STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF SOUTH KITSAP SCHOOL DISTRICT, AN AFFILIATE OF PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. SOUTH KITSAP SCHOOL DISTRICT NO. 402, Respondent.	CASE NO. 923-U-77-116 DECISION NO. 472-PECB DECISION AND ORDER

APPEARANCES:

JAMES B. GORHAM (Snure, Gorham & Varnell), attorney at law, for the complainant.

ELVIN J. VANDEBERG (Kane, Vandeberg & Hartinger), attorney at law, for the respondent.

STATEMENT OF THE CASE:

Upon a charge filed by Public School Employees of South Kitsap School District, herein called the union, a hearing was held before Examiner Alan R. Krebs on January 17, 1978 with all parties present. The issue presented is whether South Kitsap School District No. 402, herein called respondent or district, refused to engage in collective bargaining with the union in violation of RCW 41.56.150(4) and (1) of the Public Employees Collective Bargaining Act (herein called the Act). More specifically, the union alleged that respondent unlawfully refused to bargain over the decision to terminate the district's aide program. Post-hearing briefs were filed by representatives of both parties. The Examiner having considered the evidence, and the arguments of counsel makes the following:

FINDINGS OF FACT

I. Jurisdiction.

The district provides educational services to 8100 students. 333 certificated staff members teach in seven elementary schools, two

junior high schools, and a high school. The parties stipulated that respondent is a public employer within the meaning of RCW 41.56.030.

II. The Labor Organization Involved.

Pursuant to a collective bargaining agreement between the district and the union, with a term from July 1, 1976 until June 30, 1979, the union is recognized as the exclusive representative of all library aides, noon aides, instructional aides, clerical aides, special education aides, and Indian education aides. The parties stipulated that the union is a bargaining representative within the meaning of RCW 41.56.030(3).

III. The Alleged Unfair Labor Practices.

On February 2, 1977, upon hearing a rumor that the district was considering a serious change in the aide program, an officer of the union brought the matter up with the district's recently-hired superintendent. The superintendent responded that he would be recommending to the district's board of directors at its February 7th meeting that the aide program be dissolved at the end of the school year. On February 7th, the union sent a letter to the superintendent demanding that the district bargain with the union "concerning any and all elimination plans which the district may pursue regarding the aide program". On the same day the board met in executive session to discuss the superintendent's proposal. In a public session which followed, the board approved the plan to eliminate the aide program at the conclusion of the school year, and replace it with a newly-created "certified instructional support team". On February 18th, the superintendent notified the union by letter that:

> ". . . a management decision has been made to terminate the teacher aide program in the South Kitsap School District.
>
> The decision to terminate the aide program is a management decision which the South Kitsap School District is not prepared to negotiate with your organization. However, the South Kitsap School District stands ready to discuss the effects of the decision to terminate the aide program on the employees involved.
>
> I suggest that you contact me at your earliest convenience so that we can set up a mutually agreeable time to commence these negotiations."

The union never responded to this suggestion. By letters dated June 8, 1977, the district terminated all 78 aides.

Representatives of the district testified that the intent of the change was to improve the educational program by providing more qualified persons in the instructional program. None of the aide positions required certification by the Superintendent of Public Instruction, i.e. none of the aides were permitted to instruct independently. RCW 28A.67.010.

The job responsibilities of the former aides were divided between additional certificated employee positions and newly-created non-certificated positions, as follows.

Prior to the change, each school had a librarian aide and a half-time certificated librarian. Now each school has a full-time librarian but no librarian aide. Apparently, the librarian now performs the work previously performed by the librarian aide. No testimony was proffered at the hearing regarding the specific duties of the librarian and the librarian aide.

Noon duty aides supervised student conduct in the lunchroom and the playground. Their duties are now handled by certificated teachers.

Clerical aides assisted teachers by performing basic clerical duties, such as typing, copying, fetching supplies and tabulating tests. Now, while teachers perform much of this work, teachers can also obtain clerical assistance from the clerk-typists assigned to the principal.

Special education aides assisted teachers with handicapped students. Coinciding with the demise of the special aide positions, a new non-certificated position entitled "special education classroom attendant" was created. Both have similar responsibilities except that unlike the aide, the attendant is required to 1) assist in loading and unloading of buses, 2) contact parents regarding transportation and discipline, 3) have knowledge of power equipment for shop instruction, and 4) have first aid instruction.

