STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL NO. 469, Complainant, vs. CITY OF YAKIMA, Respondent.	CASE NO. 2634-U-80-385 DECISION NO. 1124-A PECB DECISION OF COMMISSION

Critchlow and Williams, by David E. Williams, Attorney at Law, appeared on behalf of the complainant.

John Vanek, Assistant City Attorney, appeard on behalf of the respondent in the proceedings before the Examiner. Carmody, Syrdal, Danelo & Klein, P.S., by Otto Klein, III, Attorney at Law, appeared on the Petition for Review.

Under date of April 8, 1981, the Examiner Rex L. Lacy of the Commission staff issued a decision, including findings of fact, conclusions of law and order, in the above captioned matter. The Examiner found the respondent to have committed unfair labor practices, and ordered a remedy. On April 28, 1981, the City of Yakima filed a timely petition with the Public Employment Relations Commission seeking review of certain findings of fact and the following conclusions of law set forth in the Examiner's decision:

> "3. The employer violated RCW 41.56.140(1) and (4) by unilaterally transferring work historically performed by the fire department to the department of community development without bargaining the issue, a mandatory subject of collective bargaining with IAFF, Local 469.
>
> 4. The employer violated RCW 41.56.140(1) and (4) when it circumvented IAFF, Local 469, the exclusive bargaining representative of the affected employees, and the statutory right of the union by meeting directly with the employees, without requesting the union to participate in the discussions about the effects of the employer's proposed transfer of the employees and the personnel matters involved therein."

That review has been made by the Commission and its conclusions are set forth herein.

DISCUSSION:

At issue is an action of the employer to eliminate fire inspection work in the fire department and to perform such necessary work in another department doing inspection work. At the outset, the Commission notes that nothing in the record or in the pleadings suggests or establishes that the recommendation of city manager or the final decision of the city council were motivated by anything other than lawful fiscal and management considerations. There has been no showing of anti-union animus or other hidden agendas that could raise suspicion of breach of good faith.

We have here a case wherein an employer faced with a budget crunch opted, among other things, to consolidate what it considered to be certain overlapping inspection functions. This was not an "off the cuff" decision, made without disclosure to interested parties. It is a matter of record that the entire process spanned the period from August, 1979 (TR 110:8-14) to December 18, 1979 (TR 116:13 - 7:). The fiscal origin of the proposal was implicit in the budget recommendation of the city manager. Implementation required that the city council (the counterpart to the corporate board of directors in the private sector) hold public hearings prior to the decision, to allow input from interested parties. Obviously, the union disagreed with the proposal. It took part in the public hearings before the city council. During this period, the assistant city manager met with the four fire inspection employees. The purpose was to explain "...the proposal that was before the city council..." (TR 124:18-19), and it was emphasized that no final decision had been made. The employees were told that their positions would be abolished only if the proposal were adopted. The options that would be available to them were outlined.

Thus, we come to the Examiner's Conclusion of Law No. 3. The issues framed by counsel for the union at the hearing and in the union's post-hearing brief made no reference to a claim of "circumvention" by direct dealings with the employees. We can only conclude that this issue was drawn in by an expansive interpretation by the Examiner of the pleadings and briefs, and that the parties have not been afforded an opportunity to address themselves to it. The "free speech" rights of the employer (See: Section 8(c) of the National Labor Relations Act) are limited both by the "interference" proscription: "if such expression contains no threat of reprisal or force or promise of benefit", and by the concept of exclusive representation, whereby the employer must deal with the union and can no longer bargain directly or indirectly with employees. General Electric Co., 150 NLRB 192, 194 (1964); enf., 418 F.2d 736 (CA2, 1969); cert. den., 397 U.S. 965 (1970). But we need not get into that quagmire, and in fact find it inappropriate to rule on the issue absent an allegation in the complaint.

This Commission has generally held, as has the NLRB in Fibreboard Paper Products, 138 NLRB 550 (1962); aff., 379 U.S. 203 (1964), that a transfer of bargaining unit work to non-bargaining unit employees is a mandatory subject of collective bargaining. South Kitsap School District, Decision 742 (PECB, 1978); Lakewood School District, Decision 755-A (PECB, 1980); City of Vancouver, Decision 808 (PECB, 1980); Port of Edmonds, Decision 844-A (PECB, 1981); City of Mercer Island, Decision 1026-A (PECB, 1981). In those cases this Commission has held, and so holds now, that it is a violation of RCW 41.56.140(4) for an employer to throw a decision involving a transfer of unit work out of the bargaining unit at an exclusive bargaining representative as a "fait accompli" without benefit of an opportunity for meaningful discussion. An employer which does so acts at its own peril. The Supreme Court decison in First National Maintenance Corporation v. NLRB, ____ U.S. ____, 107 LRRM 2705 (June 22, 1981), addresses itself to the duty to bargain collectively concerning purely fiscal decisions, but we need not get tangled up in the "scope of bargaining" web. Fibreboard and other cases cited establish the home base for consideration of work transfer cases, and require that the union be given an opportunity to bargain in its interests, but that general approach, however firmly held by this Commission, does not hold a union invulnerable to its own non-feasance.

