STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF OAK HARBOR, an affiliate of PUBLIC SCHOOL EMPLOYEES OF WASHINGTON,	)	CASE NO. 6647-U-86-1332
Complainant,	)	DECISION 2956 - PECB
vs.	)	
OAK HARBOR SCHOOL DISTRICT,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW
Respondent.	)	AND ORDER

Caroline Lacey, Attorney at Law, appeared on behalf of the complainant.

Perkins Coie, by Warren E. Martin, Attorney at Law, appeared on behalf of the respondent.

On November 12, 1986, Public School Employees of Oak Harbor, an affiliate of Public School Employees of Washington (PSE), filed a complaint with the Public Employment Relations Commission (PERC), alleging that the Oak Harbor School District had committed unfair labor practices in violation of RCW 41.56.140(1) and (4), by bargaining in bad faith by unilaterally reclassifying two positions in contravention of an agreement made in negotiations for a collective bargaining agreement between the parties. A hearing was held in the matter in Oak Harbor, Washington, on March 4, 1988, before William A. Lang, Examiner. Post-hearing briefs were filed on April 27, 1988.

PRELIMINARY MOTIONS

The employer filed a number of written pre-hearing motions on this matter, and supported those motions with written briefs. The union was allowed opportunity to submit written reply briefs, and it did so. The Examiner made the following rulings on the motions:

Motion to Defer to Arbitration

On November 13, 1987, the employer formally moved to defer the unfair labor charge to arbitration on basis of its affirmative defense that the employer had the authority to make reclassifications or promotions under the collective bargaining agreement. On December 30, 1987, the union responded by written brief opposing the motion to defer.

After due consideration of the arguments and authorities offered, the Examiner advised the parties, on January 11, 1988, that the motion was denied. The Examiner ruled that, while there may be incidental contract interpretations involved, the issue of bad faith bargaining was beyond the authority of an arbitrator. See: City of Hoquiam, Decision 745 (PECB, 1979).

Motion for Teleconference Hearing or Continuance

On January 13, 1988, the employer moved for an order to permit the examination of its principal witness by telephone, because that individual now resided in the state of Connecticut. The witness in question was formerly superintendent of schools of the respondent School District, and he was the chief negotiator for the employer during the negotiations at issue in these unfair labor practice proceedings. The employer cited extreme hardship and WAC 10-08-180(1), which permits such conferences.

The union submitted a written response to the motion on January 14, 1988, objecting to both the teleconference and continuance requests. The union argued that the motion was not timely, and that an oath given the witness in Connecticut could not be enforced under Washington law. The union also opposed further delays in hearing the case, asserting that the employer could have made the request earlier.

The Examiner discussed the motion with the Chief Administrative Law Judge, who is the agency head of the Office of Administrative Hearings of the state of Washington and the author of the rule cited by the employer. Noting that the issue was one on which there was no precedent, the Chief Administrative Law Judge advised against granting the motion for a teleconference hearing over the opposition of one of the parties, noting the difficulty in enforcing the oath. Independently, the Examiner saw the potential for problems in evaluating the creditability of the employer's principal witness, from whom a majority of the employer's evidence would flow.

After due consideration of the arguments and authorities offered, the Examiner advised the parties, on January 15, 1988, that the motion for conduct of the hearing in part by teleconference was denied, but that a continuance would be granted because of the difficulties involved in arranging for the witness to be present at the hearing.

FACTS

PSE was certified in 1970 as the exclusive representative of a bargaining unit of all classified employees of the Oak Harbor School District in the general job classifications of secretarial-clerical, security, custodial, accountant assis-

tant, food service, aides, transportation, maintenance and grounds, excluding confidential employees.

As school district classified employees, the employees in the bargaining unit represented by PSE at one time came under salary controls imposed by the state Legislature and enforced pursuant to Chapter 16, Laws of 1981.

In the autumn of 1985, PSE and the employer commenced negotiations for a successor collective bargaining contract. In the course of those discussions, the union and the employer each made a number of proposals concerning re-classification of existing employees or positions. Both parties to the negotiations understood that the implementation of re-classifications would, under the state salary guidelines in effect for the 1985-86 school year, reduce the amount available for general wage increases below the 3% then nominally available to the bargaining unit.

