Griffin School District, Decision 10489-A (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION 252, Complainant, vs. GRIFFIN SCHOOL DISTRICT, Respondent.	CASE 22170-U-08-5653 DECISION 10489-A - PECB DECISION OF COMMISSION

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Davis Wright Tremaine, LLP, by *Henry E. Farber*, Attorney at Law, and *Megan Vogel*, Attorney, at Law, and Ogden Murphy Wallace, PLLC, by *W. Scott Snyder*, Attorney at Law, for Amicus Curiae King County, City of Edmonds, City of Gig Harbor, and Ben Franklin Transit.

Spencer Nathan Thal, Attorney at Law, and *Behnaz Nelson*, Attorney at Law, for Amicus Curiae on behalf of Teamsters Local 117 and International Federation of Professional and Technical Engineers, Local 17.

Teamsters Local Union 252 (union) represents a bargaining unit of employees at the Griffin School District (employer). On December 30, 2008, the union filed a complaint alleging that the employer committed an unfair labor practice when it unilaterally changed the standard number of work days for certain bargaining unit employees without: 1) satisfying its obligation to notify the union of its desire to make such a change, 2) providing the union with an opportunity to request bargaining, and 3) upon request, bargaining in good faith the decision and the effects that the decision had upon mandatory subjects of bargaining. Examiner Katrina Boedecker held a hearing and found that the employer committed an unfair labor practice and directed the

employer to return the *status quo ante* by rescinding the 20 furlough days imposed upon bargaining unit employees, make all affected employees whole by paying back pay and benefits for all time lost due to the employer's unilateral action, and provide the union with notice and an opportunity to request bargaining prior to making any changes to the work year calendar.[1]

ISSUE PRESENTED

Did the employer fail to satisfy its Chapter 41.56 RCW bargaining obligation when it unilaterally reduced the work year calendar thereby altering the existing status quo by reducing the number of work days for certain bargaining unit employees without providing the union an opportunity to bargain the decision or the effects of that decision?

For the reasons set forth below, we conclude that the employer committed an unfair labor practice. Where an employer seeks to reduce its operating costs without making a programmatic change to its operation, any decision that reduces employee wages or hours is a mandatory subject of bargaining. Furthermore, this record demonstrates that the employer presented its decision as a *fait accompli*, thus relieving the union of its obligation to request bargaining. The employer's affirmative defenses are rejected.

While neither party raised the issue on appeal, this Commission feels compelled to express its strong disapproval of the conduct described below. Upon careful review and comparison between the underlying decision and the briefing submitted by the union, much of the rationale and text of the underlying decision was copied verbatim from the union's post-hearing brief. This borrowing was not limited to, and extended far beyond, a mere incorporation of a party's recitation of the facts. This Commission does not condone this practice.

This Commission has made an independent review of the entire record and, based upon this meticulous review, has concluded that Examiner Boedecker conducted a proper hearing. In this instance, although we can conclude that only the union's post-hearing brief was copied, this

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1 *Griffin School District*, Decision 10489 (PECB, 2009).

Commission is satisfied that this strongly discouraged practice did not otherwise constitute reversible error. However, we will not hesitate in the future to take other action should this admonition be ignored. *See Dish Network Service Corp.*, 345 NLRB 1071 (2005).

BACKGROUND

The union represents a bargaining unit of employees who work in several classifications, including bus drivers, building maintenance, custodians, mechanics, secretaries, school nurses, and food service assistants. Although the parties' September 1, 2005 to August 31, 2008 collective bargaining agreement was silent as to the length of the school year that applied to bargaining unit employees, testimony and evidence demonstrated that one building maintenance employee, one mechanic, three full-time custodians, and one half-time custodian all worked 260 compensated days during a calendar year.[2]

In May 2008, the parties began negotiating a successor agreement to replace the contract that was to expire on August 31, 2008. During negotiations, the union was represented primarily by Local 252 President Gary Johnston, and the employer was represented primarily by Superintendent Donald Brannam.

