STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFSCME, AFL-CIO, and its LOCAL NO. 307 VC, Complainants, vs. CITY OF VANCOUVER, Respondent.	CASE NO. 1618-U-78-212 DECISION NO. 808 PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF SUPPLEMENTAL HEARING

Pamela G. Bradburn, General Counsel, Washington State Council of County and City Employees, AFSCME, AFL-CIO, appeared on behalf of the complainants.

Paul Sullivan, Senior Assistant City Attorney, City of Vancouver, appeared on behalf of the respondent.

STATEMENT OF THE CASE:

The Washington State Council of County and City Employees, AFSCME, AFL-CIO, and its Local No. 307 VC (the union) allege that the City of Vancouver (the city) refused to engage in collective bargaining in violation of RCW 41.56.140(4) and interfered with, restrained, and coerced public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW, in violation of RCW 41.56.140(1), by refusing to bargain with the union concerning the decision to contract out certain work previously performed by employees represented by the union. A hearing was held before Examiner Alan R. Krebs, on July 19 and 20, 1979.

THE FACTS:

A. The Subcontracting

The union has represented employees of the city's sewage treatment facilities since about 1969. These employees were covered by a collective bargaining agreement between the city and the Joint Labor Coalition, a coalition of four unions, including Local 307 VC. The agreement ran from January 1, 1977 through December 31, 1979 and provided that the city recognized the union as the representative of certain custodial and cemetary employees, and the employees of the Water, Sewer, and Street Divisions of the Public Works Department.

Since the city opened its Westside Wastewater Treatment Plant in 1974, it had been experiencing operating problems. It could not meet the waste discharge standards set by the government. Sludge, a by-product of the

sewage treatment process, was being dumped into the Columbia River in amounts which exceeded the plant's waste discharge permit. The state Department of Ecology monitored the problem and pressured the city to correct the problem. Early in 1978, the city had an engineering consulting firm perform an operations evaluation of the plant. The firm made numerous recommendations for improvements. The city then entered into a design contract with the firm regarding those improvements. This design work was in progress in mid-1978 when the city was confronted with increased pressure from the Department of Ecology. On June 12, 1978, the city received an order from the department to take "whatever actions are necessary to reduce the influent loading to the treatment plant to the design capacity not later than August 1, 1978." A department representative informed the city that the practical effect of the order was that the city would have to impose a building moratorium.[1/] Later in 1978, the department fined the city $500 for its continuing violations. The city was very concerned because several major industries were planning to locate in the area. As its design contract with the engineering consulting firm indicated, the city was determined to meet the problem by expanding its capacity to handle wastes.

About April, 1978, the Envirotech Corporation approached the city to propose to take over the operations of the sewage plant. Negotiations between representatives of Envirotech and city officials, including the city manager and a member of the city council stalled on the subject of compensation, but eventually led to an agreement on Friday, June 16, 1978. As expected, the city council approved the agreement Monday evening, June 19, 1978.

The contract was executed on June 23, 1978 and was to run from July 5, 1978 until December 31, 1983. Envirotech was to receive about $5.5 million over the life of the contract as compensation for operating the Westside Wastewater Treatment Plant. The contract provided that all facilities, equipment, and vehicles within the plant would remain as property of the city. The city would be responsible for any capital replacements. Envirotech would be responsible for other expenses, including maintenance and repairs, utilities, supplies, parts, and salaries. Envirotech was given a six month grace period within which it was required to come into compliance with the city's waste discharge permit. Any fines incurred by the city after the initial grace period incurred as a result of non-compliance were to be paid by Envirotech up to a maximum of $150,000. Either party was permitted to terminate the agreement on 180 days notice. Envirotech orally agreed to install a $1 million computer and $50,000 in unspecified capital improvements.

1/ It was later discovered that the problem with the Department of Ecology was in part caused by an incorrect testing sample which indicated a worse problem than actually was the case.

When the operation of the plant changed hands, the 18 city employees at the plant were laid off by the city and offered employment with Envirotech, which they all accepted.

