STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. KENNEWICK SCHOOL DISTRICT, Respondent.	CASE 8855-U-90-1942 DECISION 3942 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Eric T. Nordlof, General Counsel, appeared on behalf of the complainant.

Robert D. Schwerdtfeger, Labor Relations Consultant, appeared on behalf of the respondent.

On October 23, 1990, Public School Employees of Washington filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Kennewick School District had violated RCW 41.56.140(4), by assigning bargaining unit work to non-unit employees. A hearing was conducted on April 17, 1991, before Examiner Jack T. Cowan. Post-hearing briefs were filed on June 14, 1991.

BACKGROUND

Kennewick School District (employer) operates educational programs for more than 11,000 students in kindergarten through high school. The employer's facilities include 12 elementary schools, three middle schools, two high schools, and a vocational skills center.

Public School Employees of Washington (PSE or union) is the exclusive bargaining representative of a bargaining unit of

"regular permanent classified employees" of the Kennewick School District, consisting of employees categorized as custodial, grounds, crafts, and technicians. Included within that unit are employees who work as warehousemen and truck drivers. Historically excluded from that unit are three full-time employees and one part-time employee who staff the employer's centralized print shop.

The employer and PSE have a collective bargaining agreement which was signed on December 18, 1989, and is in effect for the period from September 1, 1989 through August 31, 1992. That contract contains the following that is pertinent hereto:

> ARTICLE X
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> PROBATION, SENIORITY AND LAYOFF PROCEDURES
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> ...
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> Section 10.8. The District shall post all new or vacant positions within five (5) days of the creation of such openings. All postings shall be in each building, and publicized for five (5) working days before the opening is filled. The District will send enough postings to provide each employee with a notice. Such postings shall be delivered to the job site by the Supervisor of Maintenance or his/her Assistant.
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> Section 10.8.1. Definition of Temporary Employee. Temporary employees shall become regular employees after working sixty (60) consecutive days with the District at which time they shall enjoy all rights and benefits under this Agreement.

The collective bargaining agreement contains a union security provision, at Article XIV, which requires all bargaining unit employees to make payments to the union or to a charity as provided by RCW 41.56.122.

Bargaining unit custodial and grounds personnel perform the same type of work in designated areas during the summer, when schools are not in session. The employer also receives and processes

supply orders, and it moves furniture and materials among its buildings during the summer months. The employer maintains a list of persons available for work as "substitutes" in bargaining unit positions during the school year, and the same persons, along with part-time bargaining unit employees, have historically been called for temporary work during the summer months. It appears that it was neither the practice of the employer nor a contractual requirement for the employer to "post" openings for substitute or temporary work that occurred in 1990.[1]

During the summer of 1990, the employer was undergoing a remodeling program which required that a large amount of furniture and materials be moved from schools. This involved loading, unloading, placement in storage, and other similar activities. In this instance, the moving crew consisted of a bargaining unit warehouseman, Jim Grogan, and four temporary employees: Lyle James, Dean Zorn, Elwin Morehouse, and John Albertson. This entire crew worked full-time, eight-hour days. The precise dates of the moving work are not established in the record, which merely indicates that it occurred during the months of July and August.

John Albertson normally works four hours per day as the part-time printer in the employer's centralized print shop. Albertson had previously worked for the employer as a temporary employee and, in addition to summer work, he had worked as a substitute for Jim Grogan during a temporary absence of that bargaining unit employee. Albertson's name had remained on the employer's list of persons who were available for call, as needed, as temporary employees. Albertson had been laid off from the print shop during the summer of 1990, due to a seasonal decline of print shop activity, and was then hired back as a summer temporary. The summer job increased

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[1] On March 28, 1991, after the events at issue in this case, the employer and union signed a memorandum of understanding "for the 1991-92 school year" which set forth procedures for posting of certain temporary jobs.

his work schedule to eight hours per day. He worked along with the warehouseman and the other temporaries, performing many, if not all, of the same tasks. Included were driving machinery, operating fork lifts and trucks. In contrast to the other temporary employees, however, Albertson was paid at his print shop rate of pay, rather than the lesser wage usually paid for temporary work.

