STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286,	)	
Complainant,	)	CASE 16403-U-02-4211
vs.	)	DECISION 8096 - PECB
LAKEHAVEN UTILITY DISTRICT,	)	FINDINGS OF FACT,
Respondent.	)	CONCLUSIONS OF LAW, AND ORDER

Natalie Teague, Attorney at Law, for the union.

Steve Pritchett, General Counsel, for the employer.

On May 16, 2002, International Union of Operating Engineers, Local 286 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Lakehaven Utility District (employer) as respondent. A preliminary ruling was issued under WAC 391-45-110 on June 19, 2002, finding a cause of action to exist on allegations summarized as:

> Employer interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4), by its subcontracting of renewing water service lines and replacing meters work, without providing an opportunity for bargaining.

In addition to setting the due date for the employer's answer to the complaint in this case, the preliminary ruling letter included an inquiry concerning the propriety of deferring the case to

arbitration.[1] The employer timely filed its answer on July 10, 2002. In response to the deferral inquiry, the employer stated that the union had filed a grievance on the matter, that the union had only pursued the grievance to a decision of the general manager, that the union had waived its right to arbitration by not pursuing an appeal to the general manager's decision, and that the employer would not waive any defenses to arbitration. A hearing in this matter was held on January 6, 2003, before Examiner Walter M. Stuteville. The parties filed post-hearing briefs.

The testimony and documentary evidence presented at hearing conclusively proved that, while the employer contracted out usual and customary bargaining unit work without bargaining with the exclusive bargaining representative, the employer's action was allowed under the terms of the parties' collective bargaining agreement.[2] The unfair labor practice complaint is DISMISSED.

BACKGROUND

The facts of this case are generally uncontested. The employer is a municipal utility that provides water service and wastewater collection in the City of Federal Way and surrounding areas of King

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[1] Citing *City of Walla Walla*, Decision 104 (PECB, 1976), the preliminary ruling letter noted that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute, and that any allegations of a contractual violation will not be processed in this unfair labor practice case.

[2] Specifically, the employer proved that it had more work than could have completed with its normal compliment of staff at the time of the contracting out, so that the employer was allowed to invoke language in the parties' collective bargaining agreement that authorized the employer to contract out bargaining unit work.

County. The employer has divided its organization into sections which have specific missions, as follows:

- The wastewater treatment plant treats water which comes from collection systems in the district.
- The water operations section operates wells, reservoirs, tanks, and booster systems to provide water to customers.
- The field operation section supports both water and wastewater systems in the operation of sewer mains, sewer pump stations, and water mains.
- The engineering and development section provides support services for new construction, improvement projects such as building facilities for wastewater plants, water plants, and water main expansion for the district.

As a part of the engineering section, three employees are responsible for maintenance of the water distribution system, including repairing leaks, repairing main lines, installation and replacement of fire hydrants, and installation of new services and irrigation services. Part of their job duties is a "water service renews" function, which involving repairs to or replacement of existing services. The renew work is frequently done in conjunction with street repairs or repaving.

During each of the past three years, the employer has had to evaluate how many renewal projects will be undertaken based upon asphalt overlay programs scheduled by City of Federal Way or King County officials.

For calendar year 2000, the employer used only its own employees on such renewal work, and was only able to complete only about half of the potential projects. This resulted in additional costs to the employer, because the half of the available work that

was not completed in advance of the paving had to be completed by tearing up and replacing the recently-completed asphalt overlay work.

For calendar year 2001, the employer subcontracted out the overlay work to a private contractor, Pape & Sons. The union filed an unfair labor practice complaint concerning that decision, but it subsequently withdrew that complaint as a part of an overall settlement.

In calendar year 2002, King County and the City of Federal Way each gave the employer their lists of planned street overlay projects, and the employer determined that 318 services would need to be renewed in conjunction with those planned projects.[3]

The controversy now before the Examiner arose when the employer determined that the work identified in 2002 could not be accomplished within the capacity of its existing workforce, because two members of its crew were already fully committed to another project. The employer thereafter advertised the renewal work for bids from private contractors, and a contract for the work was awarded to Bonner Brothers Construction on March 7, 2002.

