STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286,<br><br>Complainant,<br><br>vs.<br><br>CLOVER PARK SCHOOL DISTRICT,<br><br>Respondent. | CASE NO. 5643-U-85-1033<br><br>DECISION 2560-B - PECB<br><br>DECISION OF COMMISSION |

Hafer, Price, Rinehart & Schwerin, by John Burns, Attorney at Law, appeared on behalf of the complainant.

Kane, Vandeberg, Hartinger & Walker, by Elvin J. Vandeberg, Attorney at Law, appeared on behalf of the respondent.

On January 18, 1985, International Union of Operating Engineers, Local 286, (IUOE) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Clover Park School District had violated RCW 41.56.140(1) and (4), by contracting out certain bargaining unit work. A statement of facts was filed on February 28, 1985. An amended statement of facts was filed on March 13, 1985.

On April 2, 1985, the unfair labor practice allegations were "deferred" pending completion of the grievance procedure of the collective bargaining agreement between the parties. The matter came before an arbitrator for hearing on April 2, 1986, and an arbitration award was issued on May 2, 1986. A copy of

the arbitration award was received by the Commission on July 1, 1986. On October 31, 1986, the Executive Director issued a Preliminary Ruling and Order to Show Cause,[1] directing the employer to indicate why the arbitration award should not be taken as conclusive with respect to the facts and contractual matters determined therein. The employer's reply was received on November 13, 1986, and Examiner Jack T. Cowan was designated to conduct further proceedings pursuant to Chapter 391-45 WAC.

A hearing was conducted at Tacoma, Washington, on June 15, 1987, before the Examiner. In a decision issued February 2, 1988,[2] the Examiner found that the employer had violated RCW 41.56.140(4) and (1), and ordered remedies.

The employer filed a timely petition for review, bringing this matter before the Commission.

## POSITIONS OF THE PARTIES

The school district appeals from the Examiner's decision on three points: First, it contends that the work contracted out was not bargaining unit work; second, it contends that contracting out of bargaining unit work is not, per se, an unfair labor practice; and third, it contends that the Examiner's order is punitive, not remedial.

The union believes that the Examiner's decision should be upheld.

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1 Clover Park School District, Decision 2560 (PECB, 1986).

2 Clover Park School District, Decision 2560-A (PECB, 1988).

## DISCUSSION

### The Duty to Bargain the Decision to Contract Out

We first take up the employer's challenge to the Examiner's conclusion that there was a duty to bargain concerning the decision to contract out unit work, as there would be no need to look for contractual waivers if there were no underlying duty to bargain. RCW 41.56.140 provides:

> It shall be an unfair labor practice for an 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.

"Collective bargaining" is defined in RCW 41.56.030(4) as:

> . . . the performance of the mutual obligation of the 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, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless other wise provided in this chapter.

Contracting out of bargaining unit work has previously been held to be a mandatory subject of collective bargaining, as to which the employer generally has a duty to give notice to the exclusive bargaining representative of its employees and to

provide an opportunity for bargaining prior to making a decision. See, for example, South Kitsap School District, Decision 472 (PECB, 1978) and City of Kennewick, Decision 482-B (PECB, 1980).

The bargaining unit involved here includes employees who perform custodial/maintenance assignments. The contract specifications for the work at issue in this case state:

> CONTRACT SPECIFICATIONS
> MAINTENANCE & OPERATION
> LAKES SWIMMING POOL DECEMBER, 1984
>
> 1.0 LOCATION: Swimming Pool Bldg
> Lakes High School
> 10320 Farwest Drive SW
> Tacoma, WA
>
> AREAS OF WORK:
> Boys locker room/shower/lavatory/offices
> Girls locker room/shower/lavatory/offices
> Office area
> Foyer area
>
> 2.0 SCOPE OF WORK:
> 2.1 For all areas: Dust down ceiling and walls; spot clean ceiling and walls; remove dirt and grime from light fixtures, lamps, cabinets, air supply and return registers, heating units, and all ledges; and clean all mirrors and windows on both sides.
> 2.2 In locker rooms, including shower and lavatory areas: wash down ceiling, walls, lockers, cabinets, and all fixtures with a quaternary disinfectant solution.
> 2.3 Remove all scum, body oil, and mineral deposits from all floor tile, wall tile, grouting, shower walls and stalls, toilet bowls, urinals, sinks, flushometers, valves, and drains.
> 2.4 Restore and polish all stainless steel and chrome surfaces.
> 2.5 Restore and seal all grouting.
> 2.6 Clean and polish all wood cabinets and furniture.