The employer has some custodians who work only part-time during the school year, and they generally continue to work only part-time during the summer months. There is some evidence that three bargaining unit members were available during the summer of 1990 to increase their work hours beyond their normal four-hour day, and that they would even have welcomed the chance to do so, had the opportunity been so presented.

Beyond the fact of Albertson being given the full-time work, resentment arose because Albertson was paid at a higher wage than the other temporary workers, and because Albertson pointedly brought that fact to their attention.

POSITIONS OF THE PARTIES

The union alleges moving of furniture is bargaining unit work, and that the employer "skimmed" that work (i.e., transferred bargaining unit work to a person outside the bargaining unit) without notice or bargaining, in violation of RCW 41.56.140(4).

The employer contends that it followed what has been standard operating procedure, under which summer work has been performed by both union and non-union persons for at least the last ten years. It claims that additional help has been utilized when there were brief peaks of too much work to be accomplished by the regular staff. The employer contends it would have been inappropriate to pay Albertson at a wage less than his normal "printer" wages.

DISCUSSION

Skimming of Bargaining Unit Work

Numerous decisions throughout the history of the Public Employment Relations Commission have held that a duty to bargain exists under the collective bargaining statute with respect to an employer's decision to have bargaining unit work performed instead by its own employees outside of the bargaining unit ("skimming") or by the employees of another entity ("contracting out"). South Kitsap School District, Decision 472 (PECB, 1978), citing Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). That bargaining obligation includes the duty on the part of the employer to give notice to the union prior to making its decision, and then providing opportunity for good faith collective bargaining on the matter if requested by the union. Kennewick School District, Decision 3330 (PECB, 1989).

The union, as the complaining party, has the burden of proof in cases where "skimming" is alleged. City of Bellevue, Decision 3007 (PECB, 1988). The decisions in Clover Park School District, Decision 2560-B (PECB, 1988) and Spokane County Fire District 9, Decision 3482-A (PECB, 1991) set forth factors to be considered in establishing whether the burden of proof has been met:

> (1) The employer's previously established operating practice as to the work in question, **i.e.**, had non-bargaining unit personnel performed such work before;
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> (2) Did the transfer of work involve a significant detriment to bargaining unit members (as by changing conditions of employment or significantly impairing job tenure or reasonable anticipated work opportunities);
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> (3) Was the employer's motivation solely economic;

> (4) Had there been an opportunity to bargain generally about the changes in existing practices; and
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> (5) Was the work fundamentally different from regular bargaining work in terms of the nature of the duties, skills, or working conditions.

If the union fails to establish that the employer's decision was a mandatory subject of bargaining, then only the actual effects of the employer's non-mandatory action need be bargained.

Deferral to Arbitration

Parties may waive their statutory bargaining rights, and "waiver by contract" defenses are common in unfair labor practice cases. The Commission recently reviewed its policies on "deferral to arbitration" in City of Yakima, Decision 3564-A (PECB, 1991), and restated its preference for arbitration where the employer conduct at issue in an unfair labor practice case is arguably protected or prohibited by an existing contract.

The union and employer involved here are parties to a collective bargaining agreement which was in effect when this dispute arose. Rather than contending that its actions were specifically protected by that contract, however, the employer argues in this case that the parties' collective bargaining agreement was silent on the matter of temporary positions, at least as of the summer of 1990. Thus, deferral was not and is not appropriate in this case.[2]

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[2] During the time between the summer of 1990 and the hearing in this matter, the parties negotiated the March 28, 1991 memorandum of understanding, concerning the matter of temporary positions. The subject matter concerning Albertson was not resolved as a part of that negotiation process.

Timeliness Issue

The employer apparently sees this case as a challenge to its long-standing practices, and its post-hearing brief reminds that RCW 41.56.160 prevents the processing of an unfair labor practice claim which is more than six months old. The "statute of limitations" is inapposite in this case, however, under both the facts and the law.

