Washington State University, Decision 11749 (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. WASHINGTON STATE UNIVERSITY, Respondent.	CASES 24321-U-11-6232 and 24576-U-12-6289 DECISIONS 11749 – PSRA and 11750 – PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jason K. MacKay, Staff Attorney, for the union.

Attorney General Robert W. Ferguson, by *Donna J. Stambaugh*, Assistant Attorney General, for the employer.

On October 10, 2011, the Public School Employees of Washington (union) filed an unfair labor practice complaint against Washington State University (employer). The complaint alleged that the employer refused to bargain by making a unilateral change in the status quo regarding the rate of pay for two employees. Agency staff issued a preliminary ruling on October 13, 2011, finding a cause of action. The employer filed a timely answer. The union filed a motion for summary judgment on April 4, 2012, and the employer filed a counter motion for summary judgment on April 19, 2012. Both motions for summary judgment were denied.

On February 21, 2012, the union filed additional complaints against the employer alleging employer discrimination, refusal to bargain, and interference. Agency staff issued a preliminary ruling on February 28, 2012, finding a cause of action and consolidating the case with the complaint filed on October 10, 2011. The union filed an amended complaint on April 23, 2012, adding an additional allegation that the employer altered the status quo during contract negotiations. The preliminary ruling was not amended because the initial ruling already included a "change in status quo" allegation regarding the wages, hours, and working conditions of the

same employee. The employer's answer to the amended complaint denied the additional allegation.

Examiner Lisa A. Hartrich conducted a hearing on November 28 and 29, 2012. The parties submitted post-hearing briefs to complete the record.

ISSUES PRESENTED

1. Did the employer unilaterally change the status quo during negotiations for a first collective bargaining agreement by failing to pay temporary employees the wage rate for permanent employees and by terminating an employee during his probationary work period?

2. Did the employer discriminate against an employee by terminating him in reprisal for union activities?

3. Did the employer breach its good faith bargaining obligations by failing to meet regularly, by advancing unpalatable proposals, and by negotiating without authority to reach agreement?

4. Did the employer skim bargaining unit work when it allowed non-bargaining unit members to perform room setups?

5. Did the employer interfere with employee rights of all bargaining unit employees and other employees of the employer by terminating a union member to frustrate union organizing efforts?

Based on the arguments, testimony, and evidence presented by the parties, the Examiner finds that the employer did not commit any of the alleged violations.

ISSUE 1 – Did the employer unilaterally change the status quo during negotiations for a first collective bargaining agreement by failing to pay temporary employees the wage rate for permanent employees and by terminating an employee during his probationary work period?

APPLICABLE LEGAL STANDARDS

An employer that fails or refuses to bargain in good faith over a mandatory subject of bargaining commits an unfair labor practice. RCW 41.80.110(1)(e) and (a); *Central Washington University*, Decision 10413-A (PSRA, 2011). Wages, hours, and working conditions of bargaining unit employees are characterized as mandatory subjects of bargaining. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958).

Once a new bargaining unit is certified, the parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, and employers are prohibited from unilaterally changing mandatory subjects of bargaining except where such changes are made in conformity with the collective bargaining obligation. *Val Vue Sewer District*, Decision 8963 (PECB, 2005). The complainant alleging a unilateral change violation must establish the relevant status quo or past practice. *Whatcom County*, Decision 7288-A (PECB, 2002); *Municipality of Metropolitan Seattle*, Decision 2746-B (PECB, 1990).

ANALYSIS

The union claims the employer unilaterally changed the status quo during negotiations for a first collective bargaining agreement in two instances: (1) when it failed to pay two bargaining unit employees the wage rate established by the civil service salary schedule, and (2) when it discharged a probationary employee without providing written notification.

Rate of Pay for Temporary Employees

The union argues that the employer altered the status quo when it failed to pay bargaining unit employees the rate of pay established by the state civil service salary schedule for employees in that classification. The employer argues that the employees were temporary employees and exempt from civil service rules, and therefore the state's civil service salary schedule was not applicable.

On April 20, 2011, the union was certified as the exclusive bargaining representative of all full-time and regular part-time custodians and maintenance custodians at the employer's Tri-Cities Campus in Richland, Washington.[1] Just prior to certification, the employer hired two full-time, temporary custodians, Matthew Borchers and Alida Chavez. The positions were classified as Service Worker I and paid $9.50 per hour. Service Worker I duties involve "unskilled labor tasks that are routine and repetitive in nature." As temporary employees, Borchers and Chavez were not included in the new bargaining unit. However, once they worked 350 hours, they became bargaining unit employees under WAC 357-04-045.[2] At the time of the hearing, the bargaining unit contained a total of five employees.