The contractor used equipment of the same type that bargaining unit employees would have used for the renewal work, and in some instances actually used equipment owned by the public employer for work under the contract. The workforce used by the contractor to do the renewal work was five or six employees working 10-hour shifts. One bargaining unit employee, Joe Gray, was assigned to inspect the work performed by the outside contractor. According to

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[3] According to minutes of a meeting of the employer's Board of Commissioners held of March 7, 2002, the employer had also identified 50 other services for renewal. Those additional renewals were to be performed in-house.

unrebutted testimony, no bargaining unit employees were laid off or lost normal work hours as a result of the contracting out.

The union filed a "class action" grievance, alleging that the employer had violated the management rights clause of the parties' collective bargaining agreement. The grievance was denied at the first step and that decision was appealed to the employer's general manager. The general manager denied the grievance on multiple grounds, including that it was untimely, that contracting out of bargaining unit work was consistent with past practice, that the work was not capable of being done under the staff configuration existing at that time, and that the work was required under a public works statute applicable to the employer. The union did not invoke the arbitration procedure of the parties' contract.

POSITIONS OF THE PARTIES

The union argues that contracting out of bargaining unit work is a mandatory subject of bargaining, and that the employer had a duty to notify the union of its intent and to bargain (at least) the impacts of its decision to subcontract out some of its work. The union also argues that this unfair labor practice case is properly before the Commission, because it alleges a violation of the law.

The employer urges that the union's abandonment of its related grievance should be considered a waiver of the union's right to file an unfair labor practice complaint concerning the same issue. It asserts that the union was unwilling to exercise its contractual duties in a timely manner, and therefore decided to stop processing the grievance in favor of filing the instant unfair labor practice complaint. The employer also defends that the asphalt overlay work that was contracted out was not within the workload resources of

the bargaining unit, that there were no bargaining unit positions unfilled, and that no bargaining unit employees were laid off or lost work hours as a result of the disputed contracting out. Based upon those facts, the employer points to the parties' collective bargaining agreement which entitled it to contract out work that was not "within the normal workload capabilities of bargaining unit employees" and asserts that it had no duty to bargain with the union concerning the contracting out decision. It notes that overlay work is variable and periodically intensive, and contends it is the kind of work the contract language was intended to cover.

DISCUSSION

The Commission's Deferral Policy

The employer's opening defense incorrectly interprets (or would have the Examiner ignore or turn upside down) a Commission rule and years of consistent precedent concerning deferral to arbitration. As noted above, the preliminary ruling letter in this case cited *City of Walla Walla*, and excluded any "violation of contract" theory from this case. WAC 391-45-110 codifies the deferral policy as follows:

> WAC 391-45-110 DEFICIENCY NOTICE--PRELIMINARY RULING--DEFERRAL TO ARBITRATION. The executive director or a designated staff member shall determine whether the facts alleged in the complaint may constitute an unfair labor practice within the meaning of the applicable statute.
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> . . . .
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> (2) If one or more allegations state a cause of action for unfair labor practice proceedings before the commission, a preliminary ruling summarizing the allegation(s) shall be issued and served on all parties. The

> preliminary ruling shall establish the due date for the respondent to file its answer.
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> (3) *The agency may defer* the processing of allegations which state a cause of action under subsection (2) of this section, pending the outcome of related contractual dispute resolution procedures, *but shall retain jurisdiction over those allegations*.
>
> (a) Deferral to arbitration may be ordered where:
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> (i) *Employer conduct alleged to constitute an unlawful unilateral change* of employee wages, hours or working conditions *is arguably protected* or prohibited *by a collective bargaining agreement* in effect between the parties at the time of the alleged unilateral change;
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> (ii) The parties' collective bargaining agreement provides for final and binding arbitration of grievances concerning its interpretation or application; and
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> (iii) There are no procedural impediments to a determination on the merits of the contractual issue through proceedings under the contractual dispute resolution procedure.
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> (b) *Processing of the unfair labor practice allegation under this chapter shall be resumed* following issuance of an arbitration award or resolution of the grievance, and the contract interpretation made in the contractual proceedings shall be considered binding, except where:
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> (i) The contractual procedures were not conducted in a fair and orderly manner; or
>
> (ii) The contractual procedures have reached a result which is repugnant to the purposes and policies of the applicable collective bargaining statute.