While the record is vague regarding the duties of Indian aides, apparently they instructed on the subject of Indian culture and history. Succeeding this abolished position was the newly-created position entitled "cultural specialist." The duties of the cultural specialists appear to be similar to those of the Indian aides, although the former "now are certified by the state to carry out the responsibilities they have where before they were not".

(Tr. pp. 88-89). In order to obtain certification, cultural specialists need not have a college degree or pass a test. They may qualify on the basis of their "qualifications and their background, the experience and the education they do have." (Tr. p. 90). Most of the Indian aides employed by the district qualified for certification and were rehired as cultural specialists.

Instructional aides provided paraprofessional assistance to teachers in the classroom. Among other activities, they drilled and assisted individual students or small groups with work devised by the teacher, distributed and collected paper and materials, secured materials and equipment, and helped with room decorations. Most of the duties of the instructional aides have been absorbed by certificated teachers. As a result about fifteen additional teachers were hired.

Thirty-two former aides applied for and were hired for positions on the "certified instructional support team." Neither the union nor the district has requested that the other party bargain with it regarding any of the newly-created positions. None of the new positions fall within the precise language of the recognition clause in the collective bargaining agreement. Respondent does not contend that any appreciable monetary savings resulted from the replacement of the aides with the "certified instructional support team." Nor was there any evidence that the subject matter taught the students changed with the discharge of the aides.

IV. The Positions of the Parties.

The union argues that the respondent had a duty to bargain with it regarding the changes in hours, wages, and working conditions, which encompass the decision to lay off numerous members of the bargaining unit.

The respondent contends that it does not have a mandatory duty to bargain with the union relative to the decision to lay off, inasmuch as it is not required to bargain concerning a basic change in its method of delivering services.

ANALYSIS AND CONCLUSIONS OF LAW

RCW 41.56.140 provides:

> "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."

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

> ". . . 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 supplied).

Resolution of this dispute is governed by a determination of whether the decision to reassign work from aides to other employees resulting in the discharge of the aides, which decision was made to improve the quality of service, constitutes a "personnel matter" within the meaning of RCW 41.56.030(4). If the decision is a "personnel matter", then the respondent is mandated by RCW 41.56.140(1) and (4) to bargain the subject with the union.

A subject matter which an employer is obligated to bargain has been termed a "mandatory" subject of bargaining. In the context of the National Labor Relations Act (herein called NLRA), the Educational Employment Relations Act (Chapter 41.59 RCW) and the labor relations statutes of other states, wages, hours and working conditions are designated as mandatory subjects for bargaining. [1/] It is helpful to examine decisions emanating from those jurisdictions in order to interpret the Act, since the scope of the mandatory subjects for bargaining is at least as broad under the Act as it is under these other statutes.

In Fibreboard Paper Products v. NLRB, [2/] the U. S. Supreme Court held that the decision to contract out work previously performed by members of the established bargaining unit, which results in termination of unit employees, is a mandatory subject of bargaining.

1/ NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958); Federal Way School District No. 210, Decision 232-A (PECB, 1977); Town of Andover, 4 MLC 1086 (1977); City of Brookfield, Wis. Emp. Rel. Comm. (11489-B and 11500-B, 1975).

2/ 379 U.S. 203 (1964).

The National Labor Relations Board (NLRB) has broadly defined the obligation to bargain the decision to discharge or lay off. It has held that the decision to lay off employees for economic reasons, [3/] such as efficiency innovations, [4/] is a mandatory subject of bargaining. Also found bargainable by the NLRB is the decision to close one of several plants. [5/] On the other hand, the NLRB has held that an employer's decision to sell an independent dealership is not a mandatory subject of bargaining. [6/] Where unit work was relocated, the NLRB held that bargaining must precede that decision. [7/] More directly to the point in this case, the NLRB and several state labor boards have held that an employer is obligated to bargain the decision to reassign bargaining unit work to other employees, which decision results in the layoff or termination of bargaining unit employees. [8/]

Several of the United States Courts of Appeals have defined a somewhat narrower interpretation of an employer's bargaining obligation. They have held that an employer is not required to bargain the decision to terminate a business in whole [9/] or in part. [10/] Reversing the NLRB decision in Dixie Ohio Express Co., [11/] the 6th Circuit held that an employer need not bargain over the decision to lay off resulting from new work procedures which reduced the number of employees required to perform the same amount of work. [12/] Both the 6th Circuit and the D. C. Circuit have held that an employer must bargain the decision to reassign work to other employees who were not in the bargaining unit. [13/] I agree.

