

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES)	
OF WASHINGTON,)	
)	
Complainant,)	CASE 21861-U-08-5568
)	
vs.)	DECISION 10546 - PECB
)	
EVERGREEN SCHOOL DISTRICT,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
_____)	

Eric T. Nordlof, General Counsel, for the union.

Karr, Tuttle, Campbell, by *Lawrence B. Ransom*, Attorney at Law, for the employer.

On July 10, 2008, the Public School Employees of Washington (union) filed an unfair labor practice complaint against the Evergreen School District (employer), alleging interference and refusal to bargain violations by contracting out work previously performed at the employer’s Evergreen Internet Academy. The complaint concerns two bargaining units of classified employees represented by the union. One of the units includes office-clerical employees. The other includes non-clerical employees. The employer filed an answer on August 4, 2008. Examiner Emily H. Martin held an evidentiary hearing on November 18, 2008. Both parties filed post-hearing briefs.

ISSUE

1. Did the employer have a duty to bargain concerning the contracting out of bargaining unit work of its virtual school to a private contractor?

As a result of the employer’s contracting out decision, bargaining unit positions were eliminated or reduced. However, most of the unit work that was eliminated was not transferred to the employees of the private contractor. The work was instead eliminated due to changes in technology.

In relation to the small portion of unit work that was transferred, the employer did not have a duty to bargain because the transfer did not cause a significant detriment to the bargaining unit and the employer's motivation was not solely economic.

APPLICABLE LEGAL PRINCIPLES

The parties have a bargaining relationship under the Public Employees' Collective Bargaining Act (PECB), Chapter 41.56 RCW. Under RCW 41.56.160, the Commission is empowered and directed to prevent unfair labor practices and to issue remedial orders. Under RCW 41.56.140(4), it is an unfair labor practice for a public employer to refuse to engage in collective bargaining. Parties asserting unfair labor practices bear the burden of proof. WAC 391-45-270.

Collective bargaining is defined in RCW 41.56.030(4) and includes the mutual obligation to meet at reasonable times to negotiate in good faith on personnel matters, including wages, hours and working conditions. Employee wages, hours and working conditions are generally mandatory subjects over which the parties must bargain in good faith. It is an unfair labor practice for either an employer or an exclusive bargaining representative to refuse to bargain a mandatory subject. *Kitsap Transit*, Decision 9667-A (PECB, 2008).

Before changing a mandatory subject of bargaining, an employer must first give the employees' exclusive bargaining representative notice of the change and an opportunity to bargain the change. *Skagit County*, Decision 8746-A (PECB, 2006).

Typically, the decision to transfer bargaining unit work is a mandatory subject of bargaining. *Snohomish County*, Decision 9540-A (PECB, 2007). Transferring bargaining unit work to employees of the same employer who are outside of the existing bargaining unit is known as "skimming," and transferring unit work to employees who work for a different employer is known as "contracting out."

In order to establish a transfer of bargaining unit work violation, the first step is to determine whether or not the work at issue was in fact bargaining unit work. *City of Snoqualmie*, Decision 9892-A

(PECB, 2009). If that question is answered in the affirmative, the Commission considers five factors to determine whether the employer had a duty to notify the union of the intended change and provide an opportunity for bargaining a transfer of bargaining unit:

1. The previously established operating practice as to the work in question (*i.e.*, had non-bargaining unit personnel performed such work before?);
2. Whether the transfer of work involved a significant detriment to bargaining unit members (*e.g.*, by changing conditions of employment or significantly impairing reasonably anticipated work opportunities.);
3. Whether the employer's motivation was solely economic;
4. Whether there has been an opportunity to bargain generally about the changes in existing practices; and
5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

City of Snoqualmie, Decision 9892-A (PECB, 2009).

ANALYSIS

The employer is a school district which serves some of its students with a virtual school. From 1999 to 2008, the employer's Evergreen Internet Academy provided classes taught on-line by the employer's certificated teaching staff. Classified employees also worked at the virtual school: a registrar, a registrar/secretary, a computer lab technician, and an at-risk advocate. The union represented these four classified positions. The registrar and registrar/secretary were part of the union's office-clerical bargaining units and the computer lab technician and at-risk advocate were a part of the union's non-clerical bargaining unit.

At the end of the 2007-2008 school year, the employer replaced the Evergreen Internet Academy with the iQ Academy Washington (iQ Academy). The employer operated the iQ Academy in partnership with KC Distance Learning, a private contractor. The new virtual school continued to use the employer's certificated staff to teach the classes. However, the four classified positions represented by the union were eliminated or reduced.

Registrar and Registrar/Secretary

The work of the employees in the two registrar positions for the Evergreen Internet Academy included registering students; communicating with students, parents, and staff; preparing various reports; and performing other office-clerical duties associated with the virtual school.

