Othello School District, Decision 13488 (EDUC, 2022)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

OTHELLO EDUCATION ASSOCIATION, Complainant, vs. OTHELLO SCHOOL DISTRICT, Respondent.	CASE 133399-U-21 DECISION 13488 - EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On March 18, 2021, the Othello Education Association (union or OEA) filed an unfair labor practice complaint against the Othello School District (employer or OSD). The complaint alleges that the employer refused to bargain in several respects when it began hybrid in-person and online instruction during the 2020–21 school year and circumvented the union by engaging in direct dealing with bargaining unit employees regarding their terms and conditions of employment.

On March 30, 2021, an Unfair Labor Practice Administrator issued a preliminary ruling finding causes of action. The undersigned held a hearing conducted by videoconference in the matter on November 15 and 16, 2021. The parties filed briefs on January 28, 2022, to complete the record.

ISSUES

As framed by the preliminary ruling,[1] the complaint presents the following issues regarding whether the employer violated RCW 41.59.140(1)(e):

1. Did the employer unilaterally change bargaining unit employees' working conditions by returning to in-person instruction, requiring employees to teach both in-person and online at the same time, or requiring a doctor's note to initiate the reasonable accommodation process under certain circumstances without providing the union an opportunity for bargaining?

2. Did the employer circumvent the union through direct dealing with bargaining unit employees during the reasonable accommodation process?

BACKGROUND

The employer is a common school district organized under Title 28A RCW. It operates a high school (Othello High School), one middle school (McFarland Middle School or MMS), four elementary schools (Hiawatha, Lutacaga, Scootney Springs, and Wahitis Elementaries), and an alternative high school (Desert Oasis High School or DOHS). Sandra Villarreal is the employer's executive director of Human Resources. At all times relevant to the complaint, Pete Perez was the employer's assistant superintendent.

The union represents a bargaining unit of certificated staff. The employer and the union were parties to a collective bargaining agreement effective September 1, 2018, to August 31, 2021.

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[1] At hearing the union sought to introduce evidence purporting to show that the employer additionally violated chapter 41.59 RCW by (a) failing to accommodate employees at high risk for COVID-19 infection and (b) circumventing the union by contacting two special education teachers regarding their work assignments that were the subject of a grievance. These allegations were not pled in the complaint nor were they included in the preliminary ruling—or reasonably comprehended by it. Following an objection by the employer, I precluded the union from introducing the evidence. *King County*, Decision 9075-A (PECB, 2007) (explaining that once an examiner is assigned to hold an evidentiary hearing, the examiner can only rule upon the issues framed by the preliminary ruling). These allegations are therefore not addressed here.

Loren Jenson is the union's president. Chad Smith is the union's vice president. Steve Lindholm is an employee of the Washington Education Association assigned to assist the local union.

The COVID-19 pandemic had an enormous impact on the state's K–12 educational system. The governor issued Proclamations 20-08 and 20-09 during spring 2020. The proclamations prohibited schools from conducting in-person programs to limit the spread of the disease. Although removing students from congregate settings decreases COVID-19 transmission, given the variety of functions served by schools, the lack of in-person education also negatively impacted students, families, and communities in a myriad of ways.

In preparation for the 2020–21 school year, on August 5, 2020, the Washington State Department of Health (DOH) issued guidance for school districts to assist them in determining how and when to resume in-person instruction. The guidance included a decision tree based on the rate of community transmission as measured by new cases per 100,000 county population over a rolling 14-day period. When new cases per 100,000 in population exceeded 75, the DOH "[s]trongly recommend[ed] distance learning with the option for limited in-person learning in small groups, or cohorts, of students for the highest need students, such as students with disabilities, students living homeless, those farthest from educational justice, and younger learners." Between October 2020 and January 2021, the rate of community transmission in Adams County, where the employer is located, was greater than 75/100,000.

During summer 2020, the union and employer negotiated a memorandum of understanding (MOU) for the 2020–21 school year dealing with a range of issues surrounding the impact of COVID-19 on the district and staff. The agreement committed the employer to following certain state guidelines. With respect to in-person instruction, the MOU provided that

> OSD and OEA will follow Governor Inslee's current (as of 8/5/2020) school reopening guidelines as outlined by the district to the school board on 7/27/2020. Upon the state or county health department determining schools are safe to transition to a less restrictive model, the district shall provide at least 5 business days notice to all unit members to prepare for the transition to a new model.

The parties' MOU further noted that

> Certificated staff will be allowed to choose to work either from school or home unless the District determines that its instructional program requires a staff member to service students on site, in which case the District will work in good faith with the employee and OEA to address accommodations for the staff member.
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> . . . Teachers will not be required to teach both online and in person at the same time.

Smith and Villarreal participated in bargaining the MOU on behalf of the union and employer, respectively. Smith explained that the language regarding changes to the instructional program was included in the MOU so that when kids "were allowed to or required to be on-site, then the teachers would have to then be required to be on-site as well." Villarreal similarly testified that the language was intended to provide the district the right to determine whether instruction occurred online, face-to-face, or via a hybrid model.

The District Returns to Some In-Person Instruction

The 2020–21 school year began with nearly all teachers providing instruction online. The district's board of directors, however, began to receive pressure from the community to provide an in-person option because of the challenges faced by students and families with online learning. A little over a month into the school year, the school board responded to this pressure and took action to implement a hybrid model. At a special meeting on October 6, 2020, the board voted on a schedule for resuming in-person instruction. The plan involved a phased approach with elementary schools and certain special education students moving to an optional hybrid in-person model first.[2] The board believed it was important to bring younger students back in-person first because of concerns about the effectiveness of student learning online. The district's experience showed that younger learners often had difficulty accessing the technology and following the schedules without direct adult support at home. The district felt that, in comparison, older students were better served by online learning because of their greater level of maturity and ability to independently interact with the learning management systems. In balancing the risk to safety posed by in-person instruction with the benefits of a more traditional learning model, the employer believed that for the youngest students, the rewards outweighed the risks at the time. As a result, the first group, kindergarten

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[2] Some special education students were provided in-person instruction from the start of the 2020–21 school year if it was not feasible for them to learn in an online environment.

through third grade, were scheduled to begin on November 4, 2020, with others to follow over the course of the ensuing weeks and months, ending with grades 9–12.