Although the parties believed they were close to reaching an agreement for a successor agreement, they nevertheless requested mediation assistance from this agency. At the August 5, 2008 mediation session, the employer presented the mediator with a list of three district goals that it tried to emphasize during negotiations. Those goals included making decisions that were "in the best interests of the kids," that "maintain the sovereignty of [the employer]," and that "protect employee jobs." Exhibit 2. Included with this letter was a spreadsheet that included columns entitled Description, Information and Impact. Under the "Description" heading was an entry listed as "school closures," with corresponding entries stating "240 day operation" and "240 Compensated Day Calendar" under the "Information" and "Impact" headings, respectively.

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[2] All other bargaining unit employees worked the 180 days in which school was in session. Only the employees who worked 260 compensated days are the subject of this complaint.

When Johnston asked Brannam for clarification regarding the 240 day calendar, Brannam informed him that the school board had adopted the 240 day calendar at its July 28, 2008 meeting. The employer's decision to reduce the calendar from 260 working days to 240 working days resulted in 20 days where those employees who previously worked the 260 work day calendar did not work and were not paid. Brannam admitted in his testimony that he did not inform the union of his intent to propose a 240 day calendar to the school board. Additionally, he testified that he did not inform the union that the school board would be considering his proposal at the July 28 meeting.

Johnston sent a letter to the employer informing it that the decision to reduce the work calendar represented a "substantial change in working conditions" and requested bargaining over the decision to reduce the number of work days as well as the impacts that the decision had on terms and conditions of employment. Brannam responded by letter and stated that although he did not believe the employer had an obligation to bargain the decision to reduce its work calendar, the employer was nevertheless willing to meet and discuss any concerns the union may have with the employer's decision. Additionally, Brannam stated in a separate meeting with Johnston that he would not reinstate the 20 days because the employer did not have the money to do so.

Although the parties continued to meet with the agency mediator, they had not bargained over the decision to reduce the 260 work day calendar when they reached final agreement on a collective bargaining agreement in November 2008. The union filed its complaint on December 30, 2008.

DISCUSSION

Applicable Legal Standard

A public employer covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Borg-Warner Corp.*, 356 U.S.

342 (1958). The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the statutory collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 8*, Decision 3661-A (PECB, 1991). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1); *Federal Way School District*, Decision 232-A.

Balancing Test to Determine Mandatory and Permissive Subjects

The bargaining obligation is applicable to a decision on a mandatory subject of bargaining and the effects of that decision, but will only be applicable to the effects of a managerial decision on a permissive subject of bargaining. *Skagit County*, Decision 6348 (PECB, 1998); *City of Kelso*, Decision 2120 (PECB, 1985) (both the decision to contract out bargaining unit work and its effects on the employees are mandatory subjects of bargaining); *City of Kelso*, Decision 2633 (PECB, 1988) (decision to merge operation with another employer is an entrepreneurial decision, and only the effects that the decision has upon wages, hours, and working conditions are bargainable). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the "effects" of such decisions could be mandatory subjects of bargaining. *See Spokane Education Association v. Barnes*, 83 Wn.2d 366, 374 (1974).

When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates. *IAFF, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989).

For example, in *Wenatchee School District*, Decision 3240 (PECB, 1989), a school district facing a budget crisis changed its kindergarten program from a half day to a full day. As a result of this decision, the mid-day bus runs that transported the kindergarten students were eliminated, and the employees who performed that work were laid off. The union filed an unfair labor practice complaint and the examiner found the employer committed an unfair labor practice by not bargaining the decision to change the kindergarten program.

The Commission reversed the examiner, and held that decisions concerning curriculum and basic education policy are reserved to the employer. *Wenatchee School District*, Decision 3240-A (PECB, 1990). The Commission also noted that even though the employer's decision to change the kindergarten program was economically motivated, that did not convert the programmatic decision into a mandatory one. However, the Commission was also careful to explain that while the employer's decision to change the kindergarten program was permissive in nature, the employer still had an obligation to bargain the effects that its decision had on mandatory subjects, such as any layoff that would be necessitated by the change. *Wenatchee School District*, Decision 3240-A.

In *IAFF, Local 1052 v. PERC*, a slightly different outcome was reached. In that case, an employer filed a complaint alleging that a union representing uniformed employees was attempting to bargain to impasse the number of employees that would be assigned to emergency vehicles which, in the employer's view, was a permissive subject of bargaining. The Commission agreed, noting that the level of shift staffing is generally a management prerogative.

