STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF CENTRALIA, an affiliate of PUBLIC SCHOOL EMPLOYEES OF WASHINGTON,	)	CASE NO. 6573-U-86-1305
Complainant,	)	DECISION 2757 - PECB
vs.	)	
CENTRALIA SCHOOL DISTRICT,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

<u>Eric T. Nordlof</u>, attorney at law, appeared on behalf of the complainant.

<u>Jerry Gates</u>, labor relations specialist, appeared on behalf of the respondent.

On September 23, 1986, Public School Employees of Centralia, an affiliate of Public School Employees of Washington (hereinafter PSE), filed a complaint charging unfair labor practices against the Centralia School District. The complaint alleged that the school district refused to engage in good faith collective bargaining, in violation of RCW 41.56.140(4) and (1), when it unilaterally transferred bargaining unit work to non-district employees. Additionally, the complaint alleged that the district had interfered with the rights of the employees by circumventing the exclusive bargaining representative and dealing directly with employees, also in violation of RCW 41.56.140(4) and (1). A hearing was conducted December 11, 1986 in Centralia, Washington, by Examiner Katrina I. Boedecker. The parties filed post-hearing briefs.

BACKGROUND

The complainant is the exclusive bargaining representative for a unit of transportation and food service employees of the Centralia School District. The parties had a collective bargaining agreement for the period September 1, 1983 through August 31, 1986. Included in the bargaining unit was the position of "bus monitor". Bus monitors ride on school buses which transport students in the special education program. The monitors assist the bus drivers, by helping students entering and exiting the bus and by being attentive while the students are transported.

Centralia School District participates in a "special education cooperative" which is operated by the Chehalis School District. An "Agreement for Cooperative Educational Services for Handicapped Children" governs the arrangement. The agreement originally ended August 31, 1979 and was extended year to year thereafter. There were no significant changes in the document between the time the parties ratified their 1983 - 1986 collective bargaining agreement through the date of the most recent extension of the cooperative agreement, October 7, 1986. Pertinent parts of the cooperative agreement read:

> IV. PROGRAM STAFF AND FACILITIES
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> All cooperative staff members shall be hired, contracted, and assigned by the Serving District [Chehalis] and such employees shall be subject to rights and sanctions under the applicable collective bargaining agreement in force. Resource room teachers shall be hired and contracted by the school district in which they instruct. Personnel of special education program self-contained classroom(s) shall be deemed cooperative staff members, however, of individual school district

self-contained programs shall be deemed personnel of the school district in which they instruct.

* * *

V. FINANCING OF COOPERATIVE

Serving District shall apply to Superintendent of Public Instruction annually for funds to operate this cooperative. Serving District shall be entitled to and shall receive all apportionment monies derived from student enrollment in the cooperative program with the exception of students in resident district resource room and self-contained classroom programs.

Each district agrees to share the burden of any costs of the program which are approved but are not funded from basic apportionment (including staff weighting and interdistrict cooperative weighting), and excess cost funding, pursuant to RCW 28A.13.040. Such unfunded costs shall be prorated among the Serving and Cooperative Districts on the basis of FTE students served pursuant to this agreement. Excess costs for the program will be borne by all parties to this agreement on an FTE student special education program enrollment basis. Protests or concerns with district cost will be heard by the advisory council. ...

* * *

VI. TRANSPORTATION

Each district retains responsibility for providing transportation services to and from each child's home and place of learning within or without the child's resident district. Each district agrees to pay its share of actual costs for any transportation, other than home to school, provided by either district party to this agreement, from one place of learning to another place of learning during the school day, including special events and field

> trips. The division of costs shall be based upon the ratio of each district's student enrollment of the school or schools involved.

Thus, the two school districts run three special education programs: a self-contained program in the Centralia School District; a self-contained program in the Chehalis School District; and the cooperative program serving more severely handicapped students of both districts.