The employer also determined that older students who faced particular difficulty in the online learning environment would be offered in-person instruction via small group interventions early in the return process. In order to offer the small group in-person instruction for students challenged by online learning, the employer further decided that at least some middle and high school staff would be required to appear in-person for instruction for at least a portion of the day.

The union responded to the board's action in several ways. It submitted a demand to bargain on October 20, 2020, "around the protection of members due to reopening of school by the school board before the Department of Health safety recommendations (less than 75 positive cases in 100,000) have been met." The union also filed a grievance alleging a violation of the parties' COVID-19 MOU.[3] There is no evidence that the union demanded to bargain over the decision to return to in-person instruction itself. Although the parties met in connection with the union's demand to bargain, the employer implemented its decision to provide in-person instruction for the district's youngest students and those challenged by online learning prior to completing effects bargaining.

The employer's return to in-person learning was brief. Outbreaks of COVID-19 at multiple schools led the district to return to online instruction for most students starting November 23, 2020. Although the employer intended to resume hybrid instruction on December 4, the return was delayed by increasing rates of community transmission. At a board meeting on December 3, 2020, the employer adopted new metrics to determine when to offer hybrid instruction. These metrics were revised at a meeting on January 4, 2021, to align with DOH guidance issued December 16, 2020.

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[3] The employer did not request that the allegations in the complaint be deferred to the parties' grievance and arbitration procedure. The parties held an arbitration hearing in the matter in August 2021. The arbitrator's decision was not included in the record.

The employer resumed offering in-person learning for most students in January 2021. Following winter break, students and staff returned to the buildings via a phased approach in a hybrid model. Pre-K through third grade began on January 12, grades four through six started on January 14, grades seven and eight began on January 19 and, finally, high school students started hybrid instruction on January 25. The employer's implementation of the phased transition was consistent with the state's December 16 guidance.

The parties continued to engage in effects bargaining regarding the employer's decision to offer in-person instruction. They eventually reached an agreement on a revised COVID-19 MOU. The new agreement was executed on February 10, 2021.

Special Education Simultaneous Instruction

Returning to in-person instruction required substantial planning on the part of all district staff, especially those serving special education students. In October 2020, the employer asked MMS[4] special education resource room teachers Lindsay Scott and Melinda Wagner to come up with a schedule containing an in-person offering for their students. Under the schedule created by bargaining unit members Scott and Wagner, there was a 30-minute block every day where one of the teachers would be providing simultaneous instruction to students both in-person and virtually (for those at home). The employer adopted the plan and implemented it for Scott and Wagner's classes beginning November 5, 2020, when students returned to the buildings. The MMS resource room teachers utilized the arrangement until at some point in January 2021, when the rest of the school returned to some level of in-person instruction.

Employees Request Accommodations

In response to the employer's decision to resume in-person instruction, some employees requested accommodations for various medical conditions that placed them at higher risk for severe

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[4] Although the union alleged in the complaint that the employer also required simultaneous instruction at Wahitis Elementary, it introduced no evidence in support of the allegation.

COVID-19. The approach to handling reasonable accommodation requests is governed by various overlapping statutory and contractual requirements.

The parties' August 2020 COVID-19 MOU incorporated certain requirements regarding the accommodation process for employees at higher risk for severe COVID-19 from directives issued by the governor and the federal Centers for Disease Control and Prevention (CDC). The MOU specified that "employee[s] will not be required to provide a note from their doctor if they meet the 'at increased risk' category as outlined in Governor Inslee's Proclamation 20-46-2." The proclamation in turn referenced a June 25, 2020, list of conditions identified by the CDC as risk factors for getting severely ill from COVID-19. The conditions included, among others, age, immunocompromised state, and obesity.

Prior to the 2020–21 school year, the employer's practice had been to request documentation from a medical provider when an employee requested an accommodation. Villarreal explained that the employer did so to ensure that the employee could still perform the essential functions of their position. Prior to the start of the 2020–21 school year, Villarreal created a document titled "COVID-19 Temporary Accommodation Request Form." The form was intended for use by individuals who were requesting an accommodation if they were or might be at increased risk for severe illness from COVID-19. The form also explained that "if you are submitting a request because of a medical condition, you will also need your medical provider to complete the Medical Certification Form (form attached)." There is no evidence showing whether the form was disseminated to employees. To the extent it was circulated, there is no evidence showing in what manner, or how, it was explained to staff. Villarreal testified she believed she stopped using the form around November 2020.

McFarland Middle School Accommodation Requests

Two teachers at MMS requested accommodations for the 2020–21 school year. One of the employees[5] had several risk factors for severe COVID-19, as well as vulnerable family members.

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[5] The employees whose accommodation requests are at issue in this proceeding are not identified by name here in the interest of privacy.

When she first inquired about an accommodation, the employee testified that either her principal, Villarreal, or Villarreal's assistant told her that the employer "wasn't accepting very many accommodations and . . . if [she] wanted to be considered, [she] needed to get the doctor's note." Villarreal denied informing the employee that she needed provider documentation, and there is no other evidence in the record providing further context for the conversation.

