City of Richland, Decision 6120 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 280,	)	
Complainant,	)	CASE 12860-U-96-3099
vs.	)	DECISION 6120 - PECB
CITY OF RICHLAND,	)	
Respondent.	)	FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER

Davies, Roberts & Reid, LLP, by Michael R. McCarthy, Attorney at Law, appeared on behalf of the complainant.

Menke, Jackson, Beyer & Elofson, LLP, by Rocky L. Jackson, Attorney at Law, appeared on behalf of the respondent.

On December 5, 1996, International Union of Operating Engineers, Local 280, filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the City of Richland (employer) had unilaterally transferred duties from a bargaining unit employee to a member of another bargaining unit, and that the employer refused to bargain when the union requested negotiations on the matter. In a preliminary ruling issued on February 5, 1997, the Executive Director found a cause of action to exist,[1] and referred the case to an Examiner for further proceedings. Walter M. Stuteville was substituted as Examiner on June 18, 1997. A hearing was held before the Examiner on July 31, 1997. The parties filed post-hearing briefs to complete the record.

[1] See, WAC 391-45-110. At that stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable.

BACKGROUND

Bargaining Units and Historical Division of Work

Local 280 represents a bargaining unit of approximately 100 public works and maintenance employees of the City of Richland. That bargaining relationship has existed since approximately 1959, and has included "storekeeper" and "lead storekeeper" classifications in the employer's central stores warehouse.

International Brotherhood of Electrical Workers, Local 77, represents a bargaining unit of City of Richland employees working at the employer's electrical utility. That bargaining unit has historically included "electrical store clerk" and "lead electrical store clerk" classifications in the employer's electric utility warehouse.

The two warehouses operated by the employer are both housed in the same building:[2]

- The central stores warehouse has historically received, warehoused and redistributed all equipment and supplies utilized by city employees, **except** electrical equipment.

- The electric utility warehouse has historically received, warehoused and redistributed only electrical materials.

Testimony from the employer's warehouse supervisor, Marvin Moore, indicates that there has historically been very little cross-over of responsibilities between the electrical "stock clerks" and the general stores "storekeepers". Although their responsibilities parallel one another, the job descriptions for the electrical

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[2] The two warehouses occupy separate legs of an L-shaped building owned by the employer.

warehouse positions specifically reference "electrical materials, supplies and tools", while the job descriptions for the central stores warehouse omits reference to "electrical" supplies while making a general reference to "materials, equipment and tools".

Historical "Jurisdiction" Disputes on Warehouse Work

On May 22, 1995, Local 280 Business Representative Larry Johnston wrote the following letter to Human Resources Director Paul Elsey at the City of Richland:

> Of recent days I have been informed that some types of changes in staffing are occurring at Central Stores. Of primary concern is recent promotions to management positions that have left vacancies in the bargaining unit. While this is of no particular concern on the surface, it does represent a concern when management persons perform unit work on routine basis. It's my understanding this is occurring.
>
> Since I have been left in the dark on the matter with little recourse but to react, I though [sic] it appropriate to inquire in advance of filing a grievance.
>
> While I reserve the exclusive option to file grievances, I am hopeful that you can provide me with sufficient details of the central stores to alleviate concerns I may harbor regarding exempt employees performing work customary to our bargaining unit.
>
> At your earliest convenience I would appreciate a communication from you, or your designee, as to any changes that are either on-going or contemplated at central stores that may affect this labor organization or its membership. ...

Elsey replied with the following letter sent to Johnston on July 24, 1995:

> Please be advised that the City has changed course on the warehouse reorganization.

> In our discussions, the City indicated that it would add the position Warehouse Assistant to Appendix A of the IUOE agreement. The City will add this position to the IBEW agreement.

Johnston then continued the correspondence with the following letter dated July 31, 1995:

> Thank you for your letter of July 24th, 1995 regarding the Warehouse Assistant position. In that your brief note made no reference to a specific impact on our bargaining unit, I will assume there will be no impact what so ever [sic].
>
> Should there be a negative impact not addressed in your letter, IUOE Local 280 reserves its option to grieve or file for appropriate relief with PERC.

