City of Tacoma, Decision 5634 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 120, Complainant,	CASE 11727-U-95-2761
vs.	DECISION 5634 - PECB
CITY OF TACOMA, Respondent.	FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

George S. Karavitas, Senior Assistant City Attorney, appeared on behalf the City of Tacoma.

Julia C. Mullowney, Legal Counsel, appeared on behalf of the union.

On April 27, 1995, the Washington State Council of County and City Employees, Local 120, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Tacoma had refused to bargain either a decision to transfer bargaining unit work outside the bargaining unit or the impact of that decision, in violation of RCW 41.56.140(4). A hearing was held in Tacoma, Washington, on March 26, 1996 and April 5, 1996, before Examiner William A. Lang. The parties filed briefs on May 20, 1996.

BACKGROUND

The Department of Public Utilities of the City of Tacoma is under the overall supervision of a utilities board and Director Mark Crisson. Three major operating divisions are the primary source of revenue for the department: City Light, City Water, and the

Beltline Railroad. Each of those divisions is headed by a superintendent, and is divided into various subunits and sections.

Washington State Council of County and City Employees, Local 120, is the exclusive bargaining representative of a bargaining unit which historically included employees working in a photography lab at Tacoma Public Utilities. Robert McCauley was staff representative for Local 120 during the period relevant to this case.

The bargaining relationship between the employer and union dates back to 1937. They were signatories to a collective bargaining agreement covering the years 1993 and 1994, and were engaged in bargaining a successor agreement when this dispute arose.

The In-House Photography Operation

This controversy involves the dissolution of an in-house photographic lab section, and the resulting layoff of two employees on April 1, 1995. Stephan Hanson and Leonard Whitney were employed as photographers working in the photo lab under Graphics Art Supervisor Bradley Bogue.[1] The section was under the direction of June Summerville, who was the manager of community and media services for Tacoma Public Utilities. The photo lab furnished on-demand photographic services to the divisions and subunits in the department, and to the general city government. Videotaping of utilities board meetings was among the services provided.

The photographer positions required college level course work in commercial, aerial and/or related photography and darkroom techniques and two years experience as a commercial photographer. The photographers performed a wide variety of complex and technical photographic, video and graphic arts services; planned and provided

---

[1] Bogue was laid off at the same time, but was rehired later as a records supervisor.

assistance to various departments; and produced engineering graphics, audio-video displays, documentation, legal photos, and employee portraits. They operated and maintained (including minor repair) a variety of cameras, audio-visual and photographic equipment, developed film, retouched prints, and managed a photography archive file. The photographers processed virtually all of their black and white film.[2] The photographers estimated that 40 percent of their time was spent photographing routine maintenance and documenting accidents; photo-documentation of major construction projects (e.g., pipelines) accounted for 10 percent of their workload; aerial photography accounted for another 5 percent.

The Decision to Close the Photographic Lab

With enactment of Proposition 3 in 1992, the Tacoma Public Utilities were compelled to use general city services in several areas, instead of duplicating such services. Director Crisson instructed Summerville not to prepare a 1995 budget for the photographic lab section, and to ask each of the operating division superintendents how much monetary support they could manage for photography. The superintendent of City Light was willing to fund one position. City Water would not commit to any funding support for photography services, citing it had greater unfulfilled priorities. The Beltline Railroad also declined to commit to funding any photography positions.

Summerville provided further justification for closing the photo graphic lab section, noting: (1) The department did not have any major projects scheduled which would require photo-documentation; and (2) photography technology had been changing toward utilizing computerized graphics and imaging.

---

[2] Color film and an occasional overload of black and white film was processed by commercial photo labs.

On August 25, 1994, Summerville and the human resources manager for the utilities, Sedonia Young, advised McCauley that the department wanted to eliminate the photo lab and lay off the photographers. They cited budget restraints, but Summerville stated the employer was open to suggestions. McCauley replied that he would have to think about it, but recommended that the photographers should be notified before their layoff was discussed at a utilities board meeting scheduled for the next day. Summerville informed Hanson of the impending layoff, but Whitney was out on assignment.[3]

In September of 1994, Whitney received a typed "Schedule for the Dissolution of Photo Graphics". The document listed weekly tasks, such as dismantling of the photo lab, itemizing the equipment, and tagging equipment for sale. It called for the lab to be closed by October 28, 1994, and for the employees to be laid off on December 31, 1994. The layoff was later delayed to April 1, 1996, to avoid layoffs during the Christmas holidays.

In the October 7, 1994 issue of "Newsline",[4] Director Crisson informed employees that the department would lay off 8 permanent employees and 10 project employees, effective April 1, 1995, in order to meet increased financial pressures. The two photographers were listed among those selected for layoff.

On October 7, 1994, McCauley acknowledged Summerville's August 25 telephone call.[5] He raised a concern that unit work would be transferred to other bargaining units, and requested "impact bargaining prior to any layoff or transfer situation".

---

[3] Later that day, Summerville sent a message to Crisson detailing her conversation with McCauley.

[4] This is an in-house newsletter distributed to all employees in the department.

[5] McCauley described the conversation as having taken place the previous day.

