STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| PUBLIC SCHOOL EMPLOYEES OF YELM, an affiliate of PUBLIC SCHOOL EMPLOYEES OF WASHINGTON,<br><br>Complainant,<br><br>vs.<br><br>YELM SCHOOL DISTRICT,<br><br>Respondent. | CASE NO. 5729-U-85-1055<br><br>DECISION NO. 2543 - PECB<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

Edward A. Hemphill, Legal Counsel, Public School Employees of Washington, appeared on behalf of the complainant.

Williams and Terry, by John David Terry, II, Attorney at Law, appeared on behalf of the respondent.

Public School Employees of Yelm (PSE) filed a complaint with the Public Employment Relations Commission (PERC) on March 18, 1985, alleging that Yelm School District had committed unfair labor practices in violation of RCW 41.56.140(1) and (4), by changing conditions of work without negotiating with the exclusive bargaining representative and by assigning bargaining unit work outside of the bargaining unit. A hearing was held in the matter on May 22, 1985 at Olympia, Washington, before Examiner Martha M. Nicoloff. The parties filed post-hearing briefs.

BACKGROUND

The Yelm School District recognizes Public School Employees of Yelm as the exclusive bargaining representative for a bargaining

unit of classified employees of the district, excluding clerical personnel and the supervisors of food service, transportation, and custodial/maintenance services. PSE and the district were parties to a collective bargaining agreement at the time of the hearing in this case.

The situation which gave rise to this unfair labor practice case was the district's proposed reorganization of its custodial program and the creation of a new position of custodial supervisor. On August 23, 1984, the district's maintenance supervisor sent a memorandum to the maintenance and custodial staff of the district, informing them of a new work schedule and of the appointment of Dick Orndorff as custodial supervisor. Orndorff had theretofore been one of the lead custodial workers in the bargaining unit represented by PSE.

PSE field representative Ed Wolf contacted the employer, by telephone, concerning the matter. Thereafter, on or about August 31, 1984, the district retracted the proposed changes. The retraction was in the form of a letter to Wolf from Dr. Glen Nutter, district superintendent, as follows:

> Dear Ed:
>
> It has come to the District's attention that PSE may be concerned with some changes that Mr. Schmidtke recommended to the custodial staff about the use of foreman (sic) and the scheduling of custodial work for the 1984-85 school year.
>
> Since these decisions have not been implemented, the District wishes to formally retract them. The District will send a letter to each member of the custodial staff at PSE's request informing them that the District has formally retracted the recommendation affecting the custodial staff and that no decision will be implemented in this area until the District has complied with

> Sections 5.1 and 5.2 of the collective bargaining agreement.
>
> In making this retraction the District wishes to advise you that this retraction in no way affects our ability and right to establish supervisory position (sic), to determine the level of custodial services, or establish appropriate work schedules. The District does, however, recognize its obligation under the law to meet, confer, and negotiate the impact of such changes on employees.
>
> We are considering making some changes in working conditions for custodians similar to those discussed at a recent meeting with custodians. We are herein requesting a meeting with you to seek agreement on these matters.

A meeting between the parties was held on October 1, 1984. Those attending were: Nutter; John Terry, the attorney for the district; Del Blocker, president of the Yelm chapter of Public School Employees; and Wolf. The matters under discussion at the meeting were threefold. First, the district proposed to divide the responsibilities of the existing custodial maintenance supervisor between two positions, with the current supervisor to become the maintenance supervisor and both positions to be excluded from the bargaining unit. Second, although the district had initially proposed eliminating three lead custodial positions (also variously termed foreman or head custodian), the district proposed at the October 1, 1984 meeting that the three positions be posted and filled. Third, the district proposed that it be able to assign bargaining unit work to the new custodial supervisor in non-emergency situations for up to 25% of his time. Following the meeting, Terry wrote the following letter to the union:

> Dear Mr. Wolfe (sic):
>
> This is to confirm the results of our negotiations session on October 1, 1984,

where we discussed the organization of custodial services being proposed by the District.

The consensus of the parties was to compromise the situation so that a non-unit custodial supervisor would be able to do unit work in non-emergency situations up to 25% of the time. The district would fill the lead custodial vacancies as discussed notwithstanding its ability to determine the level of services under state law. In addition, the parties agree that the future utility of the lead positions should undergo further evaluation as the district may be desirous of eliminating some or all of the lead positions after the expiration date of the current contract.

Should this letter not reflect the consensus and positions of the parties, please do not hesitate to contact us.

