STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

COLVILLE EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	CASE 20738-U-06-5283
	)	
vs.	)	DECISION 9836 - EDUC
	)	
COLVILLE SCHOOL DISTRICT,	)	
	)	ORDER OF DISMISSAL
Respondent.	)	
	)	

Michael J. Boyer, UniServ Representative, for the union.

Stevens, Clay & Manix, by *Gregory L. Stevens*, Attorney at Law, for the employer.

On October 27, 2006, the Colville Education Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, naming the Colville School District (employer) as respondent. The union represents a bargaining unit of certificated employees. On December 4, 2006, a preliminary ruling issued under WAC 391-45-110 found a cause of action existed on allegations summarized as:

> Employer interference with employee rights in violation of RCW 41.59.140(1)(a) and refusal to bargain in violation of RCW 41.59.140(1)(e), by skimming of physical education work previously performed by certificated employees, without providing an opportunity for bargaining.

The employer filed its answer on January 16, 2007, admitting some facts, asserting some affirmative defenses, and denying that it had

committed any violation. A hearing was held before Examiner Sally B. Carpenter on April 24 and 25, 2007, in Colville, Washington.

ISSUE PRESENTED

Did the employer skim bargaining unit physical education work previously performed by a certificated employee, without providing an opportunity for bargaining?

The Examiner finds that there was no skimming of bargaining unit work.

APPLICABLE LEGAL STANDARD

Duty to Bargain

Under the Educational Employment Relations Act, Chapter 41.59 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees on mandatory subjects of bargaining. RCW 41.59.020(2). Mandatory subjects include wages, hours, and terms and conditions of employment for bargaining unit employees. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.59.140(1) and (2).

The bargaining obligation extends to situations when an employer seeks to remove work from a bargaining unit. *Kitsap County Fire*

District 7, Decision 7064-A (PECB, 2001). When an employer transfers bargaining unit work to non-unit employees without fulfilling its bargaining obligation, an unfair labor practice violation will be found for unlawful "skimming" of bargaining unit work. *South Kitsap School District,* Decision 472 (PECB, 1978). When an employer transfers unit work to employees of another employer without bargaining, the Commission will find an unfair labor practice violation for contracting out of unit work. *City of Kennewick*, Decision 482-B (PECB, 1980), *aff'd*, 99 Wn.2d 832 (1983).

Bargaining Unit Work

Bargaining unit work is defined as work that has traditionally and historically been performed by bargaining unit employees. In *Port of Seattle*, Decision 7271-B (PECB, 2003), police officers had historically performed general security work on the employer's facilities at Pier 66. When the employer decided to make Pier 66 a cruise ship home port, it contracted for private security services. Port employees had historically performed the contracted-out work. The Commission held that there was an unlawful contracting out of bargaining unit work.

In *City of Seattle*, Decision 8313-A (PECB, 2004), the police union and employer jointly acknowledged that certain use of specialized diving gear for rescues was the exclusive bargaining unit work of the police union. Bargaining unit work was established. Thus, the employer's decision to share diving rescues between the police and firefighter unions eroded the police union's work jurisdiction and was an unfair labor practice.

In *South Kitsap School District*, Decision 472, the employer eliminated a school aide program and replaced it with a new "certified instructional support team." All 78 aides were laid off. The employer then hired back 32 of the aides into the positions on the certified instructional support team. The 32 new positions were not within the recognition clause of the union representing the aides. Some of the former aide work was transferred to certificated teachers. The Examiner held that the employer transferred bargaining unit work to non-unit employees without fulfilling its bargaining obligation, and that unlawful skimming had occurred.

ANALYSIS

The decision in this case turns on a threshold factual question: Does the paraeducator position at Aster Elementary School perform the duties of a certificated employee? In other words, does the Aster paraeducator position perform bargaining unit work?

In school year 2005-2006, Aster Elementary housed only kindergarten and first grade classes. Aster had gradually been emptied of higher elementary grades in prior years. By school year 2006-2007, Aster was reduced to housing only kindergarten classes.

For thirteen years, a certificated physical education (P.E.) teacher taught at Aster. State law requires P.E. instruction for all children beginning in first grade.[1] The certificated P.E. teacher was assigned to Aster on a full-time basis. He had also

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[1] RCW 28A.230.040. The statute does not require P.E. for kindergarten students.

taught P.E. to Aster's kindergarten students in the years immediately before this complaint was filed. In addition to P.E. duties requiring twelve hours per week in the 2005-2006 school year, the P.E. teacher performed tasks which would normally have been assigned to a paraeducator, such as lunch room and recess duties, and tasks which would normally have been assigned to an assistant vice principal, like pulling misbehaving students out of classes. In May 2006, having made the decision to move first grade out of Aster, the employer and the P.E. teacher agreed to his reassignment to a junior high school for school year 2006-2007. There is no issue in this case as to the propriety of that transfer.

The skimming charge in this case arose against a background of multiple simultaneous changes within the Colville schools. In the five school years before September 2006, the employer spent more money than it received. In the first half of calendar year 2006, both of the employer's two levy requests to the voters failed. The second levy failure was confirmed in late May 2006. Meanwhile, there was a ten-year decline in student enrollment. The employer was in a gradual process of consolidating its students from a five-building configuration to four buildings.