3/ Amsterdam Printing and Litho Corp., 223 NLRB No. 66 (1976).

4/ Dixie Ohio Express Co., 167 NLRB No. 72 (1967); See also City of Brookfield, supra, note 1.

5/ Ozark Trailers, Inc., 161 NLRB No. 48 (1966); Royal Typewriter Co., 209 NLRB No. 174 (1974); Mack Trucks, 230 NLRB No. 147 (1977).

6/ General Motors Corp., 191 NLRB No. 149 (1971).

7/ Stone & Thomas, 221 NLRB No. 115 (1975); 229 NLRB No. 9 (1977).

8/ Awrey Bakeries, Inc., 217 NLRB No. 127 (1975); Boeing Co., 230 NLRB No. 94 (1977); Town of Andover, supra note 1; Leominster School Committee, 4 MLC 1512 (1977).

9/ NLRB v. Thompson Transport, 406 F.2d 698 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967).

10/ NLRB v. Drapery Mfg. Co., 425 F.2d 1026 (8th Cir. 1970); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965); NLRB v. Royal Plating and Polishing, 350 F.2d 191 (3rd Cir. 1965).

11/ Supra note 4.

12/ NLRB v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969).

13/ Office and Professional Emp. Int. U., Local 425 v. NLRB, 419 F.2d 314 (D.C. Cir. 1969), enforcing Brotherhood of Locomotive Firemen & Enginemen, 168 NLRB 677 (1967); Awrey Bakeries, Inc. v. NLRB, 548 F.2d 138 (6th Cir. 1975), enforcing Awrey Bakeries, supra note 7.

Generally speaking, termination of employment is a mandatory subject of bargaining. 14/ This is reflected in the following language from Fibreboard:

> "The words ['condition of employment'] even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit." 15/ (Emphasis supplied).

The court in Fibreboard reached its conclusion that "contracting out" was a mandatory subject of bargaining by analyzing industrial practice and the union's and employer's interest in the subject. It explained that contracting out provisions are not uncommon in collective bargaining agreements. Further, unions have a legitimate interest in preventing curtailment of jobs. On the other hand, the court noted that the employer's freedom to manage his business was not significantly abridged since the "decision to contract out the . . . work did not alter the company's basic operation." 16/

Justice Stewart, in his concurring opinion 17/ said ". . . assignment 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." 18/ This applies to the instant case. The respondent replaced the aides with other employees for the purpose of improving the quality of instruction. Respondent admittedly used the money it saved on the aides' salaries in order to pay for new positions hired to perform work the aides had previously performed and then did reassign the work the aides formerly performed.

The union has a legitimate interest in preserving the work it has historically performed, at least where the district has not cut back in services and personnel. 19/ Especially in this case, where a collective

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14/ Ozark Trailers, Inc., supra, note 5 at 566; Awrey Bakeries, Inc., supra, note 7 at 731.

15/ Supra, note 2 at 2612.

16/ Fibreboard, supra note 2 at 213.

17/ (Joined by Justices Douglas and Harland).

18/ Supra note 2 at 224.

19/ City of Boston, 4 MLC 1202 (1977).

bargaining agreement was in effect at the time of the wholesale discharges of the entire bargaining unit, it would serve the intent of the statute to permit the union to collectively bargain to protect negotiated working conditions. 20/ If it had an opportunity to bargain the reassignment with the respondent it may have pointed out to management unforseen problems resulting from the change or it may have advanced proposals that would convince respondent to retain the employees. 21/ For example, the union may have agreed to mandatory training programs for the employees, or mandatory certification within a prescribed period for certain of the aide category employees, or it may have agreed to altered job descriptions. In this regard, the Supreme Court said:

> ". . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." 22/

In holding that respondent was obligated to bargain its decision to reassign the bargaining unit work, I am not unmindful of respondent's argument that decisions "central to entrepeneurial control are outside the scope of the mandatory duty to bargain." (Br. p. 12). However, the legislature determined that employers subject to the Act, would have their absolute freedom to run their enterprise curbed in order to further labor tranquility and to provide collective bargaining rights to employees. 23/ As stated by the NLRB:

> "The authority, duties, and prerogatives of a bargaining representative are dictated by the statute and they are not subject to diminution or modification because of any employer's good faith or economic necessity." 24/

Regardless, I do not believe that requiring respondent to bargain the decision to terminate the aides, unduly restricts its ability to manage

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20/ Town of Andover, supra note 1.

