



STATE OF WASHINGTON
PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL P. SELLARS, EXECUTIVE DIRECTOR

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April 9, 2013

Sonya Kraski, Clerk
Snohomish County Superior Court
3000 Rockefeller Avenue, M/S 605
Everett, Washington 98201-4046

Re: Everett Community College
Cause No. 12-2-08341-8
Case 23327-U-10-5942

Dear Ms. Kraski:

On February 12, 2013, the Honorable Thomas J. Wynne remanded the above-referenced matter to the Public Employment Relations Commission for further findings of fact. Enclosed is the original Findings of Fact on Remand issued this date by our Commission. Also enclosed is a working copy for the Court.

Very truly yours,

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL P. SELLARS, Executive Director

MPS:mcB

Enclosures

cc: The Hon. Thomas J. Wynne
Scott Majors
Jon Rosen

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMERICAN FEDERATION OF
TEACHERS WASHINGTON,

Complainant,

vs.

EVERETT COMMUNITY COLLEGE
(COMMUNITY COLLEGE DISTRICT 5),

Respondent.

CASE 23327-U-10-5942

DECISION 11135-C - CCOL

DECISION OF COMMISSION

The Rosen Law Firm, by *Jon Howard Rosen*, Attorney at Law, for the union.

Attorney General Robert W. Ferguson, by *Scott Majors*, Assistant Attorney General, for the employer.

The American Federation of Teachers Washington (union) filed a complaint against Everett Community College (employer) on June 30, 2010. The complaint alleged employer discrimination and refusal to bargain. An Examiner conducted a hearing and issued a decision finding that the employer did not discriminate and did not unilaterally change wages, hours, and working conditions.¹ The Examiner found that the employer unlawfully skimmed bargaining unit work without providing an opportunity for bargaining.

The employer appealed the Examiner's decision that the employer skimmed bargaining unit work. On September 12, 2012, the Commission issued a decision affirming the Examiner.² The employer appealed the Commission's decision to the Snohomish County Superior Court (Court).

¹ *Everett Community College*, Decision 11135-A (CCOL, 2011).

² *Everett Community College*, Decision 11135-B (CCOL, 2012).

On February 12, 2013, the Court remanded the case to the Commission to issue further findings of fact within 90 days of the Court's order. The Court reserved jurisdiction to schedule further proceedings and render a decision on review.

The Court directed the Commission to enter findings of fact:

- A. Findings related to whether the work performed by educational planners was the exclusive and historical work of the bargaining unit:
 - 1. Any and all duties or work performed by the bargaining unit and not listed in the collective bargaining agreement at 6.11B that the Commission found to be the exclusive and historical work of the bargaining unit;
 - 2. Any and all duties or work performed by educational planners as a group or by individual educational planners that the Commission found to be exclusively and historically the work of the bargaining unit;
 - 3. Any and all duties or work performed by the educational planners as a group or by individual educational planners that the Commission found to be non-bargaining unit work;
 - 4. Any and all duties or work performed by any and all non-bargaining unit personnel and also performed by the bargaining unit;
 - 5. Any and all evidence the Commission considered to be in direct conflict with the factual findings made pursuant to (1), (2), (3), and (4) above, and if such a conflict of evidence exists, whether the evidence found to be contrary to the Commission's findings is not credible or otherwise relied upon by the Commission.
- B. Findings related to the *City of Snoqualmie*, five factor balancing test:
 - 6. The Commission is directed to make specific factual findings for each of the five *City of Snoqualmie* factors, citing the material evidence relied upon;
 - 7. If any evidence directly contradicts the factual findings made pursuant to (6) above, the Commission shall make a finding of whether such contradictory evidence is not credible or otherwise not relied upon by the Commission in making its finding;

8. After making the factual findings in (6) and (7), the Commission is directed to make a finding as to the weight of each factor in determining that a skimming violation occurred.

After receiving the Court's ruling and the instructions above, the Commission reviewed the evidentiary record before it. At the hearing, the union presented evidence about the work performed by the counselors and the work they are no longer performing. The employer presented evidence from supervisors about the work the educational planners are performing. Neither party presented testimony from an educational planner as to what duties the educational planners perform. While the Examiner did not make specific credibility determinations, the text of her decision supports an inference that she found the union's witnesses more credible as to what work the counselors and the educational planners performed. While the Commission does not typically rely exclusively on job descriptions, the educational planner job description (Exhibit 32) and the January 10, 2008 Memorandum of Understanding (Exhibit 30) in this case support the testimony of the union witnesses.