William Brumsickle is the assistant superintendent of schools in the Centralia School District. Among his duties, he represents the employer in its collective bargaining relationship with PSE, including negotiating the agreement and adjusting any grievances at the second level. Sometime in February, 1986, Brumsickle had an informal "by chance" meeting with Dale Dunham, president of the PSE local.[1] Brumsickle told Dunham that there was a possibility that the bus monitors would be transferred to the Chehalis School District because the special education cooperative was responsible for them. Dunham indicated that he thought the transfer should be negotiated. They discussed the transfer from "time to time" over the next few months. There is no record of counter-proposals from the union being submitted to the employer.

The transportation employees of the Chehalis School District have not organized for the purposes of collective bargaining. Working conditions vary between the two districts. At Chehalis, transportation employees receive a lower hourly wage, no paid holidays and a lower hour computation, (rounding

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[1] The only office that Dunham has held with the local is that of president, from February 1986 through November 1986.

off to the nearest five minutes, instead of the nearest fifteen minutes as in Centralia).

On March 25, 1986, Brumsickle met with all of the bus monitors, to inform them of the possibility of their being transferred due to "adjust[ing] the funding for the 'special ed' program in the right category". Dunham saw Brumsickle, Tom Praugemore the transportation supervisor, and the bus monitors walk into the meeting room in the bus garage as the meeting was beginning. He neither was invited into the meeting, nor did he make any attempt to attend. Karen Branam had been a bus monitor for Centralia School District since April, 1979. She attended the March meeting with Brumsickle. She testified that he announced that there "might be a possibility" of having the monitors work out of Chehalis the following year so that the special education program could save money. The monitors asked about the effect on their seniority, pay, retirement, medical insurance and union standing. Brumsickle indicated that he did not know the answers to their questions and that he would supply the information later.

On or about April 8, 1986, Branam, who was also treasurer of the PSE local told Pat Lambert, field representative for PSE, about the meeting with Brumsickle. Lambert contacted Jerry Gates, labor relations specialist for the district, who confirmed that the district was considering the transfer and acknowledged that it would be an appropriate subject for bargaining.

On May 16, 1986 Lambert wrote to Brumsickle, making a formal demand to bargain the transfer. Brumsickle's written response to Lambert, dated May 27, 1986, contained an invitation to bargain the matter, reasons for the transfer and a "reminder" that the president of the local had been made aware of the

action throughout the spring. Approximately the beginning of June, Lambert was replaced by Dennis Murphy as the field representative for PSE at the Centralia School District. No official notice of the change of representatives was sent to the school district.

On July 1, 1986, the Full Time Employees Association filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission. On the petition, the Centralia School District was listed as the employer. The petition described a bargaining unit of:

> All classified employees in the following general job classifications: Transportation and Food Services Department, excluding the supervisor of Food Service and the Transportation Supervisor.

The representation petition was docketed as Case No. 6468-E-86-1143.

In mid-July, 1986, PSE mailed proposals to the employer for changes in the collective bargaining agreement. The package contained a recognition clause proposed in a new format which specified the job classifications to be in the bargaining unit. The listing included "monitors".

On or about July 28, 1986, Branam was called by Randy Millhaller, assistant for bus transportation for Centralia School District, and asked to work three weeks in August as a bus monitor. Due to scheduling difficulties, Branam worked two weeks and Cheryl Deitwiler, another bus monitor for Centralia School District, worked the third week.

August 1, 1986, Gates wrote to Murphy that the district had received the bargaining proposals from the union, but that the

employer was "reluctant" to bargain with PSE until the representation issue was resolved.

The next contact that Brumsickle had on the transfer was a phone call from Dennis Murphy on August 26, 1986. Murphy requested a meeting to discuss the bus monitors. Brumsickle agreed to meet that same day. Murphy did not appear at the appointed time. When he did arrive, Brumsickle had left for another meeting.