Among the re-classification proposals discussed by the parties, the one which is key to this controversy was an employer request to restructure the groundskeeping staff. The employer proposed to create a "head groundskeeper" position with a 3-step salary range of $9.28 to $9.94. This position was intended to be a supervisory or lead classification. The existing 3-step salary range of $9.01 to $9.63 for a "groundskeeper" classification was to be merged with an existing 8-step salary range of $6.45 to $7.67 for an "assistant groundskeeper" title, resulting in a modified "groundskeeper" position with an 8-step salary range of $7.35 to $9.63. Previously, the employer's grounds staff consisted of two groundskeepers and two assistant groundskeepers. It is clear that under the employer's proposal, the grounds function would now be staffed by three groundskeepers taking direction from a lead worker.

Early in November, 1985, the parties reached tentative agreement on a new contract. Included among the changes was the restructure of salaries for the groundskeeping department, as described above.

At a union meeting held on November 18, 1985, the union's members rejected the proposed new contract, because of concern that the salary changes for the groundskeepers would siphon off funds from the general pay increases allowed by the state salary limitations.

The parties thereafter met briefly, agreeing to pass through the entire 3.09% state allocation without any reclassifications. The tentative agreement was then ratified by the union and the employer, and a successor collective bargaining contract was signed on March 12, 1986.

During the first year of the new agreement, the grounds department continued to be staffed with two groundskeepers and two assistant groundskeepers. The latter, according to the job description, was an entry level position working under the direction of the groundskeepers. This staffing continued to be inefficient in the view of the employer. Evidence showed that approximately 25% of the groundskeeping work was not being completed, and that this problem had existed since 1984.

In preparation for the 1986-87 school year, which was to be the second year under the collective bargaining agreement signed in March, 1986, the employer re-examined its groundskeeping needs and determined that it now required four groundskeepers, each of whom would be assigned specific areas of responsibility. Position descriptions reflecting the new assignments were developed by the employer and approved.

On August 26, 1986, the employer posted notice of job openings to fill two additional groundskeeper positions. The only applicants for these openings were the two employees who then occupied the assistant groundskeeper positions. The employer awarded the jobs to them. The reorganization proved to be successful, or at least met the employer's operational needs. None of the other employees in the bargaining unit represented by PSE suffered any reduction of wages or of wage increases at that time.

At the end of the 1985-86 school year, the employer was notified the salaries paid to its classified employees were out of compliance with the state salary limitations then in effect. One of the reasons given was the increased salaries for the new groundskeepers. The state guidelines permitted, however, use of an alternate method of calculations which recognized promotions. As a result, the employer did not have to reduce the salaries paid either to the groundskeepers or to its other classified employees.

DISCUSSION

The positions of parties on the several issues are set forth under separate sub-headings below, together with the disposition of each issue.

Timeliness

The employer contends that the complaint alleging bad faith bargaining is time-barred under RCW 41.56.160, because its filing, on November 12, 1986, came more than six months after the conclusion of the negotiations where the alleged agreement was reached. The union counters that the act which demon-

strated bad faith on the part of the employer occurred in August of 1986, when the employer created and filled the two new groundskeeper positions, which was well within the statutory time limit on unfair labor practice charges.

Unlike the situation in City of Seattle, Decision 1887 (PECB, 1984), where the events which formed the basis of the unfair labor practice case took place some 17 months prior to the filing of the complaint, it is the employer's creation of the two new groundskeeper positions which is directly at issue here. Even though related to alleged commitments made during bargaining which ended earlier with the signing of the new agreement, it is clear from the record that the event which ripened this controversy into an unfair labor practice complaint was the employer's actions changing the status quo within the six months previous to the filing of the complaint. The Examiner concludes, based on the record, that the complaint was timely filed.

Bad Faith Bargaining

The union alleges that employer agreed during negotiations to refrain from reclassifying the two assistant groundskeeper positions, yet later proceeded to unilaterally create two new groundskeeper positions and fill them by promotion of the two assistants. Thus, the union argues,

> . . . to allow the employer the benefit of concessions gained in exchange for the reclassification exclusion while precluding the employees from enjoying the rights they bargained for encourages bad faith bargaining and disrupts labor harmony.