By December, 1978, Envirotech was able to achieve permit compliance by instituting new procedures and installing new equipment. In March, 1979, the city agreed to pay an additional $22,000 per month to compensate Envirotech for increasing the plant's designed treatment capacity.

The city did not notify the union of the proposed change in operations prior to reaching its decision to contract out the operation of the sewage facility.[2/] On June 19, Kent Shorthill, the city's director of finance and administration, phoned Steve Dryke, the union's staff representative, and informed him of the city's plans, and that the city council would probably approve the contract that evening. Shorthill proposed that they meet on June 20. Dryke was unavailable on that date and they arranged a meeting to be held on June 22. On June 22, Shorthill and Doug Tryon, an Envirotech representative, informed union representatives that the operations had in fact been contracted out. They discussed the impact of the change on the affected employees. Tryon offered to recognize the union and bargain with it for a contract.

The union protested the change in a grievance filed the following day. The union elected not to pursue the matter to arbitration.

On July 5, the transferred employees presented Envirotech's plant manager with a petition which indicated that a majority of the employees did not desire to be represented by the union. Following consultations with the employees, Envirotech implemented a benefit package. It appears that at least some of the employees suffered financially as a result of the change of employer, principally regarding salary, overtime pay, holiday pay, and pension.

B. The Collective Bargaining Agreement

The city's 1977-1979 collective bargaining agreement with the Joint Labor Coalition provided in part:

2/ At hearing, this Examiner granted the union's motion that the facts alleged in the complaint be deemed to be admitted as true. WAC 391-21-520 and the Notice of Hearing, each put the city on notice that failure to file a timely answer, except for good cause shown, would result in such an admission. The city, without good cause, failed to file a timely answer.

ARTICLE III. Rights of Management.

Section 1.

The management of the municipal corporation and the direction of the work force is vested exclusively in the employer subject to the terms of this agreement. All matters not specifically and expressly covered or treated by the language of this agreement may be administered for its duration by the employer in accordance with such policy or procedure as the employer, from time to time, may determine. This right does not restrict the right of an employee to use the grievance procedure set forth in Article XIX.

Section 2.

The parties hereby recognize the city's right to determine the methods, processes and means of providing municipal services, to increase, diminish or change municipal equipment, including the introduction of any and all new, improved or automated methods or equipment, and the assignment of employees to specific jobs within the bargaining unit in accordance with their job classification or title.3/

* * *

ARTICLE XXIII. Non-reduction of Wages and Working Conditions.

Section 1.

The parties hereto agree that the wages and working conditions in effect and now being paid to and enjoyed by the members of the union shall not be reduced in view of the provisions of this agreement; provided, nothing in this section shall be construed to limit in any way, the employer's rights under Article III, Rights of Management, or to make changes in current practices, provided: (1) advance notice of the change is given to the union and affected employees, and, (2) reasonable opportunity is provided them to discuss the change with the city.4/

Article XIX provides a four step grievance procedure culminating in arbitration.

During negotiations for the collective bargaining agreement the city proposed that Article III, Section 2, include the following sentence:

> This Agreement shall not limit the right of the City to contract for services of any and all types.

The union objected to this inclusion. While the city withdrew this proposal, its negotiator maintained at the bargaining table that the city had the right to contract out services.

POSITIONS OF THE PARTIES

The union asserts that the city's decision to contract out the operation of the sewage treatment plant greatly impacted the wages, hours, and working conditions of the employees and thus was a mandatory subject of

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3/ and 4/ Underlinings reflect contract language not included in previous agreements.

bargaining. The city's unilateral decision to contract out was, according to the union, an unlawful refusal to engage in collective bargaining with the union. The union further contends that it did not negotiate away its decision to bargain over decisions like the one at issue in this case.