On November 29, 1995, Johnston again wrote to Elsey concerning the status of the employer's storekeeper position:

> For the past few months IUOE Local 280 has been compiling information related to the job duty assignments of the IBEW represented Warehouse Assistants. As you will recall, the City notified IUOE Local 280 of this decision on July 24, 1995.
>
> Our data suggests that the vast majority of work performed by these employees is completed within the jurisdiction of the IUOE bargaining unit rather than the IBEW unit. This is unacceptable.
>
> IUOE Local 280 continues to claim the traditional jurisdiction of its bargaining unit as such jurisdiction relates to Central Stores. IUOE Local 280 would appreciate the City initiating actions that will resolve this ongoing encroachment without delay. This request is consistent with my 7/31/95 letter to your office.
>
> Warehouse Assistant time cards will validate the claim of encroachment and it is recommended that they be reviewed by your office. IUOE Local 280 is maintaining a separate job

> assignment list which will closely correlate with the Warehouse Assistant time cards. ...

On November 30, 1995, Elsey sent a reply to Johnston, as follows:

> This is in response to your letter of November 29, 1995.
>
> As you will recall, the job of warehouse Assistant was a new job classification. The City recognized that the work was appropriately bargaining unit work and had no preference between the IUOE or IBEW. Accordingly, the City commenced negotiations with both unions.
>
> It became apparent during negotiations that the IBEW's position was that they would not accept delivered parts, etc. from another union member. The ramifications of that position are obvious. The City made a business decision that the new position would be added to the IBEW contract appendix. As you indicated you were informed of that decision. The City acknowledges that the IUOE reserved its option to grieve or file for relief with PERC. I heard nothing else from you since July 31, 1995.
>
> As this job classification was new, it had no apparent impact on what you claim to be a traditionally [sic] jurisdiction of work for IUOE membership. As you did not list any tasks that you consider to be of jurisdictional [sic] dispute, I can not respond to that allegation.
>
> On many occasions you have commented unfavorably about the working relationship between the IUOE and the City of Richland. You may want to consider that, if such is the case, the union must share the burden. Pertinent to the instant case, the union has sat in the bushes and has not communicated that there was an issue. This is certainly more than a strong indication that the union would prefer to arbitrate or have PERC attempt to resolve issues. The City is prepared to conduct its business with IUOE that way.
>
> The City does not intend to modify its operation in the context of the Warehouse Stock

> Assistant. The city suggests that the union file a unit clarification petition with PERC.

On December 12, 1995, Johnston replied to Elsey by letter, as follows:

> Your response came as no surprise to me. The City management leaked your position a month ago as well as Mr. Carter's long range intention to get IUOE out of the stockroom service functions as soon as possible. Given the foreseeable retirement of an IBEW attendant and your current position, it seems the stage is set. Be assured the City's assault will be resisted by IUOE.
>
> Since our last discussion, I have contacted the IBEW representative to determine if they are willing to share the membership and job function(s) of the Warehouse Assistant position. I would hope, that is if it is possible to resolve issues of concern to our labor organizations we will be able to approach the City with a joint resolution. Should this not materialize, I will seek clarification of our unit work through PERC.
>
> In regard to this issue, you suggest IUOE Local 280 has sat in the bushes and raised no issue. I'm humored by the remark to the extent that you know full well the last thing the City of Richland would have done is responded to an IUOE complaint that had no factual basis. while [sic] sitting in the bushes we have compiled the factual data to support our case, either before the City or the Public Employment Relations Commission. The fact that the City refuses to hear about it now is just business as ususal - what's new?
>
> Finally, you're right! Our relationship has been less that [sic] cooperative. The hard core positions of City Management have been met with hard core positions by the Union. In most cases, this only leads to a more pronounced adversarial relationship, exactly as you have stated. While I have no particular problem with adjusting issues by arbitration or PERC processes I much prefer, as stated

> many times, to resolve our differences in house. ...

