" issues, we conclude that the decision was so intermingled with employee working conditions that it had a direct effect on personnel matters and was not a managerial prerogative.[14]

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[14] The scheduling of students for lunch would naturally affect the length of times lunch room employees would be busy with tasks associated with the students.

The Waiver by Contract Issue

The usual outcome of the collective bargaining process under Chapter 41.56 RCW is for an employer and the exclusive bargaining representative of its employees to sign a written collective bargaining agreement controlling wages, hours and working conditions of bargaining unit employees for a period of up to three years. RCW 41.56.030(4); 41.56.070. Such contracts are enforceable according to their terms, including by means of arbitration. RCW 41.56.122(2); 41.58.020(4). Thus, there is no duty to bargain on matters set forth in a collective bargaining agreement, for the life of the contract. If a union waives its bargaining rights by contract language, an employer action in conformity with that contract will not be an unlawful "unilateral change". City of Yakima, Decision 3564-A (PECB, 1991). Waiver by contract is an affirmative defense, and the employer has the burden of proof. Lakewood School District, Decision 755-A (PECB, 1980).

In this case, Article V. of the parties' collective bargaining agreement states:

> A. The Union recognizes the District's inherent and traditional rights to direct and manage its business functions. These include:
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> ...
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> 3. The right to determine the starting and quitting time and the number of hours to be worked within the limits of applicable State and Federal laws including, but not limited to the Fair labor Standards Act;
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> ...
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> ...
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> C. The above statement of Management Rights is not intended to be exclusive and shall not be construed to limit or exclude any historical or normal rights of either Management or Union.

The employer requested "deferral to arbitration" in this case, and that request was granted under City of Yakima, supra, where the Commission anticipated the results of deferral as follows:

> Post-arbitral Consideration by the Commission
> Regardless of whether a question of contract interpretation is decided by the Commission or by an arbitrator, there are three likely results:
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> 1. Action protected by contract. If it is determined that the contract authorized the employer to make the change at issue in the unfair labor practice case, that conclusion by either the Commission or an arbitrator will generally result in dismissal of the unfair labor practice allegation. The parties will have bargained the subject, and the union will have waived its bargaining rights by the contract language, taking the disputed action out of the "unilateral change" category prohibited by RCW 41.56.140(4). [Footnote citing examples of application of this principle omitted.]
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> 2. Action prohibited by contract. If it is determined that the employer's conduct was prohibited by the contract, that conclusion by either the Commission or an arbitrator will also generally result in dismissal of the unfair labor practice allegation. Again, the parties will have bargained the subject, taking it out of the category of "unilateral change" prohibited by RCW 41.56-.140(4). [Footnote citing examples of application of this principle omitted.]
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> 3. Action neither protected nor prohibited by contract. If it is determined that the employer's conduct was not covered by the parties' contract, further proceedings will be warranted in the unfair labor practice case. Whether the Commission makes that determination itself, or merely accepts an arbitrator's decision on the issue, such a finding will be conclusive against any "waiver by contract" defense asserted by the employer in the unfair labor practice case. Unless the

> employer is able to establish some other valid defense, a finding of an unfair labor practice violation generally follows. See, e.g., Clover Park School District, Decision 2560-B (PECB, 1988).

The parties submitted their differences to Arbitrator Jane R. Wilkinson, who issued an arbitration award on September 14, 1996, in which she made the following ruling on Article V.A.3:

> Without the conditioning language ("within the limits of applicable State ... laws including" the FLSA), the provision would clearly constitute a waiver of the Union's bargaining rights on questions of starting and quitting time and the number of hours to be worked. However, the "within the limits of applicable State ... laws" could be read to include RCW 41.56. This raises the question of whether the Arbitrator should determine the "limits" of State law. Given the rather intricate legal relationship between duty to bargain statutes and the fruits of that bargaining (i.e., the collective bargaining agreement), the Arbitrator determines that "the limits of applicable State ... laws", as the question pertains to RCW 41.56, is one that falls within the expertise of PERC and is more properly within its jurisdiction. ... She **declines to hold that Article V.A.3 (or any other provision of the Agreement) is a waiver of any statutory Union right to bargain the decision to adopt a *one period lunch schedule*.** ...

[Emphasis by *italics* in original; emphasis by **bold** supplied.]