The city asserts that it is not an unfair labor practice to subcontract out for services previously performed by employees, absent anti-union motives. The city further contends that its collective bargaining agreement with the union allows a change in the "means" of providing services and only requires it to notify the union of the change and offer them a chance to discuss the change. This, the city points out, it has done. It contends that by the agreement, the union has waived its ability to demand bargaining on the decision to contract out services. The city further contends that this dispute is not a proper subject for an unfair labor practice charge, since it should have been resolved pursuant to the grievance process of the collective bargaining agreement and that process should be deferred to. The city notes that the union never requested negotiations and the city never refused to negotiate.

DISCUSSION:

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).

This Commission, the National Labor Relations Board, and the United States Supreme Court, each holds 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.[5/]

5/ City of Kennewick, Decision 482-B (PECB, 1980); Fibreboard Paper Products Corp., 138 NLRB 550 (1962), enf. 322F.2d 411 (C.A.D.C., 1963), affd., 379 U.S. 203 (1964). (The city cites numerous federal appellate court cases in support of its position that it is not required to bargain the decision to subcontract out services previously performed by employees, absent anti-union notices. All cases cited precede and were overruled by the U.S. Supreme Court's Fibreboard decision.)

Generally speaking, termination of employment is a mandatory subject of bargaining.[6] 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.[7] (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 . . . work did not alter the company's basic operation."[8]

Especially in this case, where a collective bargaining agreement was in effect at the time of the discharge of a significant portion of the bargaining unit, it would serve the intent of the statute to permit the union to collectively bargain to protect negotiated working conditions. It has not been shown that the city was compelled, directly or indirectly, to contract out in order to resolve its problems. Given the opportunity to bargain the decision to contract out, the union may have shown management unforeseen problems resulting from the change or it may have advanced proposals that would convince the city to retain the employees.[9] For example, the union may have been able to convince the city that the city would be better off retaining the sewage treatment plant, and making operational changes or capital additions to the plant, as the city was planning prior to Envirotech's proposal. Further, the union may have proposed economic concessions which may have convinced the city that the plant operations should not be subcontracted. As the Supreme Court said in Fibreboard:

> ". . .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.[10]

6/ South Kitsap School District No. 402, Decision No. 472 PECB (1978), citing Ozark Trailers, Inc., 161 NLRB No. 48 (1966).

7/ 379 U.S. 203, 212.

8/ Id., at 213.

9/ South Kitsap School District No. 402, supra note 6, citing Town of Andover, 4MLC 1986 (1977) and International Harvester Co., 277 NLRB No. 19 (1976).

10/ Kennewick, supra, note 5 at 214.

The Public Employees Collective Bargaining Act did not preclude the city from contracting out the operations of its sewage treatment plant. All that was required was that the city 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." 11/

The union's failure to request bargaining regarding the decision to contract out services is inconsequential because the union was not informed of the decision until after it was made and the city had committed itself.12/

The NLRB has established "that a bargaining representative may waive statutory rights guaranteed employees provided such waiver does not contravene the policies of the Act."13/ The city contends that the union in its collective bargaining agreement with the city has waived the right to bargain collectively on the subject of contracting out.

Thus the city's waiver contention must be resolved by interpreting the collective bargaining agreement. The parties have mutually agreed in their collective bargaining agreement that questions of contract interpretation should be resolved by their grievance machinery. This Commission has taken a position in conformity with the U.S. Supreme Court and the NLRB, that arbitration is the preferred method of resolving such matters.14/

In several cases, this agency has indicated that it will defer unfair labor practice allegations to arbitration where two basic conditions have been met:

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

12/ Kennewick, supra, note 5.

13/ The Bunker Hill Co., 208 NLRB No. 17 (1973), at 33.

14/ City of Richland, Decision No. 246 (PECB, 1977); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

> (1) The disputed issues are, in fact, issues susceptible of resolution under the operation of the grievance machinery agreed to by the parties, and
> (2) There is no reason for us to believe that use of that machinery by the parties could not or would not resolve such issues in a manner compatible with the purposes of the Act.15/

An arbitrator should be capable of deciding the underlying contractual issue in this case, i.e., whether the union in its collective bargaining agreement with the city waived its statutory right to bargain concerning a decision by the city to contract out services which results in layoffs.16/

I would have been more sympathetic to the city's deferral contention if it had been made in a more timely fashion. Deferral motions will be entertained by the Executive Director prior to the case's transfer to an examiner, or thereafter prior to trial by the examiner.