> 3.0 COMPLETION
> 3.1 Facilities shall be available to contractor from 9:00 p.m. to 5:00 a.m. on weekdays and 1:00 p.m. Saturday to 5:00 a.m. Monday on weekends.
> 3.2 Facilities can be made available from December 26 through 31, 1984, on a 24 hour basis.
> 3.3 All work must be completed by January 31, 1985.

It appears from the record that the contract was let in an amount of $400.

In City of Kennewick, supra, the Commission made reference to the standards used by the National Labor Relations Board (NLRB) for determining the necessity of bargaining on decisions to contract out bargaining unit work. The NLRB's Westinghouse decision,[3] cited in Kennewick, noted that bargaining has "invariably" been required where:

> ... the contracting out involved a departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.

Westinghouse, 150 NLRB at 1576.

Other authorities[4] have suggested that "subcontracting motivated solely by economic reasons" and the circumstance of there having been "opportunity to bargain about changes in existing subcontracting practices at general negotiations

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[3] Westinghouse Electric Corporation, 150 NLRB 1574 (1965).

[4] See, Morris, The Developing Labor Law, BNA Books, Second Edition at p. 824.

meetings" be added to the list of circumstances when bargaining is not required.

The record does not support a finding that the contracting out at issue here was consistent with previously established operating practices of this employer. While the school district apparently has contracted out some remodeling work in the past, the evidence does not show that cleaning work of the type involved here had been contracted out. Additionally, it is not clear from the record that the remodeling work which has been contracted out was ever within the scope of work usually performed by bargaining unit employees.

The evaluation of whether there was significant detriment to the employees in the bargaining unit may be in the eyes of the beholder, as the operative term appears to be "significant". While perhaps small in the view of an employer with a multi-million dollar budget, the $400 contract amount could be significant from the point of view of a bargaining unit employee, so that the loss of opportunity to perform the work at issue was significantly detrimental to the bargaining unit.

There is nothing in the record here to indicate that the school district's motivation was solely economic. On the contrary, as noted below, there is substantial evidence that the motivation was largely, if not entirely, based on dissatisfaction with the performance of bargaining unit members who had attempted the work in the past.

The record does not show that the union had notice of this particular decision to contract out, or of a change of practices concerning contracting out, prior to signing the collective bargaining agreement that was in effect at the time pertinent to this case. Thus, there is no support for a

finding that the union had an opportunity to bargain generally about changes in existing contracting practices at general negotiating meetings.

We conclude that the employer was not excused under Westinghouse and other NLRB precedent from its normal obligation to give notice of the proposed contracting out to the union and, upon request, to bargain with the union concerning both the decision and its effects prior to implementing the change of practice.

Waiver by Contract / Deferral to Arbitration

We next consider whether the arbitration award issued on the union's grievance is conclusive in this matter. In his Preliminary Ruling and Order to Show Cause, the Executive Director noted that arbitrator could have: (1) Found that the employer's conduct was prohibited by the contract and fashion a remedy; (2) found that the conduct was protected by the contract, thereby denying the grievance; or (3) found that the conduct was neither prohibited nor protected by the contract. It was further noted that either of the first two results in arbitration would indicate that the subject matter had been dealt with in bargaining, so as to result in the dismissal of the unfair labor practice charges, while the third likely result in arbitration would eliminate the employer's "waiver by contract" defense in these unfair labor practice proceedings.