On April 4, 1996, Johnston wrote the following letter to Elsey concerning the union's position on the storekeeper position:

> Pursuant to our discussions regarding IUOE Local 280's continued representation of employee(s) involved in the operation of the Central Stores/Warehouse functions, I have had an opportunity to discuss your proposal with Business Manager Don Bushey.
>
> Our records indicate that IUOE Local 280 has represented the Storekeeper classification since 1970 when the position first appears in the Exhibit A of our collective bargaining agreement. Obviously, the classification remains in our most recent contract with the City of Richland covering the period 1995 through 1997.
>
> Based upon my conversation with Business Manager Bushey, I have been instructed not to relinquish our association or jurisdiction over the Central Stores/Warehouse and the Storekeeper classification. Additionally, I have been instructed to pursue the unit clarification on the Warehouse Assistant classification, to the extent that encroachment is occurring within the bargaining unit represented by IUOE Local 280. I will be filing the clarification within the next few days.
>
> As I have explained to you, IUOE Local 280 has no specific interest in going to battle with the IBEW. IUOE has not refused to accept parts from IBEW represented employees. On the other hand, IUOE Local 280 is committed to protect its contractual work and will do so in a manner legally recognized by the Public Employment Relations Commission (PERC) of the State of Washington. ...

Warren Hyland had been the central stores storekeeper, and had been within the bargaining unit represented by Local 280. In April of 1996, he successfully bid to fill a vacancy in the electrical warehouse. IUOE member Scott Becker was then transferred into the

position vacated by Hyland. In reference to Becker's transfer, Johnston wrote the following letter to the employer's maintenance superintendent on June 3, 1996:

> It has recently been called to my attention that the full-time budgeted Storekeeper position vacated by Warren Hyland has not been filled. It is my understanding that Scott Becker is filling this position on an upgrade basis as if a temporary vacancy exists.
>
> IUOE Local 280 does not view the position vacancy as temporary in nature and is concerned about the City's intent to fill the budgeted vacancy in a timely manner.
>
> So that the City's intent can be clearly understood and communicated to affected employees, potential bidders and shop stewards; I would appreciate you communicating the City's intent regarding this vacancy to me.
> ...

Hicks replied to Johnston with a letter dated June 7, 1996, as follows:

> The full time budgeted storekeeper position vacated by Warren Hyland has been filled on an upgrade basis by Scott Becker. The City is experiencing a revenue shortfall and may not be filling this vacant position on a full time basis.
>
> At this time the City is evaluating the long-term needs of the warehouse positions and the current structure of the staffing requirement.

On June 24, 1996, Johnston replied:

> In order that there be no misunderstandings, IUOE, Local 280 continues to protect and enforce its unit certification and historical practice of representing this classification and any other classifications associated with this unit work. The Union has no communication as of this date regarding the City's

> interest or intent to restructure staffing requirements in this area.
>
> I do find it odd, and certainly disturbing, that 70 to 80 percent of warehouse functions are those of the IUOE unit. Recently, the City was able to fill, on a full-time basis, warehouse positions in Electrical Utilities without any concern whatsoever to revenues shortfalls. At last count, the City has four employees working at higher rates, performing 20 to 30 percent of the work load associated with warehousing and supply distribution. I am certain this failure to fill the remaining IUOE Storekeeper position has much more to do with the City's proposal to eliminate IUOE Local 280 from the warehouse functions than a revenue shortfall issue.
>
> At any rate, IUOE Local 280 requests negotiations of any and all changes, amendments or alterations of the current IUOE bargaining unit work associated with the warehouse functions, should any such changes occur in the future.

On July 15, 1996, the union sent another letter to the employer concerning the staffing of the central stores stockroom:

> It has been called to my attention that the relief person for the IUOE Stockroom Attendant is a non-bargaining unit person. In conversations with Chief Union Steward John Campbell, Supervisor Marvin Moore suggested this activity has been occurring for some time and constitutes a past practice.
>
> IUOE Local 280 has not been made aware of this action preceding the conversations that took place last week. IUOE Local 280 strongly objects to **any** bargaining unit work being performed by non-represented personnel except, in instances of training or instruction of bargaining unit personnel. This position has been consistent for many years in the parties application of the bargaining agreement.
>
> This letter will serve as notice of the unacceptability of this practice. IUOE Local 280 is willing to forgive the past transgression, however, IUOE Local 280 will grieve any future assignments that place non-bargaining

> unit personnel performing bargaining unit work without agreement between the parties to do so.