In May and June 2006, the employer decided it would not lay off any certificated teachers. It instead implemented cuts in other areas: programs were cut, cost-of-living pay increases to all administrators were eliminated, and non-teaching staff time was reduced.[2]

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[2] At the beginning of the 2006-2007 school year, the final result was that 12 coaching positions, driver's education, one administrative position, music, some secretarial time and some custodial time were eliminated. Athletic programs became "pay to play" programs.

As the fiscal picture became clearer in mid-August 2006, the employer decided to keep its tuition-based all-day kindergarten program. It advertised for a fifth kindergarten teacher in late August.[3]

In July 2006, the union president sent an e-mail to the district superintendent (who was out of town until August) raising several issues about the changes. Regarding the Aster issue, the union president wrote, "We have been advised that since we have set the precedent of offering Music, P.E. and Library for Kindergarten students, a change in this policy and resulting implications should be discussed as a labor-management issue." The e-mail goes on, "As you know, our contract (page 30) requires that certified positions not be replaced by non-certified personnel."

In September 2006, Aster kindergarten classes began with five classroom teachers. The collective bargaining agreement between the employer and union requires at least 160 minutes per week of preparation time.[4] In mid-September, the employer posted a job opening for a paraeducator position at Aster. The job vacancy description stated the "primary duties will be in the gymnasium area and/or in recess areas coordinating students in various recess type activities throughout the kindergarten school day."

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[3] A sixth kindergarten teacher position was added in November 2006.

[4] The superintendent testified that there were two reasons given for having P.E. for kindergarten children: (1) to provide physical welfare for the children, and (2) to afford classroom teachers a preparation period.

The union objected. By letter to the superintendent on September 26, 2006, the union representative wrote, "I suggest you work with Jennifer Strand [union president] to immediately rectify this situation, or I will have no choice but to ask WEA [Washington Education Association] to authorize an Unfair Labor Practice action." The superintendent met with union leaders and discussed the issues. The superintendent offered to work on any solution that did not incur additional expense. The union would not agree to any solution other than hiring a new P.E. teacher at Aster.

The employer asserts that the duties of the new paraeducator position are so different in kind from the formal certificated teaching of P.E., that the paraeducator position does not perform bargaining unit work. At the hearing the employer presented an expert witness, Professor O. J. Cotes. Cotes is a professor at Whitworth College's Master in Teaching program, where she teaches basic skills of instruction to future teachers. She is also a former classroom teacher. She observed three classrooms of the employer: an elementary P.E. class, a kindergarten class, and the paraeducator's activities group at issue in this case. Professor Cotes described each of the rooms, the purposes, words and actions of the school employees, and the responses of the children. She summarized her description of the two teachers as structured, purposeful towards a learning goal, and directing students towards higher levels of thinking. When asked if the paraeducator was engaged in teaching, she replied, "No. A lot of supervision and fun things to do for kids. It was a break."

Professor Cotes was the only witness who spent substantial observation time in each of the three settings. Other witnesses

offered their opinions about whether or not the paraeducator taught a class, but their opinions fail to carry as much weight as the independent outside observer who spent time in each room.

The types and quality of activities offered by the paraeductor position are not the structured, skills-building kind and quality of instruction provided by a certificated P.E. teacher. The paraeductor offers games and activities to the kindergarten students. The union has failed to carry its burden of proof that the work performed by the paraeducator position at Aster is work that has traditionally and historically been performed by a certificated teacher.

FINDINGS OF FACT

1. The Colville School District is a public employer within the meaning of RCW 41.59.020(5).

2. The Colville Education Association is an exclusive bargaining representative within the meaning of RCW 41.59.020(6), and represents a bargaining unit of certificated employees.

3. In September, 2006, the employer eliminated offering P.E. instruction by certificated employees to kindergarten students at Aster Elementary School. The employer hired a paraeducator at Aster to offer games and activities to kindergarten students.

4. The types and quality of activities offered by the paraeducator are not the structured, skills-building kind and

quality of instruction provided by a certificated P.E. teacher.

5. The work performed by the paraeducator position at Aster is not work that has traditionally and historically been performed by certificated employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC.

2. As described in Findings of Fact 3 through 5, the employer did not skim bargaining unit work or violate RCW 41.59.140(1)(a) or (e).

NOW, THEREFORE, it is

ORDERED

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

Issued at Olympia, Washington, this 13th day of August, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Sally B Carpenter

SALLY B. CARPENTER, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE
P. O. BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	20738-U-06-05283	FILED:	10/27/2006	FILED BY:	PARTY 2
DISPUTE:	ER PROVIDE INFO				
BAR UNIT:	TEACHERS				
DETAILS:	Skimming				
COMMENTS:					

EMPLOYER: COLVILLE S D
ATTN: KEN EMMIL
217 S HOFSTETTER ST
COLVILLE, WA 99114-3239
Ph1: 509-684-7850 Ph2: 509-684-7857

REP BY: GREGORY L STEVENS
STEVENS CLAY MANIX
PAULSEN CTR
421 W RIVERSIDE STE 1575
SPOKANE, WA 99201-0402
Ph1: 509-838-8330

PARTY 2: WASHINGTON EDUCATION ASSN
ATTN: JERRY PAINTER
PO BOX 9100
FEDERAL WAY, WA 98063-9100
Ph1: 253-765-7020 Ph2: 253-946-7232

REP BY: MICHAEL J BOYER
WASHINGTON EDUCATION ASSN
230 E MONTGOMERY AVE
SPOKANE, WA 99207
Ph1: 509-326-4046