STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GREEN RIVER UNITED FACULTY COALITION, Complainant, vs. GREEN RIVER COMMUNITY COLLEGE, (COMMUNITY COLLEGE DISTRICT 10), Respondent.	)	CASE 8889-U-90-1952 DECISION 4008-A - CCOL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Evelyn Rieder, Executive Director, Washington Federation of Teachers, AFL-CIO, appeared for the union.

Kenneth Eikenberry, Attorney General, by James R. Tuttle, Assistant Attorney General, appeared for the employer.

On November 6, 1990, the Green River United Faculty Coalition (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Green River Community College (employer) had violated RCW 28B.52.073, with regard to alleged unilateral changes of employee wages, hours and working conditions. The Executive Director's preliminary ruling, issued pursuant to WAC 391-45-110, found that the complaint stated a cause of action.[1] Examiner J. Martin Smith was assigned to conduct further proceedings in the matter. The settlement conference procedure of WAC 391-45-260 was initiated in 1991, but did not result in a resolution of the matter.

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

On February 7, 1992, the employer filed a motion for dismissal of the complaint, asserting that the Public Employment Relations Commission lacked jurisdiction over the parties. The union filed a letter on February 20, 1992, responding to that motion. On March 2, 1992, the employer: (1) sought a summary judgment in the matter; (2) moved to strike the union response filed on February 20, 1992; and (3) sought to exclude evidence of any alleged violation of the sick leave or emergency leave provisions of the parties' contract.

On March 5, 1992, the Examiner denied the employer's motions for dismissal, summary judgment, striking of the union's response, and exclusion of evidence.[2]

A hearing was conducted before the Examiner on April 27 and 28, and June 9, 1992. The parties thereafter filed memoranda of legal authorities to complete the record in this case.

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[2] Green River Community College, Decision 4008 (CCOL, 1992). The Examiner therein noted that, "a preliminary ruling on this complaint has been issued, stating that an employee's failure to bargain could be a violation of law", and that, "whether or not any employee has engaged in unprotected activity, or whether the employer was making a lawful response to prohibited activity, raises questions of fact ...". The Examiner also stated:

> The core rights of academic employees under Chapter 28B.52 are the rights to form, join or assist employee organizations for the purposes of collective bargaining ... If a labor organization files an unfair labor practice charge alleging violations of RCW 28B.52.073, the Administrative Procedures Act at Chapter 34.05 RCW requires the Commission to decide the matter on the basis of a full evidentiary record.

Since the allegations concerned facts probative to the employer's failure to bargain a change in policy, the motions for dismissal and summary judgment were denied. The Examiner also noted that the right to file charges under Chapter 391-45 WAC does not depend upon whether the union was engaging in "protected" activity.

BACKGROUND

Green River Community College (GRCC) is a state institution of higher education operated pursuant to Chapter 28B.50 RCW. The employer's statutorily defined "district" is in the southeast portion of King County, Washington. The main campus and administrative buildings are at Auburn, Washington. Policy direction for the institution comes from a board of trustees appointed by the Governor subject to confirmation by the Senate. Richard Rutkowski is the president of the college; Clark Townsend is assistant to the president; Rick Brumfield is vice-president for business affairs; Ben Lastimado is director of personnel and affirmative action. The employer retains a consultant, James Conner, for many of its labor relations responsibilities.

The academic faculty at GRCC is represented for purposes of collective bargaining by the Green River United Faculty Coalition (UFC).[3] Jerry Hedlund is the president of the UFC. Although the UFC is affiliated with both the Washington Federation of Teachers, AFL-CIO (WFT), and the Washington Education Association/AHE (WEA), the WFT is responsible for negotiations with the employer.[4]

Negotiations in Summer of 1990

These charges emerge from negotiations for a successor to a 1987 - 1990 collective bargaining agreement between the parties. That contract was designated to expire on May 15, 1990. Clark Townsend was the principal negotiator for the employer; President Rutkowski

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[3] The UFC was certified as exclusive bargaining representative by the Commission, as the result of a representation election held in 1977. Green River Community College, Decision 273 (CCOL, 1977).

[4] An attorney employed by the Washington Education Association entered an appearance on behalf of the union in this case, but subsequently withdrew on February 21, 1992.

attended bargaining sessions. Betty Vickers was the chief negotiator for the UFC;[5] Evelyn Rieder was the staff representative from the WFT.

Negotiations during March, April and May of 1990 were difficult, but not acrimonious. Wages and provisions with respect to part-time faculty were on the agenda, along with certain contract issues which had separated the parties in past contract negotiations. The employer did not move quickly from its positions, and the parties appear to have reached impasse over a short list of issues, rather than any overriding issue.

Vickers testified that the UFC proposed changes in the sick leave provision set forth at Article VI, Section A of the contract, and that the UFC also asked for 10 days of paid bereavement leave and 5 days of paid personal leave. By September 29, 1990, the parties reached a tentative agreement to add two days to the emergency leave clause of the contract, and to leave the "sick leave" provisions of Article VI at "current contract language" in the typical labor relations parlance. Conner remembered the sick leave clause as being largely unchanged from the contract language negotiated by the employer with a predecessor union in 1974.[6]

Mediation and Further Negotiations

By late September 1990, the parties agreed to request the services of a mediator. Beverly Rinehart of the Federal Mediation and Conciliation Service scheduled mediation sessions with the parties for October 29 and 30, and November 6, 1990.

