STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 117, Complainant,	)	CASE 15114-U-00-3814
vs.	)	DECISION 7271-A - PECB
PORT OF SEATTLE, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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On March 27, 2000, Teamsters Union, Local 117 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Port of Seattle (employer) had unilaterally contracted out work historically done by employees in a bargaining unit represented by the union. Examiner Rex L. Lacy held a hearing on April 19, 2001. The parties filed post-hearing briefs.

The Examiner concludes that the employer did not commit any unfair labor practice by entering into a contract by which a private firm leasing terminal facilities from the employer will provide its own personnel to perform security work of a type that was not historically performed by employees represented by the union. The complaint is DISMISSED.

BACKGROUND

The employer is a public port district in King County, Washington, operating under Title 53 RCW. It provides a variety of functions, including a law enforcement operation responsible for maintaining order at various employer facilities.

The union is the exclusive bargaining representative of three separate bargaining units within the employer's law enforcement operation. One unit consists of rank-and-file police officers; the second unit is limited to sergeants; the third unit is limited to lieutenants.

The employer and union have been parties to a series of collective bargaining agreements, the latest of which expired on December 31, 1999. Unresolved issues in the parties' negotiations for a successor contract were referred to interest arbitration under RCW 41.56.450.

Law enforcement officers represented by the union provide some, but clearly not all, of the security functions at the employer's facilities. At the Seattle-Tacoma International Airport operated by the employer, security screening of passengers within the terminal facilities (including electronic scanning of passengers and their carry-on items) has historically been provided by private firms hired by the various airlines. The employees of those private firms do not have the power of arrest, and law enforcement officers represented by the union continue to patrol the facility and make arrests, when necessary.

For many years, a limited number of passenger ships arrived at and departed from Seattle, and then only on a sporadic basis. On those

few occasions, they docked variously at Pier 25, Pier 30, Pier 46, or Pier 48, on the south end of the Seattle waterfront, or at Pier 90 or Pier 91 on the north end of the Seattle waterfront. The employer only assigned its law enforcement personnel to work at those facilities on an as needed basis. The employer would typically assign up to five police officers and a sergeant to be present during the port calls of passenger ships, and the employees represented by the union then only provided general patrol and directed traffic. Passengers and baggage were not handled in a consistent manner, and embarking passengers did not pass through any electronic monitoring devices at those facilities.

Cruise Ship Operation Altered

The employer renovated its facilities at Pier 66 on the central Seattle waterfront, including development of the Bell Street Terminal for use by passenger ships. By 1998 and 1999, increasing numbers of cruise ships calling at Seattle had commenced using Pier 66 exclusively for loading and unloading passengers and their baggage. Passenger traffic through the cruise ship terminal has increased dramatically, from approximately 10,820 persons in 1993 to about 119,000 persons in year 2000.

The United States Coast Guard regulates the operation of vessels and terminals throughout the United States, and Coast Guard regulations cover both "Protection and Security of Vessels, Harbors, and Waterfront Facilities" at 33 CFR Chapter 1, Part 6 and the "Security of Passenger Vessels" at 33 CFR Chapter 1, Part 120. Pier 66 is identified as a passenger terminal. As such it is required to have a "Terminal Security Plan" approved by the Coast Guard. With one exception, law enforcement employees represented by the union were assigned to be present when ships called at the

new cruise ship terminal prior to the contract that gives rise to this case. The union filed a grievance on the one occasion when other employees were utilized to perform security functions, and the parties resolved that grievance to the apparent satisfaction of the union.

On March 24, 2000, the employer entered into a contract with Cruise Terminals of America (CTA) for the operation of the cruise ship terminal at Pier 66. That agreement included:

> CTA shall manage and coordinate all activities related to the berthing of ships ("Ship Activities"), which will principally be cruise ship activities at the facility including:
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> . . . .
> (B) SECURITY. Manage the security operations at the Facility, on cruise ship days and for non-cruise ships, as necessary. This will include security staff who will provide security guards and security equipment operators for terminal security.

The CTA provided a security plan for the Port of Seattle, and it was approved for use by the Coast Guard. Under that plan, CTA employees are recognized by the Coast Guard as "security" personnel without the power of arrest. The Coast Guard recommended that one police officer be assigned to Pier 66 when one passenger ship is present, and that two police officers be assigned when two ships are present, but the Port of Seattle assigns a minimum of two of its law enforcement officers to Pier 66 whenever cruise ships are present.