McCauley was meeting in October of 1994 with an employer negotiating team headed by Assistant Director of Human Resources Andy Michaels. McCauley asked Michaels whether the closing of the photo lab was on the negotiation agenda. Michaels said, "No", and told McCauley to call Director of Human Resources Jan Gilbertson. The photo lab was never discussed in the contract negotiations.

In a letter to Gilbertson dated November 14, 1994, McCauley asserted that the utilities department was purchasing photographic equipment for the various divisions, and was assigning them work that had traditionally been performed by bargaining unit employees in the photo lab. McCauley also complained that his requests for bargaining had been ignored. McCauley requested a meeting with responsible officials to discuss the matter.

Gilbertson replied to McCauley's October 7 and November 14 letters on December 19, 1994, expressing his willingness to meet and to discuss the discontinuance of the photography unit. Gilbertson challenged McCauley's characterization of the use of employees outside the bargaining unit as "contracting out", citing an appellate court decision.[6] Gilbertson claimed the photographers did not perform all of the photography functions for the employer, that other operating divisions provide their own photography requirements, and that some photography had always been contracted out. Gilbertson stated,

> Considering the department's reduced photography needs, it was considered financially imprudent to maintain a four person photography group.

Gilbertson concluded that the employer had not replaced civil service workers with private contractors, but had merely re-

---

[6] Gilbertson cited Keeton v. Social & Health Services, 34 Wn. App. 353 (1983).

structured its operation to eliminate a financially imprudent practice.

In December of 1994, Summerville prepared a professionally printed, two-page summary titled "Photography Services Procedures" for distribution throughout the department. That document listed the procedures for obtaining photographs once Tacoma Public Utilities no longer employed staff photographers. Summerville first asked employees to consider foregoing the photographs. If the need persisted, she indicated she would call back the laid off photographers for the task. If that was not feasible, she recommended employees take the photographs, after obtaining equipment and supplies through purchase orders.[7] Finally, she authorized the hiring of professional photographers when all else failed.

On January 11, 1995, the utilities board approved a memorandum of understanding with City of Tacoma Municipal Television (Muni TV) to provide video production services for 1995, in the amount of $46,000. That contract, which was signed by Summerville and the director of Muni TV, provided for video coverage of utilities board meetings, for creation of a new opening segment for the board meetings, for a staff person to specifically handle public utility video tape production and related needs, for CityScape and CityLine segments, and for public service announcements on an agreed-to schedule on cable television.

McCauley and a local union official discussed the layoffs with Summerville and Young on January 24, 1995 and February 17, 1995. The union representatives were concerned that unit work had already been transferred to persons outside the bargaining unit. The employer representatives replied that photography was not the exclusive work of the union, and also contended that the union did not have a claim to photography work because the union only

---

[7] Summerville listed purchase order numbers for suppliers.

represented the photography "classifications". They also discussed the effort to obtain other positions for the photographers.[8]

On February 17, 1995, McCauley expressed concern to Crisson that the photographers' work of taping utilities board meetings would be shifted to other bargaining units. Crisson replied on February 21, 1995, disagreeing with McCauley's characterization that a majority of the photography work had been shifted to other offices, and denying that the video work was exclusively work of Local 120. Crisson stated that a majority of work assignments on a list prepared by Whitney had been eliminated, and that he did not consider the employer's actions to be "skimming" of bargaining unit work.

In a letter to McCauley dated February 21, 1995, Young described "the small amount of remaining photographic work", as follows:

> The work relating to annual photography of the dams is estimated to take only three days annually. The [Federal Energy Regulatory Commission] inspections, done every five years, have not always involved Public Utilities photographers. Construction of the Water Division's second supply pipeline, which will require photo documentation, is not expected to begin until early 1996. **We expect to hire a temporary photographer** to handle this work. Since the announced closure of the photography section, photo service requests have dropped significantly. We expect this trend to continue. **Photography work required by Community/Media Services will likely be accomplished by that office's staff**, one of whom is a photo-journalist. **Engineering photos will be taken by the sections requiring them.** If longer term photography projects should occur,

---

[8] Young arranged classes on resume writing and interviewing for Bogue, Hanson and Whitney. She and Summerville also made calls to other managers, urging consideration of the photographers for vacant positions. Director Crisson was kept informed.

> we will use the layoff register to handle these needs.
>
> The work we used to do for General Government has decreased significantly in the last few years. General Government has requested photographic service less than a half dozen times in the last year. Presently, they are not contacting us for photo services.
>
> **Coordinating the use of audiovisual equipment will be assigned to the Building Maintenance Section** and combined with their present duties of handling room setups. This will be more efficient and provide the customer a single point of contact.
>
> Preparation of slide and education programs has averaged four per year. When such work is needed, **we will use outside sources** to produce the slides, music and narration.
>
> Videotaping meetings of the Public Utility Board requires on average four hours a month (including setting up), with the exception of November and December when it drops to two hours a month. **This work will be assigned to Municipal Television**, where it properly belongs.
>
> **Maintenance of photo archives has been assigned to Records Management**, which is where all materials to be archived are kept. **Light Engineering will maintain the photo files relating to major projects**.
>
> Although Mr. Whitney presented us with documents relating to some past work assignments, it is our feeling that the work can be handled in a more efficient manner in other areas of our operation or through **service agreements with General Government such as the one we recommended to the Public Utility Board on January 11, 1995**. It is our understanding that our service request will provide for the inclusion of additional support staff. We would encourage those individuals scheduled to be laid off to consider applying for the position when it becomes available.

