STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 8615-U-90-1876 DECISION 3979 - PECB ORDER DENYING MOTION FOR DISMISSAL

Hafer, Price, Rinehart and Schwerin, by John Burns, Attorney at Law, appeared on behalf of the complainant.

Michael W. Hoge, General Counsel, by Catherine E. Agor, Assistant General Counsel, appeared on behalf of the respondent.

On May 30, 1990, International Union of Operating Engineers, Local 609 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Seattle School District (employer) had assigned bargaining unit work to persons outside of the bargaining unit, without notice to the exclusive bargaining representative or opportunity for bargaining with the union regarding the decision or its effects.

In accord with usual procedure for unfair labor practice cases involving alleged unilateral changes, a letter was directed to the parties on June 15, 1990, requesting comment on the propriety of "deferral" of the case to arbitration. The union responded on June 21, 1990, enclosing a copy of the parties' current collective bargaining agreement. The union informed the Commission that a grievance on the issue had been filed, and that the parties were awaiting the selection of an arbitrator through the procedures of the American Arbitration Association. The union resisted deferral, however, on the grounds that the "refusal to bargain" issue would

not be resolved by arbitration. The employer's response, filed on June 29, 1990, indicated that an arbitrator had been selected. Although the employer nominally supported deferral of this case to arbitration, it raised the possibility that it would assert a procedural issue in arbitration (e.g., that the grievance was not timely filed at the initial grievance step).

The parties were informed, by means of a letter dated August 1, 1990, that deferral did not appear to be appropriate. The reasons given at that time were: (1) The employer's reservation of a right to assert procedural defenses to arbitration; and (2) the employer action at issue in the case did not appear to fall into the category of "arguably protected or prohibited by contract" necessary for deferral.

A preliminary ruling issued pursuant to WAC 391-45-110 on January 22, 1991, concluded that an unfair labor practice could be found on the union's allegations concerning:

> The employer's unilateral removal of asbestos inspection work from the bargaining unit, without first giving notice and opportunity to bargain to the exclusive bargaining representative.

Examiner Walter M. Stuteville was then assigned to conduct further proceedings in the matter.

A notice of hearing was issued on January 25, 1991, scheduling the hearing in the matter for March 19, 1991, and setting February 13, 1991 as the date for filing of an answer. The employer's answer filed on February 14, 1991 still did not claim that the employer had a contractual right to make the disputed work assignment.

Prior to the scheduled hearing date, the employer advised the Examiner that the parties were awaiting the decision of an

arbitrator, and that the employer believed the arbitration award would probably resolve the issue. The employer thus requested that the hearing be postponed. The union objected to the postponement, but the hearing was postponed by the Examiner.

Arbitrator Eric B. Lindauer issued his initial decision on the related grievance on March 11, 1991. Arbitrator Lindauer described two issues to be decided:[1] (1) Did the actions of the parties modify their agreement, and establish union jurisdiction over the asbestos inspection work performed by the custodians for the employer? and (2) Should the current asbestos inspection work being performed by the building inspectors be assigned to the union-represented custodian classification?

Arbitrator Lindauer upheld the union's position on the first issue. Citing Certified Corporation v. Teamsters, Local 996, 597 F.2d 1269, 101 LRRM 2584 (9th Cir., 1979), he concluded that a written contract can be orally modified through a gradual process of negotiation, and that this union and employer had modified their collective bargaining agreement.[2] The arbitrator thus concluded

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[1] The arbitration award indicates that the parties had stipulated, at the commencement of the hearing, that the procedural steps of the grievance procedure had been complied with, and that the matter was properly before the arbitrator.

[2] As evidence of bilateral negotiations on the asbestos inspection work, Arbitrator Lindauer pointed to: (1) the employer's request for union-represented employees to conduct asbestos inspections; (2) negotiations between the parties for wage rates for the inspectors and the custodians who helped them; (3) the employer's action to continue the grievant in the asbestos inspector capacity, performing both data entry work and on-site inspections, after having dismissed temporary, non-union, asbestos inspectors from employment. The arbitrator concluded that the employer's assignment of asbestos inspection work beyond the time frame it had initially outlined took the position out of the "temporary" category argued by the employer, and made it de facto a permanent position.

that the asbestos work of grievant Blann had been negotiated by the parties, and had become a permanent position within the bargaining unit represented by Local 609.