Within days after the contract between the employer and the CTA was signed, the union filed the complaint to initiate this unfair labor practice proceeding.

While the number of law enforcement personnel on duty at Pier 66 during cruise ship operations has decreased (from five or six police officers plus one sergeant to a minimum of two police officers plus a sergeant who divides his responsibilities among several waterfront locations), that reduction of law enforcement personnel did not result in the loss of employment for any bargaining unit member.

POSITIONS OF THE PARTIES

The union contends that the employer unilaterally contracted out security work historically performed by members of the bargaining unit it represents, without bargaining that change with the union.

The employer contends that the controversy concerns a matter controlled by the parties' collective bargaining agreement, and also contends that employees represented by the union have not historically provided security services similar to those now provided by the private firm, so that the employer did not commit any unfair labor practice by entering into the contract.

DISCUSSION

The Standard for Determination

This proceeding is conducted under the unfair labor practice provisions of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, inasmuch as Chapter 53.18 RCW does not contain any provisions concerning unfair labor practices. RCW 53.18.015. Chapter 41.56 RCW requires public employers to engage in collective

bargaining with the exclusive bargaining representatives chosen by their employees. RCW 41.56.030 defines the subjects of collective bargaining, as follows:

> RCW 41.56.030 DEFINITIONS. As used in this chapter:
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> . . . .
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> (4) "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,* 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 otherwise provided in this chapter.

(emphasis added).

The topics included within "wages, hours and working conditions" have come to be known as the *mandatory subjects of bargaining*, and an employer that refuses to bargain about (or takes unilateral action on) such matters commits an unfair labor practice under RCW 41.56.140(4). *City of Pasco v. PERC*, 119 Wn.2d 504 (1992).

A balancing test is used to determine whether a particular topic is a mandatory subject of bargaining. In *IAFF, Local 1052 v. PERC (City of Richland)*, 113 Wn.2d 197 (1989), the Supreme Court of the State of Washington described the factors to be applied, as follows:

> On one side of the balance is the relationship the subject bears to "wages, hours and working

> conditions". On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. . . . *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222-23 . . . (1964). Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. . . .

IAFF, Local 1052 v. PERC, at 203.

In its adoption of a balancing test, the Supreme Court followed the same approach used by the Commission in previous rulings concerning scope of bargaining disputes. *See Lower Snoqualmie Valley School District*, Decision 1602 (EDUC, 1983); *City of Olympia*, Decision 3194 (PECB, 1989).

The preservation of "bargaining unit work" has been found to be a mandatory subject of collective bargaining in numerous cases. The leading case on the subject was decided by the National Labor Relations Board (NLRB) and federal courts under the National Labor Relations Act.[1] The *Fibreboard* decision cited by the Supreme Court of the State of Washington in *IAFF, Local 1052, supra*, involved an employer's decision to contract out work previously performed by bargaining unit employees to an independent contractor. Noting that the work at issue in that case continued to be performed by employees (although now by employees of the outside contractor), the Supreme Court of the United States held that an employer's decision to contract out bargaining unit work is a mandatory subject of collective bargaining. Since *Fibreboard*, the NLRB and

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[1] Decisions construing the federal law are persuasive in interpreting similar provisions of Chapter 41.56 RCW. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984); *City of Bellevue v. IAFF, Local 1604*, 119 Wn.2d 373 (1992).

federal courts have consistently held that infringements on bargaining unit work are a mandatory subject of collective bargaining.[2]

The principle established in *Fibreboard* has been reiterated in numerous Commission decisions over the years. In *City of Vancouver*, Decision 808 (PECB, 1980), the employer contracted with a private company to take over operations of its wastewater treatment

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[2] In *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967), work preservation language in a collective bargaining agreement (stating that union members would not handle pre-machined doors) was claimed to violate the NLRA. The NLRB ruled that the provision was designed to preserve cutting and fitting work which jobsite carpenters had customarily performed. The Supreme Court affirmed the NLRB's ruling, holding that work preservation language of this nature was lawful.