In August 2011, the union and employer began negotiating a first collective bargaining agreement for the custodians. On August 22, 2011, union field representative Cecily Hutton sent a letter to the employer regarding issues that arose during negotiations. Hutton requested that the employer pay Borchers and Chavez, who were now members of the bargaining unit, $11.09 per hour, the lowest rate of pay for a Custodian I according to the state's salary schedule. Hutton's letter stated, "By paying these bargaining unit members $9.50 per hour, WSU is acting in contravention of the *status quo*." (italics in original). Hutton further requested that the custodial supervisor, Tami Farley,[3] be accreted into the bargaining unit because she "is clearly a lead worker who performs significant bargaining unit work."[4] The employer disagreed, and continued to pay Borchers and Chavez $9.50 per hour. In addition, the employer maintained that Farley was a supervisor, not a lead worker.

In September 2011, Borchers applied for a permanent Custodian I position. On November 10, 2011, the employer hired Borchers as a permanent, full-time custodian on probationary status for six months.[5] His rate of pay increased from $9.50 to $11.09 per hour. Borchers was responsible

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1 *Washington State University*, Decision 11039 (PSRA, 2011).

2 WAC 357-04-045 states that a temporary employee who works more than 350 hours in a twelve consecutive month period may be included in an appropriate bargaining unit.

3 Tami Farley is now Tami McDonald.

4 The parties originally agreed to exclude Farley as a supervisor as reported in the April 5, 2011 investigation statement in *Washington State University*, Decision 11039.

5 Temporary employee Chavez was let go.

for cleaning the Bioproducts, Sciences, and Engineering Laboratory (BSEL) facility, as well as the outside trash, the atrium stairs, and the Commons. Prior to becoming a permanent employee, Borchers was a "floater" who cleaned various areas as assigned.

In order to prove a unilateral change violation, the union must establish the relevant status quo. The union argues the status quo wage rate for Borchers and Chavez was $11.09 once they became bargaining unit employees. The Examiner disagrees. Even though Borchers and Chavez were bargaining unit employees performing bargaining unit work, they remained temporary Service Worker I employees. Temporary employees are exempt from state civil service rules, and the employer was not required to pay them according to the state civil service salary schedule until they became permanent employees. While they were temporary employees, Borchers and Chavez were paid $9.50 per hour, according to the employer's wage schedule for the position of Service Worker I, which ranged from $8.67 to $13.50 per hour. Once Borchers became a permanent employee, the employer properly increased his pay to the status quo wage rate for a Custodian I, which was $11.09 per hour.

At the time Borchers and Chavez became members of the bargaining unit, the union and employer had not yet negotiated a wage rate for temporary employees covered by the collective bargaining agreement. Without the existence of an agreement, the Examiner finds the status quo wage rate for a temporary Service Worker I was $9.50 per hour, and the union failed to establish that $11.09 was the relevant status quo.

Discharge Without Providing Written Notification

The union argues that the employer failed to maintain the status quo when it discharged Borchers during his probationary period without providing him with written notice of work deficiencies, as required by state civil service rules. The employer acknowledges it did not provide official written notice of deficiencies to Borchers as required by the state civil service rules, but asserts that the employer provided numerous notices of deficiencies by way of face-to-face discussions between Borchers and his supervisor, Farley.

On February 14, 2012, Borchers was called into Vice Chancellor Lori Selby's office for a meeting. Borchers had worked approximately three months as a permanent custodian, but he

was still on probation. Farley also attended the meeting. Selby notified Borchers that he had not passed his probationary period, and gave him a letter stating that his employment would end at the conclusion of his shift on the next day. Borchers had not received a written evaluation or written notice of any work deficiencies prior to his termination.

Under civil service rule WAC 357-37-035, a probationary employee whose work performance is determined to be unsatisfactory "must be notified in writing of the deficiency(ies)" and given an opportunity to demonstrate improvement. The union argues this rule establishes the relevant status quo.

The employer admits it did not follow the state civil service rule and concedes Borchers was not provided with written notice of his work deficiencies before he was terminated. However, the Commission does not have jurisdiction to enforce civil service rules. Furthermore, the union failed to present any evidence to establish the relevant status quo or the employer's practice for providing written notice of work deficiencies to probationary employees. No basis exists for determining whether the employer altered the status quo when it terminated Borchers during his probationary period.

CONCLUSION

The Examiner finds the employer did not unilaterally change the status quo when it failed to pay bargaining unit employees, Borchers and Chavez, the rate of pay established by the state civil service salary schedule. The employer did not unilaterally change the status quo when it discharged probationary employee Borchers without written notification of performance deficiencies during negotiations for a first collective bargaining agreement. The union's unilateral change allegations are dismissed.

