City of Snoqualmie, Decision 9892 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 4028,	)	
Complainant,	)	CASE 20529-U-06-5229
vs.	)	DECISION 9892 - PECB
CITY OF SNOQUALMIE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent,	)	

Emmal Skalbania & Vinnedge, by *Alex J. Skalbania*, Attorney at Law, for the union.

Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, by *Lewis L. Ellsworth*, Attorney at Law, for the employer.

Reid, Pedersen, McCarthy & Ballew, by *Todd A. Lyon* and *Michael R. McCarthy*, Attorneys at Law, for the intervenor.

On July 18, 2006, the International Association of Fire Fighters, Local 4028 (union) filed a complaint charging unfair labor practices against the City of Snoqualmie (employer). The complaint alleged that the employer interfered with employee rights and refused to bargain in violation of RCW 41.56.140(4) by unilaterally reassigning Class B building inspection work performed by the employer's fire fighters to another bargaining unit. On March 14, 2007, Teamsters Union Local 763 (intervenor) filed a motion to intervene. The intervenor represents building inspectors employed by the employer. On March 15, 2007, the undersigned Examiner granted the motion for intervention. A hearing in this matter was held on May 10, 2007, and the parties filed post-hearing briefs on July 27, 2007, to complete the record.

ISSUE

Did the employer refuse to bargain when it unilaterally assigned its building department employees to perform Class B building inspections that had previously been done by the employer's fire department employees?

The Examiner finds that the employer only temporarily assigned the Class B inspections to its fire fighters and its failure to bargain its decision to reassign the Class B inspections back to its building department does not constitute not an unfair labor practice.

APPLICABLE LEGAL PRINCIPLES

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires a public employer to engage in collective bargaining with the exclusive bargaining representative of its employees. RCW 41.56.030(4). That section establishes that the employer and the bargaining representative of its employees have the "mutual obligation . . . to meet at reasonable times . . . to confer and negotiate in good faith, and to execute a written agreement with respect to . . . wages, hours and working conditions . . . ." The preservation of bargaining unit work has repeatedly been found to be a mandatory subject of bargaining as it has the potential to have an impact on both the wages and hours of bargaining unit employees. Furthermore, the term "working conditions" can include the preservation of the scope of work historically performed by the employees in a bargaining unit, and the bargaining obligation would thus apply where an employer seeks to remove work from a bargaining unit. *City of Tacoma*, Decision 6601 (PECB, 1999).

> The Commission has uniformly held since 1978 that skimming, a transfer of bargaining unit work away from the unit without prior bargaining, is an unfair labor practice. *South Kitsap School District*, Decision 472 (PECB, 1978). The complainants right to the disputed work is the first factor that must be established to prevail on a skimming allegation. *King County Fire Protection District 36*, Decision 5352 (PECB, 1995).

Kitsap County Fire District 7, Decision 7064-A (PECB, 2001)

Skimming of bargaining unit work occurs when the work is transferred to other employees of the same employer outside of an existing bargaining unit. Contracting out occurs when the work is transferred to employees of another employer. *City of Seattle*, Decision 4163 (PECB, 1992). Either skimming or contracting out can be an unfair labor practice if an employer fails to provide notice and an opportunity to bargain before it unilaterally transfers bargaining unit work to non-bargaining unit employees.

As referenced in *Kitsap County Fire District* 7, Decision 7064-A, one of the key elements of proof in a skimming case is whether the work at issue is bargaining unit work. Bargaining unit work is defined as the work historically performed by bargaining unit employees. Where an employer assigns bargaining unit employees to perform a certain body of work, that work attaches to the unit and becomes bargaining unit work. The complainant in a skimming cases has the burden of proving that the work had attached to the bargaining unit and that it was removed from the bargaining unit without bargaining in good faith.

In addition to this first inquiry, the Commission has also considered five factors when determining whether a duty to bargain exists concerning the transfer of bargaining unit work:

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 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.

Clover Park School District, Decision 2560-B (PECB, 1988); *Port of Seattle*, Decision 7271-B (PECB, 2003); and *Skagit County*, Decision 8746-A (PECB, 2006).

ANALYSIS

In the summer of 2002, the employer began assigning to the fire fighters represented by the union, some Class B building inspection work. Prior to this time all class B inspection work had been done by employees in the building department who are represented by the intervenor. Class B inspection work involves annual inspections of businesses with less than a 50 person occupancy to determine if the City's building codes are being followed.