In *Brotherhood of Locomotive Firemen & Enginemen*, 168 NLRB 677 (1967), *aff'd* 419 F.2d 314 (1969), the NLRB held the preservation of work usually performed in a bargaining unit is a mandatory subject of bargaining. After abandoning a bargaining table proposal to exempt a class of employees from the bargaining unit, the employer went ahead with creating a new classification to perform the work outside of the bargaining unit. The NLRB held the union had been unlawfully deprived of its right to bargain the transfer of unit work.

In *NLRB v. Rockwell-Standard Corp., Trans. & Axle Div.*, 410 F.2d 953 (1969), the bargaining unit included office-clerical employees of several divisions. The employer moved one division to a facility a few miles away and hired an outside agency to provide functions historically performed by bargaining unit employees, and it refused to provide the union with requested information about the transfer. The court of appeals stated:

> If unit work was in fact transferred . . . the Union may have grounds to file . . . unfair labor practice charges. The preservation or diversion of unit work is a subject of mandatory bargaining under the Act.

The NLRB's finding of a violation was thus affirmed.

plant. The evidence established that the union which represented the displaced employees was not given advance notice of the employer's proposed decision to contract out the work, or provided an opportunity for bargaining before the decision was made. In ruling that the employer's conduct violated RCW 41.56.140(4), the Commission stated, "[I]t would serve the intent of the statute to permit the union to collectively bargain to protect negotiated working conditions." The fact that the 18 employees laid off by the public employer as a result of the contracting decision were all offered (and accepted) employment with the private firm did not eradicate the public employer's violation of its collective bargaining obligations toward the union.[3]

A key distinction is disclosed by comparison of two decisions involving the City of Kelso. In *City of Kelso*, Decision 2120-A

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[3] In *South Kitsap School District*, Decision 472 (PECB, 1978), and numerous subsequent cases, the same principle has been applied to transfers of work within an employer's workforce. In his concurring opinion in *Fibreboard*, Justice Stewart emphasized the security of employment and specifically commented on internal transfers of bargaining unit work, as follows:

> [A]ssignment of work among potentially eligible groups within the plant - all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.

Fibreboard, supra, at 224.

The effect on the bargaining unit is the same, regardless of who gets the work. The *South Kitsap* decision cited *Awrey Bakeries, Inc.*, 217 NLRB 730 (1975), *aff'd* 548 F.2d 138 (6th Circuit, 1976), where the employer unlawfully transferred work from employees in one bargaining unit (who had moved product from loading docks into retail stores and arranged displays) to truck drivers in another bargaining unit (whose responsibilities previously ended with delivery of the products to the loading dock).

(PECB, 1985), that employer was found to have violated its bargaining obligation by contracting out its fire suppression operation to a neighboring fire district. The decisions in *Fibreboard*, *City of Vancouver*, and *South Kitsap School District* were all cited for the following principle:

> While the cases detailed above arose in different factual settings, one common circumstance exists. In each of the subcontracting disputes, the employer did not change its business character, and it provided the same services to the public. The only evident change was the removal of the employees performing the work from the bargaining unit and from the employer's payroll.

City of Kelso, Decision 2120 at 11 (PECB, 1984).

Based on findings that the contract called for the City of Kelso to collect taxes and make payments to the fire district for the services, and that the contract was terminable at will by the City of Kelso, an unfair labor practice violation was found. By contrast, an unfair labor practice complaint was dismissed in *City of Kelso*, Decision 2633-A (PECB, 1988), upon a conclusion that there had been a fundamental change of business character after the City of Kelso annexed itself to the neighboring fire district and thus gave up both control and the collection of taxes regarding the fire protection operation.[4]

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[4] In his concurring opinion in *Fibreboard*, Justice Stewart also indicated that not every decision affecting job security would constitute a mandatory subject, and that decisions "at the core of entrepreneurial control" would be considered to be permissive subjects of bargaining. Examples of "permissive" subject areas cited by Justice Stewart included decisions concerning the volume and kind of advertising expenditures, product design, manner of financing and of sales, commitment of investment capital, and the basic scope of the enterprise. Such decisions are not primarily about conditions of employment.