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[5] Vickers had been an instructor at GRCC for 14 years.

[6] Conner described a nine-day work stoppage by GRCC faculty in 1974, and recalled that no sick leave requests were honored for days lost due to that work stoppage. Conner acknowledged that instructors did work "make-up days" for standard hourly pay following the 1974 work stoppage.

The impasse in negotiations was discussed at a meeting of the UFC executive board on October 8, 1990. A motion was "made, seconded and tabled that the Executive Board encourage faculty to support a Professional or Sick Day on Tuesday, October 16."[7]

On October 11, 1990, the union's executive board directed faculty members to hold their regularly scheduled office hours, but to leave the campus promptly thereafter.[8] At the same meeting, it was "moved, seconded and passed to recommend that the faculty give the UF executive board the authority to call a strike".[9]

Apparently, some vote of the faculty was taken. On October 18, 1990, a flyer sent out by the union to all UFC members announced that a strike authorization had passed by a margin of 95 "Yes" votes to 3 "No" votes.

On Monday, October 22, 1990, the UFC executive board voted to file both unfair labor practice complaints and a unit clarification petition with the Public Employment Relations Commission.[10]

The Events of October 26-30, 1990

On Friday, October 26, 1990, approximately 20 faculty members were absent from work and/or canceled their classes. Those absences were all from two areas of the campus, namely the "BI" and

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7 Exhibit 8. Apparently no vote was taken on that motion.

8 Exhibit 9.

9 Exhibit 10.

10 The parties had disputes at this time concerning the bargaining unit status of employees working at an "Education and Training Center" located in Kent, Washington (Cases 8867-U-90-1946 and 8905-C-90-508, both of which remain pending before the Commission), and concerning employees working at a branch campus located in Kanuma, Japan (Case 8906-C-90-509, since withdrawn).

"Library" buildings. Only two of the faculty members absent on October 26 were on approved sick leave, and rumors of a "sick-out", "work stoppage" or "walkout" circulated on the campus. Rutkowski testified that he attended a meeting at Mt. Vernon, Washington, on the morning of October 26, and that he arrived back at the GRCC campus to find classes canceled and students fuming about a "lack of notice".[11]

Conner had planned to join the employer's bargaining team beginning with a mediation session scheduled for November 6, but he was summoned to meet with Rutkowski, Townsend and Assistant Attorney General Janet Frickleton on Saturday, October 27. Rutkowski remembered meeting on October 27 with the Board of Trustees and his "cabinet", as well. The general discussions of these meetings concerned how the employer was going to respond to what appeared to be a work stoppage of undetermined duration.[12] The employer officials were not sure of what was going to happen on Monday, October 29, 1990, except that the federal mediator was due to convene mediation that evening.

On Monday, October 29, 1990, classes in the "BI" and "Library" buildings operated normally, but there were 30 faculty absences from the "HS" building, 9 faculty absences from the "ST" building, and 2 faculty absences from "OE" building.

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[11] Community colleges typically do not call in "substitute" teachers for classes, but often re-schedule class periods that are missed.

[12] According to payroll records, the average daily absence rate for full-time faculty during the February, 1990 to January, 1992 period was only 0.75 per day. Rick Brumfield, the GRCC vice-president for business affairs, also testified that the average faculty absence rate would be "one" for any particular classroom day, and he produced charts prepared for the hearing in this matter. No part-time faculty were involved in these statistics.

The employer arrived at a course of action, and Townsend read the following statement to the bargaining teams at the beginning of the mediation session on Monday, October 29, 1990:

> 1. The College has a responsibility to its students and the public to make all reasonable efforts to provide an ongoing instructional program.
> 2. The College administration believes that a work stoppage by faculty members, such as occurred on Friday, October 26, 1990, substantially interferes with the educational mission of the College.
> 3. **You are now reminded that sick leave can only be authorized in circumstances when you or an immediate family member are ill.**
> 4. **Under the sick leave law, the college has no authority to pay faculty who choose not to fulfill their teaching assignments for reasons other than illness.**
> 5. Therefore, as of Friday, October 26, 1990, **sick leave will only be granted when a medical statement signed by a physician on his/her letterhead verifies each sick leave request.**
> 6. Emergency leave is only authorized when a true emergency exists and is verified by a written statement which details the unavoidable circumstances of the emergency.
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> [Emphasis by **bold** supplied.]

Individual memos distributed to all faculty members on the same day contained the same text.

The employer's announcement became a topic of discussion during the early stages of the October 29 mediation session. Vickers thought that Townsend's statement was an "edict", and that it did not sound to her like an "offer to negotiate". She believed that Article VI of the contract had already been negotiated to a tentative agreement in September, and that "doctor verification" had not been made an issue, or a part of the contract. Vickers testified that

Townsend's speech was "very discouraging", that it "annoyed" her, and that it persuaded her that "maybe" the employer did not want a contract.