[Emphasis by **bold** in original.]

On August 26, 1996, Johnston wrote another letter to the employer, concerning a stockroom position:

> Enclosed is a memo delivered to Superintendent Roger Hicks by IUOE member Scott Becker. Scott is currently filling in as the Stockroom person in an upgrade capacity rather than in a permanent assignment. Obviously, there remain some issues between IUOE and the City in this area that, hopefully, will be resolved in the future.
>
> In a recent conversation with Mr. Becker, I was informed that the working conditions (with the exception of vacation relief) identified in Scott's May 24, 1996 memo continue to exist. In perspective, Scott's concern is not weighed to the fact that these onerous working conditions exist, but rather to the fact that it could negatively reflect on his work record with the City of Richland.
>
> It seems to me that the Stockroom situation is a mess at best and that Scott Becker has found himself in the middle of the entire issue. I would appreciate that a copy of Scott's May 24, 1996 memo be entered into his personnel file, along with this letter in an effort to provide some security that a bad labor management issue and budget matters will not reflect on his long-term employment record. ...

In his memo, Becker listed complaints concerning his ability to complete assigned work within the time allotted, and requested reassignment back to his previous position as a maintenance worker.

The Current Controversy

Becker continued to fulfill the responsibilities of the central storekeeper until October of 1996, but changes were in the works.

On September 6, 1996, Hicks wrote a memo to Don Carter, the employer's deputy city manager for utilities and physical services, under the title "Proposed revision to warehouse staffing levels", as follows:

> This proposal will have an impact on a position in the IUOE Local 280. The current incumbent in the Storekeeper position is in the position on an upgrade from the Parks Division. The Parks Division needs the person back to meet their staffing needs and this reorganization of the work load in the warehouse will not require that the position be back filled. The position will remain in the IUOE contract appendix but not be filled. This is per contract a management right under Article 3.0 Management Rights Sections 3.01 & 3.02.
>
> During the past 30 months the Warehouse operations and staffing requirements have been going through an adjustment to improve the efficiency and customer support levels. The structure [sic] the (8) staff in the warehouse 30 months ago was:
>
> (1) (Acting) Supervisor
> (2) Inventory Control Specialist
> (3) Materials Control Specialist
>
> | Electrical Warehouse | Operations Warehouse |
> |---|---|
> | (1) Lead Electrical Stock Clerk | (1) Lead Storekeeper |
> | (2) Electrical Stock Clerk | (1) Storekeeper |
>
> The Warehouse staffing has evolved to (7) positions which are:
>
> (1) Supervisor
> (1) Inventory Control Specialist
>
> | Electrical Warehouse | Operations Warehouse |
> |---|---|
> | (1) Electrical Stock clerk | (1) Storekeeper |
> | (2) Warehouse Stock Assistant | |
>
> The next step required in improving cost efficiency for the warehouse operations is to combine job functions into a centralized warehouse operation that will change staffing from (7) to (6):

(1) Supervisor
(1) Inventory Control Specialist

Centralized Warehouse

(2) Electrical Stock Clerk	(2) Warehouse Stock Assistant

This staffing level will require changes in how the warehouse operations serve the customer. The inventory [sic] Control Specialist will be responsible for coordinating with purchasing in placing orders for stock materials. Warehousing will have to work with purchasing to solicit their support in the buying of warehouse materials. The buyers will need to improve their expertise in the products stocked in the warehouse and what suppliers are used for the products. The Inventory Control Specialist does not have the knowledge and expertise to sort this information for purchasing. Purchase requisitions will be made for common items such as plumbing, electrical, fleet ect.[sic] but the requisitions will not be broken out specific product to suggest vendor which is the responsibility of the buyer. The Inventory Control Specialist will work closely with the Electrical Stock Clerks who are responsible to receive, ship and store materials and report inventory levels to the Inventory Control Specialist. The Warehouse Stock Assistants will pickup and deliver materials for the warehouse. They also will be upgraded to the Electrical Stock Clerk position as need to cover for approved leaves. The south storage yard will no longer be staffed full time. An Electrical Stock Clerk or Warehouse Stock Assistant will be dispatched to the yard when materials are to be issued or received. This coverage of the south yard will not impact customer service levels if the linemen use the various means of communication available to them to inform the warehouse personnel that their services are needed. This planned reduction in staff level is the absolute minimum at which the warehouse can operate and any additional duties that maybe added to the operations in the future will require additional staffing. Two programs that are in the planning stage are tool rental and kitting [sic] of materials.

