STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GENERAL TEAMSTERS UNION LOCAL NO. 378, Complainant,	CASE NO. 3396-U-81-489
	DECISION NO. 1366 - PECB
vs.	
OLYMPIA SCHOOL DISTRICT NO. 111, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hafer, Cassidy & Price, by Thomas K. Cassidy, Attorney at Law, appeared on behalf of the complainant.

Perkins, Coie, Stone, Olsen & Williams, by Lawrence B. Hannah, for the respondent.

General Teamsters Union Local No. 378 (union) filed a complaint with the Public Employment Relations Commission (PERC) on April 8, 1981, amended on June 4, 1981, in which it alleged that Olympia School District No. 111 (district) committed an unfair labor practice in violation of RCW 41.56.140(4) of the Public Employees Collective Bargaining Act (Act). The union alleges that the district unlawfully refused to engage in collective bargaining when it unilaterally instituted changes in the terms and conditions of employment regarding the laundry worker position represented by the union. The hearing was held on September 25, 1981.

FACTS:

The union and the district were parties to a collective bargaining agreement which was effective from September 1, 1980 until August 31, 1981, and which by its terms encompassed the "laundryman position". That position was held by one employee from about June, 1974 until he retired on November 30, 1980. From the time that this employee had transferred to the laundry position in 1974 it was a year-round position, even though no laundry work was performed during the summer months. Each summer he was assigned maintenance work at no change in salary and with no break in service.

When the employee retired, another employee was assigned his work on an interim basis. Shortly afterwards, Owen Linch, the union's business agent, phoned Michael Boring, the district's assistant superintendent and asked

when the opening for the position would be posted. Boring responded that the district was considering a modification of the position. On December 2, 1980, a meeting was held on the matter attended by Linch, Boring, and Richard Hunter who is the district's superintendent. At the meeting Hunter indicated that the district was looking for ways to economize and was therefore considering the possibility of making the laundry position a 199 day position rather than a year-round position. If that was effectuated, the position would encompass laundry work only and the summer maintenance work would not be performed. When Hunter asked Linch for his response, Linch said "I would hurry to arbitration just as fast as we could get there." During this meeting, Hunter stated that the district was also considering contracting out the laundry work or not permanently filling the vacancy.

Boring testified that on December 11, 1980, he again raised the matter of a reduced work year for the laundry position and that Linch reiterated his opposition to any change to the work year for the position. While Linch did not recall this meeting in his testimony he did not rebut it, and I credit Boring's testimony in this regard.

On December 18, 1980, the district posted the position of "district laundry operator" as a 199 days per year position and set the deadline for application as December 24, 1980. On the same date Boring wrote to Linch:

> Enclosed is a copy of the posting for the school district laundry postion. You will recall that we have discussed this on two occasions. We are posting this as a slightly more than 9 month position and as we indicated to you was a possibility.
>
> I will of course, be glad to talk with you further about the job at your convenience.

On December 22, 1980, Linch responded by letter to Boring:

> Please consider this as a protest to the change in working condition for the laundry position.
>
> Your unilateral action expressed by the laundry posting would have the effect of reducing the wages, hours, shift differentials and job security of that position, all of which are prohibited by contract and/or law.
>
> In accordance with Article VII, Section 1(b), I will be available to discuss this matter to attempt to resolve it short of arbitration. Please call so that we may set such a meeting as soon as possible.
>
> Also, in accordance with Article VII, Section 1(e) of the collective bargaining agreement I request that the wages, hours and working conditions remain unchanged in regard to the laundry position until a final decision in the matter can be reached.
>
> Thank you for your attention to this matter.

The union filed a grievance and several meetings were held regarding it. Throughout the discussions, the union maintained the position that it emphatically opposed anything other than twelve months of work for the laundry position and that the union would bring the matter to arbitration. The final meeting on the grievance was held on January 14, 1981 and the dispute was never submitted to arbitration. On January 19, 1981, the 199 day laundry position was filled on a permanent basis.

POSITIONS OF PARTIES:

The union contends that the district committed an unfair labor practice by unilaterally modifying a mandatory subject of bargaining in an existing bargaining agreement. It argues that the maintenance of standards clause in the agreement was violated[1/] and that the district's unilateral action could not be justified, even had it bargained to impasse.

The district does not concede that the posting of the laundry job as a 199 day position involved a mandatory subject of bargaining. The district asserts that the union is asserting merely a breach of contract which is not an unfair labor practice. It contends that the district did negotiate, and, by its actions and the union's responses satisfied its duty to bargain. Further, the management rights clause of the agreement authorized the district's actions by providing that the district had the right "to determine the number of its personnel".[2/]

DISCUSSION:

RCW 41.56.140 provides:

> It shall be an unfair labor practice for a public employer:
>
> * * *
>
> (4) To refuse to engage in collective bargaining.

1/ The agreement provides as follows: "Article XVII -- Maintenance of Standards -- The District agrees that all conditions of employment in the District's operation relating to wages, hours, overtime, shift differentials, job security provisions, and benefits, shall be maintained at not less than the standards generally in effect at the time of the signing of this agreement, within the limits of funds available, other than exceptions provided for in this agreement; and the conditions of employment will be improved wherever specific provisions for improvement are made in this agreement."

2/ Article XVI of the agreement provides that: "It is agreed that nothing in this agreement shall limit the District in the exercising of its function as management, including but not limited to the rights ... to determine the number of its personnel..."

Collective bargaining is defined 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.

RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours and working conditions" are mandatory subjects for bargaining. Subjects which are remote from such matters or are regarded as a prerogative of management are non-mandatory subjects for bargaining. The duty to bargain applies only to mandatory subjects. Federal Way School District, Decision 232-A (EDUC, 1977); Yakima Police Patrolman's Association, Decision 1130 (PECB, 1981); NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958). A permanent change in the work year of a position is a "personnel matter", and more specifically falls within the meaning of "hours".

PERC's Executive Director has held that shift scheduling is a mandatory subject since it "falls within the broad ambit of 'hours' of employment". City of Yakima, Decision 767 (PECB, 1979); City of Auburn, Decision 901 (PECB, 1980). The NLRB required employers to bargain changes in the work schedule which resulted in one case with employees working less shifts per year, Americal Oil Co., 238 NLRB 294 (1978), and in another case which altered summer hours. Sevahis Industries, Inc., 238 NLRB 309 (1978). Certainly the hours of the day and the days of the week during which employees may be required to work fall within the ambit of "hours". Amalgamated Meatcutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965). In logical progression, the weeks of the month and the months of the year which employees are scheduled to work also fall within the meaning of "hours" of employment.

In fashioning the Act's definition of collective bargaining the legislature borrowed extensively from §8(d) of the National Labor Relations Act (NLRA), but omitted §8(d)'s proviso:

> ... Provided, That where there is in effect a collective bargaining contract ..., the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification ...
>
> * * *
>
> (4) Continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later...

The U.S. Supreme Court and the National Labor Relations Board (NLRB) have viewed that proviso as prohibiting unilateral midterm modifications of collective bargaining agreements. Allied Chemical and Alkali Workers V. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); John W. Bolton & Sons, Inc., 91 NLRB 984 (1950). In Bolton, the NLRB held that even where a union refuses to negotiate on an employer's proposed midterm modification, the employer violates the §8(d) proviso by its implementation.

Previously, PERC's Executive Director has held that both violations of collective bargaining agreements and enforcements of agreements to arbitrate are not within PERC's jurisdiction, but rather are within the jurisdiction of the courts. Thurston County Communications Board, Decision 103 (PECB,1976); Olympia School District No. 111, Decision 1272 (PECB, 1981). Indeed, even the NLRB finds no unfair labor practice where a party simply defaults on a contract obligation. C & S Industries, Inc., 158 NLRB 454 (1966). Relying on the §8(d) provisio, the NLRB would find that an unfair labor practice has been committed if a party unilaterally modifies a contract in a manner which would have a continuing impact on a term or condition of employment. Id. While the district argues that the union is alleging a mere contract violation, rather than a contract modification, I find it unnecessary to make that distinction under the Act which PERC administers. Since there is no language in the Act similar to the §8(d) proviso, it is held that a party which enacts a midterm modification to a collective bargaining agreement without the consent of the other party, has not per se committed an unfair labor practice.

While the Act requires the parties to "negotiate in good faith, and to execute a written agreement", it does not prohibit a party from modifying an agreement as does §8(d) of the NLRA. PERC has recognized that the Act was patterned in large part after the NLRA, and that the differences between the two statutes must be given significance. City of Seattle, Decision 489 (PECB, 1978). The §8(d) proviso was added to the NLRA in 1947 as part of the Taft-Hartley amendments. Prior to that time, the NLRB held that an employer's midterm modification of a collective bargaining agreement was not a per se refusal to bargain. In Carroll's Transfer Co., 56 NLRB 935 (1944), the NLRB said that the NLRA would be violated if an employer changed the terms of an existing contract without first submitting the matter to negotiations with its employees' bargaining representative and then observed:

> If, after a full exchange of views and a sincere effort to compose differences, the parties to a trade agreement are left at an impasse concerning its interpretation, application or modification, the matter is outside our hands.

See also, NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); Consolidated Aircraft Corp., 47 NLRB 694 (1943). The Bolton decision implies that the NLRB viewed the §8(d) proviso as superseding the Carroll's Transfer Co. case. However, the Washington legislature's omission of the §8(d) proviso resurrects the

Carroll's Transfer Co. rationale and effectively relegates alleged violations or modifications of collective bargaining agreements to the parties' agreed upon dispute resolution procedures or to the courts.

In the case at hand, the parties' collective bargaining agreement provides for arbitration of disputes involving the interpretation or application of the agreement. Assuming for a moment that the union was correct in its allegation that the district's actions constituted a midterm modification of the agreement, a remedy could have been obtained through the contract's arbitration provisions.

The legislature has not chosen to provide the union with an alternative unfair labor practice remedy. Instead, it, in effect, marched beyond the NLRA along the path of the long standing federal labor "policy in favor of settlement of disputes by the parties through the machinery of arbitration" expressed in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

RCW 41.56.030(4) requires negotiations on hours. An employer's unilateral change of its employees' hours of employment, without prior discussion with the employees' bargaining representative, ordinarily constitutes a refusal to bargain unfair labor practice. NLRB v. Katz, 369 U.S. 736 (1962); Federal Way School District No. 210, supra. This is so even where there is a bargaining agreement in effect, if the agreement does not specifically permit the employer to make the unilateral change. Port of Edmonds, Decision 844 (PECB, 1980), affirmed, Decision 844-B (PECB, 1980).

A unilateral change is not unlawful if the union involved fails to request negotiations after it had actual knowledge of the employer's intentions and there was sufficient time prior to the implementation date for it to meaningfully request negotiations. City of Yakima, Decision 1224-A (PECB, 1981); Renton School District No. 403, Decision 706 (EDUC, 1979); Medicenter, Mid-South Hospital, 221 NLRB 105 (1975). In Medicenter, the union, upon receiving two days notice from an employee of the employer's intended change in working conditions, "showed no inclination to do anything but object". The NLRB agreed with the administrative law judge's conclusion that the union's failure to prosecute its bargaining rights constituted a waiver of the union's right to bargain. See, also Clarkwood Corp., 233 NLRB 1172 (1977). The same analysis is applicable to the instant case.

The union admittedly was informed by the district that it was considering a reduction in the work year for the laundry position. Later, the district apprised the union when it began accepting applications for the position with a reduced work year. The union had a month to request negotiations on the matter before the position was filled. At no time did the district preclude negotiations on the matter. In fact, it orally, and in writing, solicited the union's views on the subject. The union never requested negotiations. Instead, it expressed uncompromising hostility to the district's intended

change and vowed to fight it through the contract's grievance procedure. If, as it appears, the union firmly believed that the district's action was in violation of the contract, it is certainly understandable that the union perceived that it had no need to bargain the matter. Nevertheless, by failing to request negotiations on the district's intended change in the work year for the laundry position, the union waived its bargaining rights.

I therefore conclude that the district did not in violation of RCW 41.56.140(4) refuse to engage in collective bargaining with the union.

FINDINGS OF FACT

1. Olympia School District No. 111 is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1).

2. General Teamsters Union Local No. 378 is a bargaining representative within the meaning of RCW 41.56.030(3).

3. The union and the district were parties to a collective bargaining agreement which was effective from September 1, 1980 until August 31, 1981, and which by its terms encompassed the "laundryman position". The agreement contained a maintenance of standards clause.

4. In December, 1980, there was an opening for the one laundry position at the district. The district advertised the position as a 199 days per year position. Previously, it had been a year-round position.

5. The union was notified of this intended change in the work year for the laundry position. The union never requested negotiations. Instead, it expressed uncompromising hositility to the district's intended change and vowed to fight it through the contract's grievance procedure.

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 fact 3, 4, and 5, the district did not commit unfair labor practices violative of RCW 41.56.140(4).

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, the undersigned Examiner hereby orders that the complaint against the Olympia School District No. 111 be, and it hereby is, dismissed.

DATED at Olympia, Washington this 10th day of February, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

ALAN R. KREBS, Examiner