ISSUE 2 – Did the employer discriminate against an employee by terminating him in reprisal for union activities?

APPLICABLE LEGAL STANDARDS

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Personnel System Reform Act of 2002,

Chapter 41.80 RCW. *State - Corrections*, Decision 10998-A (PSRA, 2011); *Central Washington University*, Decision 10118-A (PSRA, 2010); *see also Educational Service District 114*, Decision 4361-A (PECB, 1994). The union maintains the burden of proof in employer discrimination cases. To prove discrimination, the union must first set forth a *prima facie* case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

A union may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to the common experience gives rise to a reasonable inference of the truth of the fact sought to be proved. *State – Corrections*, Decision 10998-A.

In response to a union's *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the union to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The union meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

ANALYSIS

The union alleges that the employer terminated Borchers for engaging in three instances of protected union activity: (1) by being an integral part of a pending unfair labor practice

complaint filed by the union on Borchers' behalf; (2) for reporting to the union that his supervisor was performing bargaining unit work ("skimming"); and (3) for meeting with a union organizer during his lunch break. This decision will next review each of these allegations to determine whether the union can establish a *prima facie* case for discrimination.

Unfair Labor Practice Complaint

An employer commits an unfair labor practice when it discriminates against an employee for filing unfair labor practice charges or giving testimony in an unfair labor practice proceeding. RCW 41.80.110(1)(d). In this instance, the union filed a complaint on behalf of Borchers against the employer in October 2011, alleging that the employer failed to maintain the status quo with respect to wages paid to Borchers. Borchers was terminated in February 2012.

The union claims Borchers was terminated because of his involvement in the unfair labor practice complaint. In response, the employer counters that it hired Borchers into a full-time, permanent custodial position on November 10, 2011, one month after the union filed the unfair labor practice complaint.

In order to prove a *prima facie* case of discrimination, the union must first show that Borchers was engaged in protected union activity. Filing an unfair labor practice charge is protected union activity. Next, the union must prove the employer deprived Borchers of an ascertainable right, benefit, or status. When the employer terminated Borchers, it deprived him of an ascertainable right, benefit, or status.

The final step to prove a *prima facie* case of discrimination requires the union to show that a causal connection exists between Borchers' involvement in the union's complaint and his termination. The union argues that causation can be inferred from the timing of Borchers' termination in relation to the timing of the filing of the complaint. Commission precedent allows the union to use circumstantial evidence to establish a *prima facie* case.

The Examiner is not convinced that the timing of Borchers' termination in relation to the filing of the unfair labor practice complaint proves the existence of a causal connection. The facts or

circumstances do not give rise to a reasonable inference that the employer would hire Borchers in November, after the unfair labor practice was already filed, and then terminate him four months later for filing the same unfair labor practice charge.

The timing in this instance is not sufficient on its own to establish the causal connection required to prove a *prima facie* case. The Examiner finds the union failed to prove a *prima facie* case of discrimination against Borchers for filing an unfair labor practice complaint.

Reporting Skimming Allegations

The union alleges the employer terminated Borchers in response to Borchers' reporting to that his supervisor, Farley, was performing bargaining unit work ("skimming"). The employer asserts it was unaware Borchers reported possible skimming violations.

Borchers testified that he was "instructed by the union" to inform the union if he saw Farley doing a room setup. A room or event setup occurs when a meeting or event takes place on campus that requires a requested configuration of tables, chairs, extra trash cans, etc. On or about January 15, 2012,[6] Borchers witnessed Farley setting up a room, and subsequently reported it to the union.

According to an e-mail sent from Hutton to labor relations officer Kendra Wilkins-Fontenot on February 8, 2012, "a bargaining unit employee" reported that Farley was "doing a set up." The union argues the employer could easily determine that Borchers was the "bargaining unit employee" referenced by Hutton in the e-mail, and that his report caused the employer to retaliate against him.

In response to Hutton's inquiry, Wilkins-Fontenot sent Farley an e-mail on February 9, 2012, inquiring whether Farley was performing setups. Wilkins-Fontenot did not mention Borchers' name to Farley in connection with her inquiry, nor did she tell Farley that the source of the complaint was a bargaining unit employee. Wilkins-Fontenot testified credibly that she did not know who the unnamed bargaining unit employee was.

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[6] Another exhibit suggests this actually occurred on January 24 or 25, 2012.

Despite Wilkins-Fontenot's testimony, the Examiner finds it plausible the employer deduced it was Borchers who reported skimming to the union given that he was the one who witnessed Farley performing the room setup in question. Only a small number of bargaining unit employees were potential sources. These facts or circumstances give rise to a reasonable inference that at least Farley, and possibly others, was aware that Borchers was the one who reported Farley performing a room setup.