When this case came back before the Executive Director, he set forth both the foregoing quotation from City of Yakima, supra, and the foregoing quotation from the arbitrator's award, as prelude to ordering further proceedings in this case. What is important under our deferral to arbitration policy and, for our present purposes under RCW 41.56.140(4), is that the employer failed to obtain the

"waiver by contract" interpretation of the management rights clause which it urged when it requested deferral of this case to arbitration. Simply put, the employer *lost the arbitration case* even though Arbitrator Wilkinson denied the grievance.

The employer nevertheless argued before the Examiner, and again before the Commission, that the arbitrator held the union waived its right to bargain the issues by Article V.A.3 of the parties' collective bargaining agreement, and that Article V.C. constituted an independent waiver of the union's bargaining right in regard to adjustment of hours. The employer cites Seattle School District Decision 2079-B (PECB, 1986), affirmed in relevant part, Decision 2079-C (PECB, 1986), in support of its position, but we find that case to be distinguishable. In the earlier case: An arbitrator found that numerous express provisions of the parties' contract contemplated the employment of part-time employees, and so denied a grievance protesting their hiring; the Examiner ruled that clear language on time allocation standards constituted a waiver of the union's bargaining rights on that subject; and the Examiner ruled that contract language explicitly setting forth ranges of shift starting times constituted a waiver of the union's bargaining rights on that subject. We find no language in the parties' recent contract which is sufficiently specific to constitute a waiver of the union's bargaining rights on the lunch period schedule at Cleveland High School. We agree with the Examiner that the arbitrator disposed of the employer's "waiver by contract" defense, and that it should not have been revisited in this proceeding.

Waiver by Inaction

The employer argued before the Examiner, and argues again here, that the union waived its bargaining rights by inaction. It

contends the union was informed of the possibility of a lunch schedule change at Cleveland High School many months in advance of its actual implementation, that it knew of the possibility before the superintendent's May 24, 1995 memorandum, and that the lunch schedule was still an open question on June 16, 1995, but the union did not request bargaining.[15] The Examiner dismissed the employer's argument as "frivolous". We concur.

Timing of the Decision -

Principal Howard's testimony is particularly revealing, and requires rejection of the employer's repeated contention that the lunch schedule was still an open question on June 16, 1995. On direct examination by the employer's counsel, Howard testified:

> And the purpose of this meeting was to talk about how were going to implement the one lunch since **the vote had been for the one lunch**. I wanted to just put everything behind us and go forward and see how we were going to implement the one lunch.
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> [Tr. 161; emphasis by **bold** supplied.]
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> [Kitchen Manager Banay] didn't like the one lunch. She wanted to have the two lunches. And she gave me the reasons why, and I said, 'Well, **we've already voted to go to one lunch**. Let's try to work out how we're going to make this one lunch work. **That's not an option anymore**. ...
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> [Tr. 167; emphasis by **bold** supplied.]

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[15] The employer cites Lake Washington Technical College, Decision 4721-A (PECB, 1995); Clover Park School District, Decision 3266 (PECB, 1989); Mukilteo school District, Decision 3795-A (PECB, 1992); City of Brier, Decision 5089 (PECB, 1995), aff'd, Decision 5089-A (PECB, 1995); and City of Seattle, Decision 4851-A (PECB, 1995).

Howard's testimony constituted substantial admissions against interest, and the employer is bound by the testimony of its own witness. Further, Howard's testimony on cross-examination reconfirmed that the decision was made before June 16:

> Q. [By Ms. Barnard] Is it fair to say ... that the school district or the Cleveland High School was still considering the option of the two period lunch at the end of May in 1995?
>
> A. [By Mr. Howard] Not considering. I think we had made our decision by then. We were voting at that point.
>
> ...
> So we passed out the ballots on the 24th and it takes 48 hours at our Rep Council. So by this time, we kind of knew before the end of the month whether we were going to go to a two [sic] lunch.

[Tr. 174-175.][16]

It is clear Howard had no intention of bargaining either the lunch period schedule or its effects. In fact, other testimony by Howard evidences his complete disregard for the obligations of the collective bargaining process. Regarding Daugharty's statement at the June 16th meeting about filing a grievance, Howard testified:

> I was trying to ... work how I'm going to make **my lunch period** work. **My meeting wasn't with Mr. Daugharty.** It was with the two food service people for us to try to work out a system of trying to get our lunch period to work.

[Tr. 168; emphasis by **bold** supplied.]

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[16] After another person in the hearing room commented aloud, Howard immediately corrected his "two lunch" statement to "A one lunch."