During the afternoon of October 29, 1990, UFC President Hedlund sent a letter to all faculty members on UFC letterhead, advising that AFT and AHE legal representatives had advised the UFC that the physician statement requirement could not be made pursuant to the Article VI sick leave provision. In a more lengthy memorandum issued the same day, Hedlund advised the faculty that the UFC believed the employer's action was an unfair labor practice, and that the UFC would take appropriate actions.

On Tuesday, October 30, 1990, eight faculty members were absent, mostly from the "SMT" building, but other operations were normal.

Subsequent Related Events

The employer's records indicate that attendance by the faculty was at or near normal on October 31, November 1 and following days.

On November 1, 1990, the UFC mailed the unfair labor practice complaint in this case to the Commission.

At a UFC executive board meeting held on November 5, 1990, the faculty was instructed to not provide "details of illnesses or include notes from physicians when submitting sick leave forms", but were encouraged to apply for sick leave "whenever it is appropriate". Also announced was a plan to picket a college administrative meeting scheduled for November 8, 1990, and a "lunch-in" scheduled to be held at the student cafeteria on November 9, 1990.[13]

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[13] Exhibit 18. The employer has not raised any issue concerning these activities, which presumably caused no cancellation or postponement of classes.

At the mediation session held on November 6, Conner asked the mediator to get an answer from the UFC with respect to the employer's announced "leave verification" procedure. The mediator indicated that the union said only, "We understand the College's position". Apparently, the union made no counter-proposal on the sick-leave issue.

Soon thereafter, the employer began to receive sick leave requests for absences which occurred on October 26. For example:

Instructor Stan Guinn requested leave for eight hours for illness/injury." No other explanation was provided initially.

Instructor Betty Vickers submitted a request for emergency leave, and indicated by testimony she was visiting her ill mother in southwest Washington. She offered no physician verification.

Instructor Jerry Hedlund, filed a sick leave request. He testified that he felt ill on that date, but submitted no physician verification.

The next regular paydays for GRCC faculty members were on November 9 and 26, 1990. Reductions in an amount approximating "one days pay" were made on the pay warrants of 56 faculty members who were absent from work on October 26, 29 or 30, and who did not provide a physician's verification.[14] No reductions were taken from the pay of 42 other faculty members who were at work on all three of the days in question.

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[14] Of the 59 teacher absences on the three days, three physician verifications were eventually submitted and accepted by the employer. The leave slip submitted by Stan Guinn was initially marked "disapproved deducted as leave without pay", and his pay stub for November 9, 1990 reflected a deduction of $220.23 for leave "without pay". Guinn testified that he later provided the personnel office with a note from Dr. Richard McCabe, DDS, who indicated that he treated Guinn for a toothache on October 26, 1990. Guinn was still protesting this deduction on January 16, but appears to have been paid eventually for this day.

Negotiations between the parties continued. At a session held on November 15, 1990, the UFC made the following proposal:

> ARTICLE - AMNESTY
>
> Section A - Amnesty
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> 1. All faculty, full-time or part-time and all other faculty who participated in any coverted [sic] activities shall be returned to work without malice, intimidation, reprisal, discrimination or recrimination or loss of pay either now, or in the future from the college, any of its administrators or any other of its authorized agents.
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> 2. No student shall be disciplined, subjected to malice or intimidation or in any other way penalized by any college official or agent by reason of his/her participation in coverted [sic] activities.
>
> 3. Any allegation or violation of this amnesty agreement shall be set down in writing by the person or persons affected and be presented to an impartial arbitrator appointed by the American Arbitration Association. Said arbitrator shall be empowered to take any appropriate action to satisfy the complaint.

Conner testified that the foregoing "amnesty" language was received by the employer as the last page of a 14-page package proposal made by the UFC. The parties noted with amusement that the word "concerted" had been misspelled, and Conner corrected that error on his copy of the document.[15]

On November 26, 1990, Rutkowski sent a memo to all faculty members, advising that the physician verification procedures described his October 29, 1990 memo were rescinded, retroactive to November 1, 1990. Instructors were told that "the conditions which prompted the stringent sick leave reporting requirements for faculty have

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[15] Conner's copy of the document was admitted in evidence in this proceeding, as Exhibit 11.

changed", and that they were to follow the sick leave procedures in effect prior to October 26, 1990.

No "make-up" classes were held for those faculty members who were absent on October 26, 29 and 30. Apparently, an attempt was made to settle the issue of the employee absences in March of 1991, when the employer offered to compensate employees for the "docked" sick leave day in return for its package proposal to end the negotiations. Conner testified that he made a "what-if" proposal, with the mediator present. His recollection is as follows:

> I did indicate a what-if situation and indicated it was strictly that. That it had not been discussed with the [employer's Board of Trustees] ... but in any event it was, would a possible basis for settlement be to withdraw and leave all litigation and accept the districts' position regarding the Educational Training Center and at the same time pay for any time lost during the work stoppage. ... If my recollection serves me correct, there was not even a caucus. It was just rejected outright at that point and that was the end of it as far as proceeding any further.