The Examiner finds Borchers engaged in protected union activity when he reported Farley doing a room setup. The Examiner further finds that the close proximity between Borchers' termination in relation to making the report is sufficient to establish the causal connection required for the union to make a *prima facie* case of discrimination.

Meeting with a Union Organizer

The union alleges the employer terminated Borchers for the protected activity of meeting with a union organizer. The employer asserts that it was unaware that Borchers met with a union organizer. The union counters that the employer knew of the meeting because the Commons is in close proximity to the chancellor's office, human resources, and other administrative offices.

On February 10, 2012, Borchers and Greg Stewart met with union organizer Rey Trevino on campus in the Commons during their lunch break. Trevino met with employees at another table, and when finished, he visited with Borchers and Stewart for about 15 minutes.

Borchers testified that he did not have previous meetings with the union. Borchers' cross-examination by the employer unfolded as follows:

> Q. When you were a temp, did you ever meet with the union?
> A. As a temp? No.
> Q. When did you first meet with Mr. Trevino?
> A. Rey?
> Q. Yes.
> A. That would have been, I'm going to guess, probably somewhere in the January, February time [2012] when I saw him in the Commons area.
> Q. You didn't ask him to come out here?
> A. Oh, no, no, no. No.

Q. You just ran into him?
A. Yeah. He was already in the Commons area when I went in there on lunch break.

(Transcript at 112).

The evidence shows that Borchers did not plan or instigate the meeting with Trevino. The union presented no evidence to prove the employer was aware of or witnessed this brief encounter with Trevino. However, the union argues that the close proximity of the Commons and administrative offices provides sufficient circumstantial evidence to prove the employer was aware of the meeting.

Borchers' meeting with a union organizer during his lunch break is protected union activity. Borchers was terminated just a few days after the meeting. The union relies on the close proximity in time between Borchers' meeting with a union organizer and Borchers' termination to prove the employer terminated Borchers for protected union activity.

The Examiner finds the circumstantial evidence of the close proximity between Borchers' chance meeting with Trevino and the employer's decision to terminate Borchers is sufficient to establish the causal connection required for the union to make a *prima facie* case of discrimination.

The Employer's Non-Discriminatory Reasons

The union proved a *prima facie* case of discrimination for the protected union activities of reporting skimming allegations and for meeting with a union organizer. In response to the union's proof of a *prima facie* case, the employer must articulate non-discriminatory reasons for terminating Borchers. If the employer articulates non-discriminatory reasons, the ultimate burden remains on the union to prove the employer's reasons for terminating Borchers were pretextual, or that union animus was a substantial motivating factor.

The employer articulated non-discriminatory reasons for terminating Borchers, claiming Borchers' work performance became inadequate once he was hired as a permanent employee. The employer maintains that Borchers performed an adequate job while he was a temporary employee, but produced sufficient evidence to show Borchers' job performance declined once he became a permanent employee.

Borchers' supervisor during his time working both as a temporary and permanent employee was Farley. Farley testified that Borchers' performance while he was a temporary employee was "really good." However, soon after Borchers was hired as a permanent employee, Farley began to receive complaints about the cleanliness of areas assigned to Borchers. Farley testified that Borchers was not cleaning his assigned area, but rather spent time working with Stewart, a fellow custodian, in the areas where Stewart was assigned to work.

The employer presented additional evidence of the decline in Borchers' work performance. For example, supervisor Farley directed Borchers to obtain a badge required to enter areas needing special identification. Borchers did not follow her directive and did not acquire the badge. In a January 3, 2012 e-mail, Farley reminded Borchers to clean the stairs in the BSEL facility. On January 6, the building maintenance supervisor received a complaint that the BSEL facility was lacking custodial attention: "The floors and stairs have not been swept or mopped in months, the carpets in the entryways haven't been vacuumed, and no one has swept or mopped the floors in the laboratory's [sic]." Borchers was responsible for cleaning the BSEL facility.

On February 8, 2012, Farley received another complaint about the cleanliness of the BSEL facility. The same day, Farley notified Selby that she had "concerns" about Borchers' performance. On February 10, Farley notified human resources consultant Debra McCormick that Farley walked through the BSEL building with Borchers to point out work responsibilities he had missed. Farley reported that the bathrooms were dirty and the trash can outside of BSEL was overflowing. Borchers was responsible for both areas. Farley asked Borchers to buff the floors in advance of a high profile event occurring on February 9, 2012. Borchers did not do it.