(emphasis added). The likely alternatives for results in arbitration (and their respective consequences on the unfair labor practice proceedings) were outlined by the Commission in *City of Yakima,* Decision 3564-A (PECB, 1991), as follows:

> *Post-arbitral Consideration by the Commission* -
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> Regardless of whether a question of contract interpretation is decided by the Commission or by an arbitrator, there are three likely results:

> *1. Action protected by contract.* If it is determined that the contract authorized the employer to make the change at issue in the unfair labor practice case, that conclusion by either the Commission or an arbitrator will generally result in dismissal of the unfair labor practice allegation. The parties will have bargained the subject, and the union will have waived its bargaining rights by the contract language, taking the disputed action out of the "unilateral change" category prohibited by RCW 41.56.140(4). Examples of cases applying this principle include: *City of Richland*, Decision 2792 (PECB, 1987); *King County*, Decision 2810 (PECB, 1987) and *King County*, Decision 3204-A (PECB, 1989).
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> *2. Action prohibited by contract.* If it is determined that the employer's conduct was prohibited by the contract, that conclusion by either the Commission or an arbitrator will also generally result in dismissal of the unfair labor practice allegation. Again, the parties will have bargained the subject, taking it out of the category of "unilateral change" prohibited by RCW 41.56.140(4). Examples of cases applying this principle include: *Anacortes School District*, Decision 2464-A (EDUC, 1986); *Spokane Transit Authority*, Decision 2597 (PECB, 1987) and *King County*, Decision 3587 (PECB, 1990). A union needs to look to arbitration for a remedy in such a situation.
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> *3. Action neither protected nor prohibited by contract.* If it is determined that the employer's conduct was not covered by the parties' contract, further proceedings will be warranted in the unfair labor practice case. Whether the Commission makes that determination itself, or merely accepts an arbitrator's decision on the issue, such a finding will be conclusive against any "waiver by contract" defense asserted by the employer in the unfair labor practice case. Unless the employer is able to establish some other valid defense, a finding of an unfair labor practice violation generally follows. See, *e.g.*, *Clover Park School District*, Decision 2560-B (PECB, 1988).

The discretionary nature of "deferral" was described in *City of Wenatchee*, Decision 6517 (PECB, 1998), as follows:

> The Commission *chooses to accommodate* its statutory responsibilities over unfair labor practice complaints with the statutory deference to arbitration in RCW

> 41.58.020(4) *by voluntarily suspending* the processing of complaints alleging unilateral changes that are refusals to bargain. This permits arbitrators to decide the respondents' contract defenses *so long as the resulting delay assists the Commission in preventing and remedying unfair labor practices. City of Yakima*, Decision 3564-A (PECB, 1991). This temporary *suspension of processing doesn't deprive the Commission of continuing jurisdiction. Yakima* states:
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> > The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to assist this Commission in evaluating a "waiver by contract" defense which has been or may be asserted in the unfair labor practice case. . . .
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> Decision 3564-A at pages 11, 16.
>
> *If the existence of a contract language defense or the act of deferral deprived the Commission of continuing jurisdiction over a complaint, an arbitrator's award interpreting the language wouldn't assist the Commission at all.* How, then, would the goal of the Commission's deferral policy be achieved? In addition, *Yakima* states deferral is "a discretionary, rather than mandatory, policy". Decision 3564-A at page 11.