The subject complaint relates to work performed during July and August of 1990. The complaint was filed with the Commission on October 23, 1990, which is clearly within the six-month period allowed by RCW 41.56.160.

Even if the union has waived bargaining rights "by inaction" on past occasions when a "skimming" allegation might have been raised, that is not a basis for putting the focus of attention on an earlier period, or for invoking the statute of limitations based on past practice. Each change of circumstances affecting a mandatory subject of bargaining (e.g., each incident of "skimming") can give rise to a mandatory duty to give notice and bargain. City of Wenatchee, Decision 2194 (PECB, 1985). The fact that the union had accepted transfers of bargaining unit work in the past did not preclude it from objecting to the 1990 situation, so long as that was done within six months of its occurrence.

Application of Precedent

(1) The employer's previously established operating practice - Close questions can be presented in evaluating "unit work" claims. In Community Transit, Decision 3069 (PECB, 1988), and Spokane Fire Protection District 9, supra, the same kind of work was historically performed by both bargaining unit employees and a non-unit group. A similar situation exists in the instant case. School districts commonly maintain a list of "substitute" personnel, to cover for the absences of regular personnel during periods when the

school calendar calls for students to be in attendance.[3] The parties' contract excludes temporary employees from the bargaining unit until they have worked 60 consecutive days.[4] The employer has traditionally used persons from its "substitute" roster to perform the tasks that need to be performed during the summer months.

(2) Was there significant detriment to bargaining unit members - The summer "moving crew" in 1990 consisted of one bargaining unit employee and four other individuals. There is no indication that any bargaining unit employee was laid off as a result of the inclusion of Albertson on the moving crew.

While there is some suggestion in the record that part-time bargaining unit employees might have welcomed an increase of their work hours during the summer months, it is not possible to conclude that they were deprived of an expectancy of increased hours. There is no evidence of a past practice by which the employer increased their hours prior to hiring temporary help. Even if there were, the complaint would be against hiring any of the temporaries (which is not alleged by the union), rather than merely against the hiring of Albertson. If Albertson had not been available, it appears that some other temporary would have been called, rather than giving the additional hours to a part-time bargaining unit member.

(3) Was the employer's motivation solely economic - The employer's motivation was not solely economic in this matter, nor is there evidence that the employer was motivated by malice

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[3] Commission precedent in cases such as Sedro Woolley School District, Decision 1351-C (PECB, 1982) and Mount Vernon School District, Decision 2273-A (PECB, 1986), indicates that such persons are to be included in the bargaining unit after 30 days of employment in a one-year period.

[4] The employer's representative apparently mis-spoke in his opening argument at the hearing, when he referred to a 90-day period for inclusion in the bargaining unit.

aforethought. The motivation here appears to have been simply a desire to get the work done in an expeditious manner by using temporary help, an ongoing and accepted past practice. In the mind of the employer, Albertson had lost his identity as a regular employee, and had assumed the identity of a temporary employee during the summer work activity.

The fact that Albertson continued to receive the wages which he received as a regular employee is not conclusive. While such a wage rate could be consistent with a finding that the employer had "skimmed" unit work to the printer classification, the record also indicates that the payment aligned with an employer practice of paying regular wages to bargaining unit members who performed temporary work during the summers.

(4) Opportunity to bargain generally about existing practices - While there had been no opportunity to bargain generally about changes in existing practice, it becomes questionable as to whether a detrimental change actually occurred. The work was the same work which historically had been performed, year after year, by a combination of regular and temporary employees. There is no indication that moving of furniture and materials was seen as becoming a part of the "printer" job in 1990, or that it would be considered part of the "printer" job on an ongoing basis.