This Class B inspection work can be contrasted with "pre-fire" inspections which the fire department has done continuously and which was not impacted by the addition of the Class B inspection work. At the time of the transfer of some of the Class B inspections in 2002 to the fire fighters, the building department

employees continued to do all other building inspections.[1] In addition, the fire fighters were not doing all Class B inspections. Business that had repeatedly failed previous inspections and inspections of government buildings were retained by building department employees. Testimony from city officials explained that the staff of the building department was not able to keep up with inspection of new construction because of the growth of Snoqualmie Ridge, an area adjacent to the City. The Snoqualmie Ridge development included 1,500 homes to be built between 2000 and 2010. But the building rate was actually increased and the final completion date was 2005.

On January 12, 2006, the employer notified the fire fighters that it was transferring the Class B inspection work back to the building department employees. By 2006 the employer had hired two additional building inspectors and the new construction at Snoqualmie Ridge was completed or nearing completion. On February 24, 2006, the union wrote the employer telling them that if it unilaterally removed the Class B inspection work from the fire fighters, such removal would be challenged as an unfair labor practice. The union requested to bargain the decision to transfer the Class B work. On March 1, 2006, the employer replied and offered to bargain any impacts connected with the removal of the work. The union replied on March 13, 2006, stating that the offer to bargain impacts was insufficient. This charge of unfair labor practices was filed by the union on July 18, 2006.

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[1] Other inspections done buy the building department include assembly occupancies (churches, or other facilities that serve food), E occupancies (educational); F occupancies (factories), H occupancies (hazardous facilities such as manufacturing dynamite), I occupancies (institutional), M occupancies (retail), R occupancies (residential), S occupancies (storage) and U occupancies (radio towers and all other constructions not listed above).

Bargaining Unit Work

As discussed above, one of the elements of proof required in a skimming case is for the complainant to establish that the work in question is bargaining unit work. In this case, the union did not fulfill this initial burden of proof. Three factual elements establish that the inspection work did not become the permanent work of the fire fighters, and was never intended to become such.

First, Class B inspection work was not work that the fire department had historically done, except for the three years between the summer of 2002 and January of 2005. Prior to 2002, the fire department had consistently done what is termed "pre-fire" inspections, but had never done the types of fire or building inspections that had historically been done by the building department.

Second, according to the testimony of Thomas Swasey, a building inspector with the employer since 2000, he was the person who decided which Class B inspections would be done by the fire fighters and which he would do himself. Swasey testified that in addition to preparing the schedule for the fire fighter Class B inspections, he did inspections of Class B government buildings and Class B code violators as those inspections were more complex. Given this partial delegation of the Class B work, if some Class B inspections were to become a permanent part of fire fighter bargaining unit work while some Class B work remained as a permanent part of building inspector unit work, this could result in a continuous source of conflict between the two bargaining units. Swasey also trained the fire fighters in the Class B inspection work. During the three and one-half years that the fire fighters did the Class B inspections, he served as a resource for questions from the fire fighters. Thus, the Class B inspection work was clearly under the supervision of the building department.

Third and finally, testimony from employer officials established that the union was notified from the inception that the transfer of the Class B inspection work was temporary. At the time of the transfer of the work, Bob Rowe, the Deputy Fire Chief testified that he met with the Building Official to "formulate a plan to have fire fighters assist the building inspectors with certain small fire inspections, referred to as 'Class B' inspections." Rowe testified that he remembered subsequently telling the fire fighters that the assignment of Class B work was temporary until the building department could increase its staff or until the construction slowed down and the building department could handle all of the inspections. He specifically remembered that the vice president of the union was present when the temporary nature of the inspections was discussed.

This evidence of the temporary nature of the transfer of Class B work was in concert with the circumstances of the initial decision to transfer work between city employees that was made by the employer. Uncontested evidence was presented that the community experienced an enormous increase in new buildings, including residences and commercial buildings, in a matter of several years. Furthermore, the original plan to complete the building at Snoqualmie Ridge was speeded up from its original completion date of 2010 to 2005, thus putting even more pressure on the building department to complete new building inspections. The fact that the new building projects did have a completion date and that in the meantime, the employer had hired two new building inspectors, also supports the intended duration of the work transfer.

The Five Factor Test

Examining the five factors recited in the Commission's decision in *Port of Seattle*, Decision 7271-B, also proves that the union's claim of skimming of bargaining unit work must fail.