(emphasis added, except last). In furtherance of this discretionary policy, the Commission inquires about procedural defenses before deferring cases to arbitration. That inquiry is made because the contract interpretation issue that is of interest to the Commission will not be resolved in arbitration if the arbitrator dismisses the grievance on procedural grounds.

In this case, the employer asserts multiple arguments based on the fact that the union filed a grievance alleging a contract violation in regard to the contracting out that is the subject of this proceeding. Those arguments are not persuasive.

First, the employer now argues that a dispute should be processed to arbitration when a union files a grievance, but it asserted procedural defenses both in responding to the grievance at

the manager level and in responding to the deferral inquiry from the Commission staff. If it wanted an arbitral interpretation of the contract, the employer should have waived procedural defenses in the face of WAC 391-45-110(3)(a)(iii). Having responded to the deferral inquiry by *not waiving* its defenses to arbitration, it has no basis to object to the Commission asserting jurisdiction.

Second, the employer argues that the union waived its right to pursue this unfair labor practice claim because it did not pursue its grievance to arbitration. In fact, all that the union waived or lost was its opportunity to obtain a remedy if there was a contract violation. Under *City of Walla Walla*, Decision 104, and the second of the alternative results outlined in the foregoing quotation from *City of Yakima*, Decision 3564-A, the union would be without a remedy in this proceeding if the Commission were to rule that the disputed contracting out violated the parties' contract.

Third, no support is cited or found for the employer's proposition that, by filing a grievance under a contract, a union waives its statutory right to file an unfair labor practice complaint. Deferral is a discretionary Commission procedure to effectuate efficient resolution of issues. As was also stated in *Yakima*, Decision 3564-A:

> A union's failure to implement contractual dispute resolution machinery does not alter the Commission's limited interest in obtaining an interpretation of the contract "to resolve the pending unfair labor practice". Nor does a union's failure to file a timely grievance under the contract preclude deferral of unfair labor practice allegations under the statute. *Tumwater School District*, Decision 936 (PECB, 1980).

This case is properly before the Examiner for a decision which includes interpretation of the parties' contract.

Waiver by Contract

A collective bargaining agreement is, essentially, a collection of documented waivers by the parties of their bargaining rights on issues that they have negotiated and agreed upon. As was stated in *Yakima County*, Decision 6594-C (PECB, 1999):

> The principal outcome of the collective bargaining process under Chapter 41.56 RCW is for an employer and the exclusive bargaining representative of its employees to sign a written collective bargaining agreement controlling wages, hours and working conditions of bargaining unit employees for a period of up to three years. RCW 41.56.030(4); 41.56.070. The Supreme Court has required that agreements reached in collective bargaining be put in writing. *State ex rel. Bain v. Clallam County*, 77 Wn.2d 542 (1970). Such contracts are enforceable according to their terms, including by means of arbitration. RCW 41.56.122(2); 41.58.020(4). Thus, there is no duty to bargain for the life of the contract on the matters set forth in a collective bargaining agreement, and an employer action in conformity with that contract will not be an unlawful unilateral change.

A similar conclusion was reached in *City of Kalama*, Decision 6739 (PECB, 1999), as follows:

> No unfair labor practice violation will be found if a party . . . acts or makes changes in a manner authorized by the contract, or consistent with established practice. *North Franklin School District*, Decision 5945-A (PECB, 1998). The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976).

Thus, the outcome of an unfair labor practice proceeding initiated by a "refusal to bargain" charge must be dismissal, if the parties have discussed the issue, have agreed upon a settlement, and have reduced that settlement to writing. The Commission has, however,

consistently held parties to a high standard concerning the specificity of language that would constitute a waiver by contract:

> If a union waives its bargaining rights by contract language, an action in conformity with that contract will not be an unlawful "unilateral change". *In City of Yakima*, Decision 3564-A (PECB, 1991), the Commission wrote:
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> > In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer.
>
> The Commission then found *no waiver on* certain issues in *Yakima*, because *contract provisions were either ambiguous or added no substance* to the matter at issue. In *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998), the Commission noted that the Supreme Court of the State of Washington has long adhered to an "objective manifestation" theory of contracts, and imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts. *Where the contract provisions are not ambiguous, and when the contract terms themselves evidence a meeting of the minds, no further inquiry is needed to determine what was intended.* See, *Chelan County*, Decision 5469-A (PECB, 1996), where the Commission determined that if the union had an individual intent as to the bargaining of normal work schedules, it became subsumed by the mutual intent expressed by both parties in the contract.