[Transcript at page 420.]

The parties finally reached a tentative agreement on a collective bargaining agreement on or about March 13, 1991. Vickers estimated that 200 hours were spent in bargaining for the new contract. By the union's accounting, some 38 bargaining and mediation sessions were held in these negotiations before a tentative agreement was reached. As part of the "settlement terms" document prepared on March 13, the UFC reserved the right to pursue the "sick leave deduction" unfair labor practice claims advanced in this case.[16]

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[16] Also remaining pending before the Commission is Case 8934-U-90-1966, which was filed by the UFC on December 10, 1990. Some allegations of that case were dismissed on September 6, 1991, Green River Community College, Decision 3861 (CCOL, 1991). That case has not been the subject of active processing since. The decision in this case, however, is dispositive as to the issue of unilateral change of sick leave provisions.

POSITIONS OF THE PARTIES

The UFC contends that the employer unilaterally implemented a requirement that employees provide, upon request, a physician's verification that the employee was ill on a day for which "sick leave" was claimed under Article VI(A) of the collective bargaining agreement. The UFC urges the Commission to find a violation even though the alleged change came after two work days when a significant number of employees filed for sick leave at the same time, citing that there had never been any discussion between the parties of a physician verification requirement during earlier successful negotiations on the sick leave clause.

The employer argues that it never changed the sick leave policy, and that it had always maintained a right to require physician verification under the parties' contract. It asserts that it called for physician verification for absences on October 26, 29 and 30, 1990, because it believed that there was a "sick-out" or "work stoppage" which was an expression of displeasure by the bargaining unit about the lack of a contract settlement, rather than related to legitimate illnesses. Based on its premise that it did not implement a "unilateral change", the employer asserts that it did not fail to bargain in good faith under RCW 28B.52.073(1)(e).

DISCUSSION

Case Law on "Unilateral Change"

As noted in City of Pasco, Decisions 4197, 4198 (PECB, 1992), the "unilateral change" has been a subject of ongoing legal analysis since NLRB v. Katz, 369 U.S. 736 (1962). An employer commits an unfair labor practice if it changes an existing term or condition of employment of its union-represented employees, without having exhausted its obligations under the collective bargaining statute.

Those obligations include giving the union advance notice of the proposed change, and bargaining in good faith if requested.

Chapter 28B.52 RCW is the collective bargaining statute which covers the academic faculty employees of community colleges. As amended effective July 26, 1987, that statute imposes bargaining obligations similar to those found in Chapters 41.59 and 41.56 RCW,[17] which are in turn closely parallel to the provisions of the National Labor Relations Act. Community college districts are obligated to bargain in good faith with the exclusive bargaining representatives of their faculty employees. RCW 28B.52.073(1)(e).

In the current situation, the parties were without a collective bargaining agreement from May 16, 1990 until March 13, 1991. No "extension" or interim agreements were signed. Conner indicated that the employer took the position that the terms and conditions which apply to individuals, (e.g., salaries, load, leaves, etc.) continued "at the same level that was in effect in the previous contract", but that the union security clause and grievance procedure were "dormant" during that hiatus. Impliedly, the employer recognized that it still had a bargaining obligation regarding "unilateral changes" affecting employee wages, hours and working conditions.

The first ingredient of a "unilateral change" case is that there be some change. In Pierce County Fire District 3, Decision 4146 (PECB, 1993), an unfair labor practice complaint was dismissed

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[17] The Educational Employment Relations Act, Chapter 41.59 RCW, governs collective bargaining relations between school districts and their certificated employees. The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs collective bargaining relations between a wide variety of local government and state government employers and their employees. Unlike RCW 41.56.123, however, there is no provision in Chapter 28B.52 RCW that **automatically** extends a collective bargaining agreement beyond its expiration date.

where it was concluded that the employer's enforcement of a rule on "emergency call-back" was a reiteration of a long-standing rule, rather than an adoption of some new or changed rule.

A recent analysis summarizes four other "windows of opportunity" when an employer can escape the need to bargain: (1) when the subject matter of the change is not a mandatory subject of collective bargaining; (2) when the duty to bargain on a mandatory subject has been waived by contract provisions; (3) when the union fails to request bargaining after being given timely and adequate notice of the change; or (4) when the dispute involves an emergency, such that bargaining is not possible or required. "When May Unilateral Changes Be Made Without a Bargaining Obligation?" Washington Public Employment Relations REVIEW, Volume II, No. 3 (December, 1992).

In this case, there is no doubt that "sick leave" is a mandatory subject of bargaining. In response to an inquiry concerning the propriety of "deferral to arbitration", the employer made it clear that the parties' contract had expired at the time of the disputed events, and that therefore no grievance arbitration provision was then viable. But the employer has not argued that sick leave was anything but a mandatory subject.

Was There Any Change?

A question arises in the instant case as to whether the "physician verification" requirement imposed by the employer in October of 1990 was actually a change of practice. It is difficult to accept the union's claims here that sick-leave absences were never denied, and that physician's statements were never used.