On November 4, 2020, the teacher sent an email to Villarreal explaining that she was in a high-risk category and was concerned about returning to in-person instruction. When Villarreal did not immediately respond, the employee discussed the matter with some coworkers, one of whom sent her the employer's COVID-19 temporary accommodation request form. The record does not detail how the coworker obtained the document. The employee completed the form, without the medical providers' certification, and emailed it to Villarreal with the note, "A fellow teacher sent this form to me." Neither Villarreal nor any other agent of the employer provided it to the teacher. Villarreal did not ask the teacher to complete the form. After receiving the document, Villarreal spoke with the teacher. During the conversation Villarreal told the teacher that she did not need to submit the accommodation request form.

With students returning to the buildings in January, the teacher met with Villarreal, a union representative, and others on January 12, 2021, to discuss possible accommodations. Following the meeting the employer sent the teacher a letter, copying the union representative, offering several options. The union contacted Lindholm who then became involved in trying to secure a more favorable accommodation for the teacher. Lindholm and Villarreal exchanged emails regarding the topic. The employer subsequently offered the teacher a different accommodation on January 19, which she accepted.

On February 18, 2021, the teacher was contacted by Villarreal and Perez. No representatives for the union were present. During the discussion between Villarreal, Perez, and the teacher, Villarreal offered to modify her existing accommodation by removing one of the assigned remote classes. The teacher told the two that she would have to think about it and talk to Lindholm. Later that day Villarreal emailed Lindholm, explaining the offer. After further discussion between Lindholm and Villarreal, the parties reached an agreement on a modified accommodation.

Another MMS teacher requested an accommodation around March 2021. The teacher met with Villarreal, the school's principal, and union representative Smith to discuss options. Following the meeting Villarreal asked the teacher for more information concerning her treatment plan in order to evaluate the request. Villarreal did not ask the teacher for a medical provider's note or certification. Although it was not specifically requested by the employer, the teacher voluntarily provided the employer with a doctor's note that discussed her treatment plan.

Lutacaga Elementary Accommodation Request

Teachers at other schools requested accommodations as well. Around August 2020, a special education teacher at Lutacaga Elementary requested an accommodation because of health concerns about returning to in-person instruction.[6] Lindholm assisted her in the process. The employee, Lindholm, and Villarreal scheduled a meeting for October 29, 2020, to discuss the request. The teacher was granted an accommodation and permitted to work remotely for the first half of the school year. In anticipation of the district returning to hybrid instruction, Villarreal sent an email to the employee and Lindholm in December 2020, seeking to schedule a meeting to review the accommodation. Villarreal and Lindholm exchanged email messages throughout the month and into January 2021 regarding the issue. On January 11, 2021, Villarreal sent Lindholm an email explaining that the school's principal had met with the employee "as a follow-up and her accommodation [would] continue as is." The employee testified that, contrary to the text of Villarreal's email, she did not in fact meet with her school's principal. The principal testified that the two did meet. The principal added that the purpose of the meeting was not to change the teacher's accommodation; rather, it was to explain a change in the students she was serving.

Desert Oasis High School Accommodation Request

A teacher at Desert Oasis High School (DOHS) requested an accommodation at some point during the first half of the 2020–21 school year. The condition suffered by the DOHS teacher was not listed specifically by the CDC as one of the conditions at higher risk for severe COVID-19.

[6] The union sought to introduce evidence at hearing purporting to show that the employer circumvented the union in August 2020 by attempting to deal directly with the employee regarding her requested accommodation. The complaint was filed with the Public Employment Relations Commission on March 18, 2021. These communications occurred outside of the six-month statute of limitations period and are not addressed here.

Because the condition was not on the list, consistent with its pre-COVID-19 approach to the reasonable accommodation process, Villarreal asked the teacher for documentation from his medical provider. The provider submitted the documents on the temporary accommodation request form provided by the employer on November 18, 2021. The employer granted the accommodation and permitted the employee to work remotely for the first half of the school year.

The employer's view on the employee's accommodation changed in January 2021, after the employer established a schedule for in-person instruction at DOHS. On January 5, 2021, the school's principal emailed the employee and explained that the district could no longer honor the accommodation as they did not have any online distance learning teaching positions open at the school. Instead, the principal offered the employee the option of taking unpaid leave. The employee reached out to the union who then contacted the employer to continue discussing the teacher's options. On January 12, 2021, the principal sent an email to the teacher, copying Villarreal. In the email, the principal proposed a compromise revision to the accommodation for the teacher, permitting him to work at least part of the second semester remotely without using any leave. The principal also solicited the teacher's thoughts on the plan. The communication was not sent to any representative of the union nor was it previously discussed with one.

ANALYSIS

Applicable Legal Standards

Duty to Bargain

Chapter 41.59 RCW requires school districts to bargain with the exclusive bargaining representative of its certificated employees. The duty to bargain extends to mandatory subjects of bargaining. RCW 41.59.020(2). The law limits the scope of mandatory subjects to those matters of direct concern to employees. *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission* (*City of Richland*), 113 Wn.2d 197, 200 (1989). Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer must give a union sufficient notice of possible changes affecting mandatory subjects of bargaining and, upon union request, bargain in good faith.

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining.[7] In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. *City of Richland*, 113 Wn.2d at 203. The inquiry focuses on which characteristic predominates. *Id*. The Supreme Court has explained that that "the scope of mandatory bargaining thus is limited to matters of direct concern to employees" and that "[m]anagerial decisions that only remotely affect 'personnel matters', and decisions that are predominately 'managerial prerogatives', are classified as nonmandatory subjects." *Id*. at 200.

A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002). For a unilateral change to be unlawful, the change must have a material and substantial impact on employees' terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007) (citing *King County*, Decision 4893-A (PECB, 1995)).

Waiver

Generally, for employees not eligible for interest arbitration, once a union requests bargaining over a proposed change the employer is obligated to maintain the status quo until the parties reach either an agreement or impasse. *Skagit County*, Decision 8746-A (PECB, 2006). An employer is not required to bargain prior to implementing a change if a union waives its statutory right to do so. A union may waive its right to bargain by contract. A contractual waiver of statutory collective bargaining rights must be consciously made, clear, and unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contract 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). Waiver is an affirmative defense that the employer bears the burden of proving. *City of Yakima*, Decision 11352-A (PECB, 2013).