Wolf responded in a letter dated October 19, 1984, as follows:

Dear Mr. Terry:

This is in response to your letter dated October 8, 1984 concerning the Yelm School District.

You are not correct in your concept of a consensus of the 25% workload factor or in the concept of that meeting as a full negotiation session.

It has been P.S.E.'s position from the start that those meetings were held for the purpose of determining what the District's position is in terms of complying with the current agreement. We do recognize the District's right to seek access to P.E.R.C. for a unit clarification, and our meetings were intended to seek a local solution to avoid that route.

It is P.S.E.'s position that the three vacant Custodial Foreman positions be filled immediately. The District's stated desire to

> create a supervisory position is a separate question.
>
> We would like a clear statement of the District's intentions in the following areas:
>
> 1. Is the District going to fill the Foreman position at the High School, Middle School, and Prarie (sic)?
> 2. Is the District going to create a new "supervisory" position in the Custodial area?
> 3. Is the position going to the be inside or outside of the bargaining unit?
>
> We have attempted to deal with this issue in good faith and with patience. It is our position that if grievances and or unfair labor practice charges are ultimately filed concerning the foreman positions, that P.S.E. will seek retroactive pay to November 1, 1984.
>
> Thank you for your efforts to help resolve this matter.

The district did not make any response to Wolf's letter. Nutter testified, although somewhat confusing, Wolf's letter meant to him that the parties might not have agreement on all issues, but: "at that point, I felt that there wasn't anything for us to do; if they wanted to bargain, they should ask us further."

Sometime after the exchange of correspondence, the district posted and filled two of the lead custodian positions. The new supervisory position was subsequently posted, and Orndorff was again appointed to that position. Thereupon the lead custodian position which Orndorff had held was posted and filled.

Nutter testified that, as custodial supervisor, Orndorff was performing approximately one to one-and-one-half hours of custodial work each day. That work consisted of maintaining his own work station and following up after a handicapped worker to assure that his work was being properly done.

Nutter's testimony was that no employee had been deprived of any work opportunity because of the tasks performed by the custodial supervisor, and that it was "impractical" to hire an individual for an hour or so of work a day. Other testimony indicated, however, that the district employs at least one individual as a groundskeeper on a part-time basis, and that the district had not offered the custodial work to him as additional hours of work.

In December, 1984, Nutter apparently first became aware of a grievance filed in September, 1984 by one of the lead custodians. That grievance detailed a number of concerns regarding the custodial supervisor position. Nutter responded to that grievance by letter, inviting the grievant to discuss the matter further. Nutter's letter indicated a copy being sent to Blocker. Blocker did not recall receiving that letter, although he did recall meeting with Nutter and the grievant.

Wolf testified that, although he had seen the posting and knew the district had filled the custodial supervisor position, he did not become aware until February, 1985, that the supervisor was performing any custodial assignments on a regular basis. These unfair labor practice charges followed.

## POSITIONS OF THE PARTIES

The union argues that the district has failed to bargain concerning the reorganization of custodial operations and assignment of unit work to a non-unit employee. It claims that the October 1, 1984 meeting was not a negotiation session. However, the union asserts that even if that meeting were deemed to have been a negotiation session, the district failed to meet its bargaining obligation, because neither agreement nor impasse was reached as a result of that meeting. The union further argues that,

although the district's initial reorganization plan would have removed far more unit work than its eventual plan, the reorganization cannot be deemed to be de minimus. Responding to the district's arguments, the union asserts that the obligation rested with the district to pursue bargaining after the October 1, 1984 meeting and subsequent correspondence, and that the union has waived none of its bargaining rights.

The district takes the position that it fulfilled its bargaining obligation by the October 1, 1984 meeting and by its continuing willingness to negotiate any demand or proposal that the union might tender. The district asserts that it was within its rights in creating a new supervisory position. Further, the district argues that there must be some latitude in ascribing work exclusively to one class of employee. The district also alleges that there is insufficient evidence to show that the work in question was indeed bargaining unit work or that there was any significant detriment to the bargaining unit by reason of the assignment of duties to the custodial supervisor. The employer also claims that the failure of the union to pursue further discussion on the issue after the October 1, 1984 meeting or after the December, 1984 grievance discussions constituted a waiver. In the alternative, the district argues that the union's behavior after the October 1, 1984 meeting created an impasse concerning the issue, such that the employer was free to implement its decisions.

## DISCUSSION

### Waiver by Contract and Deferral to Arbitration

This dispute has been processed exclusively as an unfair labor practice case. The initial correspondence from the district to

the union made reference to the collective bargaining agreement between the parties, even indicating that the district would make no decisions regarding reorganization of the custodial staff until certain sections of that agreement had been complied with. The union's October 19, 1984 letter also made reference to "compliance with the collective bargaining agreement". Such references could be taken to raise a question as to whether deferral to arbitration might have been appropriate in this matter. As a matter of policy, the Commission defers to contractual dispute resolution machinery (in order to permit the arbitrator to make the initial interpretation of the contract) where "unilateral change" conduct at issue in an unfair labor practice case is "arguably protected or prohibited by the collective bargaining agreement" between the parties. In this case, however, neither party has made any claim that the conduct at issue was either protected or prohibited by the contract. The collective bargaining agreement was not entered into evidence. Since the question was not otherwise raised, the examiner deems deferral to be inappropriate in this case.

Creation of a Supervisory Position

It is clear that an employer may legitimately create a supervisory position that is not in a bargaining unit. See: Lakewood School District, Decision 755-A (PECB, 1980). The creation of such a position may lead to an unfair labor practice charge, however, if the new position is then assigned to do work usually done by bargaining unit employees. Lakewood, supra; City of Mercer Island, Decision 1026-A (PECB, 1981).

In the instant case, the original intention of the district was to couple its creation of a new supervisory position with leaving three "lead" positions unfilled. Those lead positions were part of the bargaining unit, so that the district's plan would have

eliminated promotional possibilities within the unit as well as removing work from the unit. Such an action would have given rise to a duty to bargain, and implementation without agreement or impasse would clearly have been an unfair labor practice. Lakewood, supra; City of Mercer Island, supra; South Kitsap School District, Decision 473 (PECB, 1977).

The district rescinded its original plan to remove positions from the bargaining unit. Its August, 1984 letter to Wolf put an end to that problem, and the union concedes in its post-hearing brief that the district had appropriately restored the status quo on this issue.

The district went ahead, after the October 1, 1984 meeting and the exchange of correspondence, with the creation of the custodial supervisor position. While the employer seemingly had a right to do so, the question remains whether the new custodial supervisor is performing bargaining unit work.

Skimming of Bargaining Unit Work

The assignment of work that clearly has been bargaining unit work to the custodial supervisor would be grounds for finding an unfair labor practice absent agreement, impasse or waiver of the union's bargaining rights. Lakewood, supra; City of Mercer Island, supra; South Kitsap School District, supra.

Arguably, both cleaning his own office and doing follow-up behind a handicapped employee could be regarded as bargaining unit work. There is some inference which might be drawn from the record that those responsibilities have been unit work. The complainant in any unfair labor practice proceeding has the burden of proof with regard to the allegations of its complaint. In this case, however, the union has not met that burden regarding the issue of

whether the work being performed by the custodial supervisor at the time of hearing was in fact bargaining unit work. It is also arguable that the claimed unit work at issue is within the usual and customary responsibilities of a custodial supervisor. It is clear that checking the work of others is often a supervisory function. The inferences noted above are insufficient to meet the union's burden.

## Bargaining to Agreement

The determination that the union has not met its burden with regard to the specific work being performed by the custodial supervisor at the time of hearing does not resolve the issue of whether the supervisor may perform unit work for 25% of his time. When focused on the issue of whether good faith bargaining has taken place on this subject, the examination must look at the behavior of the parties on October 1, 1984 and thereafter.

The union argues that the meeting between the parties on October 1, 1984 was exploratory, and that it did not constitute negotiations over the issue of the supervisor's being assigned bargaining unit work. To the contrary, the examiner finds that the October 1st meeting and the subsequent correspondence did constitute bargaining between the parties. This is in contrast to City of Bellevue, Decision 839 (PECB, 1980), where the informal nature of the discussion and the employer's failure to include its labor relations consultant in the discussions led to a conclusion that bargaining had not taken place. Here, the employer and the union were both represented at the October 1st meeting by individuals who usually negotiate and administer the collective bargaining agreement. Additionally, a determination can be based on the behavior of the parties. The principal representatives of the parties had already discussed the matter by telephone and there had been correspondence on the issue. The

parties met and discussed the issues before them. The parties reached an agreement concerning the issue of filling the lead custodial positions. It is equally clear that the parties did not reach an agreement on the issue of what percentage of the custodial supervisor's time could be spent in doing bargaining unit work.

Even if the district's representatives left the October 1st meeting believing that they had an agreement, it should have been abundantly clear that there was no agreement after the exchange of the correspondence dated October 8th and 19th. The examiner does not see any basis on which the district could have continued to believe it had agreement on the "unit work" matter after it received Wolf's letter.

Waiver by Conduct

Contrary to the district's assertion, the burden was not solely on the union to pursue bargaining after the exchange of correspondence.

> RCW 41.56.030 (4) imposes a mutual obligation on the employer and on the bargaining representative of the employees. It cannot be assumed that the burden of taking the lead in a given situation falls solely on one party or the other.

City of Yakima, Decision 1124-A (PECB, 1981).

It was the employer that desired to alter the status quo by its proposal to regularly assign work historically belonging to the bargaining unit outside of that unit. The union had made a bargaining demand in August, and there was no indication that the demand had been dropped. The obligation to press forward in

negotiations was on both parties. The union could perhaps have been more aggressive in its pursuit of bargaining on the subject, but the burden of proving waiver rests with the district. There is nothing in the conduct of the union that expresses an intent to surrender its bargaining rights on the issue. Waivers will not be lightly inferred. City of Kennewick, Decision 482-B (PECB, 1978). Lakewood School District, supra.

## Impasse

Nor does the district's "impasse" theory have any merit. The parties had not reached an agreement, but there is little to indicate that their positions had hardened so as to make further discussion useless. To the contrary, the employer's own officials came away from the October 1, 1984 meeting with an impression of "agreement" rather than of "impasse". The failure of the district to follow up on the October 19th letter from the union with any inquiries as to what resolution might be made of the matter undermines the credibility of the employer's claim now that it had reached an impasse in good faith bargaining. The employer had and has a continuing obligation to bargain. The mere passage of time did not relieve it of that obligation.

## Summary

The examiner concludes that the record establishes neither a waiver by the union of its bargaining rights nor bargaining of the employer's "the supervisor may perform any type of unit work 25% of the time" proposal to agreement or to impasse. Hence, this decision cannot and should not be read as holding that the district has exhausted its bargaining obligations on the subject matter of this complaint. Rather, the dismissal of the complaint in this case is based on the narrow ground that the union has not met its burden of proof to show that the particular work being

performed by the custodial supervisor at the time of hearing was bargaining unit work.

## FINDINGS OF FACT

1. Yelm School District is a school district of the state of Washington organized and operated pursuant to Title 28A RCW, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public School Employees of Yelm, an affiliate of Public School Employees of Washington, is a "bargaining representative" within the meaning of RCW 41.56.030(3).

3. Public School Employees of Yelm is the exclusive bargaining representative of a bargaining unit of certain non-supervisory employees of the Yelm School District, including employees working in maintenance and custodial services.

4. On August 23, 1984, the district announced changes in the custodial-maintenance operation, including the creation of a custodial supervisor position outside of the bargaining unit and the elimination of three lead custodian positions from the bargaining unit. The district retracted these changes after being contacted by the union.

5. Representatives of the district and of the union met and negotiated on October 1, 1984 with respect to the district's plan to reorganize its custodial-maintenance operation. In response to the objections of the union, the district agreed to continue the three existing lead custodian positions. The parties discussed creation of a custodial supervisor position and whether that position would be outside the

bargaining unit. The parties also discussed the district's proposal that a custodial supervisor be permitted to perform unit work on a non-emergency basis up to 25% of his time, but failed to reach agreement thereon.

6. Correspondence between the parties following the October 1, 1984 meeting established, and was understood by the employer's superintendent of schools to establish, that there was no agreement, and some confusion existed, regarding the results of the discussion between the parties.

7. After the exchange of correspondence between the parties referred to in paragraph 6 of these findings of fact, no further formal or informal communications occurred between the parties on this subject. The district created and filled a custodial supervisor position outside the bargaining unit. The district also posted and filled the three lead custodian positions.

8. The custodial supervisor performs approximately one to one-and-one-half hours of custodial work daily, including cleaning his own work station and checking on the work of a handicapped individual employed by the district as a custodian. The record does not show whether, or to what degree, such work was performed prior to the creation of the supervisory position.

## CONCLUSIONS OF LAW

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

2. This unfair labor practice case is properly before the examiner in the absence of any claim or inference that the conduct at issue is or could be either protected or prohibited by the collective bargaining agreement between the parties.

3. The complainant has failed to sustain its burden of proof to show that the specific work described in paragraph 8 of the foregoing findings of fact has historically been or should appropriately be performed by members of the bargaining unit for which the complainant is exclusive bargaining representative.

On the basis of the above findings of fact and conclusions of law it is now, therefore,

ORDERED

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

DATED at Olympia, Washington, this 7th day of October, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Martha M. Nicoloff

MARTHA M. NICOLOFF, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.