21/ See International Harvester Co., 227 NLRB No. 19 (1976).

22/ Fibreboard, supra, note 2 at 214.

23/ Ozark Trailers, supra, note 5 at 569.

24/ Wellman Industries, Inc., 222 NLRB No. 44 at 206 (1976).

the district. The decision to reassign the work to other employees did not change materially the direction of the services offered by the district. Apparently the same classes and services were offered to the students. Further, the change in personnel classification may have been instituted by respondent. All that was required was that respondent bargain with the union in good faith about the decision. As stated by the NLRB:

> ". . . an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business." 25/

Respondent, in its brief, relies primarily on three Courts of Appeals decisions, each of which reversed an NLRB decision.

In Royal Plating and Polishing Co., 26/ an employer operated two closely situated plants, which constituted a single bargaining unit. The business had been suffering severe lossses for seven years when the City housing authority forced the sale of one of the plants. Without bargaining the decision, the employer closed the plant and laid off all of that plant's employees. The court held:

> "We conclude that an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down." 27/

In the case at hand, there was not an economically compelled reduction in the level of operations which arguably might justify a unilateral decision.

25/ Id. at 568; See also Awrey Bakeries, Inc., supra, note 7 at 733; Stone & Thomas, supra, note 6 at 576; Dixie Ohio Express Co., supra, note 4 at 574.

26/ NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3rd Cir. 1965).

27/ Id., at 196.

Like Royal Plating, Adams Dairy, Inc. [28] involved a refusal to bargain the decision to partially close a business. Adams liquidated the distribution arm of its business by selling its trucks and contracting with independent distributors who were solely responsible for selling the products. The court held that Adams was not required to bargain this "change in the capital structure. . . which resulted in a partial liquidation and a recoup of capital investment". [29] The court in part justified its decision by noting that it was not confronted with "a substitution of one set of employees for another." [30] In the case at hand there was no "partial liquidation", but rather a transferring of responsibilities among employees.

Respondent's reliance on Dixie Ohio Express [31] also appears to be misplaced. The Sixth Circuit held that the employer was not obligated to bargain the decision to streamline operations which resulted in layoffs. Unlike the case at hand, no employees were hired to perform the work of the terminated employees. Further, no work was transferred to any other group of employees. [32] When later confronted with a situation more similar to the instant case, the Sixth Circuit held in Awrey Bakeries, Inc., [33] that a reorganization which resulted in the transfer of unit work from one group of employees to another, and the layoff of those employees who had previously performed the work, could not be instituted without first bargaining the decision with the union. [34]

The respondent contends that it has no duty to bargain concerning its decision to modify its educational program. To the extent that program is defined as curriculum, this is true. [35] However, I conclude that RCW 41.56.150(4) imposed upon respondent the duty to bargain with the union regarding the decision to transfer unit work from one group of employees to another, and the concomitant layoffs. Thus, respondent's

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28/ NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965).

29/ Id. at 111.

30/ Id. at 113. The court appears to imply that it would rule differently were such the case.

31/ NLRB v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969).

32/ Dixie Ohio Express Co., supra note 4 at 575.

33/ Awrey Bakeries, Inc. v. NLRB, supra note 13.

34/ Id.

35/ Federal Way School District No. 210, supra note 1.

refusal to accede to the union's request to bargain this matter, accompanied by its unilateral implementation of its "certified instructional support team" plan, constitute a violation of its statutory duty under RCW 41.56.150(4) and (1).

THE REMEDY

Having found that the respondent committed an unfair labor practice as alleged in the complaint, it must be ordered to cease and desist from violation of the Act and to take certain affirmative action designed to restore the status quo ante and to effectuate the policies of the Act.

Restoration of the status quo requires that the discharged aides be returned to their former positions, that they be made whole for loss of earnings, and that respondent bargain in good faith before it implements an intended change in conditions of employment. 36/

While I recognize the considerable problems and expense that this may cause respondent, a meaningful bargaining order requires that the unit employees be offered reinstatement. Had respondent engaged in good faith bargaining, it is possible that the bargaining representative may have convinced respondent to alter its plans so as to preserve the jobs of some or all of the unit employees. Therefore, respondent will be required to make whole the discharged employees for loss of earnings from the date of their discharge to the date of respondent's offer of reinstatement.