When determining whether a skimming violation has occurred, the Commission focuses on the duties that are alleged to have been removed from the bargaining unit. The focus of the Commission is not on the duties that were not performed by the bargaining unit. Thus, we have focused our answers to the Court's instructions on those duties that were historically bargaining unit work. After reviewing the evidentiary record, the Commission enters the following Findings of Fact on Remand specifically answering those points raised by the Court that we are able to answer based on the record before us.

FINDINGS OF FACT ON REMAND

- A. Findings related to whether the work performed by educational planners was the exclusive and historical work of the bargaining unit:

1. Any and all duties or work performed by the bargaining unit and not listed in the Collective Bargaining Agreement at 6.11B that is the exclusive and historical work of the bargaining unit:
 - a. Bargaining unit counselors were responsible for a wide range of student advising activities, including the dissemination of routine information, while non-bargaining unit employees were limited to providing routine information. Exhibit 30.
 - b. Bargaining unit employees advised entering students, continuing students, and transfer students. Continuing students are those students in their second or later quarters. Exhibits 20 and 30, Transcript at 23-24, 36, 112.³
 - c. Bargaining unit employees provided transfer advising. Transfer advising included discussion of the prerequisites the student would need for transferring, the likelihood of acceptance, advice on the personal statements, procedures, processes, and forms; advising on how to prepare academically; and connecting students with the institution the student desired to transfer to. Providing transfer advising to students seeking to transfer to other institutions is bargaining unit work. Tr. at 37-38, 46-47, 101, 165, and Exhibit 33.
 - d. Counselors in the bargaining unit: advised students; provided career counseling; provided limited personal mental health counseling and crisis counseling; referred students to the appropriate services; provided program advising for Human Services; worked with academic warning students, and provided learning disability screening. Transcript at 23, 101, 122, 230, and Exhibit 33.
 - e. Counselors helped students select their courses, register for classes, and assisted with services such as financial aid. Tr. at 25, Exhibit 33.
 - f. Academic advising entails interviewing students, determining the student's needs, completing a degree plan for the student to reach their goals, providing guidance and direction, and referring to resources. Counselors and members of the faculty bargaining unit provided academic advising. Tr. at 37, 205, 221-2.
 - g. Faculty and counselors provided mandatory advising and were required to complete a certain number of educational plans each year. Exhibit 20, Tr. at 187.

³ Citations to the transcript will be in the format Tr. at page number.

- h. Advising undecided students, transfer students, and conducting transcript evaluations is bargaining unit work. Exhibit 30, Tr. at 36, 112.
- i. Advising undecided students and general advising included assisting students in clarifying their educational goals and referring the student to the appropriate program faculty or program advisors. Tr. at 230.
- j. Education counseling covers study skills, effective communication, teacher/student conflict, stress reduction, and academic advising. Exhibit 33.
- k. Advising continuing students is bargaining unit work. This includes advising undecided students. Exhibit 30.
- l. Bargaining unit employees make counseling referrals to agencies that provide personal counseling. Tr. at 244, Exhibit 32.
- m. Counselors administered specific programs. Counselors were the liaisons to faculty and the diversity specialist; administered the opportunity grant and the persistence grant; worked with foster students; worked with the college success foundation scholars program; and provided transfer counseling and information. Tr. at 125-127; 139-140.
- n. The counselor assigned to the opportunity grant primarily administered the program, including: development of forms, intake of application materials, determining eligibility, awarding grant dollars, coordinating grant awards with the financial aid office, monitoring the grant, and providing counseling services to the grant recipient students. Tr. at 228-229.
- o. The counselor assigned to the persistence grant worked with targeted student populations including academically at-risk, under prepared, low income, and first generation students, in order to increase student retention. Tr. at 229.
- p. In the Diversity and Equity Center, a counselor in the bargaining unit provided information entry advising assistance, and counseling for new students, reentry students, and prospective students; performed outreach activities at high schools; worked with the STAR program students connecting the students with mentors; performed mid-quarter assessments for STAR students and College Success Foundation students; and was the College Success Foundation Mentor Contact. The counselor worked with a target student population including students of

color, older women, returning students, and gay or lesbian students. The counselor provided personal counseling, career counseling, academic counseling, and advised students. Exhibit 22, Tr. at 139-140, 230-231.