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[7] Although the *City of Richland* balancing test arose under chapter 41.56 RCW, the Commission has applied the principles to various statutory schemes, including the Educational Employment Relations Act (chapter 41.59 RCW). *Lake Chelan School District*, Decision 4940-A (EDUC, 1995).

Circumvention

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees over mandatory subjects of bargaining. *Central Washington University*, Decision 12305-A (PSRA, 2016); *Royal School District*, Decision 1419-A (PECB, 1982). To prove a circumvention violation, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning a mandatory subject of bargaining. *Skagit Regional Health (Skagit Public Hospital District 1)*, Decision 12616-A (PECB, 2016); *City of Seattle*, Decision 3566-A (PECB, 1991).

Application of Standards

The employer did not violate chapter 41.59 RCW when it began requiring teachers to provide in-person instruction during the 2020–21 school year. The decision to offer hybrid learning was not a mandatory subject of bargaining. Further, even if it was, the union waived its right to bargain the decision in the parties' August 2020 COVID-19 MOU. There is also insufficient evidence to establish that the employer unilaterally changed employees' terms and conditions of employment by mandating concurrent in-person and online instruction. At most, the evidence shows a single, isolated deviation from established policy that does not amount to an unlawful unilateral change. The employer similarly did not unlawfully refuse to bargain with the union regarding the type of documentation employees are required to submit during the COVID-19-related accommodation process. Finally, the employer did circumvent the union by dealing directly with employees regarding mandatory subjects of bargaining on two occasions.

The Decision to Resume In-Person Instruction Is a Permissive Subject of Bargaining

From late spring 2020 until November 2020, nearly all instruction was performed online. The employer's decision to begin offering in-person learning during fall 2020 involved a change to the parties' status quo. The first issue becomes whether, in the context of a global pandemic, the general manner of instruction—i.e., online or in-person—constitutes a mandatory subject of bargaining. To determine whether a particular topic is a mandatory subject, the Commission applies the *City of Richland* balancing test. I am required to weigh the impact of the decision on

the working conditions of employees against the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. *Id*.

Determinations about whether a particular issue constitutes a mandatory or permissive subject of bargaining is fact- and situation-specific and is made on a case-by-case basis. The Commission, however, has long found that issues pertaining to the employer's overall educational program are not mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977) ("The educational program is the basic service of a school district . . . . We also conclude that the educational program is a matter of basic managerial policy which is properly classified as a nonmandatory subject for bargaining").[8]

The manner of instruction is closely tied to issues at the core of the employer's educational mission. As a common school district, the employer is responsible for providing basic education. It also serves other functions, including facilitating student social and emotional growth. The latter portion of the 2019–20 school year took place online for nearly all students and demonstrated the pitfalls of distance learning. The employer was concerned that it was not effective for many students, especially those in the primary grades. Some students and families faced substantial challenges even accessing educational programs offered online. In its December 2020 guidance on school reopening, the DOH further noted that reliance on online instruction contributed to a rise in mental health issues among children. Based on these factors the employer concluded that fully remote learning inhibited its ability to fulfill its statutory mission to the district's children, families, and community.

Consistent with Commission precedent, in balancing the extent to which the decision to resume in-person instruction impacts employees' terms and conditions of employment with the managerial right of the employer to control its instructional program, I find that the employer's interests predominate. The employer's educational program is an inherent management prerogative. The

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[8] *See also Kent School District*, Decision 595-A (EDUC, 1979) (determining membership on curriculum committee not mandatory); *Wenatchee School District*, Decision 3240-A (PECB, 1990) (supporting decision to eliminate half-day kindergarten); *Richland School District*, Decision 7367 (PECB, 2001) (modifying schedule within the contracted workday); *Seattle Community College (Community College District 6)*, Decision 12014 (CCOL, 2014) (defining selection of online learning software).

general method of instruction—online or in-person—forms an essential component of that overall program. The union has raised substantial issues pertaining to employee health and safety. Transitioning from remote to in-person instruction does indeed have an impact on employees' terms and conditions of employment. Not only does their physical workspace change but, more significantly, returning to in-person learning increases the chance of exposure to COVID-19. Employees' individual risk factors may magnify these concerns. The existence of compelling health and safety issues, however, does not dictate that a particular topic is mandatory. *Port of Seattle*, Decision 11763-A (PORT, 2014) (finding staffing to be permissive despite countervailing safety concerns raised by union). The format of the employer's overall educational program is a core managerial interest. The requirement that teachers appear in-person for live instruction is inseparably bound to the employer's programmatic decision to resume face-to-face learning. The decision to resume in-person teaching is a permissive subject of bargaining.

The Union Waived Its Right to Bargain

Even if the decision about whether to provide instruction in-person versus online was a mandatory subject of bargaining, the union waived its right to bargain the matter via the parties' August 2020 COVID-19 MOU. Contractual waivers of collective bargaining rights must be clear and unmistakable. The parties' COVID-19 MOU signed at the beginning of the 2020–21 school year provided in section J.1 that certificated staff would be allowed to work from home "unless the District determines that its instructional program requires a staff member to service students on site." The MOU explicitly gives the employer the right to require staff to provide in-person instruction when consistent with its instructional program. I am not persuaded that the header of the relevant section of the MOU ("COVID On-Line / Distance Learning Plan Accommodations") makes the clear language of section J.1 inapplicable to in-person instruction. As described below, such a conclusion is contrary to the parties' bargaining history. It is also at odds with other provisions of the agreement. Other sections under the header unambiguously address various aspects of face-to-face instruction, such as those dealing with special education services. I therefore find that the language of the August MOU clearly and unmistakably waived the union's right to bargain the employer's decision to resume offering in-person instruction.