Common practice in many employment settings is to require that an employee provide a physician's verification to support a claim of sickness after some specified period (e.g., three working days).

In the public sector, paid time off would be a "gift of public funds" unless justified in relation to some established leave benefit (e.g., "annual leave" or "sick leave") granted to the employee by contract, practice, rule or statute.[18]

Many instructors at Green River Community College have, in fact, arranged for "pre-approved" use of sick leave. For example, Bob Aubert arranged for substitute teachers during a time when he was to be absent for surgery in 1990, and notified the employer in advance of those arrangements. This indicates that the employee understood the need for, and the employer has exercised, some review of claims for paid sick leave.

The record also contains examples of situations where sick leave verification has been required, and where claims have been denied by this employer:

Carpentry instructor Walter Jacobson was requested to provide a physician's verification for coronary problems in 1989. Jacobson provided the requested verification.

Employee Carol Bishop was asked for, and provided, documentation to verify her extended illness leave, when an anticipated one-month absence for surgery turned out to be longer.

Math teacher David Bender was asked for, and apparently provided, physician's verifications on two occasions in 1991.

Employee Judith Ferguson was denied paid leave for an absence while attending a Rose Bowl game in 1978.

Employee Pat Cummins was denied paid leave for an absence while on a canoe trip in 1989.

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[18] As to the classified employees of a community college district, the Higher Education Personnel Law in effect at the time of concern here provided, at RCW 28B.16.100, for the Higher Education Personnel Board (HEPB) to adopt rules governing sick leave for employees. WAC 251-22-100, 251-22-110 and 251-22-111 set forth the HEPB rules on the subject, including authority of an employer to require physician verification of sick leave claims.

The union sought to distinguish these examples on two grounds: First, that none of the verifications were sought when the employee had only been absent **one** day, and second, that there was "no consistent uniform written policy regarding when the College would ask for verification". In unrebutted testimony, however, employer negotiator James Conner recalled that faculty members who engaged in the strike activity in 1974 were docked pay for the strike, and requests from faculty members for sick leave during that strike were denied, based upon Article VI, Section A(5) of the contract then in existence, which allowed salary deductions for "leaves" which were **"not covered by the leave provisions"**. The same contract provision appeared in the 1987-1990 agreement between the employer and the UFC. Conner testified, further, that sick leave claims were denied when the GRCC faculty engaged in a one-day walkout in 1975.[19] There has been no work stoppage since the UFC became the exclusive bargaining representative of the faculty at GRCC, and so no opportunity to revisit, test or change the practice which predates the current bargaining relationship.

It appears that the employer at one time entertained an idea to require physician verification after five days,[20] which would have been a change from the 1973-74 agreement, but there is no indication that an agreement was reached to that effect. There can be no question however that, based on a reasonable suspicion of fraud or misuse, the employer retained a right to request medical verification for sick leave claims. In this case, the employer reasonably suspected that its employees were engaging in a concerted work

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19 In 1975, the faculty was upset that the employer had adopted a calendar which included "holidays" for certain staff members. After a one-day strike in November, the former exclusive bargaining representative requested that sick leave be utilized to cover the lost day or, in the alternative, that the day be re-scheduled. Those requests were rejected, and the faculty lost a day's pay.

20 Exhibit 35 contains a handwritten note to that effect on a document from the employer's files.

stoppage (i.e., a strike), rather than being too ill to teach school on the days in question. There simply was too much evidence that employee claims of illness were not genuine, and that the sick leave requests were an artifice erected with the hope that it would withstand scrutiny under examination, cross-examination, documentation, and due process. It did not. The Examiner concludes that the employer was acting within its historical policies in demanding physician verification of sick leave claims for the period of the suspected work stoppage, and that there was no "unilateral change".

Did the Union Waive Bargaining Rights by Inaction?

If there was an alteration of the sick leave policy in this case, it was announced by the employer at the October 29, 1990 mediation. The reasons for an "immediate" implementation were or should have been clear to all concerned. The employer sought a response from the union, through the mediator.

The union's brief makes a fait accompli argument, i.e., that because the employer had already made up its mind to implement a physician's certification requirement, the union was not obligated to make a futile attempt to request bargaining. See, Renton School District, Decision 1608 (PECB, 1983) and City of Vancouver, Decision 808 (PECB, 1980). The facts of this case fail to establish a fait accompli, however. First, as noted above, the physicians' verification requirement was not a change in overall college policy on unauthorized sick leave. Second, the employer informed the staff in November of 1990 that the requirement would be waived for the remainder of the year.[21]

If the duty to bargain existed, the union argues that it was entitled to give a simple "no" response to the employer, once the

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[21] If a fait accompli existed, it was only for the period October 26 through November 26, 1990.

"new" sick leave policy was announced. The facts do not support the union argument, however. The UFC made a minimal response, by stating, through the mediator, that it "was aware of the employer's position". Implementing the statutory duty to bargain requires more than mere resistance to notice of a contemplated change. Newport School District, Decision 2153 (PECB, 1985); Willapa Valley School District, Decision 4374 (PECB, 1993). This is especially true where the parties are engaged in contract negotiations, and opportunities for bargaining are frequent. If the union had a right to bargain here, it did not take steps to protect or implement that right.