The Washington State Supreme Court reversed. The Court first admonished the Commission for assuming that equipment staffing was similar in nature to shift staffing. The Court then found that while employers may have the right to determine the number of employees assigned to each shift, safety is a legitimate employee concern, and therefore equipment staffing "is not so importantly reserved to the prerogative of management." *IAFF, Local 1052 v. PERC*, 113 Wn.2d at 206.

Employer's Bargaining Obligation Regarding Mandatory Subjects

As a general rule, an employer has an obligation to refrain from unilaterally changing terms or conditions of employment unless it: (1) gives notice to the union; (2) provides an opportunity for bargaining prior to making a final decision; (3) bargains in good faith, upon request; and (4) bargains to agreement or to a good faith impasse concerning any mandatory subjects of bargaining. *Skagit County*, Decision 8746-A (PECB, 2006).[3] An employer violates RCW

[3] For employees eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but rather must seek interest arbitration. *Snohomish County*, Decision 9770-A (PECB, 2008). The interest arbitration requirements are also applicable to situations

41.56.140(4) and (1) if it implements a unilateral change of a mandatory subject of bargaining without having fulfilled its bargaining obligations. [4]

Bargaining From the Status Quo and Presenting Decision as a *Fait Accompli*

Good faith bargaining is never from scratch; rather, good faith bargaining occurs when the parties begin from the status quo. *Snohomish County*, Decision 9834-B (PECB, 2008), *citing Shelton School District*, 579-B (EDUC, 1984). In *Shelton School District*, one of the earliest complaints ever filed with this Commission, a school district and a newly certified bargaining unit of teachers were negotiating an initial collective bargaining agreement. As part of its initial offer, the employer proposed a longer school year than what was previously in effect, and saw any shortening of that year as a concession made by the employer. In effect, the employer arbitrarily raised the pre-existing standard for purposes of bargaining. In finding the employer's proposal in violation of its good faith bargaining obligation, the Commission clearly stated that pre-existing terms and conditions are the starting point for any negotiations between the parties.

Furthermore, it is an unfair labor practice to present a change to a mandatory subject of bargaining as a *fait accompli*. In determining whether an employer has presented a decision to change a mandatory subject as a *fait accompli*, the focus is on whether an opportunity for meaningful bargaining existed under the circumstances as a whole. *City of Edmonds*, Decision 8798-A (PECB, 2005), *quoting Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a *fait accompli* should not be found. Although Commission precedents do not require that an employer provide *written* notice to a union regarding a proposed change in the status quo, an employer's communication to the union must be sufficiently clear to afford the union actual notice of the intended change. *See Washington Public Power Supply System*,

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where an employer desires to make a mid-term change to terms and conditions of employment for such a bargaining unit. *See City of Yakima*, Decision 9062-A (PECB, 2008).

[4] In her decision, the Examiner held that an "employer must also, for a *reasonable period* following notice to the union, maintain the 'status quo' with respect to wages, hours and working conditions in order to permit meaningful bargaining." (emphasis added). This is not the correct statement of applicable legal standard. Practitioners before this agency should apply the standard enunciated above.

Decision 6058-A. The imposition of a change in the status quo as a *fait accompli* without any prior contact with the employees' authorized bargaining agent is not effective notice, and where an employer presents a decision as a *fait accompli*, failure on the part of the bargaining agent to request bargaining will not create a waiver by inaction. *Washington Public Power Supply System*, Decision 6058-A; *see also King County*, Decision 5810-A (PECB, 1997).

Commission Examines the Totality of Circumstances

Finally, in determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed. *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988). The evidence must support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid reaching an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989).

Application of Standards

The first step of the analysis is to determine whether the employer's decision to reduce the 260 work day calendar to 240 work days was a mandatory subject of bargaining. The Examiner found that the employer's decision to reduce the number of work days for certain employees constituted a "furlough." The employer argues that the Examiner's characterization of its actions is incorrect and points out that nowhere in the correspondence between it and the union was the term "furlough" used to describe the school board's decision to reduce the work calendar.