The parties' contemporaneous understanding of the purpose of section J.1 supports this conclusion. Discussions surrounding the adoption of a contract provide important context and assist in interpretation of its terms. *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990) ("[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid to ascertaining the parties' intent."). Representatives of both the union (Smith) and employer (Villarreal) who participated in bargaining the MOU testified that the language regarding the employer's instructional program was intended to make clear that if the employer resumed offering in-person instruction, teachers could be required to be on site. Contrary to the union's assertion on brief, comments allegedly made by a single member of the employer's board of directors during public meetings to the contrary are of little probative value. There is no evidence that board members were directly involved in bargaining the MOU. Their individual opinions are of no more value in determining whether the language of the MOU constitutes a clear and unmistakable waiver than that of union members not directly involved in negotiations.

I recognize that the rate of new cases in Adams County during the relevant period was greater than the 75/100,000 threshold, over which the DOH recommended distance learning for most students in its August 2020 guidance. The union argues that the language of the MOU permitting the employer to transition to a less restrictive model "when deemed safe by state or county health officials," serves as a precondition to any change in instructional model. It reasons that because new cases exceeded 75/100,000, the employer's decision to offer in-person instruction was not authorized by any health officials and was contrary to the parties' agreement. The employer's actions, however, were in fact in line with state guidance. In August 2020, the DOH explicitly recommended that districts offer in-person instruction for certain groups—such as the youngest learners and those struggling with online learning—even if the county's new case rate was above 75/100,000. The employer's decision to resume some in-person instruction in November 2020 for K–3 students and other small groups was fully consistent with that recommendation. The employer's subsequent phased return in January 2021 of all grade levels was similarly in step with the revised state guidance issued in December 2020. To the extent that the MOU could be read to modify the employer's right to begin offering in-person instruction by requiring compliance with state or county recommendations, any such conditions were met. As a result, even if the decision

to transition to implement a hybrid teaching model was a mandatory subject of bargaining, the union waived its right to do so in the parties' August 2020 MOU.

The employer also met any effects bargaining obligation it may have had. Generally, under Commission precedent, an employer "may implement decisions within its sole prerogative . . . even though required bargaining has not been concluded on the effects of that decision." *City of Bellevue*, Decision 3343-A (PECB, 1990). In October 2020 the union requested to bargain the effects of the employer's decision to resume offering in-person instruction. The employer agreed and the parties subsequently met on numerous occasions, exchanged proposals, and reached an agreement in February 2021. Its actions were consistent with its statutory obligation.

Concurrent Remote and In-Person Instruction

Two special education resource room teachers at MMS provided instruction to a classroom with some students in-person, and some appearing via videoconference for a short period during fall 2020 and in January 2021. The union alleges this violates the parties' COVID-19 MOU and constitutes an unlawful unilateral change in violation of chapter 41.59 RCW. I disagree.

Under the circumstances present here, I do not find that the union established that the employer made a meaningful change to a mandatory subject of bargaining. An isolated deviation from an established policy does not constitute a unilateral change. *See King County*, Decision 4258-A (PECB, 1994); *City of Pasco*, Decision 4197-A (PECB, 1994); *City of Yakima*, Decision 3564-A (PECB, 1991). The policy at issue contained in the parties' MOU provides that "[t]eachers will not be required to teach both online and in person at the same time." The employer did not announce a new policy regarding the matter. The teaching arrangement was initiated at the request of the two employees involved. The evidence does not show this type of instruction arising anywhere else in the district. It involved two employees at one school for 30 minutes a day. It was also limited in duration, occurring only during the several-week period that the employer offered wider-ranging, in-person services in November 2020 and, briefly, in January 2021.

The facts are similar to those addressed by the Commission in *King County*, Decision 4258-A, where it dismissed a unilateral change allegation that "never involved more than an isolated

incident, with no announced changes of policy or procedure that were to have any ongoing effect on either the employee directly involved or other bargaining unit employees." The arrangement alleged to be unlawful amounts to no more than an isolated deviation from the typical mode of instruction.[9] This may provide the basis for the union to file a grievance. Not all grievances, however, are also unfair labor practices. Based on the particular facts present here, the teaching method utilized by the two teachers at one school for a limited duration does not constitute a violation of chapter 41.59 RCW.

Medical Provider Documentation for COVID-Related Accommodation

The union's allegation is premised on certain medical documentation provided by three employees to the employer to support their request for a temporary COVID-19 accommodation. The evidence does not establish that the employer unilaterally changed bargaining unit employees' terms and conditions of employment.

The two employees at MMS who submitted supporting documentation did so of their own volition. One of the teachers testified that she was told by someone that, prior to completing her request, she would need to provide a doctor's note. Assuming for the sake of argument that the employee did receive this instruction, the employer's position that medical provider certification was not necessary in her situation was made clear during a subsequent conversation between the teacher and Villarreal. To the extent that the employer asked the other MMS teacher for further information regarding her medical issue, the request was directed at determining what types of accommodations may be viable. It was not for the purpose of deciding whether the employee was in fact at higher risk for severe COVID-19 effects. There is no evidence that either teacher was required to submit documentation from their medical provider in order to continue the accommodation process. Employees voluntarily providing information to the employer to persuade district administrators to grant their requested accommodation does not show that the employer changed a past practice.

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[9] As previously noted, I determined that the manner of instruction—i.e., in-person or via videoconference—is a permissive subject of bargaining. Given this conclusion, it is questionable whether the instructional arrangement contested by the union even involves a mandatory subject of bargaining.