The session was subsequently rescheduled for September 3, 1986, the first day of the 1986-1987 school year and the first day the bus monitors worked for the Chehalis School District. The first notice Branam had that her bus monitor duties were transferred to Chehalis was September 3, 1986, when she reported to work in Centralia and found a time card for Chehalis. Deanna Schmitt was a driver/monitor for the Centralia School District, driving a school bus in the mornings and working as a monitor in the afternoons. With the start of the 1986-87 school year, she now drives for Centralia School District and monitors for Chehalis School District.

In attendance at the September 3, 1986 meeting were Brumsickle, Gates, Murphy, Dunham, and Lee West (vice-president of the local). Brumsickle testified that this was the first time the district gave formal notice to the union that the transfers had taken place. At the meeting Murphy conveyed that he and/or PSE had "dropped the ball" about negotiating the transfers. The union did not present a proposal regarding the bus monitors at this meeting. Murphy requested another meeting to review the inter-district cooperative agreement. The meeting was scheduled for September 16, 1986.

On September 10th, Branam asked Praugemore for the information that the monitors had sought from Brumsickle in March. Praugemore advised her to go to the Chehalis School District for the answers to her questions. She preceded to do so that day. At Chehalis she was directed to complete a W-2 form, insurance forms and medical forms. She asked to have union dues deducted from her paycheck and she was told that she was no longer a member of the union.

At the September 16th meeting, Murphy indicated that the filing of an unfair labor practice complaint was likely, since the cooperative agreement had been in effect for a number of years and thus he saw no business necessity for the transfer of the monitors to occur prior to a resolution being reached through bargaining with the union.

Brumsickle testified that the final decision to transfer the monitors was made during the latter part of summer, 1986, based on three factors: 1) the district had not had any further response from the union about the transfers; 2) the start of the school year was near, when the youngsters would have to be served; and 3) the funds for the monitors were being channeled through Chehalis School District as the serving district of the cooperative.

Murphy testified that the district never informed the union that it had made a final decision to transfer the bus monitor positions out of the unit.

A pre-hearing conference regarding the representation petition filed by the Full Time Employees Association was conducted on September 29, 1986. At that time, the petitioner amended the

bargaining unit description to seek only severance of a group of vehicle maintenance employees from the bargaining unit.[2]

POSITIONS OF THE PARTIES

The union argues that the employer committed an unfair labor practice when it unilaterally transferred bargaining unit work to persons outside of the unit while refusing to negotiate a successor bargaining agreement. It contends that the employer has not met its burden of demonstrating that the union waived its rights to bargain. Additionally, the union argues that the employer bargained unfairly by attempting to deal directly with bargaining unit members concerning the possible shift of the monitor positions.

The employer asserts that the union had a clear and timely understanding that the district was considering shifting the bus monitors to Chehalis School District and that, thereafter, the union did not exercise its opportunity to negotiate in a timely manner. The employer further defends its actions by claiming that the March meeting was not a bargaining session and that it did not circumvent the bargaining agent since Lambert had an invitation to bargain the transfer; the district had no notice that the field representatives had changed; and, at Murphy's first request, the district did schedule a bargaining session over the transfer at which time the union failed to appear.

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2 The question concerning representation was the subject of a formal hearing. The petition was dismissed on the basis that the petitioned-for bargaining unit of vehicle maintenance employees was not an appropriate unit for the purposes of collective bargaining; Centralia School District, Decision 2599 (PECB, 1987).

DISCUSSION

At the outset, it should be noted that nothing in the record or in the pleadings suggests or establishes that the transfer of bus monitor duties out of the unit was motivated by anything other than lawful fiscal and management considerations.

Where work traditionally performed within a bargaining unit is to be transferred to employees outside of that unit (whether employed by the same employer or a different employer), a duty to bargain has been imposed in order to give the employees the opportunity, through their union, to seek to influence the decision of the employer. South Kitsap School District, Decision 402 (PECB, 1978). The duty to bargain includes notice of the contemplated change and an opportunity to bargain upon request of the union.