The record shows that the custodial department was short-staffed during the three-month period during Borchers' tenure as a permanent custodian. Borchers often filled in for other custodians. On January 23, 2012, in response to an inquiry regarding how frequently to expect vacuuming, Farley responded that all offices should be vacuumed on a weekly basis, but that custodial services "have been really short-handed lately." Farley further explained, "One custodian has been out for a month, people have been sick, snow days, PSE negotiations, etc. So I apologize if

it isn't getting done as it should be." Union witness and former staff attorney Eric Nordloff, testified that workload was the number one issue for the custodial bargaining unit.[7]

In response to the union's *prima facie* case of discrimination, the Examiner finds the employer articulated legitimate non-discriminatory reasons to terminate Borchers during his probationary period of employment. The ultimate burden remains on the union to prove the employer's reasons were pretextual. Borchers may be a casualty of the employer's poor supervision or poor management of the custodial workload, but the union failed to present evidence proving the employer's reasons for terminating him were pretextual, or that union animus was a substantial motivating factor.

CONCLUSION

The union made a *prima facie* case of discrimination. The employer articulated non-discriminatory reasons for terminating Borchers during his probationary work period. The union failed to carry its burden to prove by a preponderance of the evidence that Borchers was terminated in retaliation for his involvement in an unfair labor practice complaint, for advising the union that his supervisor was performing bargaining unit work, and for meeting with a union organizer. The union's discrimination allegations are dismissed.

ISSUE 3 – Did the employer breach its good faith bargaining obligations by failing to meet regularly, by advancing unpalatable proposals, and by negotiating without authority to reach agreement?

APPLICABLE LEGAL STANDARDS

RCW 41.80.005(2) defines collective bargaining as "the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement." RCW

[7] Increased workload for this bargaining unit was the subject of another unfair labor practice complaint and recent decision, *Washington State University*, Decision 11704 (PSRA, 2013) (employer failed to bargain with the union over an increase in workload).

41.80.005(2) further states that the collective bargaining obligation "does not compel either party to agree to a proposal or to make a concession."

The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. *University of Washington*, Decision 10608-A (PSRA, 2011). The collective bargaining obligation does not compel parties to agree to proposals or make concessions, but parties are not entitled to reduce collective bargaining to an exercise in futility. *Western Washington University*, Decision 9309-A (PSRA, 2008).

The bargaining obligation is not onerous and does not mandate agreement. There is no duty to agree, but the process of communication between labor and management must be given a chance to operate. *State – Social and Health Services*, Decision 9551-A (PSRA, 2008).

ANALYSIS

The union claims that the employer frustrated the bargaining process for the parties' first collective bargaining agreement in the following ways: (1) by failing to regularly meet with the union and bargain in good faith; (2) by advancing several "unpalatable" proposals; (3) by coming to the bargaining table without the authority to reach agreement; and (4) by prolonging negotiations beyond the one-year certification so that the bargaining unit would become eligible for decertification.[8] The employer denies these allegations.

Failure to Regularly Meet

Wilkins-Fontenot, labor relations officer, was the chief negotiator for the employer. Unlike some other state institutions of higher education, the employer directly negotiates its own contracts locally. Once an agreement is reached and ratified, it is submitted to the Washington State Office of Financial Management (OFM) and reviewed for financial feasibility under RCW 41.80.010(3).

[8] Under WAC 391-25-030(2)(a), a "certification bar" prevents a petition to decertify the same bargaining unit during the first 12 months following the date of certification.

Eric Nordloff, former staff attorney for the union, was a member of the union's bargaining team that negotiated the first contract for the custodians. Nordloff testified that the parties met "pretty sporadically" and that negotiations "dragged on way too long for a little unit of five people."

The parties began meeting in August 2011 to negotiate their first collective bargaining agreement. The parties met approximately 16 times in an attempt to reach agreement before jointly filing for mediation on February 24, 2012. The parties exchanged numerous proposals and counterproposals. Meetings were held on campus, at the union's offices, and even by video conference when weather was an impediment. The parties reached agreement on the terms of their first collective bargaining agreement in September 2012.

The Examiner finds nothing unusual about the course of bargaining between this union and this employer. The evidence shows the union and employer met consistently and with regularity common to a normal course of bargaining. The Examiner finds the employer did not breach its duty to bargain in good faith by failing to regularly meet with the union.

Advancing Unpalatable Proposals

The union argues that the employer engaged in bad faith bargaining by putting forward several "predictably unpalatable" proposals.[9] Nordloff testified he was "personally offended" by an election of remedies proposal put forth by the employer which he believed to be "contrary to the law." He described the employer's proposed management rights language as "overreaching."