The actual "label" applied to the employer's action is not the issue in this case. What is at issue is whether the employer had an obligation to bargain its decision to reduce its work calendar which also reduced employee wages and hours.[5]

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[5] Although the employer did not specifically challenge the Examiner's conclusion that the imposition of furloughs is a mandatory subject of bargaining, in order to provide the proper analysis to our decision we apply the *Federal Way School District* balancing test to the facts presented at hearing. In making our determination, we considered Amici King County et al. argument that decisions to furlough employees is a decision to reduce services that must remain a managerial prerogative that relieves the employer of its obligation to bargain such a change. We also considered Amici Teamsters 117 et al. argument that this Commission should adopt a standard that requires an employer to bargain any decision that results in changes to employees' hours and wages.

The *Federal Way School District* Balancing Test

It is well settled that employee wages and hours are mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A. This record clearly establishes that the employer's decision to reduce its work calendar from 260 days to 240 days permanently impacted the hours and wages of employees. Not only would employees not be working the 20 days they had the previous year, they would not be paid for those lost days. The loss of salary would also impact the employees' pensions.

Furthermore, there is no evidence in this record demonstrating that the school board's decision to reduce the work calendar is temporary. Therefore, unless the school board takes affirmative steps to reinstate the 260 day work year, the affected employees' loss will be permanent. Brannam admitted in a memorandum to employees that the decision to close facilities "also resulted in some staff members' time being negatively impacted." Exhibit 11. Thus, bargaining unit employees clearly have an interest in the employer's decision because of the impacts on their wages and hours.

Looking at the employer's interests, the parties do not dispute that this employer is faced with a budgetary crisis, and has a legitimate interest in not only operating under a balanced budget, but also a sustainable budget. The employer presented some evidence demonstrating that by closing its facilities for 20 days, it will save approximately eight percent of its energy costs for the calendar year. The union does not dispute this assertion.

Reducing the Work Calendar is a Mandatory Subject of Bargaining

Despite the employer's legitimate need to achieve budgetary savings, the decision to close facilities for 20 days impacted employee wages and hours so substantially that the decision must be bargained. Although this Commission recognizes that employers generally have the entrepreneurial right to control the level of services that they provide, *see Spokane County Fire District 9*, Decision 3021-A (PECB, 1988), this employer is not reducing its services, nor did it provide any evidence demonstrating that its decision to close its facilities on certain days was due to a lack of work, or that the public was no longer utilizing a service it had offered. Thus, this case can be distinguished from the *Wenatchee School District* case.

The union had a legitimate interest in being afforded the opportunity to work with the employer through collective bargaining to provide possible alternatives to reducing the wages and hours of certain of its bargaining unit employees. The union is not required in this hearing to specify the alternatives it might have proposed; it is only required to demonstrate that the reduction to the calendar was a mandatory subject of bargaining that triggered its right to be provided notice and an opportunity to request bargaining. Because the decision to reduce its work year calendar was a mandatory subject of bargaining, we next turn to whether the employer satisfied those obligations.

Employer Presented Decision as a *Fait Accompli*

This record supports a finding that the employer presented its decision to reduce the work calendar to the union as a *fait accompli.* Brannam admitted that he did not contact the union about his decision to reduce the work calendar, and also admitted that he did not contact the union to inform them that the school board would be considering reducing the work calendar at the July 28, 2008 meeting. Furthermore, Brannam did not directly inform the union of that decision at the August 5, 2008 mediation session. Rather, the record demonstrates that the union had to notice the change from 260 work days to 240 work days and ask the employer about that change before the employer offered any information. These actions are inconsistent with the employer's good faith obligation.

Although this record supports a finding that this employer presented its decision to reduce a mandatory subject of bargaining as a *fait accompli*, and therefore committed an unfair labor practice, the employer may still be relieved of its bargaining obligation through any affirmative defenses it asserted. The employer claims that the union waived its bargaining rights through inaction, through the contract, and also argues that RCW 28A.150.230 allowed it to change its work year calendar without having to satisfy its bargaining obligation. We reject all three defenses.

Waiver by Inaction

If a union fails to request bargaining in a timely manner when notified of a contemplated change, or fails to advance proposals in a timely manner for the employer to consider, a "waiver by

inaction" defense asserted by the employer will likely be sustained. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). A key ingredient in finding a waiver by inaction is a finding that the employer gave adequate notice to the union. *Washington Public Power Supply System*, Decision 6058-A.