2. Any and all duties or work performed by educational planners as a group or by individual educational planners that the Commission found to be exclusively and historically the work of the bargaining unit:
 - a. Educational planners advise new students in the admission process, course selection, registration, transcript evaluation, degree requirements, and graduation procedures; provide entry information; explain the next steps after students take their placement tests; and provide entry information. Exhibits 10 and 32, Tr. at 109, 222, 241.
 - b. Counselors and educational planners advise first-quarter students, undecided students, and transfer students planning to major in Human Services or Social Work. Exhibit 8, Tr. at 28, 109, 222, 241.
 - c. Educational planners provide general transfer advising and informal transcript evaluations for entering and graduating students to assist students and prospective students with transferring to and from different colleges and universities. Exhibits 8, 10, and 33. Educational planners develop training sessions for faculty and staff. Educational planners work with faculty and counselors to develop workshops for other faculty. Exhibit 32, Tr. at 103, 249.
 - d. Educational planners lead student workshops and orientation sessions. Exhibit 32, Tr. at 248.
 - e. Educational planners interpret and explain entry assessment test scores. Exhibit 32.
 - f. Educational planners advise faculty, staff, and administrators. This is the same type of work described in the collective bargaining agreement article 6.11B. Tr. at 245.
 - g. Educational planners' work includes assisting more than entry level, or first quarter students. Tr. at 40, 245.

- h. An educational planner performs the work of a faculty liaison that counselors previously performed. Tr. at 45, 103.
 - i. Educational planners have provided career counseling. Tr. at 120.
 - j. Educational planners assist students in clarifying objectives and connect students with resources. Exhibit 32. Educational planners direct students to faculty advisors, provide the curriculum guide, refer to tutoring resources, and refer to academic support resources available to students. Tr. at 253.
 - k. Educational planners work with special populations that bargaining unit employees were previously responsible for, including providing transfer information, faculty liaison, opportunity grant, and the college success foundation scholars program. Tr. at 40, 46, 140-141, 256. Exhibit 24.
 - l. The educational planner whose focus is diversity and equity student populations performs duties that were previously performed by a counselor. Tr. at 256.
 - m. In the Diversity and Equity Center, an educational planner is College Success Foundation mid-term contact and prepares the mid-term plan. Exhibit 24 and Tr. at 140-141.
 - n. An educational planner works with the opportunity grant students. The employer assigned the processing of financial resources associated with the opportunity grant to a non-bargaining unit position not involved in this case. Tr. at 125, 201.
3. Any and all duties or work performed by the educational planners as a group or by individual educational planners that the Commission found to be non-bargaining work:
- a. The program coordinator assisted a counselor with transfer information. The program coordinator obtained fliers and publicized information. The program coordinator was not a member of the bargaining unit. The program coordinator kept those job duties when she became an educational planner. Tr. at 110.

- b. Educational planners review advising programs and recommend changes, modifications, or expansions. Exhibit 32.
 - c. Educational planners prepare budget requests for the Dean's approval and provide advice and information to the Dean about the budget. Educational planners review budget status reports and advise the Dean of the financial status of programs and of any potential problems. Exhibit 32.
 - d. The initial intake of students in the Counseling, Advising and Career Center (CACC) was previously performed by non-bargaining unit employees. Tr. at 125.
 - e. Educational planners each have a population focus: transfer specialist, diversity and equity student population, opportunity grant, foster youth, and faculty liaison. Tr. at 40, 254. The transfer specialist focus was previously performed by a non-bargaining unit employee. Tr. at 254-255. The educational planner whose focus is the diversity and equity student populations performs some duties previously performed by non-bargaining unit employees. Tr. at 256. The educational planner who focuses on foster youth brought the focus duties to the position from a non-bargaining unit position. Tr. at 257-258.
 - f. Two classified employees previously worked disseminating information related to the opportunity grant. Tr. at 218.
 - g. Educational planners promote advising week. Tr. at 250-251.
4. Any and all duties or work performed by any and all non-bargaining unit personnel and also performed by the bargaining unit:
- a. Program advisors were almost exclusively faculty in the bargaining unit. Tr. at 230 and Exhibit 30.
 - b. Bargaining unit and non-bargaining unit employees participated in student orientation. Tr. at 204-205.
 - c. Entry advising consists of providing students with information that is readily available in publications published by the employer. Entry advising is