The union produced no evidence to prove the employer engaged in bad faith bargaining by deliberately submitting proposals it knew the union would find unpalatable. In the normal course of bargaining, each party commonly submits proposals that are sometimes distasteful to the other party. The law does not compel the parties to agree to such proposals, but obligates the parties to meet until an agreement can be reached. The Examiner finds nothing unusual about the course of bargaining between this union and this employer. The Examiner finds the employer did not breach its duty to bargain in good faith by advancing unpalatable proposals.

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[9] *See Western Washington University*, Decision 9309-A, citing *Flight Attendants v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992) (making contract proposals that employer knew were consistently and predictably unpalatable to the union and failing to exert every reasonable effort to reach agreement violated the Railway Labor Act).

Lack of Authority to Reach Agreement

Nordloff testified that "on multiple occasions" during bargaining Wilkins-Fontenot said she would have to check with "the appointing authority." Wilkins-Fontenot testified credibly that she and the employer's bargaining team had authority to make decisions at the bargaining table.

Parties at the bargaining table commonly need to consult with those who are not physically present during negotiations. The union failed to produce evidence to prove the employer's consultation with others not physically present hindered good faith bargaining between the parties. The employer did not breach its duty to bargain in good faith.

Prolonging Negotiations

The union emphasizes that it gave a full contract proposal to the employer in August 2011, and that the employer did not respond in kind with a full proposal, and did not offer a proposal on wages or seniority until February 2012. Wilkins-Fontenot testified the employer waited until February to make a wage proposal because the employer was waiting for the governor's economic forecast. She further testified that she previously had a contract rejected by OFM for financial infeasibility in the past, which required the employer to reopen negotiations with all its bargaining units. Wilkins-Fontenot's testimony explaining the reason for delay in the employer's wage proposal was credible.

The Examiner finds nothing unusual about this course of bargaining. Negotiating a collective bargaining agreement can be painfully slow. Bargaining first contracts can be especially challenging as the parties have to create and agree on all the terms and conditions in the contract. This particular bargain lasted for approximately one year. This is not uncommon. The union produced no evidence the employer prolonged negotiations beyond the one-year certification so that the bargaining unit would become eligible for decertification. The employer did not breach its duty to bargain in good faith.

CONCLUSION

The Examiner finds the union's claims the employer engaged in bad faith bargaining by failing to meet regularly, by advancing unpalatable proposals, and by coming to the bargaining table

without authority to reach agreement are not supported by the evidence. The union failed to produce evidence to prove the employer deliberately prolonged negotiations. On the contrary, the employer continued to meet with the union on a regular basis until an agreement was reached. The union's allegations the employer breached its good faith bargaining obligations are dismissed.

ISSUE 4 – Did the employer skim bargaining unit work when it allowed non-bargaining unit members to perform room setups?

APPLICABLE LEGAL STANDARDS

The employer's decision to transfer bargaining unit work to non-bargaining unit employees ("skimming") is a mandatory subject of bargaining. *State – Social and Health Services*, Decision 9551-A (PSRA, 2008). Before a skimming violation can be found, it must first be determined that the work in question is bargaining unit work. Bargaining unit work is defined as work that bargaining unit employees have historically performed.

Next, the Commission considers five factors when determining whether a duty to bargain exists concerning the transfer of bargaining unit work:

1. Whether non-bargaining unit employees previously performed the work in question;
2. Whether the transfer of work involved a significant detriment to bargaining unit employees;
3. Whether the employer's motivation was solely economic;
4. Whether there had been an opportunity to bargain about the changes in existing practices; and
5. Whether the duties, skills, or working conditions were fundamentally different from regular bargaining unit work.

University of Washington, Decision 8878-A (PSRA, 2006); *Port of Seattle*, Decision 7271-B (PECB, 2003).

In analyzing these factors, no one factor is determinative. *State – Social and Health Services*, Decision 9551-A.

ANALYSIS

As described above, a room or event setup occurs on campus when a meeting or event takes place that requires a certain room configuration of tables, chairs, extra trash cans, etc. Room setups were typically assigned by custodial supervisor Farley.

On February 8, 2012, union representative Hutton sent an e-mail to labor relations officer Wilkins-Fontenot, notifying the employer that supervisor Farley was seen by a bargaining unit employee "doing a set up" on January 15. Hutton stated, "Farley informed a bargaining unit employee that they had been really busy and short staffed so she had to do set ups and Levi (electrician) even helped." Hutton asserted that this was a "clear case" of skimming.

The employer argues that room setups are not exclusively bargaining unit work. The union concedes that room setups were not exclusively performed by custodians in the past. However, the union asserts that since the time the bargaining unit was certified in April 2011, room setups were always offered to custodians first.

The first step in the analysis is to determine whether the work in question is work that bargaining unit employees have historically performed. Although custodians performed room and event setups in the past, the evidence shows that employees outside the bargaining unit also performed room and event setups.

Jeff McFall, bargaining unit employee and maintenance custodian 2, testified that when he was first hired seven and one-half years prior to his testifying at the hearing, the majority of the room setups were done by the maintenance department. McFall testified that the work shifted "about three years ago" to the custodial department. McFall testified that supervisor Farley performed setups whenever the custodial staff was "too strapped." He further testified that people attending an event would sometimes take it upon themselves to help with setting up the room.

Supervisor Farley testified that in her previous position as a custodian, her supervisors helped with room setups. She further testified that maintenance mechanics, the maintenance supervisor, the director of facility services, admissions staff, and members of the grounds crew had all helped with setups. The position descriptions for both the Custodian Supervisor and Maintenance Mechanic 3 include the duty to assist with setups.

Melissa O'Neil Perdue, marketing and communications manager for the employer, testified that she perceived a distinction between setups for indoor and outdoor events. She testified that setups for inside events seemed to be done by the custodians, while outside events involved the grounds crew and the facilities crew. She described the approach to event setups as an "all hands on deck, get it done so it looks nice."

After the newly-formed bargaining unit of custodians was organized, the union apparently attempted to assert exclusive jurisdiction over the setup work. There is evidence the employer was on notice of the union's position that setups should exclusively be custodial work, and the employer and union had discussions about whether the work should belong exclusively to the custodial unit. However, the union failed to prove the work was exclusively performed by custodians at the time the bargaining unit was certified. The union cannot meet the threshold requirement for a skimming violation.

CONCLUSION

The Examiner finds that non-bargaining unit employees previously and historically performed setups. The union's allegation the employer skimmed bargaining unit work is dismissed.

ISSUE 5 – Did the employer interfere with employee rights of all bargaining unit employees and other employees of the employer by terminating a union member to frustrate union organizing efforts?

APPLICABLE LEGAL STANDARDS

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutorily protected rights. RCW 41.80.110(1)(a). The determination of

whether an interference allegation has been committed is based on whether a typical employee could reasonably perceive the employer's action as discouraging the employee's union activity. *Snohomish County,* Decision 9834-B (PECB, 2008). A claim of interference must be supported by a preponderance of the evidence. *State – Office of Financial Management*, Decision 11084-A (PSRA, 2012); *Pasco Housing Authority,* Decision 5927-A (PECB, 1997).

ANALYSIS

The union argues that the employer terminated Borchers in order to "chill the desire" of other employees to organize collectively. The employer denies the allegation.

While the custodians were negotiating their first contract with the employer, the union continued to maintain a presence and explore the possibility of organizing other employees on campus. On February 7, 2012, union organizer Trevino met with human resources consultant McCormick in her office and requested an updated employee list. McCormick had just begun working in the human resources position on January 9, 2012. McCormick testified that she "had never worked in a situation where there was a bargaining unit," and she was unsure about the proper procedure to respond to Trevino's request. Since she did not have any experience working with unions, she was instructed to consult with Wilkins-Fontenot on union-related issues. She e-mailed Wilkins-Fontenot, stating that Trevino had been to her office asking for an employee list. McCormick later told Trevino to make a public information request for the list.

Nordloff testified that, in his opinion, the employer terminated Borchers, a well-respected employee, in order to frustrate the union's efforts to organize other employees on campus. The only evidence the union produced to show the employer knew the union was organizing on campus was Trevino's visit to McCormick's office.

CONCLUSION

The Examiner finds no evidence to prove the employer terminated Borchers for engaging in protected union activity, and therefore also finds that a reasonable employee would not have

perceived the employer's actions as an attempt to frustrate union organizing efforts. The union's allegation the employer interfered with employee rights is dismissed.

FINDINGS OF FACT

1. Washington State University (employer) is an employer within the meaning of RCW 41.80.005(8).

2. Public School Employees of Washington (union) is an exclusive bargaining representative under RCW 41.80.005(9).

3. On April 20, 2011, the union was certified as the exclusive bargaining representative of all full-time and regular part-time custodians and maintenance custodians.

4. Just prior to certification, the employer hired two full-time, temporary custodians, Matthew Borchers and Alida Chavez, who were not included in the bargaining unit. The employer paid them $9.50 per hour.

5. Once Borchers and Chavez worked 350 hours for the employer, they became bargaining unit employees represented by the union. The employer continued to pay them $9.50 per hour.

6. On August 22, 2011, the union requested that the employer pay Borchers and Chavez $11.09 per hour, the lowest rate of pay for a Custodian I on the state's salary schedule utilized by the employer. The employer continued to pay Borchers and Chavez $9.50 per hour.