When iQ Academy replaced the Evergreen Internet Academy, the employer consolidated the registrar and registrar/secretary positions and greatly reduced the total hours allotted for registrar work. Initially, the employer assigned only 25 hours per month for the registrar duties. This proved to be too few, especially since the virtual school had a large increase in student enrollment. Eventually, the employer created a new registrar position for 30 hours per week.

The union has argued that similarities between the job description of the Evergreen Internet Academy's registrar positions and the school district's contract with KC Distance Learning is evidence that some bargaining unit work of the registrar positions was transferred to KC Distance Learning.

The summary statement in the job descriptions for the Evergreen Internet Academy's two registrar positions states "The Registrar is responsible for the organization and processing of all materials related to student information including scheduling, grading, and academic records. The Registrar is also responsible for State reports related to the enrollment and withdrawal of students."

The contract with KC Distance Learning states "[KC Distance Learning] will be responsible for collecting and managing all student attendance information in accordance with all independent study requirements. iQ [Academy] will work with the District to ensure that the attendance records are maintained in a manner that is consistent with District policies." The contract also provides that KC

Distance Learning is responsible for “coordinating and supporting the District’s required responses to any state reporting systems.”

I do not agree that the similarities between the job descriptions and KC Distance Learning’s contract demonstrates that the bargaining unit work was transferred. After the switch to the iQ Academy, the employer created a new job description for the registrar position. A comparison between the old and new job descriptions shows that most of the registrars’ essential functions remained the same. The old description included tasks such as entering information about students, preparing forms, and preparing old documents for microfilming. These tasks were eliminated in the new job description.

The virtual school’s transition to the iQ Academy involved changes in the school’s computer platform and software. Updated technology eliminated the tasks that were removed from the registrar’s job description. The registrar’s data entry and microfilming tasks were eliminated by changes to a more updated technology. A more efficient record keeping system explains the decrease in the amount of time that the employer needed for the registrar’s work. Furthermore, there is no evidence that KC Distance Learning now employs staff to perform the work of the registrars.

As the registrars’ work was reduced because of changes in technology and not transferred to KC Distance Learning’s employees, the bargaining unit work of the registrar positions was not contracted out.

Computer Lab Technician

The work of the computer lab technician at the Evergreen Internet Academy included monitoring students in an on-campus computer lab. The computer lab was a physical location where students had online access to the virtual school. The lab technician monitored the students’ computer use to ensure that students were not using the computers inappropriately. When the employer switched to the iQ Academy, the virtual school stopped providing students with a computer lab. The work of monitoring students in the computer lab was eliminated and not transferred to any employees of KC Distance Learning.

One of the lab technician's other duties included providing some information technology support for the virtual school, particularly in regard to NovaNet, the school's computer platform. The use of NovaNet was discontinued when the school became the iQ Academy. Michele DeShaw, the employer's coordinator of alternative education, testified that part of the lab technician's duties included helping students with computer difficulties. She said that the lab technician's ability to help the student would depend on the nature of the problem. Regardless of whether or not the lab technician was able to solve the computer problem, DeShaw's testimony and the position's job description indicates that this position included the task of fielding some computer questions related to the virtual school.

As KC Distance Learning provides iQ Academy students with a laptop computer, software, and a stipend for which to purchase access to the internet, it is reasonable to conclude that if students, parents, or staff have questions regarding the computers, KC Distance would be contacted. These would be the type of questions that the lab technician had been asked, so this small portion of the lab technician's work was transferred to KC Distance Learning employees.

As it has been shown that a portion of the lab technician's work was contracted out to KC Distance Learning, the next step is to analyze whether the employer had a duty to bargain before transferring the work. The Commission considers five factors to determine whether the employer had an obligation to bargain the decision to transfer bargaining unit work. *City of Snoqualmie*, Decision 9892-A (PECB, 2009).

The first factor is the previously established operating practice. The established practice was that the lab technician would field some computer questions. Depending on the questions, the lab technician could assist the user or refer the user to other resources such as the school district's information technology department.

The second factor is whether the transfer of this portion of the lab technician's work was a significant detriment to the bargaining unit. DeShaw testified that monitoring students' computer use was the primary role of the lab technician. While the lab technician's job description demonstrated that the position would be expected to develop some expertise on the NovaNet

software by remaining current using the software, providing instruction, tracking use, and scheduling access to the computer system, DeShaw's testimony shows that answering computer support questions was an ancillary task to monitoring the lab. Therefore, transferring this task to KC Distance Learning did not cause a significant detriment to the bargaining unit.