- performed by bargaining unit and non-bargaining unit employees. Exhibit 30, Tr. at 40, 165-166, 246.
- d. Entry advising includes answering questions about routine information regarding college services and educational programs. Routine information consists of facts and information that can be found in college publications. Entry advising includes providing unofficial transcript evaluation. Entry advising is performed by the bargaining unit and by non-bargaining unit employees. Advising beyond routine information is bargaining unit work. Exhibits 30 and 32, Tr. at 38-39, 202, 252.
 - e. In the Diversity and Equity Center, bargaining unit employees and non-bargaining unit employees worked with LGBTQA students. Exhibit 22, Tr. at 140.
 - f. Bargaining unit and non-bargaining unit employees refer students to the appropriate services and to the appropriate faculty for program advising. Exhibit 32.
 - g. Bargaining unit and non-bargaining employees provide detailed information to students about the college's policies, programs, and services. Exhibit 32.
 - h. Bargaining unit and non-bargaining unit employees perform unofficial transcript evaluations. Exhibit 32.
 - i. Educational planners are an entry contact who help students understand the schedule, understand the options available, assist in selecting first quarter courses, and refer the students to the appropriate advisor. Tr. at 202.
 - j. Educational planners do not interpret placement test scores. Educational planners receive a report with the student score and what level of course the student is to be placed in based on the score. Tr. at 247.
 - k. Educational planners disseminate information across the campus. Tr. at 251.
5. Any and all evidence the Commission considered to be in direct conflict with the factual findings made pursuant to (1), (2), (3), and (4) above, and if such a conflict of evidence exists, whether the evidence found to be contrary to the

Commission's findings is not credible or otherwise relied upon by the Commission.

- a. Christina Castorena testified that educational planners are not conducting the trainings for faculty, rather they are coordinating those trainings for faculty. Tr. at 250. Generally, Castorena was able to explain away any overlap between bargaining unit work and educational planner work. From the decision we infer the Examiner found the language of the job description and other testimony to be more persuasive than Castorena's testimony.
- b. Counselors and other non-academic employees were performing all of the duties listed in the educational planner job description. Tr. at 273. This testimony is not clear as to which of the duties were performed by non-bargaining unit employees.

B. Findings related to the *City of Snoqualmie*, five factor balancing test:

6. Findings of Fact related to the *City of Snoqualmie*, Decision 9892-A (PECB, 2009), five factor skimming balancing test.
 - a. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed such work before?).
 - i. As reflected in Findings of Fact on Remand 1 a.-p., that work was historically performed by the bargaining unit.
 - ii. As reflected in Findings of Fact on Remand 2 a.-n., the educational planners are performing work that was historically bargaining unit work.
 - iii. As reflected in Findings of Fact on Remand 4 a.-k., that work was historically performed by bargaining unit and non-bargaining unit employees.
 - b. Whether the transfer of work involved a significant detriment to bargaining unit members (*e.g.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities).
 - i. Bargaining unit employees suffered a significant detriment, the loss of work previously performed, because, as discussed in Findings of Fact on

Remand 2 a.-n., non-bargaining unit employees now perform bargaining unit work.

- c. Whether the motivation was solely economic.
 - i. Restructuring the CACC arose as part of the budget discussions. Tr. at 170.
 - ii. The employer restructured the counseling department and, as a result, assigned bargaining unit work to non-bargaining unit employees because it was reducing the number of counselors and needed to continue to provide counseling services to students. Tr. at 231.
 - iii. The employer saved money by not renewing the temporary counselors' contracts. Tr. at 155-156, 159, 181.
 - iv. The employer saved money by not filling classified positions and hiring classified educational planners. Tr. at 160.
 - v. The employer's motivation in restructuring the CACC was to save money; therefore its motivation was economic. The employer was also motivated by a desire to continue to provide services to students.
- d. Whether there had been an opportunity to bargain generally about the changes in existing practices.
 - i. The employer circulated the educational planner job description and allowed the counselors to provide feedback on the job description. Exhibit 34. However, the fact that the employer sought input from employees on the job description does not equate to granting an opportunity to the union to bargain the decision to transfer bargaining unit work.
 - ii. The employer presented its plan to restructure the CACC and employ educational planners at an April 2, 2010 meeting with the counselors. The employer presented the decision to restructure the CACC as the direction the employer was going, thus a *fait accompli*. Prior to the meeting, the employer did not contact the union and offer to bargain the decision. Exhibits 6 and 14, Tr. at 28-30, 48-49, 54, 85, 93, 105, 115-118 213-215, 234, 273.