7. On October 10, 2011, the union filed an unfair labor practice complaint on behalf of Borchers and Chavez, alleging the employer made a unilateral change in the status quo regarding the rate of pay for Borchers and Chavez.

8. On November 10, 2011, the employer hired Borchers as a permanent, full-time custodian. The employer increased Borchers' pay from $9.50 per hour to $11.09 per hour.

9. Soon after Borchers was hired as a permanent employee, his supervisor, Tami Farley, began to receive complaints about the cleanliness of areas assigned to Borchers.

10. In August of 2011, the union and employer began negotiating a first collective bargaining agreement for the custodians.

11. The union and employer met approximately 16 times in an attempt to reach agreement before jointly filing for mediation on February 24, 2012. The parties exchanged numerous proposals and counter proposals, and reached agreement on the terms of their first collective bargaining agreement in September 2012.

12. On or about January 15, 2012, Borchers witnessed Farley performing a room setup. Borchers reported it to the union.

13. On February 8, 2012, the union informed the employer that "a bargaining unit employee" reported Farley was performing a room setup.

14. On February 10, 2012, Borchers and another custodian met with union organizer Rey Trevino on campus during their lunch break.

15. On February 14, 2012, Vice Chancellor Lori Selby notified Borchers that he had not passed his probationary period, and gave him a letter stating that his employment would end at the conclusion of his shift on the next day.

16. Borchers had not received a written evaluation or written notice of any work deficiencies prior to his termination.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.80 and WAC 391-45.

2. By its actions described in Findings of Fact 4 through 6, and 16, the employer did not refuse to bargain with the union by making unilateral changes in the status quo in violation of RCW 41.80.110(1)(e).

3. By its actions described in Findings of Fact 15, the employer did not discriminate against Matthew Borchers in violation of RCW 41.80.110(1)(c) or (d).

4. By its actions described in Findings of Fact 10 and 11, the employer did not breach its good faith bargaining obligations in violation of RCW 41.80.110(1)(e).

5. By its actions described in Findings of Fact 12 and 13, the employer did not skim bargaining unit work in violation of RCW 41.80.110(1)(e).

6. By its actions described in Finding of Fact 15, the employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matter are dismissed.

ISSUED at Olympia, Washington, this 10th day of May, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Lisa A. Hartrich

LISA A. HARTRICH, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 05/10/2013

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ DEBBIE HOBBS

CASE NUMBER:	24321-U-11-06232	FILED:	10/10/2011	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	CUSTOD/MAINT				
DETAILS:	-				
COMMENTS:					

EMPLOYER: WASHINGTON STATE UNIVERSITY
ATTN: KENDRA WILKINS-FONTENOT
139 FRENCH ADMIN BLDG 1014
PO BOX 641014
PULLMAN, WA 99164
Ph1: 509-335-4521

REP BY: DONNA STAMBAUGH
OFFICE OF THE ATTORNEY GENERAL
1116 W RIVERSIDE AVE
SPOKANE, WA 99201-1194
Ph1: 509-458-3521 Ph2: 509-456-3123

PARTY 2: PSE OF WASHINGTON
ATTN: ELYSE MAFFEO
PO BOX 798
AUBURN, WA 98071-0798
Ph1: 253-876-7446

REP BY: JASON MACKAY
PSE OF WASHINGTON
9207 E MISSION AVE STE A
SPOKANE, WA 99206
Ph1: 509-484-2514 Ph2: 509-484-2510

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ DEBBIE HOBBS

CASE NUMBER:	24576-U-12-06289	FILED:	02/21/2012	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	CUSTOD/MAINT				
DETAILS:	Matt Borchers				
COMMENTS:					

EMPLOYER: WASHINGTON STATE UNIVERSITY
ATTN: KENDRA WILKINS-FONTENOT
139 FRENCH ADMIN BLDG 1014
PO BOX 641014
PULLMAN, WA 99164
Ph1: 509-335-4521

REP BY: DONNA STAMBAUGH
OFFICE OF THE ATTORNEY GENERAL
1116 W RIVERSIDE AVE
SPOKANE, WA 99201-1194
Ph1: 509-458-3521 Ph2: 509-456-3123

PARTY 2: PSE OF WASHINGTON
ATTN: ELYSE MAFFEO
PO BOX 798
AUBURN, WA 98071-0798
Ph1: 253-876-7446

REP BY: JASON MACKAY
PSE OF WASHINGTON
9207 E MISSION AVE STE A
SPOKANE, WA 99206
Ph1: 509-484-2514 Ph2: 509-484-2510