When asked whether Daugharty took notes at the June 16th meeting, Howard testified:

> I don't know. He came to this meeting uninvited. I don't know what he was doing. I had my agenda. **I called the meeting. It was not his meeting. It was my meeting to meet with Mrs. Banay and Ms. Johnson**, and I had my agenda talking about the one period lunch. ... I didn't watch Mr. Daugharty at all.
>
> [Tr. 179; emphasis by **bold** supplied.]

Howard's testimony establishes that the decision to change to a one-period lunch schedule was final as of June 16, 1995. We infer that Howard, who was the key player for the employer in this transaction, saw obtaining a stamp of approval of the superintendent was simply a matter of routine. In fact, the superintendent acted in a manner that is properly characterized as a procedural approval of a decision already made by the principal.[17]

Fait Accompli -

The record provides a clear basis to conclude that the union was presented with a fait accompli by June 16th, so that it had no duty to request bargaining. In determining whether a fait accompli has occurred, the Commission's focus is on the circumstances as a whole, and on whether an opportunity for meaningful bargaining existed. In Lake Washington Technical College, cited by the employer, the Commission said:

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[17] An employer which puts persons in positions of power takes responsibility for their actions or inactions in violation of Chapter 41.56 RCW. By June 16th, Howard was trying to work out details of the one-period lunch schedule directly with employees. Had it not been for Daugherty's unexpected arrival at the meeting, such a meeting could have given rise to a claim of "circumvention" in violation of RCW 41.56.140(4) and (1).

> 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 should not be found.

The facts in this case are distinguishable, however, from the facts before the Commission in the cited case. In Lake Washington, a union ignored a letter in which the employer addressed the disputed issue and spoke of an "interest of continued dialogue on employment issues of mutual concern ..."; we have no such letter or invitation of a union response in the case now before us. In Lake Washington, the union was specifically waiting for a decision to be made or the decision to go into effect;[18] here the employer did not invite union input on the change and foreclosed discussion by its "not an option anymore" statement at a meeting where the employer had not even invited the union representative to be present. Under the circumstances of the case now before us, a request for bargaining would have been futile.

The employer argues that fait accompli is generally applied in situations where the union receives notices after implementation of a change, and that a critical feature of this case is the long interval (nearly three months) between actual notice to the union and implementation of the one-lunch schedule at Cleveland High School. Contrary to the employer's assertions, however, it was not

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[18] As the Commission said in that case:

> It is not appropriate to apply [the fait accompli] doctrine in a case where the employer invites input and the union chooses to be silent until the employer proceeds to implement its proposed change.

the interval between notice and implementation that was critical to the Commission's decision in Lake Washington, but the circumstances as a whole, and the behavior of the parties in question. While there was an interval here between the decision and its implementation, it is not nearly so long as the employer suggests.

The record belies the employer's assertions that the union knew prior to June 16, 1995 of the possibility of Cleveland going to a one-lunch schedule. The recommendation of the employer's budget committee and the superintendent's memorandum of May 24, 1995, each clearly indicated a preference for a two-period lunch schedule, so Daugharty had every reason to believe that the two-period lunch schedule at Cleveland High School would be preserved while other schools made the transition to two lunch periods. Considering Howard's statements at the June meeting, however, Daugharty had full reason to consider Cleveland's decision to deviate as a fait accompli. The fate of the lunch schedule at that time was not "very much in doubt" as the employer asserts.

The employer's actions subsequent to June 16th also support finding a fait accompli. The memorandum issued by new Superintendent Stanford in August stated concurrence with the memorandum issued by predecessor Superintendent Kendrick on May 24, 1995, but then opened a window for deviations from the two-period lunch policy. Although Stanford stated, "Therefore, authorization for scheduling a single lunch period will only be granted if your school can demonstrate the ability to meet these conditions", Stanford actually disemboweled Kendrick's policy by approving one-period lunch schedules in every instance where they were requested.[19]

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[19] This blanket caving in to the wishes of building principals is one of the facts supporting our inference, above, that the superintendent's approval was merely a matter of form.

Therefore, there is no reason to doubt that Howard believed a single lunch period would be authorized with routine justification, and there was every reason for Daugharty to believe that the employer was reneging on its mandate to go to two-period lunches throughout the district.

The Duty to Bargain Effects

The record is clear: The change to a one-period lunch schedule at Cleveland High School had an actual effect of decreasing student participation in the lunch program, and resulted in a five hour per day reduction in work opportunities for food service workers. The Examiner ruled the employer had a duty to bargain effects, while the employer argues that the arbitrator disposed of "effects" issues adverse to the union. We find, however, that the analysis cannot end with the arbitration award.

If we were concluding that there was no duty to bargain the underlying decision, the arbitrator's decision might put an end to this entire controversy. We have found, however, that the employer had a duty to bargain the underlying decision. We can neither predict all of the "effects" issues that might be considered by the parties, nor assess whether they are all controlled by the parties' contract, until such time as there is good faith bargaining on the underlying decision. The employer has a duty to bargain with the union concerning any and all effects which are not controlled by the parties' collective bargaining agreement.

Remedies

Remedial orders in unfair labor practice proceedings are designed to put the injured party back in the same situation it would have

enjoyed if no unfair labor practice violation had been committed. Reinstatement of the prior practice and back pay to make affected employees whole are the conventional remedies where employers unlawfully deprive bargaining unit employees of work opportunities. We note that the Examiner deviated from the usual formula, however:

- The Examiner did not expressly order the employer to reinstate the two-period lunch schedule at Cleveland High School. We correct that omission.

- The Examiner ordered the employer to make back pay payments computed on the basis of the total wages lost due to the reduction of work hours at Cleveland High School. The employer takes issue with the back pay remedy, but we agree that a back pay remedy is an appropriate response to the employer's refusal to bargain in good faith. The Examiner's order properly assessed the employer's maximum liability.

- The Examiner ordered that the funds be paid to the food service employees who remained at Cleveland High School, according to a pro rata formula based on each day of food service operations from September 1, 1995 until the date the two-period lunch is re-established and/or personnel are added to restore the lost work opportunities. Under Kennewick Public Hospital District, Decision 4815-A (PECB, 1996) and Municipality of Metropolitan Seattle (METRO), Decision 2845-A (PECB, 1988), however, back pay is properly directed to the individual bargaining unit employees who are negatively impacted by an employer's unfair labor practices. We have thus amended the distribution formula to provide a more conventional back pay remedy in this case. See, Mansfield School District, Decision 5238-A (PECB, 1996).

Attorney Fees

In creating the Commission, the Legislature expressed its intention to achieve:

> [E]fficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services.
>
> RCW 41.58.005.

In Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992), the Supreme Court approved a liberal construction of RCW 41.56.160, in order to accomplish its purpose. The authority granted to the Commission has been interpreted to be broad enough to authorize an award of attorney fees.

- The Commission has awarded attorney fees when it was "necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless". METRO, supra. The term "meritless" has been defined as meaning groundless or without foundation. See, State ex rel. Washington Federation of State Employees v. Board of Trustees, 82 Wn.2d 60 (1980); Lewis County v. PERC, 31 Wn.App. 853 (1982), review denied, 97 Wn.2d 1034 (1982); King County, Decision 3178-B (PECB, 1990); Public Utility District 1 of Clark County, Decision 3815-A (PECB, 1992).

- The Commission has also awarded attorney fees when the respondent has engaged in a pattern of conduct showing a patent disregard of its statutory obligations. In Mansfield School District, Decision 5238-A (EDUC, 1996), attorney fees were based upon finding a causal connection between an

employee's testimony in a previous unfair labor practice proceeding and discriminatory actions against her and her husband. See, also, City of Winlock, Decision 4784-A (PECB, 1995), where the Commission reinstated an employee with full back pay where it found strong inferences of union animus in relation to his discharge, and the employer did not produce legitimate reasons for the discharge.

In a footnote in its appeal brief, the employer cites Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997) as jeopardizing the Commission's authority to award attorney fees in any case. The employer claims that Washington precedent allowing awards of attorney fees is based on Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir. 1970), cert. denied sub nom. Tiidee Prods., Inc. v. Int'l Union of Elec., Radio & Mach. Workers, 400 U.S. 950 (1970), which was overruled by Unbelievable. We do not concur that Tiidee is the basis for Washington precedent on the subject.[20] Moreover, even if that Unbelievable decision changes the interpretation of the federal law with regard to the remedial authority of the National Labor Relations Board, our remedial powers stem from RCW 41.56.160, and from state court decisions interpreting that section of state law. Our Supreme Court did not feel constrained by federal precedent in METRO, supra, when it went far beyond federal precedent in holding that

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[20] The Court cited Tiidee as persuasive, but not as controlling, in State v. Central Washington University, 93 Wn.2d 60 (1980). That case arose out of a proceeding before the (since-abolished) Higher Education Personnel Board. Even then, the Court found the Legislature had "empowered and directed" the prevention of unfair labor practices, and stated a belief that "remedial" action encompasses the power to award attorney fees under appropriate circumstances. The only citation of Tiidee in a decision of this agency was in an Examiner decision which was reversed by the Commission.

this Commission has authority to impose interest arbitration as a remedy in appropriate cases. We are not persuaded that this is the time to overrule years of Washington precedent.