In this case, the arbitrator stated that he declined to rule on whether the union had "waived its right to bargain" with the employer on the subject of contracting out work, but he found no contract language either prohibiting or protecting the employer's contracting action.

In the absence of explicit language on the subject of contracting out, arbitrators have nevertheless sometimes overturned contracting out decisions where they found, on a variety of grounds, that the employer's action subverted the collective bargaining agreement. In this case, the arbitration award itself indicates that both parties made reference in their arguments to the discussion of this subject in Elkouri and Elkouri, How Arbitration Works, BNA Books, Fourth Edition, at p. 537 ff, and particularly to a set of eleven "standards" in arbitration which are set forth at p. 540 ff. of that work. The arbitrator himself then made reference to each of those "standards" in his analysis, and he arguably supported his decision to deny the grievance, in part, with the implication that the contracted work "differed from standard bargaining unit work".

The Commission is empowered by RCW 41.56.060 to decide disputes concerning matters of unit determination. City of Richland, Decision 279-A (PECB, 1979), aff. 29 Wn.App 599 (Division III, 1981), pet. rev. den. 96 Wn.2d 1004 (1981). The conclusion of the arbitrator that the contracting out at issue did not offend his sense of what would constitute a subversion of the contract does not bind the Commission to accept the arbitrator's rulings concerning the scope of bargaining unit work. This is particularly the case where the arbitrator's other conclusions concerning the absence of language protecting or prohibiting contracting out clearly placed the situation within the unfair labor practice jurisdiction of the Commission.

A review of the contract specifications details cleaning work. The areas to be cleaned are portions of a swimming pool building operated by the school district. There is no disagreement that routine cleaning of that facility was work normally and regularly performed by members of the bargaining

unit. The record also shows that "heavy cleaning" had occasionally been performed by bargaining unit members in the past, albeit with mixed results. The arbitrator's rationale for minimizing or ignoring the unit work claim of the union is based largely on the less-than-satisfactory results achieved by bargaining unit members. In his conclusion, the arbitrator stated,

> The evidence indicates that the District had tried on previous occasions to deal with the problem using its regular bargaining unit employees and methods of cleaning. These prior attempts had failed. In these circumstances, the arbitrator finds that the District was justified in going outside the bargaining unit to try to take care of the problem.

Arbitration award at p. 25.

There is no indication, however, of any fundamental difference in the nature of the task or in the duties, skills or working conditions of the employees who were to do the work. Chapter 41.56 RCW does not allow us to consider that inefficiency or inadequacy in performing work defines the scope of bargaining unit work. The Commission finds that the disputed work was bargaining unit work before, during, and after the contracting at issue in this proceeding.

In holding that the work contracted out was bargaining unit work, the Commission does not mean to suggest that an employer must continue to tolerate inconsistency or inefficiency of its employees in the performance of their assigned tasks. The employer's dissatisfaction with the results of past efforts by bargaining unit employees may well have motivated the employer to consider contracting out, and may well have been used by the employer in support of its proposal during collective bargaining on the matter, but was not a basis to conclude that the

work somehow fell outside of the unit work claims of the union or that the employer was relieved of the duty to bargain the contracting decision and its effects.

Given the absence of contract language prohibiting contracting out, the grievance could simply have been denied. The additional discussion in the arbitration award merely indicates to us that the arbitrator found no alternative basis to sustain the grievance. The Executive Director and Examiner thus properly proceeded with the processing of the unfair labor practice charge.

## Remedies

The Examiner's remedial order is measured against the hours spent on the contracted task by the contractor's employees. The Commission has reviewed that Order and does not find it punitive. The purpose of a remedial order is to put the injured party (in this case, the bargaining unit employees who would otherwise have performed the work) back in the position they would have enjoyed, but for the violation. Thus, the remedial order is properly structured from the point of view of the bargaining unit employees. The remedy stands.