ORDER

Upon the entire record in this case and pursuant to RCW 41.56.160, the Public Employment Relations Commission hereby ORDERS the respondent, South Kitsap School District No. 402, its officers, agents, successors and assigns to immediately:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Public School Employees of South Kitsap School District, an affiliate of Public School Employees of Washington, as the exclusive representative of the employees in the appropriate bargaining unit by unilaterally transferring the work performed by such employees to other categories of employees not covered by the collective bargaining agreement and by laying off such employees without giving prior notice and reasonable opportunity to said union to bargain with respect thereto.

36/ Fibreboard, supra note 2; Awrey Bakeries, supra note 7; Office and Professional Employees International Union, supra note 12.

(b) In any like or related manner failing or refusing to bargain collectively or interfering with the efforts of the union to bargain collectively on behalf of the employees in the appropriate unit.

2. Take the following affirmative action designed to effectuate the policies of the act:

(a) Upon request by the union, bargain collectively in good faith with the union as the exclusive representative of respondent's employees in the appropriate unit with respect to personnel matters, including wages, hours, and working conditions, and specifically with respect to the decision to transfer unit work from bargaining unit employees to other employees, and any related discharges, and, if an understanding is reached thereon, reduce to writing and sign any agreement reached as the result of such bargaining.

(b) Reinstitute the aide positions previously abolished as a result of the transfer of unit work and offer immediate and full reinstatement to those unit employees represented by the union who were discharged as a result of the unilateral transfer of unit work, and make them whole for any loss of pay suffered by them. Deducted from the amounts due shall be amounts equal to any earnings such employees may have received during the period of the violation calculated on a quarterly basis. Also deducted shall be an amount equal to any unemployment compensation benefits such employees may have received during the period of the violation, and respondent shall provide evidence to the Commission that such amounts have been repaid to the Washington State Department of Employment Security as a credit to the benefit record of the employees. Money amounts due shall be subject to interest at the rate of eight (8) percent from the date of the violation to the date of payment. 37/

(c) Preserve and, upon request, make available to the Commission or its agents, for examination and copying, all payroll records necessary to analyze the amount of back pay due under the terms of this Order.

(d) Post at each of its schools, copies of the attached notice marked "appendix." Such notices shall, after being duly signed by respondent's representative, be and remain posted for sixty (60) days. Reasonable steps shall be taken by respondent to ensure that said notices are not altered, defaced or covered by other material.

37/ WAC 391-21-556.

(e) Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this Order, what steps have been taken to comply herewith.

DATED at Olympia, Washington this 18th day of July, 1978.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Alan R. Krebs

ALAN R. KREBS, EXAMINER

"APPENDIX"

E-12
4/77

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, SOUTH KITSAP SCHOOL DISTRICT NO. 402, HEREBY NOTIFIES OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively in good faith with Public School Employees of South Kitsap School District, an affiliate of Public School Employees of Washington, as the exclusive representative of the employees in the appropriate bargaining unit by unilaterally transferring the work performed by such employees to other categories of employees not covered by the collective bargaining agreement and by laying off such employees without giving prior notice and reasonable opportunity to said union to bargain with respect thereto.

WE WILL NOT in any like or related manner fail or refuse to bargain collectively or interfere with the efforts of the union to bargain collectively on behalf of the employees in the appropriate unit.

WE WILL upon request by the union bargain collectively in good faith with the union as the exclusive representative of our employees in the appropriate unit with respect to personnel matters, including wages, hours, and working conditions, and specifically with respect to the decision to transfer unit work from bargaining unit employees to other employees, and any related discharges, and, if an understanding is reached thereon, reduce to writing and sign any agreement reached as the result of such bargaining.

WE WILL reinstitute the aide positions previously abolished as a result of the transfer of unit work and offer immediate and full reinstatement to those unit employees represented by the union who were discharged as a result of the unilateral transfer of unit work, and make them whole for any loss of pay suffered by them. Deducted from the amounts due shall be amounts equal to any earnings such employees may have received during the period of the violation calculated on a quarterly basis. Also deducted shall be an amount equal to any unemployment compensation benefits such employees may have received during the period of the violation, and we shall provide evidence to the Commission that such amounts have been repaid to the Washington State Department of Employment Security as a credit to the benefit record of the employees. Money amounts due shall be subject to interest at the rate of eight (8) percent from the date of the violation to the date of payment.

DATED: _____ SOUTH KITSAP SCHOOL DISTRICT NO. 402

By: _____

This notice must remain posted for 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. Telephone: (206) 753-3444.