The Examiner ordered the employer to pay the union's attorney fees. The employer argues that it has not engaged in repetitive, intentional, or otherwise aggravated misconduct, that its view of the core bargainability issue in this case is understandable and well-intentioned, and that this case bears no resemblance to cases with the types of repeated, pervasive, flagrant, or outrageous violations that support an extraordinary remedy. We reject the employer's arguments as to most of the defenses asserted.[21]

The employer devoted substantial energy, and nearly eight pages of its post-hearing brief, to its "waiver by inaction" defense.[22] The Examiner cited the employer's "waiver by inaction" defense as frivolous, after hearing the above-quoted testimony of Principal Howard. We agree that this defense was frivolous, in light of that testimony, and that the employer has belabored the record by its continued attempts to defend Principal Howard.

As an additional basis for awarding attorney fees to the union in this case, we add the employer's continued disregard of our long-established "deferral to arbitration" policy, and its repeated mischaracterization of the arbitration award. As indicated above,

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[21] We acknowledge that there was a debatable issue concerning the duty to bargain the decision on lunch periods at Cleveland High School, and that the Examiner did not fully address that issue. That does not justify the tone and content of the employer's brief, which did nothing to promote good faith bargaining between these parties.

[22] The employer had devoted less than four pages to the "scope of bargaining" issue.

the employer asked for deferral under our precedents authorizing deferral where the employer conduct at issue in a "unilateral change" case was "arguably protected or prohibited" by the parties' collective bargaining agreement. The employer then *lost this case in arbitration*, when it failed to persuade Arbitrator Wilkinson that its conduct was, in fact, protected by the parties' contract. We predicted such a result in City of Yakima, Decision 3564-A (PECB, 1992); the Executive Director implied the same in Seattle School District, Decision 5733 (PECB, 1996), when he sent this case out for hearing; the Examiner said so in Seattle School District, Decision 5733-A (PECB, 1997); and we have had to say the same thing again here. We find the employer's meritless arguments demanding repetition of well-established principles are grounds for imposition of an extraordinary remedy in this case.

As to the employer's claim that its conduct was not flagrant or repetitive, we note that the union showed an interest in the lunch schedule issue for months prior to the decision at issue in this case, that the employer brought Daugharty into its own budget processes, that Daugharty had communicated with the superintendent about the issue, and that Superintendent Kendrick's May 24th directive was in harmony with the parties' dealings up to that time. There was a flagrant disregard for the collective bargaining process when Principal Howard did everything he could to ignore the presence of Daugharty at the June 16 meeting, and the employer went on to countermand everything that had transpired up to and including the May 24th memo. We find that the employer exhibited a pattern of obstinate refusal to bargain, and made no attempts to even communicate or discuss the matter of changing the Cleveland High School lunch periods with the union in any way. This warrants an award of attorney fees to curtail such actions in the future, to

prevent their recurrence, and to make the order effective.[23] See, e.g. Lewis County v. Public Employment Relations Commission, 31 Wn.App. 853 (1982).[24]

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by Examiner William A. Lang in the above-captioned matter on September 16, 1997, are AFFIRMED and adopted as the Findings of Fact of the Public Employment Relations Commission in this proceeding.

2. The Conclusions of Law issued by Examiner William A. Lang in the above-captioned matter on September 16, 1997, are AFFIRMED and adopted as the Conclusions of Law of the Commission, except paragraphs 3 and 4 are amended to read as follows:

> 3. By unilaterally changing the lunch period schedule at Cleveland High School, a mandatory subject of bargaining under RCW 41.56.030(4)

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[23] We are not evaluating whether the change to a one-period lunch was the right decision to make, only determining that it was one that should have been bargained with the union, and that the employer's conduct and attitude in refusing to bargain the issue shows a patent disregard for its obligation in this case.