First Factor - Previous History

It is clear from the record that the building department previously did the Class B inspections along with all the other inspections done by the employer. Furthermore, during the three and one-half year period that the fire fighters did the Class B inspections, the building department continued to do some of those inspections and did all of the inspection enforcement.

Second Factor - Detriment to the Fire Fighters

The record is clear that the impact on the fire fighters bargaining unit is not significant. According to the testimony of Lt. Steve Reno, president of the union, when the Class B inspections were usually completed by May of each year and the loss of the inspections did not result in any loss of pay, hours of work, or a decrease in the size of the bargaining unit or any significant impact on conditions of work. Reno further testified that each of the three fire fighter shifts works 8,000 hours each year. Approximately 24 hours of that time was spent doing the Class B inspection work. In fact, Reno stated that the major loss to the bargaining unit was that the employer's decision was detrimental to moral.

Third Factor - Employer Motivation

It is also clear from the testimony presented that the employer's motive in its decision to initially transfer the Class B inspections was the dramatic increase in the work load for the building department. Although the union provided testimony that contained some supposition that the decision to transfer the Class B inspection work back to the building department was economically motivated, the evidence did not confirm this allegation. The fact of the employer's having, in the interim, hired two additional building inspectors, also undercuts an economic motivation for the

decision. The employer had a legitimate business motivation for transferring the work.

Forth Factor - Opportunity to Bargain

After the employer decided to transfer the Class B inspection work, the union demanded to bargain. The employer declined to bargain the decision to transfer the work, but gave the union an opportunity to bargain the effects of its decision. The union refused.

Fifth Factor - Fundamentally Different Work

The analysis of this final factor results in a draw. The Class B inspection work was formerly done by the building department, was managed by the building department when it was done by the fire fighters, and is absolutely consistent with the other inspection work done by that department. On the other hand, the Class B work was also not entirely different from the pre-fire inspection work that has always been done by fire fighters. Thus this fifth factor provides no additional persuasive evidence in this matter and the cumulative evidence of the five factors test is that the employer did not commit and unfair labor practice.

CONCLUSION

The union failed to prove that the Class B inspection work was ever intended to become the permanent work of the fire fighter bargaining unit. Class B inspection work was not ever entirely the work of the fire fighter bargaining unit. The employer had a legitimate business reason for transferring the work. The union did not establish that its bargaining unit work was skimmed to another bargaining unit. Under the five factor test, the employer did not have a duty to bargain its decision reassign Class B inspection work to it building inspectors. In making that reassignment, the

employer did not fail to bargain in good faith nor did it interfere with the rights of its employees as protected by statute.

FINDINGS OF FACT

1. The City of Snoqualmie is a public employer within the meaning of RCW 41.56.030(1).

2. The International Association of Fire Fighters, Local 4028, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of all non-supervisory fire fighters employed by the employer.

3. Teamsters Union Local 763, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of all non-supervisory employees in the employer's building department.

4. The Snoqualmie Ridge development was scheduled to build 1,500 homes between 2000 and 2010. The original building completion schedule was accelerated and completed in 2005.

5. A part of the work traditionally done by the fire fighters is pre-fire inspections. In 2002, in response to the heavy workload placed upon the building department because of the Snoqualmie Ridge development, the employer temporally assigned some Class B inspections, previously done by the building department, to the fire fighters' inspection work.

6. In January 2006, because the Snoqualmie Ridge development was complete and the building department had added two additional building inspectors, the employer notified the fire fighters

that it was transferring the Class B inspection work back to the building department.

7. In February 2006 the union requested to bargain the employer's decision to return the Class B inspection work to the building department. The employer declined to do so but offered to bargain the effects of its decision. The union declined that offer.

CONCLUSIONS OF LAW

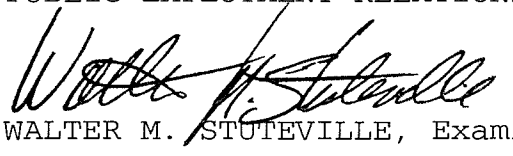
1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By transferring work temporarily assigned to the employer's fire fighters back to employees of its building department as described in Finding of Fact 6, the employer did not refuse to bargain in violation of RCW 41.56.140(4).

3. By transferring work temporarily assigned to the employer's fire fighters back to employees of its building department as described in Finding of Fact 6, the employer did not interfere with employee rights in violation of RCW 41.56.140(1).

ISSUED at Olympia, Washington, this 16th day of November, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, 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.