[Emphasis by **bold** supplied.][9]

---

9 The record does not disclose whether the photo-journalist is in the bargaining unit represented by Local 120.

Young concluded by stating that photographic work was not the exclusive work of Local 120, because some work was contracted out and other divisions provided their own photographic services. She asserted the management actions were consistent with the provisions of the management responsibilities clause found in Article 7 of the parties' collective bargaining agreement.

In a memo dated March 23, 1995, Young informed Crisson of the status of 19 employees who were "affected by the '95 layoffs". Ten had been placed in other City of Tacoma positions (one in a "project" position and nine in permanent positions);[10] two office-clerical employees had "resigned"; one employee had "retired", and six (including Whitney and Hanson) were marked "no placement to date". The memo noted that Whitney had interviewed for several jobs but was not selected, and that he declined interviews for a warehouse technician position and two part-time or temporary positions. Finally, Young noted that Hanson was not selected for three positions, was being considered for another, and that he declined a custodian position because its hours interfered with child care responsibilities.

On July 18, 1995, Summerville asked Young to hire Whitney and Hanson from the layoff list for several short-term photographic assignments. Whitney was also hired for temporary photo assignments in December of 1995 and March of 1996, while Hanson was hired for such assignments in July, August, and December of 1995.

Gilbertson acknowledged Whitney's requests to be placed on various transfer lists in September of 1994 and in January through March of 1995. Gilbertson acknowledged Hanson's request for transfer in October of 1994 and in the first three months of 1995.

---

[10] Bogue had been placed in a permanent position as Records Management Supervisor, and other evidence suggests he was to have responsibility for the photo archives.

The Impact of the Closure

The two photographers compiled a log covering their photo assignments from October of 1993 through September of 1994. Their log indicated that together they averaged 21 days or 189 hours per month on photography and video requests, so that each photographer averaged 94.5 actual hours per month in photo or video assignments. Those totals did not include time taken out of a potential work time of 173.3 hours per month for vacation, sick leave, training, or for other duties involving the photo lab, darkroom, lithography, large camera work for the print shop, and graphics.

Summerville testified that the photographers' log showed there was sufficient work for one full-time equivalent photographer. In response to questions by the union's counsel, she stated:

> Q. [By Ms. Mullowney] When you analyzed Exhibit Number 3, the log of hours --
> ...
> you concluded that you could justify slightly more than one full-time equivalent. Is that what you're testifying?
>
> A. [By Ms. Summerville] Yes, for just pure photography.
>
> Q. In your comparison of the possible hours over this time period with the actual hours that were logged you didn't take into account that the employees may have been sick during that time, did you?
>
> A. I didn't consider any other things. ...
>
> Q. Did you take into account that the lithography, darkroom, and large camera work for the print shop and graphics, the time doing that work was not included in these logs?
>
> A. No, I did not.

Transcript, pages 187-9

Examination of the photography and video requests from 1987 through 1993 indicates that the photographers handled an average of 1094

photo and 118.7 video requests per month. For 1990 through 1993, the average declined to 911 photo and 103.5 video requests per month. A survey for the January through June period of 1994 showed the two photographers processed 227 assignments totalling $39,854, averaging 38 requests and $6644 per month. Of this total: City Light utilized the service 91 times for 308 hours, or 40 percent of the total; City Water accounted for 43 occasions and 98 hours, or 19 percent of the total; and city general government accounted for 35 uses and 95.5 hours, or 15 percent of the total.

The Finance Division conducted a cost analysis comparing in-house film processing with contracted film processing for the years 1993, 1994 and 1995.[11] The totals for 1993 were $28,244.53 for in-house film processing and $5,643 contracted out. With dismantling of the photo lab in October, the photographers processed $20,911.10 in-house and contracted out $14,782.18 during 1994. In 1995, film processed by the photo lab was $546.45 in-house and $11,132.16 by contract. In another cost analysis for the same years, it appeared that amounts chargeable to office space diminished from $28,329 and $22,328 in 1993 and 1994, respectively, to $3,447 in 1995.[12] The annual cost of one photographer was estimated at $89,990 for 1995, including "rent" of space. With reductions in overtime requirements, the estimated cost was $86,774 in 1996.

POSITIONS OF THE PARTIES

The union contends the employer failed to bargain in good faith about the transfer of photography work to employees outside the bargaining unit, in violation of Chapter 41.56 RCW and Article 16

---

[11] This analysis was prepared for the hearing in this case, and was not a basis for the decision to close the lab.

[12] No explanation was given of the discrepancies in totals for the years shown. These figures do not include administrative and labor costs associated with the photo lab.

of the parties' collective bargaining agreement. The union asserts that laying off the photographers in accord with the civil service rules did not absolve the employer of its duty to bargain the transfer of work.