The union does not contend that the employer lacks authority to create the new groundskeeper positions. Rather, the union

admitted, both in oral argument and in its brief, that the employer has taken actions which, if viewed in a vacuum, would arguably fall within the scope of the management rights provisions of the contract.

The employer responded with several contractually-based arguments, including that it had the right under the collective bargaining agreement to create two new positions; that it had the right under Article 2.1 of the agreement (which deals with rights of the employer) "to determine the method, the means, the personnel by which (its) operation is conducted" and thus to restructure its grounds staff into four areas of responsibility; that it also retains the right under the agreement to "hire, promote, transfer, or assign" employees in specific positions; and that it exercised its contractual rights for sound business reasons. More directly responsive to the union's allegations, the employer contends that the reclassification actions at issue here were entirely different from the proposal made in bargaining which, it declares, sought to restructure the salary schedule and eliminate the assistant groundskeeper positions by merger with the groundskeeper classification, and that there can be no bad faith bargaining because there was no discussion in bargaining "regarding the duties or number of positions in the groundkeeping department". Thus, the employer contends there was no agreement, expressed or implied, to refrain from re-organizing its groundskeeping operation. Finally, the employer asserts that the upgrade which was implemented did not reduce the salaries of the other classified employees.

The employer has had concerns about the efficiency of its groundskeeping operation since 1984. It can be fairly presumed that those concerns led to the employer's proposal to create a lead groundskeeper position with three subordinate positions,

while eliminating the assistant groundskeeper classification. The crucial issues in this case are whether the employer agreed during the negotiations not to reclassify the positions, and whether it later reneged on such an agreement.

The record in this case clearly shows that, in the negotiations for a successor collective bargaining contract, the primary focus of concern in dealing with the employer's proposed changes in the groundskeeping staff was over diminishing the general pay increase which would then be available to the remaining employees in the bargaining unit. Both parties to the negotiations understood that salary increases granted in connection with reclassifications would decrease the amount available under the state salary limitations then in effect for general pay increases for other employees. This concern was the sole reason that the union rejected the tentative agreement, and was the basis upon which the employer agreed to a contract without the reclassifications.

The record does not disclose that the employer agreed not to restructure its grounds department for the period of the contract. There is no evidence in the record to support even an implied commitment for a per se moratorium on reclassifications, as the union contends. The mere abandonment of a proposal does not a commitment make. The Examiner concludes that the only commitment implicit in the employer's agreement to withdraw its restructure proposal was that nothing would be done which would reduce the salary increases available to other classifications.

When the employer actually proceeded with a restructure of its groundskeeping operation, it did so in a manner which did not prejudice the salary increases of other bargaining unit employees during the life of the collective bargaining

agreement then in effect. The state has subsequently abandoned imposing limitations on the salaries of school district classified employees, so the disputed reorganization has no long-term effect on other bargaining unit employees. See, RCW 28B.58.0951. It follows that no "bad faith" conclusion can be reached in this case.

Concealment of Material Facts

The union argues that the employer had an obligation to disclose and discuss its alternative plan on the matters in dispute during negotiations and "to have spelled it out in the contract before it was signed". According to the union, the timing of the employer's reorganization and the concealment of a material fact in negotiations show bad faith bargaining. The argument was raised for the first time in the union's brief to the Examiner, and so there is no response from the employer on the point.

There are multiple reasons to rule against the union. First, the action complained-of occurred, if at all, in the closing days or hours of contract negotiations concluded in November of 1985 and embodied in a contract signed in March of 1986, some eight months prior to the filing of the complaint. While the complaint was deemed timely, above, with respect to the alleged reclassification which occurred in August of 1986, the same cannot be said for these allegations relating to an earlier time period. Second, the union's assertion that the employer showed bad faith by concealing a material fact during bargaining is not only without merit, but is raised for the first time in these proceedings by post-hearing brief. The union neither pleaded or presented evidence at the hearing that the employer withheld or concealed a material fact in the negotiations. The Examiner will not consider these issues raised for the first