Although the employer did request that a teacher at DOHS provide documentation, the evidence still does not amount to an unlawful refusal to bargain. To prove a unilateral change allegation, the complainant must show the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A. There is no refusal to bargain when an employer acts in accordance with the status quo. *City of Mountlake Terrace*, Decision 11702-A (PECB, 2014). The employer's practice prior to the pandemic was to request medical provider documentation when an employee initiated the reasonable accommodation process. The parties' August 2020 COVID-19 MOU modified that practice. Under the newly established policy, employees requesting temporary COVID-19 accommodations would not be required to provide a medical provider's note if they fell into one of the specific categories identified by the CDC as being at elevated risk for severe disease. The medical condition of the teacher at DOHS was not included in the list of conditions addressed in the CDC guidance. The employer's decision to require a provider's note was consistent with its practice, even as modified by the COVID-19 MOU, and did not involve a change in working conditions.

The fact that the employer created a form that purported to require employees requesting an accommodation to provide medical documentation is insufficient, by itself, to establish a violation. Villarreal testified concerning the origins of the form. There is no evidence, however, of what steps she took, if any, to inform employees of its existence. The record also does not contain evidence concerning the extent to which employees had access to the document. Absent evidence that the employer actually informed employees about the form and explained its intended use, the union cannot prove that the employer made a meaningful change to a mandatory subject of bargaining.

Circumvention during the COVID-Related Accommodation Process

The union alleges that the employer engaged in direct dealing regarding mandatory subjects of bargaining with bargaining unit employees during the interactive process that took place following several requests for temporary accommodations. In support of its allegation, the union introduced evidence regarding teachers at Lutacaga Elementary, MMS, and DOHS.

Lutacaga Elementary

The employer did not violate chapter 41.59 RCW regarding its communications with the special education teacher at Lutacaga Elementary. The teacher was granted an accommodation early in

the 2020–21 school year involving remote work. In preparation for more special education students returning to the buildings during fall 2020, Villarreal reached out to the teacher and union representative Lindholm to discuss whether the arrangement would require any changes. Lindholm and Villarreal exchanged emails about the subject but were unable to set a date to meet. Eventually, the employer determined that it could continue the existing accommodation. Lutacaga's principal met with the teacher on January 11, 2021, to inform her of the employer's decision to continue the existing practice, albeit with different students. For unlawful direct dealing to occur there must be some element of back-and-forth communication between the employer and employee. *Skagit Regional Health (Skagit Public Hospital District 1)*, Decision 12616-A. Sharing information about a course of action the employer has already decided upon does not involve circumvention. *University of Washington*, Decision 11600-A (PSRA, 2013). The conversation between the principal and the teacher at Lutacaga did not amount to anything other than a one-way communication regarding the decision to continue the existing accommodation. It was not unlawful circumvention.

McFarland Middle School and Desert Oasis High School

In contrast to the one-sided conversation between the teacher and her principal at Lutacaga Elementary, the discussions involving the teachers at MMS and DOHS were more substantive. Both involved proposals by the employer to revise existing accommodations.

At MMS, the teacher had an approved temporary COVID-19 accommodation. On February 18, 2021, the teacher was contacted directly by Villarreal and Perez. They offered to modify her accommodation by removing one of the assigned remote classes. The teacher responded that she would have to think about it.

The conversation involved circumvention of the union as the exclusive bargaining representative of employer's certificated staff. The issue discussed, the teacher's workload, is a mandatory subject of bargaining. *Skagit Regional Health (Skagit Public Hospital District 1)*, Decision 12616-A (finding workload as measured by full time equivalent mandatory). The question posed by the employer also sought the teacher's input as to a change in her work schedule. Soliciting bargaining unit employees' views in order to effectuate a change to their terms and conditions of employment is a hallmark of circumvention. *Central Washington University*,

Decision 12305-A; *City of Raymond*, Decision 2475 (PECB, 1986) (finding employer circumvented union when it polled employees regarding their views on cost-cutting measures). The fact that the employer notified Lindholm of the discussion later that day does not render the communication lawful. *State – Corrections*, Decision 11060 (PSRA, 2011), *aff'd*, Decision 11060-A (noting employers are required to first present proposed changes to union, rather than directly to employees).

The teacher at DOHS similarly had an approved accommodation. With students returning to the buildings on January 5, 2021, the teacher's principal sent him an email explaining that the accommodation was no longer available, and he would have to either teach in-person or use unpaid leave. Later, on January 12, 2021, the principal again emailed the teacher offering him the option of continuing to teach online until the end of February 2021 when he would be eligible to become fully vaccinated. The principal explained that he would not need to use any leave under this option and asked for his thoughts on the plan.

The email exchanges with the DOHS teacher occurred to the exclusion of the union, which was not copied on the communications. They also involved mandatory subjects of bargaining, including the circumstances under which certain types of leave are used. *See City of Yakima*, Decision 3564-A ("Just as the arrangements for payment of wages are closely related to the wages themselves, and hence a mandatory subject of collective bargaining, the use of accumulated leave rights is closely related to the existence of those rights."). Finally, the email from the DOHS principal to the teacher solicited his feedback concerning proposed changes to an existing accommodation. This level of back-and-forth communication is sufficient to constitute unlawful circumvention.