The employer argues that it cannot have violated the prohibition against contracting out, if it can be shown the decision was based on a lack of funds, curtailment of work, reorganization for efficiency, or the closing of part of an operation. The employer also asserts that, in order to make a case for "skimming", the union must prove that the work was recognized as exclusively that of the bargaining unit and that this work was assigned to other employees. It contends that it fulfilled its obligation to discuss the "impacts" of an entrepreneurial decision to close the photo lab when the city delayed the layoff and met with union officials to discuss obtaining other city employment for the photographers. The employer asserts that, in the absence of layoff procedures in the collective bargaining agreement, it conducted the layoffs in accordance with the civil service rules. The employer maintains that would be "unconstitutional" to collaterally attack the civil service rules, because the civil service board is similar in scope, structure and authority to the state civil service board. Finally, the employer contends that the Public Employment Relations Commission does not have the authority to reinstate the photographers, because it would place the Commission in the position of revising the budget and staffing plans for the city.

DISCUSSION

This case deals with an employer's decision to curtail part of its operations, and to distribute the remainder of its operation to employees outside the bargaining unit. The question turns on whether the distribution of the remainder of the photography work is sufficient to create an obligation to bargain.

An employer does not have to negotiate a decision to reduce or curtail part of its operation. Wenatchee School District, Decision 3240 (PECB, 1989). An employer does, however, have a duty to bargain with the exclusive bargaining representative of its employees concerning a decision to transfer work to employees outside the bargaining unit (skimming of unit work), as in South Kitsap School District, Decision 472 (PECB, 1978) and City of Mercer Island, Decision 1026-A (PECB, 1981), or to contract for work to be performed by employees of different employers (contracting out), as in City of Vancouver, Decision 808 (PECB, 1980).

The Decision to Close the Photo Lab

The employer argues that its decision substantively eliminated its photo operations, and that any remaining residue of work was insufficient to sustain employment of the photographers. It cites Keeton v. Social & Health Services, 34 Wn.App. 353 (1983), which involved a decision to lay off state employees at a state-owned home for retarded citizens, after a decline in resident population. The union in Keeton sought to enjoin the state's decision to lay off the bakers, on the basis that an anticipated purchase of bakery products from a commercial bakery would violate a "no contracting" provision contained in a collective bargaining agreement signed by those parties under the limited-scope bargaining procedures of the state civil service law, Chapter 41.06 RCW. The union also argued in Keeton that the planned actions would constitute an infringement on civil service rights prohibited by Washington Federation of State Employees v. Spokane Community Colleges, 90 Wn.2d 698 (1978). Finding that the state purchased goods, rather than contracted for services, the Keeton court held that the employer did not violate either the collective bargaining agreement or the civil service law. While there are some parallels to the case at bar, the Keeton court did not consider whether the state had an obligation to bargain with that union on the decision to close the in-house bakery. Thus, apart from the different statutory context and any

distinguishing facts, Keeton did not address the key issue in the case before the Examiner.

The employer cites Teamsters Local 117 v. King County, 76 Wn.App. 18 (1994) as further authority that an employer can close part of its operation when it is no longer practical to continue it. The facts of that case are distinguishable, however. King County did not concern a union demand to bargain the decision to transfer work, and cost saving was not at issue there.

Legal or Economic Necessity -
The employer's assertion of Proposition 3 as a reason to close the photo lab is not creditable. Proposition 3 was a city action that could not relieve the employer of its obligations under state law in Chapter 41.56 RCW. Further, its purpose to avoid duplication of services could not possibly have been accomplished by closing the utilities department photo lab, because the employer had terminated its general services photographic operation years earlier.

Most of the employer's evidence on "declining need" was prepared in defense of this unfair labor complaint, long after the decision to close the photo lab was made and announced to the union. The decline in requests for photographs after the photo lab closed can be attributed in substantial part to the lab's demise and to the "Photography Services Procedures" issued in December of 1994. Summerville specifically discouraged requests for photography services, and promoted alternatives which amounted to skimming or contracting out of work historically done by the photo lab section. The fact that no major construction projects requiring photo documentation were planned for 1995 appears to have been an anomaly. This activity amounted to about 10 percent of a photographer's work time, and at least one construction project was planned for 1996. Aside from the short-term lack of major construction projects, the employer produced no significant evidence of compelling need prior to its decision to close the lab. The

employer only solicited general testimony in support of its claim that technological change in graphics and film processing was a reason to close the photo lab. Since the employer failed to conduct a survey of its photo and video needs, it appears that its decision to close the photo lab is based on speculation that would not have met the test of the Keeton case which it relies upon.[13]

Infringement on "Unit Work" -
The employer's claim at an early stage of this controversy that the union did not have a claim to the photography work because it only represented "classifications" suggests that employer officials may have had a fundamental misunderstanding of collective bargaining relationships. The Commission prefers the use of generic terms, and generally avoids the use of specific civil service or job titles, in unit descriptions. That leaves employers free to change job titles and permits unions to follow their unit work claims, without need for unnecessary unit clarification proceedings. See, City of Milton, Decision 5202-B (PECB, 1995).