This record demonstrated that on August 15, 2008, the union did in fact demand bargaining about both the decision and the effects of the decision to reduce the work calendar. Despite this fact, the employer argues that the union waived its right to bargain the decision to reduce the calendar by continuing to negotiate a successor agreement, and submitting that agreement to the bargaining unit membership for ratification.

Although the employer and union continued to negotiate a new collective bargaining agreement, this fact did not mitigate the employer's actions because: a) the unilateral change had already occurred, and b) the employer committed an unfair labor practice by failing to bargain from the status quo when it continued to bargain as if the decision to reduce the 240 day work calendar was not negotiable. *See Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988)(a willingness to meet and consider a union's point of view cannot mitigate other violations of an employer's good faith obligation).[6] In fact, Brannam testified that he was unwilling to negotiate the reduction to the work calendar because the employer did not have the money.

Because the employer presented its decision as a *fait accompli*, the union was relieved of its duty to request bargaining. Therefore, it cannot be said that the union waived its right to bargain the decision to reduce the work calendar.

Waiver By Contract

When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). A waiver of statutory collective bargaining rights must be

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[6] The fact that the union waited almost six months to file its unfair labor practice complaint does not indicate that the union waived its bargaining rights. The statute of limitations for unfair labor practice complaints is six months, and the union's complaint was timely filed.

consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). We have long held that typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

In the employer's opinion, its action is in accordance with Article XIV of the parties' collective bargaining agreement. That provision states:

> 1. It is agreed that nothing in this Agreement shall limit the District in the exercising of its function as management, including but not limited to the rights to hire new employees and to direct its working force; to assign; reassign; transfer; promote; discipline, suspend or discharge for just cause; to lay-off employees because of lack of work or other legitimate reasons; to require employees to observe District rules and regulations; to determine the number of its personnel; subject to the terms and provisions of this agreement.
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> 2. Management prerogatives shall not be deemed to exclude management's rights not herein specifically enumerated. The right to make reasonable rules and regulations shall be considered acknowledged functions of the District. In making rules and regulations relating to wages, hours, and working conditions, the District will give due regard and consideration to the rights of employees and to the obligations imposed by this Agreement.

Although Article XIV does retain the employer's right to make changes with respect to certain mandatory subjects of bargaining, nothing in this provision expressly allows the employer to reduce the number of days and hours worked by employees in the manner implemented here without satisfying its bargaining obligation. The employer's decision to reduce the work calendar is not equivalent to employee layoffs due to a lack of work and the employer failed to present evidence of a lack of work to perform. Thus, the employer's reliance upon the "lay off due to lack of work" language in the existing collective bargaining agreement is not persuasive.

Furthermore, the employer's argument that it has the right to reduce the work calendar without satisfying its bargaining obligation under the "other legitimate reasons" is not persuasive. In

Washington Public Power Supply System, Decision 6058, the management rights clause of the parties' collective bargaining agreement stated:

> The Supply System retains the exclusive right to manage and operate its business, subject only to the express terms of this Agreement. All management functions, rights and responsibilities which the Supply System has not modified or restricted by this Agreement are retained and vested exclusively in the Supply System.

The employer attempted to rely upon this language to allow it to modify its tobacco use policy without satisfying its bargaining obligation. The Commission disagreed, noting that "[i]t is difficult to understand how the employer can argue that the clearly general terminology of the above-referenced contract clause can be interpreted as a specific waiver on the specific subject of tobacco use."

Here, the "other legitimate reasons" language cited by the employer is equally broad and unspecific, and does not demonstrate that the union consciously waived its right to bargain any decision that resulted in reductions to employee hours and wages. Accordingly, the employer failed to demonstrate that the union contractually waived its right to bargain the decision to reduce employee wages and hours.

RCW 28A.150.230 Does Not Preclude Decision Bargaining

Finally, the employer points out that RCW 28A.150.230(2) recognizes:

> [I]t shall be the responsibility of each common school district board of directors to adopt policies to:
> . . .
> (b) Determine the final assignment of staff, certificated or classified, according to board enumerated classroom and program needs;
> . . .
> (d) Determine the allocation of staff time, whether certificated or classified[.]