NOW, THEREFORE, it is

## ORDERED

1. The findings of fact, conclusions of law and order issued by Examiner Jack T. Cowan in this matter are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

2. Clover Park School District, its officers and agents, shall notify the Commission within thirty (30) days following the date of this order of the steps taken to comply with order issued by Examiner Jack T. Cowan and adopted herein by the Commission.

DATED at Olympia, Washington, this 6th day of October, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman

MARK C. ENDRESEN, Commissioner

JOSEPH F. QUINN, Commissioner

CONCURRING OPINION

I concur with the rationale of the main opinion in this case, but choose to make some additional remarks about the "deferral to arbitration" issue.

Our policy of deferral to arbitration is based on the premise that the arbitrator should determine whether or not the mandatory bargaining issue has been settled by the contract. As stated in the main opinion in this case, an arbitrator can determine that the conduct complained of is: (1) protected by the contract; (2) prohibited by the contract; or (3) neither protected nor prohibited by the contract. Either of the first two findings will result in a determination that the parties "waived" their mandatory bargaining rights by agreeing to the provisions contained in the contract. When specific contract language exists addressing the issue, the arbitrator simply interprets that language and proceeds with one of those two options, as appropriate. From time to time, certain issues arise that are not addressed expressly or impliedly by the parties' contract. In other words, the conduct complained of is neither protected nor prohibited by the contract. In those cases, the arbitrator proceeds with a ruling that the dispute is not arbitrable and dismisses the grievance. If a mandatory bargaining right is at issue, then the matter is placed squarely within the Commission's retained jurisdiction. It is obvious from the arbitrator's determination that the issue has not been bargained to agreement.

Arbitration decisions on contracting out do not always fit neatly within this analysis. The reason is that such contracting rights are frequently <u>not</u> addressed in a collective bargaining agreement, yet arbitrators almost universally infer either a retained management right, or restrictions on

management's ability to contract out, with most arbitrators now leaning towards the latter approach. Such cases are further discussed in Fairweather, Practice and Procedure in Labor Arbitration, 469 - 493 (BNA, 1983). This willingness of arbitrators to rule on the merits of the issue, despite contractual silence,[5] has not gone without criticism among arbitrators. For example, Arbitrator Cocalis, in Continental Tennessee Lines, Inc, 72 LA 619, 621 (1979) wrote:

> [H]ow does one determine the parties' intent regarding subcontracting when the agreement is silent on the subject and when the subject was not even discussed during negotiations?

See, also, American Sugar Refining Co., 37 LA 334, 337 (Beatty, 1961). Nevertheless, the fact remains that most arbitrators find some basis for making a ruling on the merits. Those reasons have now evolved into a set of criteria that are set forth in Elkouri and Elkouri, How Arbitration Works, supra, at 537 et seq. Those criteria were applied by the arbitrator in the case at hand.

This peculiar nature of contracting out cases creates a tension between the Commission's jurisdiction and its deferral policies, as well as with the jurisdiction and deferral policies of the National Labor Relation Board. This tension, as it pertains to the NLRB, is discussed in How Arbitration Works, supra, in Chapter 13 at pages 463 to 475. It is particularly evident in the case at hand, where the arbitrator

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[5] One arbitrator, finding implied restrictions, reasoned:

> If [the agreement] does not speak out on [subcontracting], it at least whispers....

Continental Can Co., 29 LA 67, 73 (Sembower, 1956).

has implicitly defined the scope of bargaining unit work. Nevertheless, unit determination is a question committed to our own jurisdiction. We have previously ruled that we retain the authority to overrule, if necessary, parties' agreements regarding the boundaries of the bargaining unit. City of Richland, Decision 279-A (PECB, 1978), supra. Arbitration is merely an extension of the parties. While the arbitrator in the case at hand may have properly performed his duties as arbitrator in determining the scope of unit work, as a matter of policy, that is a determination to which we will not defer. Accordingly, the unfair labor practice charge is properly before the Commission in this case.

Jane R. Wilkinson

JANE R. WILKINSON, Chairman