The employer contends, without citation of authority, that it was free to redistribute some of the work because the union did not have exclusive jurisdiction over photography. This contention is also in error. This claim is based on the fact that employees outside of the bargaining unit and commercial firms occasionally provided some photography services in the past. The employer has acknowledged that employees outside the bargaining unit provided only a "small amount" of photographic services. Whether the work was also performed by others outside the bargaining unit is irrelevant to the determination of whether the union has a work claim. In Spokane Fire Protection District 9, Decision 3482-A (PECB, 1991), standby duty being performed by paid and volunteer fire fighters were found to be unit work. In King County Fire

[13] The Keeton court held that employer had to show the curtailment of work or good faith reorganization for efficiency was not based on "mere speculation".

Protection District 36, Decision 5352 (PECB, 1995), fire inspection duties being performed by fire fighters and supervisors was found to be unit work. The fact that other employees outside the bargaining unit took some occasional photographs does not diminish the union claim for the work.

The employer offers the video taping of utilities board meetings as an example of a minor disposable residue amounting to 44 hours per year. The assertion is not creditable, in light of the department contracting with Muni TV to provide the taping. The $46,000 annual amount of that contract is equal to the funding of over one-half a full-time photographer position.

The testimony and exhibits indicate that some work done by the laid off photographers in the past has been contracted out. Young's February 21, 1995 letter to McCauley admitted that the photographers had exclusively videotaped utility board meetings and other projects, taken aerial photographs, managed the photo archives, taken employee portraits, processed black and white film, photographed the dams annually, handled photography for Community/Media Services, coordinated use of audio-visual equipment, prepared slide and educational programs, and performed other work assignments which will now be handled through service agreements. The employer's own surveys of expenditures indicates that the transfer of work was significant. In 1995 the utilities processed $11,674 worth of film or an amount equal to one-third of its average expenditures of $34,000 for 1993 and 1994. Since the layoff of the photographers, the utilities department has contracted with Gail Rieber for portrait photography work, and with Korte and CMS for photography. Ford Graphics has a contract to do laminating posters, and Custom Photos and High Gloss Photos is doing black and white film processing.

The record also indicates that work historically done by the photographers has been transferred to City of Tacoma employees

outside of the bargaining unit represented by Local 120. Before the layoff of the photographers, only one or two inspectors or engineers took a half dozen photographs per month. After the layoff, the estimated the number of engineers and inspectors taking photographs quadrupled.[14] Another employee asked assistance on how to take photographs of the 1996 floods from a helicopter, whereas aerial photography was previously performed by the photographers. A meter manager used the color scanner for a report.

Even if there was some reduction of demand, the photo lab service was sufficiently utilized to support at least one photographer. Summerville identified the need for at least a full-time equivalent photographer from her examination of the photographer's work logs. Her estimate took into account only the pure photography time and did not include leave time, training time, or time spent in related activities such as large camera, darkroom, lithography or graphics. City Light was willing to fund one position, which confirms there was a continuing need for in-house photography. City Water was on record as having need for some photography work, and the surveys showed that City Water photo requests amounted to 19 percent of the work of the photo lab section, so the unwillingness of that division to commit in advance to budget part of a position is seen as a financial artifice rather than absence of operating needs.

The Examiner concludes that the employer did not go out of the photography business entirely. An "out of business" argument by the employer in <u>South Kitsap School District</u>, <u>supra</u>, was rejected upon a finding that an ongoing body of work was still needed and was still being performed. In these circumstances, the employer had an obligation to bargain to give notice to the union and provide opportunity for bargaining on its decision.

---

[14] At the hearing the photographers recalled that the following employees ordered film: Jim Peterson, Tom Lassat, Dan LeGreen, Mark Allison, June Kafin, Carolyn Erickson, Tom Waters, Steve Fisher, and Kim Moore.

Requests to Bargain Transfers of Unit Work

When advised in August of 1994 that the employer wanted to eliminate the photo lab and lay off the photographers, the union's focus was properly directed at preservation of unit work. McCauley made it clear that he was opposed to any transfer of bargaining work. He made requests for meetings to discuss that matter in his October 7, 1994 letter to Summerville and in his November 14, 1994 letter to Gilbertson. McCauley's letter dated February 17, 1995 to Crisson asserted that transfers of photography work were skimming.

Instead of immediate and positive responses to McCauley's requests for bargaining, the employer resisted. Summerville ignored the demand. Instead of telephoning McCauley to set up a meeting as requested, Gilbertson cited a case decided under a different statute and contract and, in effect, asked McCauley to make another request for bargaining by telephone. Crisson simply denied the transfer of work was skimming. Michaels declined to discuss the matter in the negotiations for a successor contract,[15] and referred McCauley back to Gilbertson. For a full six months, employer officials stonewalled the request with legalistic arguments. In doing so, the employer committed a "refusal to bargain" violation.