Was there an "Emergency"?

The obligations of the collective bargaining process normally take time (e.g., for "notice", "opportunity for bargaining", "reasonable time to request bargaining", and "good faith negotiations"). Evergreen School District, Decision 3954 (PECB, 1991) discusses the situation where a unilateral change of a limited nature is necessitated by an emergency of some kind. In that case, the employer "skimmed" bargaining unit work, by having late-arriving textbooks processed and delivered by a non-bargaining unit employee.[22] The employer was excused from its bargaining obligation in that case, in the name of getting the textbooks into the hands of waiting students without further delay. Such emergencies excuse the duty to bargain, and presuppose that a "change" has been implemented. By contrast, no "emergency" justified the "skimming of unit work" situations in Kennewick School District, Decision 3942 (PECB, 1992) and North Franklin School District, Decision 3980 (PECB, 1992).

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[22] The "skimming of bargaining unit work" is an action which usually requires notice to the union and an opportunity to bargain. By its nature, a reasoned decision to change work from one unit to another for efficiency is seldom an "emergency". See, City of Seattle, Decision 4163, 4164 (PECB, 1992).

Chapter 28B.52 RCW protects the right of community college faculty members to organize, to bargain, and to pursue grievances, within limitations.[23] RCW 28B.52.078 provides:

> The right of community college faculty to engage in any strike is prohibited. The right of a board of trustees to engage in any lock-out is prohibited. Should either a strike or lockout occur, the representative of the faculty or board of trustees may invoke the jurisdiction of the superior court in the county in which the labor dispute exists and such court shall have jurisdiction to issue an appropriate order against either or both parties. In fashioning an order, the court shall take into consideration not only the elements necessary for injunctive relief but also the purpose and goals of this chapter and any mitigating factors such as the commission of an unfair labor practice by either party. [1987 c 314 sec. 13.]

The record indicates that the possibility of an injunction was discussed among management officials at the meetings held on Saturday, after one day of unusually high absences among the faculty, but the employer did not actually take steps to seek an injunction.[24] Had an injunction been sought, a superior court might have refused to enjoin a strike for any of a number of reasons,[25] including a perceived failure by the employer to bargain in good faith.[26]

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[23] The statute omits the "concerted activities" clause found in Section 7 of the National Labor Relations Act.

[24] Assistant Attorney General Jan Frickleton prepared injunction and "show cause" pleadings which **were ready to be** filed in King County Superior Court.

[25] Conner testified that an injunction sought by students during the 1974 strike was denied by a court on a basis that the students lacked standing to sue.

[26] Turning RCW 28.52.078 the other way, it appears that, in theory, a court could sanction an employer "lockout" of a defensive type, if it was to protect against a "refusal to bargain" unfair labor practice by a union.

Was There A Strike? -

The union's first point of attack in responding to the employer's claim of an "emergency" is to argue that there was no "strike". In the alternative, the union argues that, even if there was a strike, the union did not coordinate or direct it. It is not critical to adopt the employer's characterization of the behavior of the teachers as a "virus with an itinerary". It strains credulity, however, to believe that the absence of more than half of the employer's full-time staff on these three days constituted normal and legitimate "sickness".[27]

The events of October, 1990 add up to a planned sick-out of staff, perhaps designed to share-the-loss-of-pay three ways to guarantee that no staff member would lose more than one day's pay. Even if not officially sanctioned by the UFC, the statements of union officials, the actions taken at union meetings,[28] and the "rumor mill" existing among the employees were strong enough to design and carry out an illegal work stoppage.[29] It was also indicated in testimony that several of the instructors held their own meetings to determine a course of collective action, perhaps without the knowledge or authority of the bargaining team and executive board of the UFC.

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[27] "That's a great deal to make one word mean," Alice said in a thoughtful tone. "When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra." Lewis Carroll, Through the Looking Glass, Chapter VI.

[28] There was no rebuttal at the hearing to the evidence that the union executive board had considered sanctioning a sick-out for October 16, 1990.

[29] Although they were not union leaders or negotiators, the record is clear that instructors James DeLisa, Bob Christianson and Bob Aubert had heard the rumors that faculty would be "out" October 26, 29 and 30.

Several other factors support the conclusion that the three days of "sick-out" activity was a "strike" within the meaning of RCW 28B.52.078:

Despite the effort of many employees to disguise their strike activity by claiming sick leave, several employees were candid enough to list the reasons for their absence as supporting the union's position in collective bargaining. Instructor Al Croppi cited support for his union's position as the reason for his absence on October 29; Instructor Larry Bredeson requested "leave without pay" for October 29, and testified at hearing that a more moral position would have been for employees to "risk a day's pay" in support of their union, rather than to claim sick leave.