time in post hearing brief. See, City of Bremerton, Decision 2733-A (PECB, 1987). Third, even if the allegation were timely and properly pleaded, the fact that the employer devised the restructure of its groundskeeping operation a mere four months after the signing of the contract is not sufficient evidence, in the Examiner's opinion, to infer that the plan existed at the time of the negotiations or to impute an improper motive on the part of the employer. The evidence shows that the employer had a continuing concern about its groundskeeping operation. The record suggests that considerable discussion of the situation took place in preparation for a new school year, whereupon it was decided to try a different approach to get the work done. The employer did not have a motive to conceal an alternate plan if it were aware of one during bargaining, since such a plan would have permitted the reclassifications without prejudice to the salary increases available to the other classified employees, while enabling the employer to meet its business needs at the same time. Moreover, the fact that the employer was later determined to be out of compliance tends to show conclusively that the employer was not aware earlier of an alternative procedure. Had the employer been aware of a way to avoid compliance problems at an earlier time, it likely would have done so because pursuit of such an alternative would have both accomplished the employer's needs and avoided the severe penalties for being out of compliance.

The "Contractual" Defenses

Deferral to arbitration was rejected in this case because the basic nature of the allegation concerned violation of the duty to bargain imposed by the statute. The Examiner has fully disposed of the union's "bad faith" allegations in the preceding paragraphs, and therefore need not address the various contractual defenses put forth by the employer.

FINDINGS OF FACT

1. Oak Harbor School District is a school district organized under Title 28A RCW and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public School Employees of Oak Harbor, an affiliate of Public School Employees of Washington (PSE), a bargaining representative within the meaning of RCW 41.56.030(5), is the exclusive bargaining representative of classified employees in the Oak Harbor School District.

3. In the autumn of 1985, PSE and the employer began negotiations on a successor collective bargaining agreement to replace a contract which expired on August 30, 1985. The parties reached tentative agreement on a successor contract which included a number of reclassifications, including reclassification of assistant groundskeeper positions to groundskeeper. Both PSE and the employer understood that those reclassifications applicable to certain grounds maintenance employees would diminish the amount of the general pay increase available to other employees under the state salary limitations then in effect.

4. On November 18, 1985, the members of PSE rejected the tentative agreement because the of the effect of the proposed reclassifications on the general pay increases which would be available to the rest of the employees in the bargaining unit. The parties thereupon renegotiated a tentative agreement without any reclassifications. PSE then ratified the tentative agreement and the parties signed a written contract on March 12, 1986.

5. In preparation for the 1986-87 school year, the employer re-examined its groundskeeping needs and determined that it needed four employees in the groundskeeper classification, each of whom would be assigned specific areas of responsibility. Position descriptions reflecting the new assignments were prepared and approved.

6. On August 26, 1986, the employer posted job openings for two new groundskeeper positions and filled them in accordance with the procedures of the negotiated contract. The only two applicants were the former incumbents of the assistant groundskeeper positions. The groundskeeper jobs were awarded to the only two applicants and the assistant groundskeeper positions thereafter remained vacant.

7. At the end of the 1985-86 school year, the employer was notified that it was out of compliance with state salary limitations with respect to its classified employees. One of the reasons given was the filling of the new groundskeeper positions. The state subsequently allowed an alternative method of computing salary compliance which permitted recognition of the reclassifications as promotions. As a result, the employer did not have to reduce salaries paid other classified employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.56.160.

2. The renegotiation of the tentative agreement referred to in paragraph 4 of the foregoing Findings of Fact did not

commit the district to refrain generally from reclassification of its groundskeeping staff.

3. The actions of the employer to reorganize its groundskeeping staff without prejudice to the salaries of other bargaining unit employees, as set forth in paragraphs 4 through 7 of the foregoing Findings of Fact, do not constitute bad faith bargaining or a violation of RCW 41.56.140(1) or (4).

ORDER

The complaint charging unfair labor practices filed in this matter shall be, and hereby is, DISMISSED.

DATED at Olympia, Washington, this 16th day of June, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

William A. Lang

WILLIAM A. LANG, Examiner

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