Requests to Bargain Impact

Case precedent draws a distinction between bargaining a decision and bargaining the impact of a decision. Even in cases where there is no duty to bargain the decision itself, the employer still has a duty to bargain the effects of its decision on the wages, hours and working conditions of bargaining unit employees.

---

[15] Nothing precluded the use of the contract negotiations as a forum for exploring alternatives to a closing of the photo lab and layoffs or a reduction or dissolution of the service.

In this case, the employer took the position that it was only required to bargain impacts. To the employer's credit, Summerville and Young did meet with the union officials to discuss the layoff and placement of the photographers in other jobs. They also arranged for training in resume and interviewing. Crisson let the employees know he was monitoring their progress in obtaining alternate employment. The employer contends that these actions are significant and fulfilled its obligation to bargain the impact of the decision to close the photo lab, but the Examiner disagrees.

While the employer is to be commended for its assistance to the employees who were laid off, the union is entitled to simultaneous bargaining of all issues in situations, such as this, where there is a duty to bargain both a decision and its effects. Discussion on transferring work is likely to be intimately entwined with the possible effects of the decision. The record shows the difficulty the union faced when it was limited to bargaining the effects: Instead of being limited to discussion of how to alleviate the layoffs, the discussions could have involved the entire matter of the decision (e.g., economic alternatives to closing the photo lab, partial closure of the photo lab combined with efficiency accommodations, shared responsibilities, or union concessions to preserve the jobs) together with traditional effects (e.g., priority preference for employment for jobs for which they qualified, severance pay and job training) for affected employees. The employer's refusal to bargain the decision to transfer work and contract out severely handicapped negotiations on the impact of its decision.

The employer claims that it followed the civil service rules on layoff, and that its civil service system is similar to the state civil service system. RCW 41.56.100 provides for exemption of issues from collective bargaining if they have been delegated to a civil service board similar in scope, structure and authority to what is now called the Washington Human Resources Board under Chapter 41.06 RCW, but that exemption was narrowly construed in

City of Yakima, Decision 3503-A (PECB, 1990), affirmed 117 Wn.2d 655 (1991). The employer offered little evidentiary support for its contention that the civil service exemption should apply here, and the argument is rejected.[16]

Remedy

The union asks for restoration of the status quo, and reinstatement of the two photographers with back pay. That is the normal remedy ordered where an unfair labor practice violation is found in a skimming/contracting case, and is designed to restore the parties to the situation which existed before the violation occurred. As is also customary, the employer will be ordered to cease and desist and post notices of its violation of the law.

The employer's argument that the Commission lacks authority over a first class city to order either reinstatement of the two photographers with back pay or restoration of the status quo is specious. First class cities do have authority to regulate their own budget and staffing, but must do so within the confines of state law. A city was ordered to provide reinstatement and back pay to a laid off employee in City of Federal Way, Decision 5183-A (PECB, 1996),

---

[16] Since the employer has raised the issue, the Examiner offers the following observations in passing: The general purposes of the state and Tacoma civil service systems are similar, but the scope, structure and authority of the state personnel board are far broader. The state board has the power to rule on a wide variety of subjects including salary levels, almost all working conditions, grievance procedures and promotions. Under Chapter 6.10 of the Tacoma City Charter, the city civil service board lacks independent decisionmaking authority to set employee salaries, levels of benefits and other conditions of employment. Chapter 6.10 only empowers the elected civil service board to hear employee appeals, investigate complaints matters relating to conditions of employment and to promulgate personnel rules on positions, recruitment and promotion. The civil service board merely advises the city council on matters relating to personnel administration.

upon a finding that the layoff was motivated by union animus in violation of RCW 41.56.140(1). The state collective bargaining laws administered by the Commission have the same regulatory effect as other state laws which limit the exercise of authority by local governments. See, Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), applying the state law against discrimination, Chapter 49.60 RCW, against a public entity in a case of a type where reinstatement and back pay are possible remedies.[17]

The employer's argument that the decision of its civil service board should not be subject to collateral attack goes to the remedy rather than to whether there was a refusal to bargain, but it also fails in that narrowed context. The issues in the civil service and unfair labor practice cases are entirely separate from one another. Given that no layoff should have occurred until there was good faith bargaining to agreement or impasse on the decision to close the photo lab section, the question of whether the layoffs were conducted in accordance with civil service rules is of little import here. The union is entitled to bargain the decision and its effects from a level playing field, which means it is not obligated to from the handicapped position of having employees already laid off. If the good faith bargaining required by Chapter 41.56 RCW eventually results in one or both of the employees being laid off, that will be soon enough for them to implement any separate rights they may have under the employer's civil service system.

The Examiner's order that the employer bargain with the union on transfers of work to persons outside of the bargaining unit (which

---

[17] Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) was a companion case to Allison, applying the state industrial insurance law, Title 51 RCW. Other examples of preemptive state laws are: The open public meetings law, Chapter 42.30 RCW; and the Law Enforcement Officers and Fire Fighters Retirement System, Chapter 41.26 RCW, as recently interpreted in City of Seattle, Decision 4687-A (PECB, 1996).

includes other City of Tacoma employees as well as private photographic firms) is made with the expectation that the parties will reach an agreement which is mutually acceptable. The Examiner recognizes that the photo lab has been dismantled, and that it would be costly and difficult to reassemble. At the same time, the Examiner recognizes that some of the work formerly done by the photo lab section was tied to the existence of equipment. The question of the need for and extent of equipment purchases is left open at this time, subject to the results of bargaining between the parties on the skimming/contracting concerns which have been the union's announced interest throughout this controversy.

