

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION 763,	)	
	)	
Complainant,	)	CASE 20021-U-05-5083
	)	
vs.	)	DECISION 9839 - PECB
	)	
CITY OF TUKWILA,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

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Reid, Pedersen, McCarthy & Ballew, LLP, by *Thomas A. Leahy*, Attorney at Law, for the union.

Kenyon Disend, PLLC, by *Shelley M. Kerslake*, Attorney at Law, for the employer.

On December 19, 2005, Teamsters Local 763 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission under Chapter 391-45 WAC. The complaint alleged that the City of Tukwila (employer) committed an unfair labor practice within the meaning of RCW 41.56.140. On January 31, 2006, the Commission issued a deficiency notice. The union filed an amended complaint on February 17, 2006. The Commission issued a preliminary ruling, finding a cause of action to exist against the employer for skimming of bargaining unit work without first giving notice to the union and providing an opportunity for bargaining. The employer filed its answer on March 16, 2006. The Commission assigned Examiner Lisa A. Hartrich to conduct further proceedings, and a hearing took place on February 6, 2007, in Tukwila, Washington.<sup>1</sup> Both parties filed post-hearing briefs.

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<sup>1</sup> This hearing was originally scheduled for July 26, 2006, but was continued upon the request of the union and by mutual agreement by the parties.

ISSUE PRESENTED

Did the employer skim bargaining unit work when it reclassified a senior information technician to a non-represented program coordinator position, without providing an opportunity to bargain?

The Examiner concludes that the employer did not transfer bargaining unit work, and therefore, did not illegally refuse to bargain with the union.

LEGAL STANDARDS

Under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW, a public employer commits an unfair labor practice if it refuses to collectively bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.140(4). Matters affecting the wages, hours, and working conditions of employees are referred to as mandatory subjects of bargaining.

The bargaining obligation extends to situations where an employer seeks to remove work from a bargaining unit. 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 unit work. *South Kitsap School District*, Decision 472 (PECB, 1978); *City of Tacoma*, Decision 6601 (PECB, 1999).

Bargaining unit work is defined as work historically performed by bargaining unit employees. Once an employer assigns unit employees to perform a certain body of work, that work attaches to the unit and becomes bargaining unit work. *City of Tacoma*, Decision 6601.

Commission precedent uses a two-part analysis to determine whether the work belongs to the bargaining unit. *City of Spokane*, Decision 6232, (PECB, 1998); *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001). The answers to the following two questions control this decision:

- Does the position perform work historically performed by one or more bargaining unit employees?
- Is the work of the disputed position fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions?

*City of Tacoma*, Decision 6601.

If the union claims the disputed work belongs in the bargaining unit, it has the burden of proof. *Kitsap County Fire District 7*, Decision 7064-A. If the union fails to establish that the work was historically performed by bargaining unit employees, it cannot sustain its burden of proof. *City of Tacoma*, Decision 6601.

#### BACKGROUND

The union represents three bargaining units in the City of Tukwila: a Professional/Supervisory unit; an Administrative/Technical unit; and a Public Works unit. The position in dispute is currently held by Bao Trinh, and is located in the Information Technology (IT) Division of the city's Department of Administrative Services.

In 2005, the IT Division was reviewed for reclassification because the department needed to expand to meet the increasing demand on its services. As a result of the review process, the IT Division was reorganized and some positions were reclassified.

Prior to the reclassification, Trinh held the position of Senior IT Specialist, which was included in the Administrative/Technical unit. His supervisor, Mary Miotke, held the position of Program Coordinator/Systems Administrator,<sup>2</sup> a non-represented position.

In December 2005, the employer created the new position of IT Program Manager for Miotke. Miotke, originally the only member of the IT Division, had increasingly become involved in projects external to the city, such as working on a regional effort to develop a wireless network. Therefore, the employer determined Miotke had been working out of class, and created the new position.

Since Miotke was reclassified as the IT Program Manager, her position of Program Coordinator/Systems Administrator became vacant. Trinh, the Senior IT Specialist, was reclassified to fill Miotke's position. Upon moving to the Systems Administrator position, he became a non-represented employee.

#### ANALYSIS

The union argues that the Systems Administrator position belongs in the Professional/Supervisory bargaining unit, where other employees classified as "Program Coordinators" are located. In the alternative, the union wants Trinh's position placed in the Administrative/Technical unit. The employer argues that historically the position was never represented by the union and does not belong in either unit now.