Even having completed the trial, if I was able to discern an arguable interpretation of the collective bargaining agreement to include such a waiver, then I would defer the matter to the parties agreed upon method of deciding contractual disputes. However, no such interpretation is feasible in this case. The absence of a waiver is reflected in the union's refusal to agree to the city's proposal during contract negotiations to the effect that the city had the right to contract for services. On the other hand, there is no evidence that during the same negotiations the union intended to waive its right to bargain concerning the subject of subcontracting resulting in the loss of unit work. It may well be that the collective bargaining agreement does not preclude the city from contracting out services. However, that does not mean that the city may contract out services and as a result lay off employees, without bargaining concerning that decision with the union. Since the collective bargaining agreement is not susceptible to an interpretation reflecting a waiver by the union of its statutory bargaining rights, deferral to arbitration is inappropriate.17/

15/ City of Richland, supra note 12, 246 (PECB, 1977), citing Eastman Broadcasting Co., 199 NLRB No. 58 (1972). See also International Association of Firefighters v. City of Kennewick, Decision No. 334 PECB (1977).

16/ Roy Robinson Chevrolet, 228 NLRB No. 103 (1977).

17/ Oak Cliff-Gilman Baking Co., 207 NLRB 1963 (1973).

REMEDY

Having concluded that the city committed unfair labor practices, there remains the task of fashioning a remedial order. Ordinarily such a remedial order involves a make whole remedy and an order to bargain in good faith and to resume operations until an agreement is reached or an impasse is reached.[18/] The NLRB has held that such a remedy may not be appropriate in cases not involving discriminatory conduct, where it results in undue hardship.[19/] In view of the significant effect such a remedy may have on the city's operations and finances, I shall reopen the record to accept additional testimony and argument by the parties on the remedy question.

FINDINGS OF FACT

1. The City of Vancouver is a municipal corporation of the State of Washington within the meaning of RCW 41.56.020.

2. The Washington State Council of County and City Employees, AFSCME, AFL-CIO, and its Local No. 307 VC is a bargaining representative within the meaning of RCW 41.56.030(3).

3. Complainant is the certified exclusive bargaining representative of a certain of respondent's employees including those who work in its sewage treatment plant.

4. On or about June 19, 1978, respondent entered into a contract with Envirotech Corporation in which Envirotech agreed to take over operation of respondent's sewage treatment plant, effective July 5, 1978.

5. When the operation of the plant changed hands, the 18 city employees at that plant were terminated by the city.

6. During June, 1978, there was a collective bargaining agreement in effect between respondent and complainant.

7. During contract negotiations between complainant and respondent, complainant proposed language which specifically permitted complainant to unilaterally contract out unit work. Complainant resisted this proposal and respondent withdrew it.

18/ Kennewick, supra note 4.

19/ NLRB v. Townhouse T.V. Inc., 531 F2nd 826 (7th Cir 1976); Production Molded Plastics, Inc., 227 NLRB No. 104 (1977).

8. No provision in the collective bargaining agreement between respondent and complainant constituted a waiver of complainant's right to bargain a decision concerning the contracting out of work which results in the termination of bargaining unit employees.

9. Respondent did not bargain with complainant, or even notify complainant, before contracting out the work of employees represented by complainant.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By the events described in findings of facts 3 through 9, the respondent did commit unfair labor practices violative RCW 41.56.140 (1) and (4).

DIRECTION OF SUPPLEMENTAL HEARING

On the basis of the foregoing findings of fact and conclusions of law, the undersigned Examiner hereby directs that a supplemental hearing be held in order to determine the appropriate remedy.

DATED this 5th day of February, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Alan R. Krebs

ALAN R. KREBS, Examiner