For the notice to be adequate, it must be given in time enough for effective bargaining to occur prior to any proposed alteration. In the instant case, the employer had at least three critical contacts with the union in the winter and spring of the 1985-86 school year. Through Brumsickle, the union president was notified sometime in February, 1986. Additionally, Brumsickle notified all the affected employees in March, 1986. Lambert contacted Gates in April, 1986. Each of these meetings will be examined separately to determine if any or all qualify for adequate notice from the employer.

The record establishes that the February meeting between Brumsickle and Dunham was not a formal, scheduled meeting. However, notice of the possible transfer was delivered to the president of the local. Brumsickle, as the district negotiator, was an appropriate person to give notice of a proposed change. Dunham, as the union local president, was an

appropriate person to receive the notice. The president seemed to respond as if he understood the legal import of the information he received, as he asked that the transfer be bargained. There is no evidence that the district declined the request or took the position that it was a non-bargainable action. The notice to the local president cannot be disregarded. Even upon receiving notice outside of the context of ongoing negotiations, it is incumbent upon the union to timely request bargaining. Good faith bargaining cannot operate on legal fictions. The union cannot be content with merely protesting the action or filing an unfair labor practice complaint. City of Yakima, Decision 1124-A (PECB, 1981).

The March 25, 1986, meeting between district officials and the bus monitors is the basis for the union's charge that the employer had illegal direct dealings with unit members rather than with appropriate representatives of the exclusive bargaining representative. An employer is required by law to bargain with authorized representatives of a union selected by its employees, so that no intimidation will take place causing an upset of the balance of power at the bargaining table. A bargaining unit accepting a disadvantageous settlement out of fear. However, no bargaining took place March 25th; the meeting was strictly informational. There is no allegation that any monitor was intimidated by the employer's presentation. Although Dunham was not specifically invited into the meeting, he was aware of the meeting and was not barred from attending. As union local president, he had some responsibility to police and protect union interests. The record does not support a finding that the direct contact which the employer had with the employees was in the nature of a circumvention prohibited by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. It is apparent that the employer at least initially did what it was legally obligated

to do -- give notice to the union well in advance of making a final decision on the matter. As cited in Yakima, supra:

> The "free speech" rights of the employer (See: Section 8(c) of the National Labor Relations Act) are limited both by the "interference" proscription: "if such expression contains no threat of reprisal orforce or promise of benefit", and by the concept of exclusive representation, whereby the employer must deal with the union and can no longer bargain directly or indirectly with employees.

General Electric Co., 150 NLRB 192, 194 (1964) enf., 418 F.2d 736 (CA 2, 1969); cert. den., 397 U.S. 965 (1970).

In Yakima the Commission cautioned that the employer would have been prudent to formally notify the union of the proposal to transfer unit work and offer to bargain with the union about it. However, the Commission went on to ask two questions:

1. Did the union have adequate prior knowledge of the matter under discussion?

2. Was the time sufficient for the union to ask for bargaining, if it so desired?

Since both questions were answered in the affirmative, the Commission concluded that, by virtue of its own inaction in failing to make a timely request for bargaining given actual prior knowledge of the controversial proposal, the union waived its right to bargain on the matter.

In the instant case, the informational meeting of March 25th resulted in action that is clearly contemplated in the collective bargaining arena. Branam, a unit member, called Lambert, the union field representative. With Lambert's April

contact of Gates, and Gates' agreement to bargain the proposed transfer, the bargaining process was working as the statute intends.

As a general proposition, an employer, whose employees have organized and designated an exclusive bargaining representative, is obligated to bargain with the organization, to the exclusion of all other organizations and also to the exclusion of direct dealings with the employees. Royal School District, Decision 1419-A (PECB, 1982). However, where the union leadership clearly has actual knowledge of the employer's impending action, and has adequate opportunity to request bargaining but fails to do so, the union's inaction constitutes a waiver of its statutory bargaining rights as to that matter. Yakima, supra.[3] There were approximately five months from April through August for PSE and the school district to reach some sort of agreement on if, and/or how, the bus monitors would be transferred out of the bargaining unit before the start of the student calendar.