- iii. The employer met with the counselors individually. After these meetings, the counselors presented a recommendation for restructuring the CACC. Tr. at 190-197, Exhibit 28. This action does not constitute bargaining with the exclusive bargaining representative of the employees. It is evident that the employer could have provided an opportunity to the union to bargain the decision and effects of removing work from the bargaining unit but failed to do so.
 - iv. The employer did not provide the union with an opportunity to bargain the decision to remove work from the bargaining unit.
 - e. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.
 - i. There is overlap in the duties that educational planners and counselors perform. Tr. at 165.
 - ii. Educational planners perform work in the CACC that counselors performed in prior years. Tr. at 122.
 - iii. As described in Findings of Fact on Remand 2 a. – n., the work performed by the educational planners is bargaining unit work.
 - iv. The work that the educational planners perform that was historical bargaining unit work is not fundamentally different from regular bargaining unit work.
- 7. If any evidence directly contradicts the factual findings made pursuant to (6) above, the Commission shall make a finding of whether such contradictory evidence is not credible or otherwise not relied upon by the Commission in making its finding;
 - a. David Breyer testified that he was willing to discuss the restructuring of the CACC with the union. Tr. at 55. Based upon the Examiner's decision, we infer that the Examiner did not find Breyer's testimony credible and we refuse to disturb that interpretation. Breyer presented the union with a restructuring plan at the April 2, 2010 meeting. That plan was substantially implemented. Exhibit 6, Tr. at 60-61.

- b. Castorena testified that the employer instructed the educational planners not to perform certain duties that belong to the counselors. Tr. at 263. We do not rely on this testimony. The fact that employees are instructed not to perform certain work does not equate to a reality that those employees are not performing those job duties.
 - c. Castorena testified that the educational planners do not provide educational counseling and career counseling or advising. Tr. at 243. While Castorena supervises the educational planners, we do not give her testimony as much weight as the testimony of the counselors, some of whom worked directly with the educational planners. The Examiner's decision implicitly found the testimony of union witnesses to be more credible.
 - d. Castorena testified that, in comparing Article 6.11B3 in the Collective Bargaining Agreement with Exhibit 32, paragraph 7, educational planners are more restricted in assisting the students in getting started at the college, course selection based on placement tests, registering for classes, transcript evaluation, and graduation procedures, while counselors address career counseling, the students' goals and purposes in attending the college, and long term goals. Castorena testified that educational planners focus on the entry quarter. Tr. at 245-246. In this case, we do not give Castorena's testimony as much weight as the testimony of Christine Sullivan who worked in the CACC directly with educational planners.
 - e. Testimony by Jennifer Howard about the duties performed by the educational planners that do not include duties performed by the bargaining unit has not been afforded significant weight because Howard does not supervise educational planners and therefore lacks opportunities to observe their work day-to-day. Tr. at 177, 220.
8. After making the factual findings in (6) and (7), the Commission is directed to make a finding as to the weight of each factor in determining that a skimming violation occurred.

- a. The fact that educational planners are performing work that was historically bargaining unit work weighs heavily in favor of requiring the employer to bargain its decision to remove work from the bargaining unit.
- b. Bargaining unit employees suffered a significant detriment, the loss of work previously performed by the bargaining unit, when work was removed from the bargaining unit. This factor weighs heavily in favor of requiring the employer to bargain its decision to remove work from the bargaining unit.
- c. The employer's motivation in restructuring the CACC was to save money; therefore, its motivation was economic. The employer was also motivated by a desire to continue to provide services to students. However, because the motivation was based on an economic decision, this factor weighs in favor of requiring the employer to bargain its decision to remove work from the bargaining unit.
- d. The employer did not provide the union with an opportunity to bargain about the decision to remove work from the bargaining unit. This factor weighs heavily in favor of requiring the employer to bargain its decision to remove work from the bargaining unit.
- e. The work that the educational planners perform that was historical bargaining unit work is not fundamentally different from regular bargaining unit work. This factor weighs heavily in favor of requiring the employer to bargain its decision to remove work from the bargaining unit.
- f. Historically, the Commission has not held any one of the five factors to have more weight than the others in determining whether an employer is required to bargain the decision to remove work from the bargaining unit. In this case, all five factors weigh in favor of requiring the employer to bargain the decision to remove work from the bargaining unit. While factor three, the employer's motivation, weighs in favor of requiring the employer to bargain the decision to remove work from the bargaining unit, it does not weigh as heavily as the remaining four factors. Ultimately, the balance tips to requiring the employer to bargain the decision to remove work from the bargaining unit because the employer removed bargaining unit work, that was not fundamentally different

from regular bargaining unit work, without providing the union an opportunity to bargain the decision.

ISSUED at Olympia, Washington, this 9th day of April, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner