STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 1191, Complainant, vs. CITY OF DAYTON, Respondent.	CASE NO. 5098-U-84-896 DECISION NO. 2111 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Paul Sears and John Cole, Staff Representatives, appeared on behalf of the complainant.

Keith O. Yates, City Attorney, appeared on behalf of the respondent.

On February 9, 1984, Local 1191-CD of the Washington State Council of City and County Employees, the "union", filed an unfair labor practice complaint against the City of Dayton, claiming that the city had violated RCW 41.56.140(1) and (4) by refusing to bargain wages, hours and other conditions of employment. In particular, the union cited the city's unilateral decision to reduce the pay of one employee, Jack Burton. A hearing was held on August 2, 1984 before Examiner J. Martin Smith. The parties filed briefs to complete the record.

BACKGROUND

The City of Dayton is the county seat of Columbia County, situated at the confluence of the north fork, south fork and east fork of the Touchet River. The 4500 citizens are served by a city council, mayor and public works department. The union has represented a unit of city public works employees for over ten years, the latest contract having expired December 31, 1983.[1/]

Jack Burton has been a city employee for 22 years. During this period, he has worked on the road crew, at the sewer treatment plant, at the water filtration facility, and at the cemetery; he has been the parks' supervisor and the supervisor of the water plant; he has also worked as a mechanic in the city shops. Beginning in about 1968, Burton was included in the bargaining unit represented by the union, and was paid at the "skilled labor" rate of pay. Beginning in about 1977, Burton was assigned duties as the

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1/ The contract stated that the unit excluded administrative personnel, supervising employees, uniformed employees and temporary employees.

water treatment plant operator. This position was designated as an "assistant city superintendent" and was paid a monthly salary instead of an hourly wage. From 1977 to 1982, Burton was one of only two supervisors in the city excluded from the wall-to-wall bargaining unit.[2/]

In 1982 the city changed its fresh water service to the citizens by digging two deep wells and phasing-out the filter treatment plant. When the wells were operational in November, 1982, the filter plant was closed and Jack Burton's "assistant city superintendent" position was eliminated. The city council decided to keep Burton employed in a "park superintendent" position not listed in the collective bargaining agreement or mentioned in the previous unit determination case. The city characterized the position as supervisory. However, a budget cut required the city to transfer Burton to bargaining-unit work at the cemetery and disposal plant. The union was kept apprised of these events during 1982.

In early 1983, the union cautioned the city that Burton should re-enter the bargaining unit. The union indicated it was willing to file a grievance if Burton was not returned to the bargaining unit as soon as possible. The city did not dispute this position, which is commanded by the language of the collective bargaining agreement for 1981-1983. On March 8th, the city council discussed the Jack Burton matter without resolution. The city attorney began an exchange of correspondence with the union during April, 1983.

On or about April 20th, the city council decided it could not merely terminate Burton, but would keep him employed as a skilled laborer. At or about that time the idea arose to pay Burton at his supervisory salary rate of $1472 per month through 1983, and to reduce him to the appropriate bargaining unit hourly rate beginning January 1, 1984. On or about April 25, 1983, union representative John Cole wrote to the city attorney, advising that the union preferred that Burton receive his present salary until the skilled labor rate increased above his present salary or, if a decrease in the salaried rate occurred, he ought to revert to the higher skilled labor rate. On April 29, 1983, the city informed the union of its decision to freeze Burton's salary rate and step him down to the skilled labor rate beginning January 1, 1984. Two days later, on May 1, 1983, Burton's employment status was changed to that of a bargaining unit employee. As of the day of hearing, Burton was assigned various jobs within the city, all within the description of the bargaining unit.

2/ See: City of Dayton, Decision 1432 (PECB, 1982), where it was held that the assistant city superintendent/waste water plant operator and assistant city superintendent/filter plant operator were historically excluded from the city-wide unit and that a unit-clarification was not the proper procedure to address the union's effort to have them included in the unit.

The parties commenced negotiations to replace the 1981-1983 contract with a successor agreement. A PERC mediator has been monitoring bargaining sessions since December, 1983. Notice is taken of the docket records of the Commission, which indicate that the mediation case is still pending.

The city reduced Burton's pay rate to the contractual skilled labor rate, effective January 1, 1984. This case followed.

POSITIONS OF THE PARTIES

The union takes the position that it made a timely request of the city to negotiate the wage rate and other working conditions of a supervisor who was being demoted back into the bargaining unit, and that the city steadfastly refused to negotiate the wage rate. The union alleges that although the city had knowledge of the union's position and even considered it, the city nevertheless unilaterally adopted a wage plan for the individual employee without bargaining an agreement or reaching an impasse on this particular item. Accordingly, the union asserts that the city violated RCW 41.56.140(1) and (4), by failing to bargain in good faith. The union argues that its filing of this unfair labor practice case on February 9, 1984 was timely, since the filing was within six months of the complained of change of the employee's wage rate. In the alternative, the union contends that the failure to bargain in good faith occurred in May, 1983, that the six-month statute of limitations did not come into effect until July of 1983, and that the union retains the benefit of the longer period previously allowed.

The city argues that the union's failure to file a contract grievance within the provided three-day period, as well as the failure to file an unfair labor practice within six months of the occurrence of the alleged act, which it dates as April 29, 1983, require the dismissal of this charge. Further, the city urges that the contract required it to pay one of two wage rates specified in the labor agreement and that placing the former supervisor back in the bargaining unit subject to the contract's terms was the only duty required by RCW 41.56.140.

DISCUSSION

The facts of this case are nominally uncontroverted, as the city admits that Burton reverted to the existing bargaining unit by virtue of the broad unit description contained in the labor agreement. If he remained an employee of the city, and was no longer an "assistant city superintendent", Burton was properly placed in the bargaining unit upon his change in job function occasioned by the shut-down of the water treatment facility. See: City of Anacortes, Decision 452 (PECB, 1978).

This decision need not address whether the city was required to keep Burton employed. The city made the decision to retain him and to assign him various duties on the city payroll, none of them administrative or supervisory in nature. Where they exist, seniority rights are a creature of contract rather than of statute or common law. Practices vary as to whether persons promoted to supervisory positions retain seniority rights to revert to the bargaining unit. In the absence of contractual authority to revert Burton to the bargaining unit (potentially, at the prejudice of seniority rights of bargaining unit employees), the employer may well have had a duty to bargain the fundamental decision in this situation. The union relieved the employer of a problem in this regard - it demanded that Burton be reverted to the bargaining unit and evidently put up no barriers to the city's doing so.

The issue is, of course, what happens to Burton's wages upon his return to bargaining unit work.

Chapter 41.56 RCW says, in pertinent part, that:

> It shall be an unfair labor practice for a public employer: (1) to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter; (4) to refuse to engage in collective bargaining."

RCW 41.56.140(1), (4) (emphasis added)

The statute provides that collective bargaining means the

> ... performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions....

RCW 41.56.030(4) (emphasis added)

Faced with this clear statutory design, the Commission has held in several cases that unilateral changes implemented during the term of a labor agreement as to matters not covered by the agreement violate RCW 41.56.140(4) absent a defense of waiver of bargaining rights or a defense that the parties had reached an impasse in negotiations on the issue. Under corollary statute RCW 41.59.140, directing labor negotiations among certificated school employees, PERC has specifically ruled that unilaterally determining a salary figure or wage rate is a violation of the duty to confer, negotiate and reduce to writing the wages of the employees within an appropriate unit. Shelton School District No. 309, Decision 579-B (EDUC, 1984). Either under RCW 41.56.140 or RCW 41.59.140, the state laws carry out a basic policy, similar to that of the National Labor Relations Act, that wages are a mandatory subject for bargaining, and that no unilateral changes can be made without negotiations with the recognized union.

Was There Waiver by the Union?

The city argues that, having decided Jack Burton's position as water treatment director was surplus, Jack Burton was also surplus, at least as to the city work force. The city did not negotiate his retention as a city employee; it did not negotiate his subsequent job placement with the city, and it did not negotiate either his 1983 or 1984 salary. In short, the city did the best that it felt it could for Burton without the union's participation or approval. Now, the city urges that the union waived its right to negotiate Burton's wage, because it only threatened to file a grievance. But the union never agreed to contract language which preserved prerogatives with respect to wages to the employer only, as in Renton School District, Decision 1608 (PECB, 1983). As an affirmative defense, "waiver" on the part of the union must be shown during the employer's case-in-chief. The city neither went forward nor showed such proof. See: Lakewood School District, Decision 755-A (PECB, 1980). Indeed, the union presented a letter wherein it expressed its thinking on how Jack Burton should be accommodated.

> ... As you informed me, the City Council has agreed to include Jack in the bargaining unit effective May 1, 1983. You further stated that the City's position is that Jack retain his present salary until the end of the year and then would receive the skilled laborers salary from that date forward.
>
> After discussions with our members, it was felt that Jack should retain his salary until either (1) the skilled laborer's position passes his present salary or (2) if a decrease were to take place he could immediately revert to the skilled laborer's salary. I hope we can settle this as soon as possible, but if we need further discussions, I feel that a meeting between the parties might be appropriate.

Exhibit 5, Letter of April 25, 1983 from Cole to Yates.

The union thus set out its counterproposal position, and invited the city to meet on this particular matter during 1983. During this period, Burton's salary level remained as unilaterally placed by the city above the skilled rate of $7.77 per hour. There was no reason for the union to file a grievance, since it did not object to the payment at the rate in excess of contract scale and any claim would not have been ripe as a controversy.

Since its earliest decisions, the Commission has been consistent in requiring far more from employers and labor organizations than merely meeting and conferring. Unions must appreciate that employers have a day-to-day responsibility to manage, administer and lead the services offered by the municipal corporation. Employers must look upon the exclusive bargaining representative as not only a source of advice, but a source of authority as well. Each party must meet in good faith and be prepared to resolve, in a

written agreement, all disagreements with respect to wages, hours and working conditions. If exceptions to this rule are allowed, the policy of RCW 41.56 will be diminished proportionally. Federal Way School District, Decision 232-A (EDUC, 1977).

The union, for its part, was aware of Burton's re-classification and re-entry into the bargaining unit as soon as it happened in the spring of 1983. Once Burton was in the unit, the employer had a duty to bargain with the union about any change thereafter of "wages". See Renton School District, Decision 1608 (PECB, 1983). The union made and re-iterated its request to determine Burton's salary at the bargaining table. The city attorney's letters to the union business representative may be interpreted at their best as implicit promises to meet and confer over Burton's salary; at worst they were efforts to communicate the singular purpose and intent of the mayor and the city council.

When the city implemented Burton's bargaining unit wage rate at a rate above the contractual rate and without the agreement of the union, it established a new "base" from which future unilateral changes must be measured. See: City of Seattle, Decision 651 (PECB, 1979). Once Burton was in the bargaining unit, the employer could not change his wages without bargaining to agreement or impasse with the union. The employer stated a position to the union, but that was the same position decided upon by the employer prior to Burton's reversion to the bargaining unit and presented to the union as a fait accompli upon his reversion. The employer jumped the gun. It has overlooked the fact that it was in actuality making a change of the wage rate of a bargaining unit employee without the agreement of the union. Because the city made a final decision after failing to negotiate with the exclusive representative, the implementation of Burton's new salary on January 1, 1984 was an unlawful unilateral action on the city's part. Entiat School District, Decision 1361 (PECB, 1982), City of Hoquiam, Decision 745 (PECB, 1979), Mason County, Decision 1486 (PECB, 1982).

Prior to July 1, 1983, the union had the advantage of a longer period -- two years -- within which to bring a claim before the Public Employment Relations Commission. By the time Burton's salary was reduced to $7.77 on January 1, 1984, the statute had been amended to provide only a six-month limitations period. The union filed its complaint within a month following the reduction of Burton's wage and also filed a grievance under the collective bargaining agreement. Accordingly, the union filed a timely claim for relief on the failure to bargain problem pursuant to RCW 41.56.140(1) and (4). While the union might have filed charges earlier on the issues as they then existed, the action actually complained of did not transpire in early 1983. The action on which this complaint is based was the unilateral change which occurred on January 1, 1984.

The present case illustrates the need for reduction of labor relations agreements to written memoranda, as commanded by RCW 41.56.030(4). It is likely that one additional meeting between the city and the union in mid-1983 would have produced an agreement as to how to deal with the unique situation involving Mr. Burton. At the very least, an additional issue would have emerged from such a meeting and remained a topic for discussion during subsequent bargaining and mediation. Instead, the city unilaterally made its decision, implemented the change, and in so doing has run afoul of RCW 41.56.140(1). The complainant is therefore entitled to a remedy.

FINDINGS OF FACT

1. The City of Dayton is a municipality of the State of Washington and a "public employer" within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees Local 1191 of Dayton is a bargaining representative within the meaning of RCW 41.56.030(3) and has represented all non-supevisory employees of the city since 1968.

3. Jack Burton, a public employee within the meaning of RCW 41.56.030(2), was employed by the City of Dayton since September 1, 1962.

4. In 1968, Burton was a member of the bargaining unit and was compensated at the "skilled labor" hourly rate of pay. In 1977, Burton was promoted to a titled position of "assistant city superintendent" which gave him authority and control over the water filter treatment plant. He was removed from the bargaining unit and placed on a compensation plan which paid him a monthly salary, the latest being $1472 per month during 1983.

5. The city closed the filter treatment plant in 1982 and moved Burton to the job of "parks superintendent". Budget restraints later resulted in the city deciding to assign Burton to bargaining unit work in the cemetery and sewage treatment plant.

6. Responding to a demand made by the union, the city acknowledged that Burton would be reverted to the bargaining unit. In April, 1983, the city and the union exchanged letters discussing how Burton was to be paid after his reversion to the bargaining unit. The union requested that a meeting be held to resolve Burton's salary.

7. On April 29, 1984, without further negotiations with the union, the city announced that Burton would be reverted to the bargaining unit, that his wage would remain at the salaried rate of $1472 per month through 1983 and that he would revert to the lower labor contractual rate in January, 1984.

8. Burton was changed to bargaining unit status as of May 1, 1983. Without agreement of the union, he was paid for the balance of 1983 at a monthly salary of $1472.

9. The parties never agreed on a reduction of Burton's salary. Without further negotiations with the union, the city unilaterally reduced Burton's wage rate effective January 1, 1984.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. The union has filed a timely complaint alleging unfair labor practices under RCW 41.56.160, since the January 1, 1984 unilateral reduction change of wages of a bargaining unit member took place during the six-month period prior to the filing of the complaint in this matter.

3. The employer has violated RCW 41.56.140(1) and (4) by unilaterally changing and implementing a differing wage rate for an employee subject to representation by the exclusive bargaining representative, without having satisfied its duty to bargain by negotiating to agreement or impasse.

ORDER

1. The City of Dayton shall cease and desist from:

   (A) refusing to bargain with the Washington State Council of County and City Employees Local 1191,

   (B) unilaterally altering and determining wage rates without engaging in collective bargaining with Washington State Council of County and City Employees Local 1191.

2. The City of Dayton shall immediately take the following affirmative actions to remedy the unfair labor practices and to effectuate the policies of RCW 41.56.030(4):

   a. Make whole employee Jack Burton by reimbursing him for any loss of pay and benefits he might have suffered because of the reduction of his wages by the city, by paying him at the rate of $1472 per month effective January 1, 1984. Such remedy shall be subject to computation and payment of interest as provided by WAC 391-45-410.

b. Bargain collectively in good faith with the Washington State Council of County and City Emloyees Local 1191 as the exclusive bargaining representative of the city's employees with respect to wages and specifically with respect to the situation of Jack Burton.

c. Post, in conspciuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notices shall, after being duly signed by an authorized representative of the City of Dayton, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Dayton to ensure that said notices are not removed, altered, defaced or covered by other material.

d. Notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 22nd day of January, 1985.

ISSUED at Yakima, Washington, this 18 day of January, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX A

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with Washington State Council of County and City Employees Local 1191, by refusing to meet, confer and negotiate wage rates for all employees in the collective bargaining unit.

WE WILL reimburse and make whole employee Jack Burton for improper reduction in his wages beginning January 1, 1984.

CITY OF DAYTON

BY: _____
Mayor

BY: _____
Chairperson, City Council

DATED: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.