The record does not support the union claim that the employer illegally shut down all bargaining during this time period. Clearly from April through July 1, 1986, the employer showed no hesitation to bargain its contemplated transfer. The district took the position in the August 1st letter from Gates to Murphy, that it could not bargain a replacement for the expiring collective bargaining agreement; but it is clear that the district was facing a question concerning representation at that time, encompassing the entire bargaining unit. An employer cannot bargain a new labor contract at such a juncture

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3 The employer's defense that the union had changed field representatives without formal notice to the employer need not be addressed, since adequate notice of the employer's proposed transfer was delivered prior to the change of representatives.

without facing a complaint of illegal domination and interference. Yelm School District, Decision 704-A (PECB, 1979). Withdrawing the opportunity to bargain, when not involving a future contract or a modification of an existing contract, but rather a unilateral change in the bargaining unit is an illegal act, executed at the employer's own risk. Cf. Port of Edmonds, Decision 844-B (PECB, 1980). However, in the instant case, there is no evidence that the employer was shielding its bargaining obligation regarding the transfer of the bus monitors when faced with the decertification petition.

Where timely notice has been given, the obligation shifts to the union to request bargaining if it desires to exercise its statutory right to bargain. A failure to make a timely request for bargaining will result in a finding of "waiver by inaction". Yakima, supra; Spokane County, Decision 2377 (PECB, 1986). To establish a waiver by inaction it must be shown that the union had clear notice of the employer's intent to institute the change sufficiently in advance of implementation as to afford a reasonable opportunity to bargain regarding the proposed change, and that the union failed to timely request bargaining. American Distributing Co. v. NLRB, 715 F2d. 466 (CA 9, 1983). Here, the union chose not to pursue its bargaining rights and must now live with that decision. City of Pasco, Decision 2603 (PECB, 1987) examined an employer's procedures in making a decision to subcontract at a time when there was no collective bargaining agreement between the parties. It was held that since the employer had given notice more than four months prior to the actual contracting out, the union had waited, at its peril, for the city to raise the issue a second time. Here, as in Pasco, the union had both the notice and opportunity to bargain. The union slept on its rights from April until August 26, 1986, when Murphy requested a meeting. There is no evidence that the district refused to

attend the August 26th meeting. By agreeing to reschedule the meeting for the first day of the 1986-87 school year, the union must have been aware that the proposed transfers would become effective that day. There is no evidence that any party objected to the meeting date; it is inferred that the meeting was rescheduled with the concurrence of both parties. Additionally, the union did not offer any counter-proposals at that meeting. Since RCW 41.56.030(4) imposes a "mutual" obligation to bargain, the actions of both parties come under scrutiny. Even as late as September 16th, there is no evidence that the union bargained the transfer; rather it just objected without offering proposed alternatives.

The union's inaction allowed the employer to implement its decision to transfer the unit work without violating the statute. It does not make any difference that the inter-district agreement had been in effect for many years. The employer gave timely notice of its intent to transfer the bus monitors and the union did not take advantage of the opportunity to bargain the transfer. A similar situation was present in Newport School District, Decision 2153 (PECB, 1985) where the union was afforded ample opportunity, approximately six months, to make specific proposals to reduce costs to encourage the employer to refrain from contracting out pupil transportation services. The union's inaction and/or refusal to make specific proposals was held to have created an impasse in negotiations regarding the issue of subcontracting. In Renton School District, Decision 706 (EDUC, 1979), a failure to request negotiations was fatal to the union's charge when the employer had given four months notice of a planned transfer of unit work.

In the present case, the employer gave adequate notice in a timely fashion to allow for effective bargaining of a

contemplated transfer of bargaining unit work. The notice was delivered to an appropriate official of the local union. At the March meeting, the employer merely delivered information to its employees; it neither illegally bargained directly with its employees nor illegally intimidated its employees. There is no evidence that the employer illegally refused to bargain, upon request of the union, regarding the proposed transfer.