[24] In a case where the employer's counsel characterized the union's bargainability claim as "ludicrous", the Examiner characterized the employer's "status quo was a one-period lunch schedule" argument as "preposterous". We hesitate to join in a contest of adjectives, but consider that argument to be at the outer edge of the "debatable" zone. The employer's announced policy as of June 16th (based on the May 24th memo) was a two-period lunch schedule.

involving the wages, hours and working conditions of food service workers in the bargaining unit represented by IUOE Local 609, without having given notice to and provided opportunity for bargaining with Local 609, the Seattle School District failed and refused to bargain in good faith and violated RCW 41.56.140(4) and (1).

4. Other than its debatable defense concerning whether the disputed decision was a mandatory subject of bargaining, the defenses asserted by the employer in this proceeding concerning waiver by inaction and waiver by contract were so frivolous, and the employer's conduct was so flagrant, as to warrant the imposition of an extraordinary remedy under RCW 41.56.160.

3. The Order issued by the Examiner in the above-captioned matter is replaced by the following:

ORDER

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

1. CEASE AND DESIST from:

a. Failing or refusing to give notice to International Union of Operating Engineers, Local 609, prior to deciding upon or implementing changes of mandatory subjects of

bargaining for employees in bargaining units represented by Local 609, including the number of lunch periods scheduled at Cleveland High School.

b. In any other manner, interfering with, restraining or coercing its employees in their 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. Reinstate the two-period lunch schedule at Cleveland High School (as in effect at that school on and before May 24, 1995) beginning with the next academic semester or quarter, and maintain that schedule in effect until such time as the employer has fulfilled its collective bargaining obligations under Chapter 41.56 RCW.

b. Give notice to Local 609 and provide opportunity for bargaining prior to making any decision to change the lunch period schedule at Cleveland High School from that required by the preceding paragraph of this order and, if bargaining is requested, bargain in good faith to agreement or impasse prior to implementing any change of that schedule.

c. Provide back pay and benefits, computed in accordance with WAC 391-45-410, to employees adversely affected by the unlawful unilateral change of lunch periods schedule implemented at Cleveland High School on or about September 1, 1995, by payment to employees who held or

would have held positions at Cleveland High School for the difference, not to exceed an aggregate of five hours per day, between the compensation they actually received and the compensation they would have received in the absence of the unlawful unilateral change, from the date the one-period lunch schedule was implemented until the date when the two-period lunch schedule is reinstated pursuant to this order.

d. Reimburse International Union of Operating Engineers, Local 609, upon presentation of affidavits, for its attorney fees incurred in its prosecution of this matter (including the filing of the complaint and preliminary ruling, the proceedings before the Executive Director to implement the Commission's deferral policy, the proceedings before the Examiner and the proceedings before the Commission), based upon to the employer's assertion of frivolous defenses and/or the employer's flagrant misconduct in violation of Chapter 41.56 RCW.

e. 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 above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

f. Read the notice attached hereto and marked "Appendix" into the record of the next public meeting of the

employer's Board of Directors, and append a copy thereof to the minutes of such meeting.

g. Notify the above-named 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 above-named complainant with a signed copy of the notice required by the preceding paragraph.

h. 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 required by the preceding paragraph.

Issued at Olympia, Washington, on the 19th day of May, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL give notice to International Union of Operating Engineers, Local 609, prior to deciding upon or implementing changes of mandatory subjects of bargaining for employees in bargaining units represented by Local 609, including the number of lunch periods scheduled at Cleveland High School.

WE WILL reinstate the two-period lunch schedule at Cleveland High School (as it was in effect before May 24, 1995) beginning with the next academic semester or quarter, and will maintain that schedule in effect until such time as we fulfill our collective bargaining obligations under Chapter 41.56 RCW.

WE WILL provide back pay and benefits, computed in accordance with WAC 391-45-410, to employees adversely affected by the unlawful unilateral change of lunch periods schedule at Cleveland High School, by payment to employees who held or would have held positions at Cleveland High School for the difference, not to exceed an aggregate of five hours per day, between the compensation they actually received and the compensation they would have received in the absence of the unlawful unilateral change, from September 1, 1995 until the date when the two-period lunch schedule is reinstated pursuant to this order.

WE WILL reimburse International Union of Operating Engineers, Local 609, upon presentation of affidavits, its attorney fees incurred in its prosecution of this matter, based on the employer's assertion of frivolous defenses and/or the employer's flagrant violation of RCW 41.56.140.

WE WILL read this notice into the record of the next public meeting of the employer's Board of Directors, and append a copy thereof to the minutes of such meeting.

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

SEATTLE SCHOOL DISTRICT

DATED: _____ BY: _____

Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.