The high absenteeism of faculty on three successive days, and in three areas of the campus, indicate a pattern of activity which mirrors the preparations made by the UFC for a possible strike. The UFC offered no rebuttal of the statistical case made by the employer, to the effect that absences for sick or emergency leave normally total less than 1% of the faculty on any given day.[30]

The union subsequently proposed an "amnesty" provision in bargaining.[31] Despite the union's lack of memory on this issue at

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[30] Among the six affected worksites, absences on the days in question were 63%, 75%, 91%, 48%, 23% and 75%.

[31] An "amnesty" provision is an agreement, usually made at the conclusion of a strike or other job action, whereby the employer agrees not to punish employees who are accepted back to work, and striking employees agree not to discriminate against non-striking employees after they return to work. Even in the context of the right to strike protected by the National Labor Relations Act, the NLRB has ruled that contractual "no-strike" and "no lockout" provisions **are** mandatory topics for bargaining, on which parties may lawfully reach impasse. The NLRB has not ruled that "amnesty" clauses are unqualifiedly a "mandatory subject" for bargaining, although it has held that it is an unfair labor practice for an employer to insist to the point of impasse that a union waive its right to defend strikers after reinstatement, or to insist that the union not levy fines against nonstrikers who remained at work. Masonic Home (Grand Lodge of Masons), 215 NLRB 75 (1974).

the hearing in this matter, the proposal clearly came from the union. There is no possibility that the employer proposed such a clause, which would have paid the 56 employees for the days they had been "docked", since the employer had just taken the action to reduce their pay. Conner's recollections about this topic leave little doubt that it was discussed. The union's proposal is an admission that bargaining unit members took unauthorized days off, even to the point of attempting to use the term "concerted activities" in the proposal.

Union officials left the membership with mixed signals, at best, as to whether a sick-out or strike was legal or otherwise the best course of action to follow. Betty Vickers indicated that she thought the strike action to be illegal; unit president Jerry Hedlund indicated that he had advised people not to sick-out, that there was a lot of rumor but not a lot of support for this tactic, and that he thought he had successfully curtailed the action. On the other hand, Hedlund testified that his personal belief was that a strike was not illegal under any statute, and would be an appropriate political action.

We have present in this record the things necessary for a finding: There was an idea, a parliamentary motion, a period of communication through memorandum and rumor, and finally a series of events. In summary, the Examiner finds that the bargaining unit employees were engaged in an unlawful strike activity under RCW 28B.52.078 during the period October 26 through 30, 1990.

Did the Strike Create an Emergency? -

The existence or threat of an unlawful strike does not completely eliminate the duty to bargain. The union aptly cites Spokane School District, Decision 310-B (EDUC, 1978), for the proposition that employers have an ongoing duty to bargain in good faith, even if the employees were engaged in a strike or are threatening strike activity. In Spokane, an unfair labor practice violation was found where the employer notified potential strike replacements that they

would receive a different rate of pay than was being offered to bargaining unit employees, and would be provided transportation expenses not offered to bargaining unit employees, if they crossed picket lines.[32]

Important factual distinctions exist between Spokane and the instant case, however:

No effort was in made Spokane to advance the proposals at the bargaining table, as was done by the employer here.

A strike was being discussed in Spokane, but there was no emergency of the type which existed at Green River Community College in October of 1990, when a large number of instructors had already withheld one day of service.

There was no indication in Spokane that employees had or would claim compensation, as "sick leave" or otherwise, for days that they were engaged in a strike, as is present in the instant case.

As the undersigned Examiner noted in the earlier decision in this case, the employer could perhaps have taken more drastic action, given the events of the three days in October.[33] In California,

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[32] The compensation of strike replacements was also at issue in Steilacoom Historical School District, Decision 2527 (EDUC, 1986). In an effort to attract strike-breakers, that employer unilaterally established a daily pay rate different from what was being offered to bargaining unit employees. On a motion for temporary relief under WAC 391-45-430, the Commission authorized the Attorney General to seek an injunction to prevent the practice, if it was not discontinued immediately.

[33] Green River Community College, Decision 4008 at page 20. The Examiner's finding of an "interference" violation in Spokane School District, Decision 310-A (EDUC, 1978) was reversed by the Commission in Spokane School District, Decision 310-B (EDUC, 1979), upon a conclusion that a strike was **not a protected activity** under Chapter 41.59 RCW. Lake Washington School District, Decision 2317 (EDUC, 1985) also held that employers are not prohibited from warning public employees to deter them from striking, since such employees have no right to strike.

while there is no clear right to strike, public employers were permitted to take "emergency action" in the face of a strike. The California court of appeals decided that a series of intermittent work stoppages, occurring primarily at a county medical facility, constituted an "emergency" within the meaning of the Meyers-Milias-Brown Act, and that the employer was not obligated to meet and confer with the union prior to adopting an ordinance that empowered department heads to place employees on "administrative unpaid absence" if, after warning, they continued to participate in an intermittent work stoppage. County of Sonoma v. SEIU Local 707, 1 Cal.2d 850 (1991); 14 NPER, CA-23024 (May, 1992).

In summary, the Examiner finds that the employer acted in an appropriate manner in requiring verification of claims by bargaining unit employees for paid leave for the period beginning on October 26, 1990. The employer acted in response to an emergency situation, and in keeping with its pre-existing practice of requiring verification when it suspected abuse or fraud of the leave system. Even if this action were deemed to be a "change" unilaterally implemented as a fait accompli, the employer's actions were legally defensible under Chapter 28B.52 RCW.