FINDINGS OF FACT

1. The Centralia School District is a "public employer" within the meaning of RCW 41.56.030(1). At the time in question, it was represented for purposes of collective bargaining by William Brumsickle and Jerry Gates.

2. The Public School Employees of Centralia, an affiliate of Public School Employees of Washington, is a "bargaining representative" within the meaning of RCW 41.56.030(3) and is the certified exclusive bargaining representative of a bargaining unit of food service and transportation employees in the Centralia School District. In the bargaining unit are four employees who work as "bus monitors" aiding students and drivers on special education bus runs. At the time in question the local union president was Dale Dunham. Karen Branam, a bus monitor, was treasurer of the local. The assigned field representative was Pat Lambert; on or about May 27, 1986, the assigned field representative was changed to be Dennis Murphy.

3. The parties had a collective bargaining agreement for the period September 1, 1983 through August 31, 1986.

4. Centralia School District participates in a "special education cooperative" which is operated by the Chehalis School District. This arrangement has existed since 1979.

5. Sometime in February, 1986, Brumsickle told Dunham that there was a possibility that the bus monitors would be transferred to the Chehalis School District because the special education cooperative was responsible for them. They discussed the transfer from "time to time" over the next few months. Dunham indicated to Brumsickle that the transfer should be negotiated.

6. On March 25, 1986, Brumsickle met with all the bus monitors to inform them of the possibility of being transferred due to "adjust[ing] the funding for the 'special ed' program in the right category".

7. On or about April 8, 1986, Branam told Lambert about the meeting with Brumsickle. Lambert contacted Gates, who confirmed that the district was considering the transfer and that it would be an appropriate subject for bargaining. On May 16, 1986, Lambert wrote Brumsickle a formal demand to bargain the transfer. Brumsickle's written response to Lambert, May 27, 1987, contained an invitation to bargain the matter.

8. On July 1, 1986, the Full Time Employees Association filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission. The petition affected the overall bargaining unit of which the bus monitors are members.

9. In response to proposals for changes in the collective bargaining agreement which the district received from PSE,

Gates wrote to Murphy that the district could not bargain with PSE until the resolution of the representation issue.

10. The next contact that the parties had regarding the transfer of the bus monitor positions was August 26, 1986, in a phone call from Murphy to Brumsickle at which time Murphy requested a meeting to discuss issue. Brumsickle agreed to meet that same day. Murphy did not appear at the appointed time.

11. The session was subsequently rescheduled for September 3, 1986, the first day of the 1986-1987 school year. This was also the first day the bus monitors worked for the Chehalis School District where they received lower wages, fewer benefits and were not represented by a labor union. In attendance at the meeting were Brumsickle, Gates, Murphy, Dunham, and Lee West, vice president of the local. The union did not present a proposal at this meeting. Murphy requested another meeting to review the inter-district cooperative agreement. The parties met for that purpose on September 16, 1986.

CONCLUSIONS OF LAW

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

2. Through the meeting between Brumsickle and Dunham in February, 1986 and the April, 1986 contacts between Lambert and Gates, the employer delivered adequate and timely notice to union officials of a contemplated transfer of bargaining unit positions in accordance with RCW 41.56.030(4).

3. By waiting over six months to request a meeting regarding the transfer of the bus monitor positions and then not presenting any proposals on the matter the union waived by inaction its right to bargain the issue.

4. By meeting with the affected employees in March, 1986 and delivering them information but not bargaining with them, the employer did not deal directly with employees in violation of RCW 41.56.140(4) and (1).

5. By not bargaining with the incumbent union for a replacement collective bargaining agreement when a question concerning representation existed, the employer did not refuse to bargain in violation of RCW 41.6.140(4) and (1).

Based on sworn testimony given at the hearing, the exhibits received into evidence and the record as a whole, it is

ORDERED

The complaint charging unfair labor practices against the Centralia School District is dismissed.

DATED at Olympia, Washington, this 27th day of August, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

KATRINA I. BOEDECKER, Examiner

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