Application of the Standard

This case hinges upon whether the security work now performed by employees of CTA is:

- Merely a reassignment of work historically performed by the bargaining unit represented by the union (so that the employer had a duty to bargain with the union concerning its decision to contract with CTA for those services); OR
- New work outside of the union's historical work jurisdiction and/or resulting from a fundamental change of the business (so that the employer had no duty to bargain its decision with the union).

The Examiner concludes that this case falls into the second of those categories.

The security work provided by CTA employees at Pier 66 is comparable to the airline-supported security screenings at the employer's airport. Passengers embarking on cruise ships pass through electronic monitoring devices, much the same as passengers embarking on airplanes. In both settings police officers are present, but are only called upon to make arrests that are beyond the authority of the private security personnel.

Both union and employer witnesses testified that the operation of electronic monitoring devices has never been work performed by the law enforcement employees assigned by the public employer to work at Pier 66 during port calls of passenger ships.[5] Now, all

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[5] In fact, passengers entering or leaving Pier 66 prior to the recent renovation of that facility did not pass through any electronic monitoring devices. Baggage was placed randomly at any of the piers utilized by the cruise ships, and security was lax at best.

passengers are subjected to electronic scanning before they embark on a vessel, and are checked through Customs when debarking from a vessel.

The decline of the number of police officers assigned to Pier 66 is the result of a combination of facts and circumstances outside of their conditions of employment. As the result of capital investment, Pier 66 now has fenced areas where embarking passengers gather. Consistent with Coast Guard regulations, passengers, their baggage, and ship's provisions are generally subjected to greater scrutiny than was applicable in the past, and heightened security arrangements. The evidence thus supports a conclusion that the union has not established its claim of work jurisdiction with regard to the security work at issue in this proceeding.

FINDINGS OF FACT

1. The Port of Seattle is a public port district of the state of Washington, created under Title 53 RCW, and is a "public employer" within the meaning of RCW 41.56.030(1). The employer provides services normally associated with port districts, including the operation and maintenance of commercial airport and a cruise ship terminal, and has its own law enforcement department responsible for making arrests for misconduct at the airport and cruise ship terminal.

2. Teamsters Union, Local 117, a "bargaining representative" within the meaning of RCW 41.56.030(3) is the exclusive bargaining representative of three separate units of law enforcement officers employed by the Port of Seattle. Units consisting of police officers and sergeants are involved in this proceeding.

3. The employer and union have been parties to a series of collective bargaining agreements, the latest of which was effective through December 31, 1999.

4. Over a period of several years prior to March 24, 2000, the employer made improvements to its facilities at Pier 66 on the central Seattle waterfront and developed a terminal for passenger ship operations, resulting in a consolidation of cruise ship traffic formerly operated at several piers and an eleven-fold increase in passenger traffic from 1993 to 2000. The cruise ship terminal is operated under United States Coast Guard regulations which include provisions for security screening of embarking passengers.

5. Prior to March 24, 2000, the employer assigned law enforcement officers in the bargaining units represented by the union to be present at the piers during the port calls of passenger ships, but never assigned those employees to screen embarking passengers by means of electronic monitoring devices.

6. On March 24, 2000, the employer contracted with Cruise Terminals of America (CTA) to operate the cruise ship terminal. CTA provides its own employees to monitor the ingress and egress of materials and personnel at a number of gates to the cruise ship facility, including screening of embarking passengers by means of electronic monitoring devices. The CTA employees do not have or exercise any power of arrest.

7. Since March 24, 2000, the employer has continued to assign law enforcement officers in the bargaining units represented by the union to be present at the cruise ship terminal facility during the port calls of passenger ships, and those employees continue to make any arrests that are necessary.

8. The security work performed by CTA employees is new work, and is not of a type that has been performed in the past by law enforcement officers represented by the union, so that the union has no work jurisdiction claim as to those duties.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapters 53.18 and 41.56 RCW, and Chapter 391-45 WAC.

2. By the events described in paragraphs 5 through 7 of the foregoing findings of fact, the Port of Seattle has not contracted out work properly claimed by the bargaining units of law enforcement employees represented by Teamsters Union, Local 117, and has not committed any unfair labor practice under RCW 41.56.140(4) or (1).

ORDER

The complaint charging unfair labor practices filed in this matter is DISMISSED on its merits.

Issued at Olympia, Washington, on this 3rd day of January, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

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