The threshold question in all skimming cases is: Does the position perform work historically performed by one or more bargaining unit employees? If the answer is "no", then no further analysis is

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<sup>2</sup> Program Coordinator is the classification title; Systems Administrator is the job title.

needed. Witness testimony at the hearing provided a basis for answering this question in the negative.

Was Bargaining Unit Work Transferred?

Trinh testified that his previous job as an IT Specialist involved helping employees in every department ("in the field") with the use of their computers. For example, he set up accounts, helped users troubleshoot day-to-day computer problems, modified passwords, added and deleted users, and prevented spam from getting into users' mail boxes. He kept up with newer versions of software and hardware, and other changes as the technology evolved.

One of the significant changes in technology occurred when the city first acquired an internet connection in the late 1990s. This change required new duties such as website maintenance, security, virus protection, and e-mail. Trinh testified that these duties were initially contracted out to an outside vendor.

As Trinh became more familiar with the new technology, the work that had been contracted out was gradually turned over to him.

It is not clear from the record exactly when the outside vendor was no longer providing any of the new services, nor does the record show whether these are the type of duties that remained the responsibility of the IT Specialists once Trinh was reclassified. What is clear is that in the new position as Systems Administrator, Trinh performs job duties which are unique and fundamentally different from the duties he performed as an IT Specialist, and were not historically performed by employees of the Administrative/Technical bargaining unit.

Position is Fundamentally Different

Upon the reclassification to Systems Administrator in December 2005, Trinh's position changed in several significant ways. First,

he received a pay increase retroactive to January 2005, in recognition that he had been working out of class for some time. In addition, the new position is exempt under the FLSA, whereas his position as IT Specialist was not.

Trinh testified that about 20 to 30 percent of the work he performs as Systems Administrator was Miotke's work when she held the position. Those duties include supervising other employees in the IT Division, writing purchase orders, dealing with vendors, managing the network budget, and researching network equipment.

In addition to these duties, the Systems Administrator position requires Trinh to investigate whether employees are using the city computers in an ethical manner, in compliance with city policy. This puts him in a unique position when compared with any other employee in any bargaining unit. He has access to anything on the network, including budget information, salary information, and personnel files. The only other city employee who has the same unfettered access to the system is Miotke.

There are several types of things that Trinh does that Miotke did not do in her capacity as Systems Administrator. For example, he is responsible for network security, responds to emergencies, installs new equipment, and deals with e-mail issues between the city and other agencies. The focus of his work is not with personal computers in the field as it was when he was an IT Specialist. Rather, it is system-wide in nature.

Trinh described the change in his overall job focus as follows:

Cross Examination, By Ms. Kerslake:

Q. Mr. Trinh, you indicated as an IT specialist you worked on the firewall, the server, spam and anti-virus. But you also said that now you take a more proactive role rather than a reactive role. Can you explain a little bit about what the difference is?

A. [I]n a reactive role if somebody had a virus I would go out and cure their computer of the virus. In a proactive role I would be actively trying to defend against viruses before they actually got to the user.

Q. Is it fair to say that in your current capacity you're taking on a more vision or policy direction for the department?

A. Yes.

Transcript, page 31, lines 7 through 19.

In *City of Tacoma*, four employees each spent about one-half of their time helping customers resolve complaints. Eventually they were laid off due to financial pressure and reorganization considerations. Two years later, the employer created three new positions at a "senior-level" who were charged with providing "proactive" customer service, such as marketing. In that case, the union argued that the employer resurrected work previously performed by the consumer service employees and transferred it to the new positions. The employer in that case argued that the new positions were created to fill a "new and unique role" in the organization, and were performing new work. The examiner found that the new positions were fundamentally different in focus, responsibility, technical knowledge, education requirements, and salary levels, and held that the employer did not owe the union a duty to bargain.

Similarly, there is a fundamental difference between the work Trinh now does and the work of the IT Specialists. The IT Specialists are working in the field solving day-to-day problems, while Trinh clearly has a proactive, system-wide and policy-making role.<sup>3</sup> He

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<sup>3</sup> The record does not include testimony from a current IT Specialist.

fills a new and unique role in the employer's IT Division with a different focus than the other IT employees.