The adequacy of notice of an impending change has been at issue in numerous cases. As noted by the Examiner in City of Bellevue, Decision 839 (PECB, 1980) (where inadequate notice was found), "given adequate notice, it would have become the responsibility of the union to request bargaining in a timely manner". Further, as noted by the Examiner in Renton School District, Decision 706 (EDUC, 1979) (where adequate notice was found), citing NLRB precedent, "where a union had actual notice of an employer's intentions at a time when there was sufficient opportunity to bargain prior to implementation of the change, the employer may not be faulted for failing to afford formal notification". So the Commission has directed its attention in this case to the responsibility of the union to request bargaining, given actual notice of the pending change in the scope of the unit's work.

The union argues, after the fact of the decision by the city council, that the employer failed to bargain on this work transfer. However, the facts support a conclusion that the union was actively opposing the decision while it was pending before the city council. It is a matter of record that the union participated in the decision making process by appearing before and addressing the city council at public hearings held on November 20, 1979 and November 27, 1979. It would be stretching credulity to conclude that the union didn't know what was extant. Admittedly, the employer did not formally notify the union of the proposal or offer to bargain with the union about it. It clearly would have been prudent to do so. But still, we ask: "Did the union have adequate prior knowledge of the matter under discussion?" and "Was the time sufficient for the union to ask for bargaining, if it so desired?" Of course the union had adequate notice, and of course it had

sufficient time to press its rights. The union chose other forums! Under date of November 30, 1979, union president Morehouse sent a cryptic letter to the employer stating that the "local union does not and will not consent..." to the proposed changes and threatening to resist the change "..by all means acorded by law...". This was almost three weeks prior to the submission of the formal proposal to the city council (TR 116:12 - 117:11) and five weeks prior to the January 1, 1980 effective date of the proposed change. The Commission must question whether bargaining was even among the union's list of priorities, when the November 30 letter implies that bargaining would be made futile by the union's preconceived attitude.

RCW 41.56.030(4) imposes a mutual obligation on the employer and on the bargaining representative of employees. It cannot be assumed that the burden of taking the lead in a given situation falls solely on one party or the other. The union certainly was or should have been aware of the mutuality of the obligations of RCW 41.56.140, and we conclude that it was aware of what was being considered by the city council sufficiently in advance of implementation that meaningful bargaining could have taken place. Thus, we conclude that, by virture of its own inaction in failing to make a timely request for bargaining given actual prior knowledge of the controversial proposal, the union waived its right to bargain on the matter.

Accordingly, the Commission makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. The City of Yakima is a municipality of the State of Washington, and an employer within the meaning of RCW 41.56.020(2).

2. The International Association of Firefighters, Local 469, is a bargaining representative within the meaning of RCW 41.56.020(3), and is the certified exclusive bargaining representative of two appropriate bargaining units of the Fire Department of the City of Yakima.

3. Negotiations for the 1980 collective bargaining agreement between the City of Yakima and IAFF, Local 469, commenced on June 6, 1979 and were concluded on August 10, 1979. Subsequent to ratification by the parties in early December, 1979, the written agreement for calendar year 1980 was signed on December 21, 1979.

4. IAFF, Local 469, during the course of negotiations made an ambiguous request for information concerning the cost of medical benefits increases.

5. The employer, in good faith, replied to the union's request and indicated a cost factor of $7.46 monthly. The union did not pursue the matter further.

6. During the period of August, 1979 to December 18, 1979 the city manager and his staff prepared budget recommendations that embraced, among other things, consolidation of city inspection work in the department of community development. These recommendations were subject to public hearing and council approval.

7. On December 18, 1979, the city council of the City of Yakima - after mandatory public hearings - voted affirmatively on Ordinance No. 2354 which, among other things, transferred the responsibility for fire inspection work from the fire department to the department of community development which already had responsibility for other inspection functions.

8. Prior to December 18, 1979, IAFF Local 469 obtained actual knowledge of the proposal to transfer inspection work. The union did not request bargaining on these matters, although it wrote to the city on November 30, 1979 setting forth its disapproval and made public appearances before the city council on two occasions to protest the change.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter under RCW 41.56.

2. The employer did not violate RCW 41.56.140, nor did it fail or refuse to bargain in good faith when it furnished IAFF Local 469 with the insurance cost information, because the union's request was ambiguous enough to give rise to a legitimate misunderstanding.

3. The employer did not violate RCW 41.56.140(1) and (4) by its transfer of inspection work without the agreement of IAFF Local 469, since complainant, with adequate prior information, failed to timely request bargaining on the issues.

On the basis of the above findings of fact and conclusions of law the Commission makes the following:

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is dismissed.

Dated this 13th day of November, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson
JANE R. WILKINSON, Chairman

Robert J. Williams
ROBERT J. WILLIAMS, Commissioner

Mark C. Endresen
MARK C. ENDRESEN, Commissioner