Conclusions

The Examiner concludes that the complaint in this case should be dismissed. In reaching this conclusion as to the general rule of the case, the Examiner has some hesitation about the application of the unchanged or emergency-changed verification policy in specific situations. The record is understood to establish:

In the case of Betty Vickers, if her claim of "emergency leave" to care for an ill parent has remained unpaid, it is due to her failure or refusal to provide the "written verification" lawfully required by the employer.

In the case of Robert Aubert, if his claim of "sick leave" for his previously arranged surgery has remained unpaid, it is due to

his failure or refusal to provide the physician verification lawfully required by the employer.

In the case of Barbara Brucker, if her claim of "emergency leave" for unspecified family business has remained unpaid, it is due to her failure or refusal to provide the "written verification" of a qualifying basis for leave, as lawfully required by the employer.

In the case of Frank Primiani, if his claim of "emergency leave" to care for an ill father-in-law has remained unpaid, it is due to his failure or refusal to provide the "written verification" lawfully required by the employer.

FINDINGS OF FACT

1. Community College District 10 is organized and operated under Chapter 28B.50 RCW and operates Green River Community College.

2. The United Faculty Coalition, an employee organization within the meaning of RCW 28B.52.020(1), is the exclusive bargaining representative for the academic faculty of Community College District 10.

3. The academic employees represented by the UFC have historically enjoyed certain "sick leave" and "emergency leave" rights under policies adopted by the employer and/or collective bargaining agreements covering their employment. The normal rate of absence was 1%, or approximately 1 employee on any given day. The employer has denied leave requests made by employees for non-qualifying reasons. When faced with a strike by a predecessor exclusive bargaining representative in 1974, the employer denied "sick leave" claims by employees for days when they were on strike.

4. The employer and the UFC were engaged in collective bargaining from March of 1990 through March of 1991, in an effort to negotiate a successor agreement to replace their 1987-1990 contract. Clark Townsend was the principal negotiator for the employer; Betty Vickers was chief spokesperson for the UFC.

5. The parties' 1987-1990 agreement was not extended, and efforts to pursue several grievances were held in abeyance during the period between contracts.

6. Among the tentative agreements reached by the parties by September 29, 1990 was one for the "sick leave" provisions of the parties' contract to remain unchanged, but for the employer to provide employees two additional days of paid "emergency" leave. The parties were otherwise near an impasse, and they requested mediation assistance. Mediation sessions were planned for October 29, 30 and November 6, 1990.

7. On October 8, 1990, the UFC executive board considered and tabled a motion to support a "professional or sick day" on October 16. The union executive board directed faculty members to observe regularly scheduled office hours only, and submitted a strike authorization proposition to the union membership for a vote.

8. On October 18, 1990, the UFC membership authorized a strike or work stoppage by a vote of 95 to 3. Rumors of a "sick-out" were prevalent on the campus.

9. On Friday, October 26, 1990, 20 faculty members who taught in the "BI" classroom complex absented themselves from work.

10. On Monday, October 29, 1990, 30 faculty members who taught in the "HS", "ST" and "OE" classroom complexes absented themselves from work.

18. The employer found that the leave requests submitted by three individuals were properly documented, and paid leaves were approved for those employees. As to the remaining 56 employees, the pay warrants issued to them in November of 1990 contained deductions for one day's pay for each day on which they were absent from work on October 26, 29 or 30, 1990. So far as it appears from this record, paid leave was subsequently approved for individuals who thereafter provided appropriate documentation of their illness or emergency on October 26, 29 or 30.

19. During collective bargaining on November 15, 1990, the UFC proposed an "amnesty" provision under which employees who absented themselves from work on October 26, 29 or 30, 1990 would be compensated for the days they were absent.

20. On November 26, 1990, the employer rescinded its October 29 memorandum requiring physician verification for each claim of sick leave.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 28B.52 RCW.

2. By their actions of October 26, 29 and 30, 1990, the academic employees of Green River Community College engaged in a strike or work stoppage which was not a protected activity under RCW 28B.52.025.

3. Green River Community College reasonably suspected fraud or abuse in connection with claims for paid leave advanced by its academic employees for their absences on October 26, 29 and 30, 1990.

4. By its October 29, 1990 announcement that physician verification and/or appropriate documentation would be required to support claims for paid leave advanced by its academic employees, Green River Community College made no change of practice giving rise to a duty to bargain under Chapter 28B.52 RCW, and so has not violated RCW 28B.52.073(1)(e).

5. Green River Community College was relieved of its duty to bargain under Chapter 28B.52 RCW by the emergency presented by the potential for or actual claims of its employees for paid leave for their absences in support of a work stoppage on October 26, 29 and 30, 1990, and so did not violate RCW 28B.52.073(1)(e) by its announcement that physician verification or appropriate documentation would be required to support claims for paid leave by those employees.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

Issued at Olympia, Washington, on the 5th day of August, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.