Position Was Filled

When Trinh was reclassified, his vacant position as Senior IT Specialist was filled by another employee within the union's Administrative/Technical bargaining unit. In addition, the employer created new positions within the IT Division to handle database administration, as well as a web technician (a total of 1.5 new positions). All of these positions are included in the union's Administrative/Technical unit.

In *University of Washington*, Decision 8878-A (PSRA, 2006), the employer unilaterally assigned new job duties to bargaining unit employees, then later reclassified the employees to ensure that they were being paid for work they actually performed. The Commission held that when the employer reclassified the bargaining unit positions to reflect the new work performed, the employer transferred the new work as well as the employees performing the work. The employees continued to perform a substantial amount of traditional bargaining unit work, and the employer did not re-staff the vacated positions after the reclassification. The employees' new work assignments attached to the existing bargaining unit, and the employer was ordered to bargain with the union over the change.

There are several important distinctions between the *University of Washington* decision and the instant case. For one, the record does not show that Trinh is still performing a substantial amount of traditional bargaining unit work.

Secondly, the employer did not eliminate any positions. Rather, the employer added 1.5 new positions in addition to filling the job vacated by Trinh. This makes it difficult to argue that the union suffered an actual loss of work.



In fact, the union did not endeavor to make that argument. Instead, the union attempted to show that the work was skimmed from the Professional/Supervisory unit rather than the Administrative/Technical unit. *See also University of Washington, Decision 8818-A (PSRA, 2006).*

#### Improper Venue

In its post-hearing brief, the union no longer argues that Trinh's position was skimmed from the Administrative/Technical bargaining unit.<sup>4</sup> Instead, the union concedes that Trinh's job title and job focus changed. The union correctly points out that the classification of "program coordinator" is a position specifically listed in the Professional/Supervisory collective bargaining agreement. The union contends that Trinh's position is consistent with other program coordinator duties, and thus should be placed in that unit.

A position cannot be skimmed from a bargaining unit that it did not belong to in the first place. Whether or not the position belongs in or out of the Professional/Supervisory bargaining unit is properly determined by the Commission in a unit clarification case, not an unfair labor practice complaint.<sup>5</sup> *Snohomish County, Decision 9180-A (PECB, 2007).* Unless the union can show that the work was transferred from the Technical unit, skimming could not have occurred.

#### CONCLUSION

The union did not meet its burden of proof to show that the work of the Systems Administrator is work historically performed by the

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<sup>4</sup> However, this was the primary basis of the union's argument in its amended complaint.

<sup>5</sup> *See Concrete School District, Decision 8131-A (PECB, 2004)* [Commission affirmed the exclusion of the technology network system supervisor from the bargaining unit.]

Administrative/Technical bargaining unit. Therefore, the complaint is dismissed.

FINDINGS OF FACT

1. The City of Tukwila is a public employer within the meaning of RCW 41.56.030(1).
2. Teamsters Local Union 763 is a bargaining representative within the meaning of 41.56.030(3).
3. Teamsters Local Union 763 is the exclusive bargaining representative of three different bargaining units of City of Tukwila employees: a Professional/Supervisory unit; an Administrative/Technical unit; and a Public Works unit.
4. Prior to December 2005, Bao Trinh was a Senior IT Specialist in the Administrative/Technical bargaining unit. Historically, Trinh's work as a Senior IT Specialist included helping city employees troubleshoot day-to-day computer problems.
5. In December 2005, Trinh was reclassified to the position of IT Program Coordinator/Systems Administrator. That position had never been included in a bargaining unit.
6. Trinh's new duties included supervising employees in the IT Division, writing purchase orders, dealing with vendors, maintaining network security, managing the network budget, and researching network equipment. His overall job focus changed from responding to day-to-day problems in the field to a proactive, system-wide and policy-making role.
7. The employer filled Trinh's vacant IT Specialist position, which remained in the Administrative/Technical bargaining

unit. The employer also added 1.5 new positions to the IT Division. The new positions became part of the Administrative/Technical bargaining unit.

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. By reclassifying Bao Trinh to a Program Coordinator position, the City of Tukwila did not skim bargaining unit work, and did not commit an unfair labor practice under RCW 41.56.140.

ORDER

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

ISSUED at Olympia, Washington, this 20<sup>th</sup> day of August, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



LISA A. HARTRICH, 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


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