Community Transit, Decision 6375 (PECB, 1998) (emphasis added).

In this case, the parties collective bargaining agreement contains the following pertinent language:

> ARTICLE II - MANAGEMENT RIGHTS
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> . . . .
> 2.2 The direction of its working force and operations are vested exclusively in the Employer. This shall include, but not be limited to, the right to operate and manage

> all manpower, facilities and equipment; to determine the methods, means, and/or number of personnel needed to carry out the Employer's operations or services to be conducted by the Employer; to determine the utilization of technology; *to contract out for goods and services not normally and routinely performed by bargaining unit employees nor within the normal workload capabilities of bargaining unit employees;* to hire, promote, transfer, assign, retain and layoff employees; promulgate rules and regulations; discipline, suspend, demote or discharge employees for just cause; to maintain the efficiency of the operation entrusted to the Employer; and to determine the manner in which such operations are to be conducted.

(emphasis added). Even if some of the other management rights boilerplate is vague or ambiguous, the clause set forth in *italics* is before the Examiner for interpretation in this case. The phrase in question has two parts, and the Examiner addresses them both.

The union too-narrowly limits its focus to the first of the two parts, asserting that it has only waived the right to bargain concerning "goods and services not normally and routinely performed by bargaining unit employees . . . ." It correctly points out that the work that was contracted out was of the same type that bargaining unit members would usually and customarily perform. The employer's disagreement with the union's analysis seems to focus on the word "routinely" within the clause, but the fact that this work had been done several years in a row supports a conclusion that it was routinely performed, even if it is not necessarily frequently performed.

The union does not explain away the second part of the sentence, which is the real basis for the employer's defense. It reads as follows: "nor within the normal workload capabilities of bargaining unit employees . . . ." The employer asserts that the renewal work required for 2002 could not have been completed by the bargaining

unit employees available at the time, so that the work was susceptible to being contracted out.

The contract interpretation question before the Examiner thus turns on the parties' use of the "nor" conjunction, leading to whether there are two separate conditions under which work may be contracted out.

If the parties had used the "and" conjunction between the two qualifiers, the language would clearly support interpretation that they intended that both conditions be met before work could be contracted out.[4] Such an interpretation would strain the bounds of the collective bargaining process and tend to be a nullity, however, because it would be difficult for the union to establish a unit work claim (and thus an entitlement to demand bargaining about) work "not normally and routinely performed" by bargaining unit employees.

By using the "nor" conjunction, the parties separated the two phrases and the language clearly supports an interpretation that there are two types of work, either or both of which could be contracted out without further bargaining over the decision. With no testimony as to a contrary intent of the parties, it is the standard in this state in interpreting contract language to take the language used at its plain meaning unless it is manifestly unclear or contradictory. *City of Yakima*, Decision 3564-A. In this case, therefore, the language of the contract clearly allows the employer to contract out work that cannot be done within the normal workload capabilities of the work force present at the time

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[4] In order to contract out, the employer would have to show that the work was both not normally within the normal and routine work of its own employees and that it was not within the workload capacities of its own employees.

of the decision. The employer has thus provided a contractual basis for its "waiver by contract" defense in this case.

The evidence also supports a conclusion that the employer had a factual basis for contracting out the disputed work. With five to six employees each working 10-hour days, the contractor was able to put forth 50 to 60 employee-hours per work day and 250 to 300 employee-hours per work week. Even if all three bargaining unit employees historically assigned to renewal work were available,[5] an inference is available based on the parties' collective bargaining agreement that the maximum effort the employer could have counted upon from them was 24 employee-hours per work day or 120 employee-hours per work week. The Examiner concludes that the capacity ratio greater than 2 to 1 invokes the second half of the applicable clause found within the management rights provision of the parties' collective bargaining agreement.