The interactions with the MMS and DOHS teachers occurred in the context of the reasonable accommodation process. This does not alleviate the employer's duty to bargain with employees' exclusive representative. There is no carve-out in the Educational Employment Relations Act, or any other statute administered by the Commission, permitting public employers to engage in direct negotiations with employees regarding issues arising under the Americans with Disabilities Act or the Washington Law Against Discrimination. There appears to be little Commission precedent specifically addressing this issue during the interactive process attendant to requests for

accommodations. Other jurisdictions, however, have found that employers have violated collective bargaining statutes when meeting directly with employees during the reasonable accommodation process to discuss changes to mandatory subjects of bargaining. *See Sonoma Superior Court* (2017) Dec. 2532-C (Cal. Pub. Empl. Relations Comm'n 2017) (finding a right to union representation applies to the interactive process meetings held as part of the employer's duty to provide reasonable accommodation under California's Fair Employment & Housing Act and the Americans with Disabilities Act). The National Labor Relations Board has similarly determined that a union is entitled to be present during the adjustment of disputes arising under other statutory frameworks. *Postal Service,* 281 NLRB 1015 (1986) (deciding employer unlawfully excluded union from settlement conference regarding EEO complaints). Consistent with the practice in other jurisdictions, it is appropriate to apply traditional Commission precedent regarding circumvention to the instant case.[10]

It is also of little importance whether any of the employees notified the employer that they desired to be represented by the union during the COVID-19-related accommodation process. The union's status as the exclusive representative of bargaining unit employees exists independently of employees' requests. The situation is not analogous to the right of represented employees to representation during investigatory interviews where the employee must affirmatively exercise the right. When negotiations regarding a mandatory subject of bargaining occur, the union must be notified and provided an opportunity to be present. RCW 41.59.090. The employer's actions with the teachers at MMS and DOHS thus involved unlawful circumvention.

Remedy

The standard remedy for a circumvention violation is a notice posting and a cease-and-desist order. In the event an agreement was reached with the individual employee or employees during the

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[10] Citing *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997), the employer argues an employer may create or modify an accommodation provided it does not violate the collective bargaining agreement or involve "significant changes" in working conditions. The case cited by the employer is of limited persuasive value. The portion of the decision relied upon by the employer was authored by an administrative law judge. The analysis regarding the interplay between the National Labor Relations Act and the Americans with Disabilities Act was not addressed by the National Labor Relations Board itself. It is also at odds with Commission precedent regarding what constitutes an unlawful unilateral change.

course of the unlawful conduct, the remedy may also include an order to give the terms of the agreement no effect. *City of Pasco*, Decision 4197-A (PECB, 1994). The changes to the accommodations for the MMS and DOHS teachers at issue here ended at the end of the 2020–21 school year. They were also subsequently affirmed by the teachers' exclusive representative. Any affirmative order requiring the employer to rescind changes to those accommodations is moot. A notice posting and cease-and-desist order are sufficient to remedy the unfair labor practices under the circumstances.

CONCLUSION

The employer's decision to resume offering in-person instruction during the 2020–21 school year involved a modification to its overall educational program and was not a mandatory subject of bargaining. Even if it was, the union waived its right to bargain the decision in the parties' 2020 COVID-19 MOU. The employer did not make unilateral changes to employees' terms and conditions of employment. Because of its limited nature and duration, the simultaneous online and in-person instruction provided to certain special education students at MMS does not constitute a significant change to a mandatory subject of bargaining for bargaining unit employees. The evidence was also insufficient to establish that the employer changed its approach to requesting medical documentation during the COVID-19-related accommodation process. Finally, the employer did circumvent the union when it directly approached two employees regarding proposed changes to their COVID-19 accommodations.

FINDINGS OF FACT

1. The Othello School District is an employer within the meaning of RCW 41.59.020(5).

2. The Othello Education Association is an employee organization within the meaning of RCW 41.59.020(1) and is the exclusive bargaining representative of all certificated instructional employees of the employer.

3. The employer is a common school district organized under Title 28A RCW. It operates a high school (Othello High School), one middle school (McFarland Middle School or MMS), four elementary schools (Hiawatha, Lutacaga, Scootney Springs, and Wahitis

Elementaries), and an alternative high school (Desert Oasis High School or DOHS). Sandra Villarreal is the employer's executive director of Human Resources. At all times relevant to the complaint, Pete Perez was the employer's assistant superintendent.

4. The union represents a bargaining unit of certificated staff. The employer and the union were parties to a collective bargaining agreement effective September 1, 2018, to August 31, 2021. Loren Jenson is the union's president. Chad Smith is the union's vice president. Steve Lindholm is an employee of the Washington Education Association assigned to assist the local union.

5. The COVID-19 pandemic had an enormous impact on the state's K–12 educational system. The governor issued Proclamations 20-08 and 20-09 during spring 2020. The proclamations prohibited schools from conducting in-person programs to limit the spread of the disease. Although removing students from congregate settings decreases COVID-19 transmission, given the variety of functions served by schools, the lack of in-person education also negatively impacted students, families, and communities in a myriad of ways.

6. In preparation for the 2020–21 school year, on August 5, 2020, the Washington State Department of Health (DOH) issued guidance for school districts to assist them in determining how and when to resume in-person instruction.

7. During summer 2020, the union and employer negotiated a memorandum of understanding (MOU) for the 2020–21 school year dealing with a range of issues surrounding the impact of COVID-19 on the district and staff. The agreement committed the employer to following certain state guidelines.

8. Smith and Villarreal participated in bargaining the MOU on behalf of the union and employer, respectively. Smith explained that the language regarding changes to the instructional program was included in the MOU so that when kids "were allowed to or required to be on-site, then the teachers would have to then be required to be on-site as well." Villarreal similarly testified that the language was intended to provide the district

the right to determine whether instruction occurred online, face-to-face, or via a hybrid model.

9. The 2020–21 school year began with nearly all teachers providing instruction online. The district's board of directors, however, began to receive pressure from the community to provide an in-person option because of the challenges faced by students and families with online learning. At a special meeting on October 6, 2020, the board voted on a schedule for resuming in-person instruction.

10. The board believed it was important to bring younger students back in-person first because of concerns about the effectiveness of student learning online. The district's experience showed that younger learners often had difficulty accessing the technology and following the schedules without direct adult support at home. The district felt that, in comparison, older students were better served by online learning because of their greater level of maturity and ability to independently interact with the learning management systems. In balancing the risk to safety posed by in-person instruction with the benefits of a more traditional learning model, the employer believed that for the youngest students, the rewards outweighed the risks at the time. The employer also determined that older students who faced particular difficulty in the online learning environment would be offered in-person instruction via small group interventions early in the return process.