FINDINGS OF FACT

1. City of Tacoma is a "public employer" within the meaning of RCW 41.56.030(1). At all times pertinent hereto, Mark Crisson was the head of the Department of Public Utilities and was responsible for actions taken in collective bargaining with organizations representing its employees.

2. Washington Council of County and City Employees, Local 120, a "bargaining representative" within the meaning of RCW 41.56.0-30(3), is the exclusive bargaining representative of certain nonsupervisory employees of the Department of Public Utilities. At all times pertinent hereto, Robert McCauley was assigned as staff representative for Local 120.

3. The employer and union were parties to a collective bargaining agreement effective through December 31, 1994. During the time pertinent hereto, the parties were engaged in bargaining a successor agreement.

4. June Summerville is the manager of community and media services for Tacoma Public Utilities. A photographic lab

section maintained and operated under her direction furnished photographic services, on demand, to other divisions and subunits in the department and to the general city government. Stephan Hanson and Leonard Whitney were employed as photographers in the photo lab, and were represented by Local 120.

5. The photographers employed at Tacoma Public Utilities performed a wide variety of complex and technical photographic, video and graphic arts services, planned and provided assistance to various departments and others, and produced engineering graphics, audio-video displays, documentation, legal photos and employee portraits. The photographers operated and maintained (including minor repair) a variety of cameras, audio-visual and photographic equipment, developed, retouched prints and managed photography archive files. The position required college level course work in commercial, aerial and/or related photography and darkroom techniques and two years experience as a commercial photographer.

6. The photographers exclusively videotaped utility board meetings and other projects, took aerial photographs, managed the photo archives, took employee portraits, processed black and white film, made annual photographs of the dams operated by the department, coordinated use of audio-visual equipment, prepared slide and educational programs, and performed other work assignments. The photographers processed virtually all of the black and white film. Color film and an occasional overload of black and white film was processed by commercial photo labs. Photo-documentation of major construction projects, photographing routine maintenance, documenting accidents, and aerial photography together accounted for a substantial portion of their workload.

7. The cost of maintaining one photographer position for 1995 was estimated to be $89,990 per year. Director Crisson instructed

Summerville not to prepare a budget for the photographic lab section for 1995, and to ask each of the operating division superintendents how much monetary support they could manage for photography. The superintendent of the City Light Division was willing to fund one position. Although the City Water Division had historically accounted for 19 percent of the work of the photographic lab section, its superintendent would not commit to any funding support for photography services. The superintendent of the Beltline Railroad also declined to commit funds for photography positions. The employer's later studies show that there was an ongoing need for at least one photographer position.

8. Summerville later justified closing the photo lab section because the utilities did not have any major projects scheduled which would require photo-documentation in 1995, but that appears to have been a short-term anomaly. The record shows the employer had an ongoing need for such services in 1996.

9. Summerville further justified closing the photo lab section on the basis that photography technology has been changing to utilizing graphics and computerized imaging, but the evidence does not support a conclusion that the needs traditionally fulfilled by the photographic lab section has entirely ceased.

10. On August 25, 1994, Summerville and Utilities Human Resources Manager Sedonia Young advised McCauley that the department wanted to eliminate the photo lab and lay off the photographers. At that time, Summerville told McCauley that the employer was open to suggestions on the matter, but did not set a deadline for receiving such suggestions. McCauley said he would have to think about the situation.

11. In September of 1994, Whitney received a typewritten "Schedule for the Dissolution of Photo Graphics" which indicated that a

decision had already been made to close the photo lab by October 28, 1994, and to lay off the employees by December 31, 1994. That schedule listed weekly tasks to implement a foregone decision, such as dismantling the lab, itemizing equipment, and tagging equipment for sale. The employer subsequently delayed the layoff to April 1, 1996, to avoid layoffs during the Christmas holidays.

12. On October 7, 1994, McCauley raised concerns that the work historically performed by bargaining unit members in the photo lab section would be transferred to other bargaining units and requested bargaining prior to any layoff or transfer. The employer did not make any immediate response to that request.

13. During October of 1994, McCauley raised the question of the closure of the photo lab section in the negotiations for a successor collective bargaining agreement. The employer's representative declined to bargain the closing of the lab, and referred McCauley to Jan Gilbertson, the employer's director of human resources. The closing of the photo lab was never discussed in the contract negotiations.

14. In a November 14, 1994 letter to Gilbertson, McCauley asserted that the utilities department was purchasing photographic equipment for the various divisions, and was assigning them work that had been traditionally performed by bargaining unit employees in the photo lab section. McCauley requested a meeting with responsible officials to discuss the matter. The employer did not make any immediate response to that request.