FINDINGS OF FACT

1. Lakehaven Utility District (formerly known as the Federal Way Water and Sewer District) is a public employer within the meaning of RCW 41.56.030(1). The employer provides service in the City of Federal Way and in portions of King County.

2. International Union of Operating Engineers, Local 286, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of Lakehaven Utility District employees performing a variety of work assignments related to the

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[5] There is unrefuted testimony in the record that two of the bargaining unit employees had other projects.

construction, maintenance, repair, and operation of the water and sewer services provided by the employer.

3. The employer and the union are parties to a collective bargaining agreement effective from January 1, 2002, to December 31, 2004. That agreement contains language in the Management Rights article that allows the employer to contract out work that is not normally done and routinely performed by bargaining unit employees or work that is not within the normal workload capabilities of bargaining unit employees.

4. Under state laws regulating public works, the employer is obligated to effect "renewal" of water connections in advance of paving projects scheduled by municipalities responsible for the maintenance and repair of streets.

5. In calendar years 2000 and 2001, the employer has done water service renewals based upon asphalt repaving scheduled by the City of Federal Way and/or by King County. In 2000, the employer used only its own employees to do this work and was able to complete only about one half of the work before the streets involved were repaved. In 2001, the employer contracted out the renewal work to a private contractor.

6. In calendar year 2002, the City of Federal Way and King County provided the employer lists of their planned street paving projects overlay projects. Based on those lists, the employer determined that 318 water services needed to be renewed and that the required renewal work could not be accomplished within the available workload capacities of its own workforce. The employer then advertised the paving-related renewal project for bids.

7. The employer eventually contracted out the renewal work associated with the paving projects to a private contractor. One bargaining unit employee was assigned to coordinate with and oversee the work of the private contractor.

8. The renewal work contracted out to a private firm as described in paragraph 7 of these findings of fact was, in fact, beyond the normal workload capabilities of bargaining unit employees. No bargaining unit employees were laid off or had any reduction in pay or benefits as a result of that work being contracted out. The employer retained renewal work not associated with paving projects and within the normal workload capacities of bargaining unit employees, and assigned bargaining unit employees to perform that work.

9. The union filed a grievance protesting the decision to contract out the renewal work associated with the paving projects. After the employer denied that grievance, the union did not pursue the grievance to arbitration.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Neither the filing nor abandonment of a grievance under the parties' collective bargaining agreement constitutes a waiver of the right of a party to file and pursue a complaint charging unfair labor practices under Chapter 41.56 RCW, so that the Commission retained jurisdiction in this matter at all times under RCW 41.56.160, notwithstanding the filing and abandonment of the union's grievance.

3. A decision to contract out work that is similar in nature to the work usually and customarily performed by bargaining unit employees is, in general, a mandatory subject of collective bargaining under RCW 41.56.030(4).

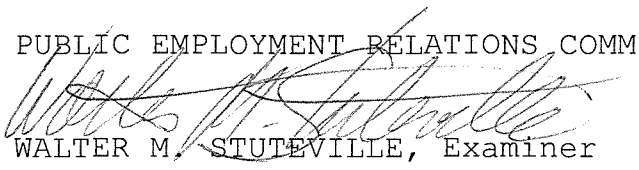
4. As to the decision to contract out the specific work described in paragraph 7 of the foregoing findings of fact, the duty to bargain normally existing under RCW 41.56.030(4) was waived by the specific language of the management rights provision in the parties' collective bargaining agreement under circumstances when the required work could not be accomplished within the normal workload capabilities of bargaining unit employees, so that the employer has not committed, and is not committing, any unfair labor practice under RCW 41.56.140(4) or (1).

ORDER

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

Issued at Olympia, Washington, on the 4th day of June, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, 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.