11. The union submitted a demand to bargain on October 20, 2020, "around the protection of members due to reopening of school by the school board before the Department of Health safety recommendations (less than 75 positive cases in 100,000) have been met." Although the parties met in connection with the union's demand to bargain, the employer implemented its decision to provide in-person instruction for the district's youngest students and those challenged by online learning prior to completing effects bargaining. They eventually reached an agreement on a revised COVID-19 MOU. The new agreement was executed on February 10, 2021.

12. The employer's return to in-person learning was brief. Outbreaks of COVID-19 at multiple schools led the district to return to online instruction for most students starting November 23, 2020. The employer resumed offering in-person learning for most students

in January 2021. The employer's implementation of the phased transition was consistent with the state's December 16 guidance.

13. In October 2020, the employer asked MMS special education resource room teachers Lindsay Scott and Melinda Wagner to come up with a schedule containing an in-person offering for their students. Under the schedule created by bargaining unit members Scott and Wagner, there was a 30-minute block every day where one of the teachers would be providing simultaneous instruction to students both in-person and virtually (for those at home). The employer adopted the plan and implemented it for Scott and Wagner's classes beginning November 5, 2020, when students returned to the buildings. The MMS resource room teachers utilized the arrangement until at some point in January 2021, when the rest of the school returned to some level of in-person instruction.

14. The parties' August 2020 COVID-19 MOU incorporated certain requirements regarding the accommodation process for employees at higher risk for severe COVID-19 from directives issued by the governor and the federal Centers for Disease Control and Prevention (CDC).

15. Prior to the 2020–21 school year, the employer's practice had been to request documentation from a medical provider when an employee requested an accommodation.

16. Two teachers at MMS requested accommodations for the 2020–21 school year. One of the employees had several risk factors for severe COVID-19, as well as vulnerable family members. On November 4, 2020, the teacher sent an email to Villarreal explaining that she was in a high-risk category and was concerned about returning to in-person instruction.

17. The employee completed a COVID-19 Temporary Accommodation Request Form, without the medical providers' certification, and emailed it to Villarreal with the note, "A fellow teacher sent this form to me." Neither Villarreal nor any other agent of the employer provided it to the teacher. Villarreal did not ask the teacher to complete the form. After receiving the document, Villarreal spoke with the teacher. During the conversation Villarreal told the teacher that she did not need to submit the accommodation request form.

18. On February 18, 2021, the teacher was contacted by Villarreal and Perez. No representatives for the union were present. During the discussion between Villarreal, Perez, and the teacher, Villarreal offered to modify her existing accommodation by removing one of the assigned remote classes. The teacher told the two that she would have to think about it and talk to Lindholm.

19. Another MMS teacher requested an accommodation around March 2021. The teacher met with Villarreal, the school's principal, and union representative Smith to discuss options. Following the meeting Villarreal asked the teacher for more information concerning her treatment plan in order to evaluate the request. Villarreal did not ask the teacher for a medical provider's note or certification. Although it was not specifically requested by the employer, the teacher voluntarily provided the employer with a doctor's note that discussed her treatment plan.

20. Around August 2020, a special education teacher at Lutacaga Elementary requested an accommodation because of health concerns about returning to in-person instruction. On January 11, 2021, Villarreal sent Lindholm an email explaining that the school's principal had met with the employee "as a follow-up and her accommodation [would] continue as is."

21. A teacher at Desert Oasis High School (DOHS) requested an accommodation at some point during the first half of the 2020–21 school year. The condition suffered by the DOHS teacher was not listed specifically by the CDC as one of the conditions at higher risk for severe COVID-19. Because the condition was not on the list, consistent with its pre-COVID-19 approach to the reasonable accommodation process, Villarreal asked the teacher for documentation from his medical provider.

22. On January 5, 2021, the school's principal emailed the employee and explained that the district could no longer honor the accommodation as they did not have any online distance learning teaching positions open at the school. Instead, the principal offered the employee the option of taking unpaid leave. The employee reached out to the union who then contacted the employer to continue discussing the teacher's options. On January 12, 2021, the principal sent an email to the teacher, copying Villarreal. In the email, the principal proposed a compromise revision to the accommodation for the teacher, permitting him to

work at least part of the second semester remotely without using any leave. The principal also solicited the teacher's thoughts on the plan. The communication was not sent to any representative of the union nor was it previously discussed with one.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 41.59 RCW and chapter 391-45 WAC.

2. By its actions described in findings of fact 3–17 and 19–21, the employer did not violate RCW 41.59.140(1)(e) by unilaterally changing bargaining unit employees' working conditions by returning to in-person instruction, requiring employees to teach both in-person and online at the same time, or requiring a doctor's note to initiate the reasonable accommodation process under certain circumstances without providing the union an opportunity for bargaining.

3. By its actions described in findings of fact 18 and 22, the employer did violate RCW 41.59.140(1)(e) by circumventing the union through direct dealing with bargaining unit employees during the reasonable accommodation process.

ORDER

The unilateral change allegations in the complaint charging unfair labor practices filed in the above-captioned matter are DISMISSED.

With respect to the allegation that the employer unlawfully circumvented the union, the OTHELLO SCHOOL DISTRICT, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

    a. Dealing directly with bargaining unit members concerning mandatory subjects of bargaining.

b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.59 RCW:

a. Give notice to and, upon request, negotiate in good faith with the Othello Education Association before proposing changes to bargaining unit employees' terms and conditions of employment.

b. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice provided by the compliance officer into the record at a regular public meeting of the Board of Directors of the Othello School District, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the compliance officer.

e. Notify the compliance officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same

time, provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 15th day of March, 2022.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL SNYDER, 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.

RECORD OF SERVICE

ISSUED ON 03/15/2022

DECISION 13488 - EDUC has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 133399-U-21

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