15. On December 19, 1994, Gilbertson replied to McCauley's letters of October 7 and November 14. Although he expressed a willingness to discuss the discontinuance of the photography unit and asked McCauley to call to arrange a meeting, Gilbert-

son cited legal precedent and advanced other arguments which indicated resistance to bargaining the matter.

16. In December of 1994, Summerville distributed a professionally printed document titled "Photography Services Procedures" which further indicated that a decision had already been made to close the photo lab. The summary listed the procedures for obtaining photographs once the department no longer employed staff photographers, including the purchase of photographic equipment by other divisions and sections, assignment of other employees to make photographs, and contracting out for photographic services. Recall of laid off bargaining unit employees was only one of the alternatives listed.

17. On January 11, 1995, the utilities board approved a memorandum of understanding under which City of Tacoma Municipal Television (Muni TV) was to take over the videotaping of utilities board meetings theretofore done by bargaining unit employees, and to provide other video production services in 1995. The $46,000 amount of that contract was sufficient to fund about one half of one photographer position.

18. On January 24 and February 17, 1995, employer and union officials had discussions about finding other positions for the photographers. The union representatives reiterated the union's concern about transfer of bargaining unit work to persons outside of the bargaining unit, and asserted that some work had already been transferred.

19. After the layoff of the photographers, the record demonstrates several instances where work historically performed by the laid off bargaining unit employees was performed by other City of Tacoma employees, including at least: The number of engineers and inspectors taking photographs increased from one or two to eight or more; other employees took aerial photo-

graphs; a meter manager produced a report using a color scanner that would previously have been operated by a photographer employed within the bargaining unit represented by Local 120.

20. After the layoff of the photographers, the record demonstrates several instances where work historically performed by the laid off bargaining unit employees was contracted out to other employers, including at least: Gail Rieber was contracted for portrait photography work; Korte and CMS were contracted for photography; Ford Graphics was contracted to laminate posters; Custom Photos and High Gloss Photos were contracted to process black and white film.

CONCLUSIONS OF LAW

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

2. As an exclusive bargaining representative recognized by the City of Tacoma under RCW 41.56.080, Washington State Council of County and City Employees, Local 120, was entitled to protect its jurisdiction over the work (including taking pictures, processing film and related media, videotaping, and related functions) historically performed by the bargaining unit employees working as photographers in the photographic lab section at Tacoma Public Utilities.

3. A decision by the City of Tacoma to transfer the work historically performed by the photographers in the photographic lab section at Tacoma Public Utilities to City of Tacoma employees outside of the bargaining unit represented by Local 120 and/or to contract out such work was a mandatory subject of collective bargaining under RCW 41.56.030(4).

4. The City of Tacoma presented Local 120 with the closure of the photographic lab section and the layoff of the photographer employees as a fait accompli. There was no operative waiver by Local 120 of its bargaining rights under RCW 41.56.030(4), and it repeatedly notified the employer of its opposition to skimming or contracting out of work historically performed by bargaining unit employees in that section.

5. By unilaterally implementing a change involving a mandatory subject of collective bargaining and by failing and refusing to bargain in response to the demands for bargaining made by Local 120, the City of Tacoma has committed and is committing unfair labor practices within the meaning of RCW 41.56.140(4) and (1).

ORDER

The City of Tacoma, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing and refusing to bargain in good faith with the Washington Council of County and City Employees, Local 120, as the exclusive bargaining representative of its employees, with respect to all wages, hours and working conditions of bargaining unit employees and specifically with respect to the transfer of photography work to City of Tacoma employees outside the bargaining unit or to private firms providing photography services.

   b. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Reinstate the photographers to their former positions and retain them in those positions until negotiations are completed in accordance with this order.

   b. Make the photographers whole for any loss of salary and fringe benefits retroactive to April 1, 1995, computed in accordance with WAC 391-45-410.

   c. Give notice to and, upon request, bargain collectively in good faith with the Washington Council of County and City Employees, Local 120, prior to implementing any change of wages, hours or working conditions of employees in the certified bargaining unit, including any transfer of bargaining unit work to persons outside of the unit.

   d. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

   e. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

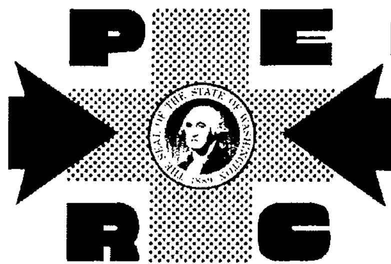
f. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Dated at Olympia, Washington, on the 14th day of August, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM A. LANG, Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL NOT refuse to bargain collectively with the Washington Council of County and City Employees, Local 120 with respect wages, hours or conditions of employment, specifically with respect the decision and effects of the transfer and/or subcontracting of photographic services to other employees outside the bargaining unit represented by the union or to commercial firms. If no agreement is reached we will submit the dispute for resolution pursuant to the procedures of RCW 41.56.100.

WE WILL reinstate Stephan Hanson and Leonard Whitney to their former positions as photographers as employees in good standing, and shall provide each employee back pay and benefits for the period since his unlawful layoff on April 1, 1993.

DATED: ____________________

CITY OF TACOMA

BY: ______________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.