In the employer's opinion, that statute allows the employer to determine the number of personnel it operates with. While we agree with the employer that RCW 28A.15.230 recognizes that school districts have the right to adopt certain policies, the right to implement those policies

allowed under 28A.150.230 does not exist in a vacuum, and is subject to collective bargaining under Chapter 41.56 RCW.

For example, in *City of Bellevue*, Decision 3156-A (PECB, 1990), the employer established a civil service board under the power granted to it through Chapter 41.08 RCW. Utilizing its Chapter 41.08 RCW authority, the civil service board unilaterally changed many of the rules and regulations that applied to represented employees, including several policies that were mandatory subjects of bargaining, without satisfying its Chapter 41.56 RCW bargaining obligation. That employer argued that Chapter 41.08 RCW specifically allowed the board to make such changes without bargaining.

The Commission agreed that the board had the right to adopt such changes as allowed by Chapter 41.08 RCW, but disagreed with the employer that the board had the right to *implement* those changes without notifying the union of the change and providing an opportunity to bargain. Specifically, the Commission recognized that although the Legislature granted employers certain rights through statute, RCW 41.56.905[7] requires employers to comply with their bargaining obligations under Chapter 41.56 RCW when exercising that authority. *See also Rose v. Erickson*, 106 Wn.2d 420 (1986). Accordingly, the employer was prevented from implementing any rules adopted by the civil service board that changed mandatory bargaining subjects for union-represented employees without first providing notice of the change and, upon request, bargaining both the decision and the effects of that decision. *City of Bellevue*, Decision 3156-A; *see also City of Spokane v. Spokane Civil Service Commission*, 98 Wn. App. 574 (1999) (recognizing that an employer must satisfy its collective bargaining obligation before changing civil service rules affecting mandatory subjects of bargaining).

Here, while the school board may have had the right to determine the work year calendar, the employer was still bound to maintain the existing terms and conditions of employment. Prior to making any changes to the existing terms and conditions, the employer was required to satisfy its

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[7] RCW 41.56.905 provides that: The provisions of [Chapter 41.56 RCW] are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of *this chapter shall control.* (emphasis added).

Chapter 41.56 RCW collective bargaining obligation, including bargaining both the decision as well as the effects of that decision in good faith. Thus, the employer's reliance upon RCW 28A.150.230 is misplaced.

Employer Contract Violation Argument is Not Properly Before this Commission

The employer asserts on appeal that the case is not properly before the Commission because its change is a contract violation; this argument was not made to the Examiner. Employer's Brief at 1-2, citing *Thurston County Communications Board*, Decision 103 (PECB, 1976). This employer was asked in the preliminary ruling process whether it wanted the case to be deferred to arbitration, and failed to respond. This Commission has previously held that it will not consider issues raised for the first time on review. *City of Dayton*, Decision 1990-A (PECB, 1984). Accordingly, the employer's assertion that this case should have been deferred to arbitration is not appropriately before us on appeal.

Conclusion

Although we are affirming the decision finding the employer committed an unfair labor practice when it presented an implemented decision to reduce the work year calendar from 260 to 240 days and the Examiner's remedial order in its entirety, and because similar situations may arise in the future, we take this opportunity to provide guidance to public employers in the State of Washington.

Chapter 41.56 RCW does not handcuff employers from taking action in the wake of a financial crisis. Should an employer be faced with a situation where it needs to make a change to a certain mandatory subject of bargaining, it should inform the union of the issue, the importance of the issue to the employer (including the timeline in which the employer needs to complete bargaining), and, upon request, bargain in good faith. If the employer and union reach a lawful impasse, then the employer is permitted to lawfully implement its last offer on that topic, while remaining willing to bargain all other mandatory subjects of bargaining, and remain willing to return to bargaining regarding the subject of bargaining implemented by the employer if the

union makes such a request. *See Skagit County*, Decision 8746-A (PECB, 2006)(outlining the test the Commission applies to determine if the parties are at a lawful impasse).[8]

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Katrina Boedecker are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission

ISSUED at Olympia, Washington, this 18th day of June, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

[8] For interest arbitration eligible employees, see footnote 3, *supra*.