No request for additional hours was initiated by any of the bargaining unit members who had been working part-time. The incident may have been the catalyst for the union to request bargaining, apparently for the first time, on bidding of temporary assignments, and that was brought to completion prior to the 1991 summer season. While bargaining unit members were not afforded any advance consideration by the employer in 1990, it appears that the employer acted mostly by rote in referring to the substitute list whenever temporary assistance was needed. Albertson was on the substitute list, was unemployed, had done the work before, and had

even acted as warehouseman when Grogan was absent. His name became a natural selection under the practices existing at that time, without further consideration of possible impact.

(5) Was the work fundamentally different from unit work - In 1990, a crew composed of one bargaining unit member and four temporary employees moved furniture and materials. That work was neither fundamentally different from bargaining unit work nor exclusively bargaining unit work. Here, as in Kennewick School District, supra, there appears to be a long standing and established policy, acquiesced by the union, which allows other persons to perform what might be claimed as bargaining unit work.

This entire matter might never have achieved prominence if Albertson had gone about his summer work without mention of the wage which he was receiving. As stated above, that wage was in conformity with the prevailing wage practices in the district. The employer utilized Albertson as a temporary employee. Such utilization did not represent a nuance, but rather a past and ongoing practice of drawing on temporary usage for summer move activity.

Conclusions

Utilization of Albertson as a temporary employee in the performance of the moving work during the summer of 1990 did not substantially change the wages, hours or working conditions of the bargaining unit as a whole, and did not constitute a transfer of bargaining unit work. The burden of proof necessary to substantiate a charge of "skimming" of unit work has not been met. The action in question did not constitute a violation of RCW 41.56.140(4), and the complaint charging unfair labor practices filed in this case must be dismissed.

FINDINGS OF FACT

1. Kennewick School District is a public employer with the meaning of RCW 41.56.030(1).

2. Public School Employees of Kennewick, an affiliate of Public School Employees of Washington and a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of non-supervisory custodial, maintenance and warehouse employees of the Kennewick School District.

3. The employer and the union are parties to a collective bargaining agreement in effect from September 1, 1989 through August 31, 1992. That contract does not control the assignment of temporary work during the summer months.

4. The employer has historically maintained a list of persons available for work as "substitute" employees during the school year, and has assigned persons from that list for at least some temporary work during the summer months.

5. During the summer of 1990, the employer had need to move a substantial amount of furniture and materials among its facilities, due to a summer remodeling program. A moving crew assigned to that work was composed of a regular bargaining unit "warehouse" employee and four temporary employees who were hired from the employer's substitute list.

6. Among the temporary employees assigned to the moving crew in the summer of 1990 was John Albertson. He had previously worked for the employer as a substitute and temporary employee, including service as a substitute for the bargaining unit warehouseman assigned to the moving crew, and his name remained on the employer's substitutes list. He had been

regularly employed by the employer during the previous school year as a part-time printer, but he had been laid off from that position for the summer of 1990.

7. Although Albertson continued to receive the hourly wage of his regular "printer" position while working as a temporary employee during the summer of 1990, the moving work was not performed as a part of his printer position and did not become a part of his printer duties. Rather, such a payment was consistent with the employer's practices concerning employees working outside of their normal classification.

8. On October 23, 1990, the union filed a complaint charging unfair labor practices against the employer, relating to the assignment of bargaining unit work to Albertson without notice or bargaining. The union did not thereby challenge the assignment of work to the other temporary employees hired at the same time from the employer's substitutes list.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By hiring John Albertson as a temporary employee from its list of substitutes, as described in paragraphs 6 and 7 of the foregoing findings of fact, the Kennewick School District did not transfer bargaining unit work to persons outside of the bargaining unit and did not give rise to a duty to bargain under RCW 41.56.030(4).

3. By failing to give notice to or bargain with Public School Employees of Kennewick concerning the hiring of temporary

employees, including John Albertson, from its substitute list during the summer of 1990, the Kennewick School District has not committed, and is not committing, an unfair labor practice under RCW 41.56.140(4).

ORDER

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

ISSUED at Olympia, Washington, this 18th day of December, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. T. COWAN, Examiner

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