As to the second issue, Arbitrator Lindauer determined that certain functions of the asbestos inspection job may have been upgraded by additional requirements imposed by federal law, and may be beyond the abilities and training of custodians presently employed by the employer. He remanded the issue of whether any present and future asbestos inspection work required more advanced qualifications to the parties for further negotiation, but retained jurisdiction to resolve any issues not settled by the parties.

The parties entered into negotiations on the issues remanded by Arbitrator Lindauer, and the above-captioned unfair labor practice matter was held in abeyance for an additional time, at the request of the employer.

The parties were unable to finalize an agreement on the details of the issues remanded by the initial arbitration award, and the matter was re-submitted to the arbitrator. On June 12, 1991, Arbitrator Lindauer issued a supplemental arbitration award. The arbitrator again identified two issues for determination:

> ISSUE NO. 1 Does the Union have jurisdiction over the work related to the three-year asbestos inspection of the District's facilities as required under the AHERA statutes?
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> ...
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> ISSUE NO. 2 What is the appropriate amount of back pay to be awarded to Donald Blann for the three six-month asbestos surveys that he was entitled to perform?

In describing the procedural history and facts surrounding those issues, Arbitrator Lindauer noted that the president of Asbestos Workers Local Union 7 had been "in attendance" at the arbitration

hearing, and that there had been a "joint agreement" between IUOE Local 609 and Asbestos Workers Local Union 7 to "equally divide" the work at issue between the two unions. Arbitrator Lindauer ruled that the disputed work "remains within the jurisdiction of either Local 609 or Local 7 personnel", and that "such work is to be shared [by Local 609] with Local 7 in accordance with their joint agreement".

On November 12, 1991, the employer moved for dismissal of the unfair labor practice complaint. The Examiner requested a response from the union to the employer's motion for dismissal. The case was thereafter transferred back to the Executive Director for disposition.[3]

POSITIONS OF THE PARTIES

The employer argues that all issues raised in the complaint were completely resolved by the arbitrator's decisions. Furthermore, it supplied evidence that the back pay award ordered by Arbitrator Lindauer had been fully complied with. It therefore urges that the unfair labor practice case should be dismissed.

The union opposes dismissal, urging that the core of its unfair labor practice charge is that the employer unilaterally removed inspection work from the bargaining unit. While it agreed that the arbitrator had addressed the effects of the employer's action on the particular work at issue, and that it had a monetary remedy, the union nevertheless argued that the arbitration award did not constitute an enforceable bargaining order regarding potential future violations. The union described the unilateral removal of work from a bargaining unit as one of the most damaging actions an

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[3] Examiner Stuteville has subsequently been assigned as "mediator" in contract negotiations between the parties, which also necessitates a change of Examiners.

employer can do to undercut trust in the bilateral process of collective bargaining, and it contended that an award of damages in the form of lost wages does little to correct that disastrous impact. In addition to requiring the employer to cease and desist from unilaterally removing work from the bargaining unit, the union asserts that an order should be issued requiring the employer to reimburse the union for monies expended on the arbitration, because of the statutory violation.

DISCUSSION

The employer's motion for dismissal requires consideration, for a second time in this case, of the propriety of "deferral to arbitration". During the time that the above-captioned case has remained pending before the agency, the Commission has reviewed and restated its policies on "deferral". City of Yakima, Decision 3564-A (PECB, 1991). In doing so, the Commission discussed the types of cases appropriate for deferral, specifically limiting use of deferral "to situations where an employer's conduct at issue in a "unilateral change" case is **arguably protected or prohibited by an existing collective bargaining agreement."**[4] The Commission then went on to specify the conditions for deferral, including the existence of a contract, the existence of provisions for final and

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[4] The Commission noted that there is no legislative preference for arbitration on issues other than "application or interpretation of an existing collective bargaining agreement", and that the Commission does not defer to arbitrators on other types of issues. Footnote 10 to the Commission's decision cited, inter alia:

> ... Jurisdiction to decide unit determination matters is specifically vested in the Commission by RCW 41.56.060, and agreements made by parties on such issues do not bind the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981); Port of Seattle, Decision 3421 (PECB, 1990).

binding arbitration of grievances, and waiver of procedural defenses. Finally, the Commission described the standards for its post-arbitral review of an arbitration award, to dispose of or resume the processing of the unfair labor practice case.[5]

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[5] The Commission described the post-arbitral process as follows:

> Regardless of whether a question of contract interpretation is decided by the Commission or by an arbitrator, there are three likely results:
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> 1. Action protected by contract. If it is determined that the contract authorized the employer to make the change at issue in the unfair labor practice case, that conclusion by either the Commission or an arbitrator will generally result in dismissal of the unfair labor practice allegation. The parties will have bargained the subject, and the union will have waived its bargaining rights by the contract language, taking the disputed action out of the "unilateral change" category prohibited by RCW 41.56.140(4).
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> 2. Action prohibited by contract. If it is determined that the employer's conduct was prohibited by the contract, that conclusion by either the Commission or an arbitrator will also generally result in dismissal of the unfair labor practice allegation. Again, the parties will have bargained the subject, taking it out of the category of "unilateral change" prohibited by RCW 41.56.140(4).
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> 3. Action neither protected nor prohibited by contract. If it is determined that the employer's conduct was not covered by the parties' contract, further proceedings will be warranted in the unfair labor practice case. Whether the Commission makes that determination itself, or merely accepts an arbitrator's decision on the issue, such a finding will be conclusive against any "waiver by contract" defense asserted by the employer in the unfair labor practice case. Unless the employer is able to establish some other valid defense, a finding of an unfair labor practice violation generally follows.

Some of the conditions for deferral have been met in this case. There was never any question as to the existence of a contract, or as to the existence of provisions for final and binding arbitration. Having the arbitrator's decision in hand, it is now clear that the procedural defenses previously reserved by the employer are no longer of concern.

Conformity to other standards for "deferral" remains problematical, however. Of particular concern are: (1) the continued absence of claim that the employer's conduct was "arguably protected or prohibited by the collective bargaining agreement"; and (2) the arbitrator's venture into the unit determination arena, in the name of deciding the union's work jurisdiction.

In one of its very first case decisions, Kent School District, Decision 127 (PECB, 1976), the Commission refused to be bound by an agreement between two unions on a unit determination matter:

> ... [T]he effect of permitting [the inter-union agreement] to operate under the circumstances presented in this appeal would be to enable one party ... to dictate to the Commission the characterization of a subsequent representation petition. ... The Commission has a statutory duty and authority to determine the unit appropriate for purposes of collective bargaining, as specified in RCW 41.56.060. With the present situation so understood, the Commission is unwilling to give any weight to the [inter-union action] and it is treated as irrelevant for purposes of this appeal.

That policy was re-affirmed by the Commission and endorsed by the courts in City of Richland, Decision 279-A, supra. An arbitration award extending the work jurisdiction of a union to a previously unrepresented group was entirely disregarded in Port of Seattle, supra, on the basis that an arbitration award on a "unit determination" matter is no more than an extension of the parties' agree-

ment, and therefore is not binding on the Commission in the exercise of its statutory jurisdiction and authority.

In the case at hand, the union's "unit work" claim could have been made the subject of a unit clarification proceeding before the Commission under Chapter 391-35 WAC, and proof of its "unit work" claim would have been a necessary element to successful prosecution of the unfair labor practice complaint by the union. In either form of proceeding before the Commission, the evident interest and involvement of Asbestos Workers Local Union 7 could have been a basis for intervention by that organization as a party with full rights of participation. Nothing in the award issued by Arbitrator Lindauer suggests that the proceedings before him had been expanded to include the contract and full participation of Local 7, however. That circumstance must be regarded as a serious omission affecting the acceptance of the arbitration award for any purpose in this unfair labor practice case.

In the case at hand, the arbitrator did not find that any assignment of asbestos work to employees outside of Local 609 was prohibited by the collective bargaining agreement. Rather, the arbitrator embraced the arrangement between the unions. That arrangement has the effect, however, of splitting the workforce doing a particular body of work between two different bargaining units. Such a fragmentation was specifically rejected in City of Seattle, Decision 781 (PECB, 1979), in the context of an attempt at new organizing. Where two unions and an employer had managed to artificially divide the workforce doing particular work into two separate bargaining units, the Commission found both bargaining units to be inappropriate in South Kitsap School District, Decision 1541 (PECB, 1983). Thus, it appears that the unions and/or the arbitrator have come up with a result that is repugnant to the unit determination policies of the Commission.

The conclusion which results from the foregoing is that the above-captioned unfair labor practice is not subject to disposition under the Commission's "deferral" policy, based on the arbitration awards issued by Arbitrator Eric B. Lindauer.

NOW, THEREFORE, it is

ORDERED

1. The motion for dismissal filed by the Seattle School District in the above-captioned matter is DENIED.

2. The above-captioned unfair labor practice matter shall be re-assigned for further proceedings, consistent with this order, under Chapter 391-45 WAC.

Issued at Olympia, Washington, on the 31st day of January, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director