The third factor is whether the employer's motivation to transfer the work out of the bargaining unit was solely economic. While the partnership with KC Distance Learning may have lowered the employer's operating expenses, the decision was also made to provide additional educational opportunities for students. The closing of the computer lab was not necessarily made for economic reasons. Instead, the closing is consistent with an effort to provide a virtual school where contact with students is done online rather than in person and in a school building.

The fourth factor is whether there was an opportunity to bargain generally about the changes in existing practices. The lab technician's task of fielding some computer questions appeared to be a natural outgrowth of his assignment to the computer lab. The decision to eliminate the computer lab is a change in the virtual school that could have been made regardless of whether the employer entered into a contract with KC Distance Learning. The record does not contain any evidence of whether there had been prior discussions between the union and the employer regarding the decision to close the lab. There is insufficient evidence on whether the union had an opportunity to bargain generally about the closure of the computer lab.

The fifth factor is whether or not the fielding of computer-related questions is fundamentally different from regular bargaining unit work. As the bargaining unit contains information technology employees, the work is similar to other bargaining unit work because information technology position would also field computer questions.

Most of the lab technician's work was not transferred to KC Distance Learning employees. Only a small amount of bargaining unit work was transferred. The transfer did not cause a significant detriment to the bargaining unit, and the employer's motive was not solely economic. The employer did not have an obligation to bargain this transfer of bargaining unit work.

At-Risk Advocate

The at-risk advocate position was eliminated when the Evergreen Internet Academy became the iQ Academy. Prior to the switch to the iQ Academy, the position's work involving student learning plans was transferred to certificated teachers, and the position's hours were reduced.

The work that remained included making contact with students who were not logging into the virtual school or making adequate progress with their work. After the change to the iQ Academy, a tracking system was put into place to give teachers the information about students who were not logging in or making progress. The at-risk advocate's work of making follow-up phone calls to students was transferred to teachers and administrators. There is no evidence that bargaining unit work was transferred from the at-risk advocate position to employees of KC Distance Learning.

CONCLUSION

The employer did not commit the alleged unfair labor practices. Most of the bargaining unit work that was eliminated was not transferred to employees of KC Distance Learning. The work was eliminated due to changes in technology. The small portion of the unit's work that was transferred did not create a bargaining obligation for the employer.

FINDINGS OF FACT

1. Evergreen School District is a public employer within the meaning of RCW 41.56.030(1).
2. Public School Employees of Washington is a bargaining representative within the meaning of RCW 41.56.030(3).
3. From 1999 to 2008, the employer operated the Evergreen Internet Academy, a virtual school which provided online classes to students taught by the employer's certificated teaching staff.
4. The union represented four classified positions at the Evergreen Internet Academy: a registrar, a registrar/secretary, a computer lab technician, and an at-risk advocate.

5. At the end of the 2007-2008 school year, the employer entered into a partnership with a private contractor, KC Distance Learning, and replaced the Evergreen Internet Academy with the iQ Academy.
6. Under the terms of the partnership with KC Distance Learning, the employer's certificated staff continued to teach the online classes. The four classified positions represented by the union were reduced or eliminated.
7. When the iQ Academy replaced the Evergreen Internet Academy, the two registrar positions were consolidated. Initially, the hours were greatly reduced, but after a large increase in the school enrollment, some of the hours were restored. Some tasks that had been part of the old job description were removed in the new job description. These tasks were related to changes in technology. The bargaining unit work of the registrar positions was not transferred to KC Distance Learning employees.
8. When the iQ Academy replaced the Evergreen Internet Academy, the virtual school stopped providing students a computer lab. The lab technician position was eliminated. Most of the work of the lab technician had involved monitoring students in a computer lab.
9. The computer lab technician also provided some information technology support involving the virtual school's use of the NovaNet software. The use of NovaNet was discontinued when the school became the iQ Academy.
10. A small portion of the computer lab technician's duties was to field questions regarding the use of the virtual school computers. As KC Distance Learning provides the software and laptop computers for the iQ Academy student, the computer-related questions would then be directed to KC Distance Learning. The employer did not have an obligation to bargain this small transfer of unit work. The transfer did not cause a significant detriment to the bargaining unit and the employer's motivation was not solely economic.

11. The at-risk advocate position was eliminated when the Evergreen Internet Academy became the iQ Academy. Historically, this position had worked on student learning plans, but that work was transferred to certificated staff before the employer and KC Distance Learning formed the iQ Academy. This position had tracked students' progress and contacts until new software was able to automatically track that information. The position's work of following up with students who were not making sufficient progress was transferred to certificated teachers and administrators. Bargaining unit work was not transferred to employees of KC Distance Learning.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By the actions described in Findings of Fact 5 through 11, the employer did not refuse to bargain or violate 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, this 25th day of September, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

EMILY H. MARTIN, 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.