On October 14, 1996, Johnston again wrote to Elsey concerning the warehouse staffing issue:

> On Monday, October 7, 1996, you contacted me by telephone to advise that the upgraded employee Scott Becker desires to return to his previous position, and that the City intended to fill the position with a individual from another bargaining unit not represented by the IUOE.
>
> As you are aware, IUOE Local 280 has represented the central Stores Stock Room Attendant position for many years and has been certified to represent the position by the State of Washington's Department of Lobor [sic] and Industries (Preceding authority of PERC). IUOE Local 280 does not voluntarily relinquish this position for assignment to a different bargaining unit.
>
> Through its agents and officers, IUOE Local 280 requests to bargain the decision and impact of this City sponsored action. IUOE Local 280 reserves its option to grieve the action should negotiation fail to produce a satisfactory remedy. ...

Elsey replied on October 16, 1996:

> Apparently you misunderstood our conversation of October 7, 1996. I said that it was the intent of the City not to backfill the position of Stock Clerk. I did not say that it was going to be filled with an individual from another unit. If you will recall, I corrected your misunderstanding at the October 14, 1996 grievance meeting.
>
> Staffing is not a mandatory subject of bargaining nor, by our agreement, is it permissive. Article 3.02 of the agreement specifically addresses your request.

[Emphasis by underlining in original.]

Johnston replied with an October 29, 1996 letter to Elsey, as follows:

> Pursuant to your letter dated 10/16/96, I remain concerned about who will be performing this IUOE Traditional [sic] bargaining unit work. Could you please advise me on this question as well as how long the City expects to not "backfill" this IUOE represented classification and work associated to it.
>
> Your assertion that staffing is not a mandatory subject of bargaining is inherently correct. It is not correct where the unit work is transferred to another group without bargaining when a request has been made. It remains my understanding that IUOE Members [sic] are not being assigned the Stockroom Attendant duties and that the essential job functions remain. ...

[Emphasis by underlining in original.]

On December 4, 1996, Carter replied to the union's grievance with the following letter to Johnston:

> This is [sic] to your letter of November 27, 1996, and received on December 2, wherein you advance the storekeeper grievance to the next level. My understanding is the Union asserts that the City's decision not to fill a vacant storekeeper position is a violation of Article 2.2 of the labor agreement. Remedy sought is filling the position.
>
> By letter dated October 16, 1996, the City notified the Union of its decision and intent not to fill the subject position. The Union acknowledged receipt in correspondence dated October 29, 1996. The subject grievance is dated November 21, 1996, more than thirty days later and notably outside the grievance timetable requirements stipulated in Article 6 of the labor agreement.
>
> The grievance is denied due to timeliness.

The complaint initiating this unfair labor practice case was filed with the Commission on the same day that the employer denied the grievance. The complaint alleged that the employer had refused to process the union's grievance.

POSITIONS OF THE PARTIES

Local 280 contends that undisputed facts prove that the employer has unlawfully skimmed work from its bargaining unit, and that the employer refused to bargain when the union made the demand for bargaining concerning the unit work issue. In response to the employer's assertion that its complaint in this case is untimely, the union argues that the complained-of action precisely at issue in this case was within the six months prior to the filing of the complaint, so that the Commission has jurisdiction.

While its director of human resources acknowledged in his testimony that the employer has no intention of permanently filling the vacant storekeeper position historically included in the bargaining unit represented by Local 280, and that it has not bargained with Local 280 concerning that decision, the employer asserts that it had no duty to negotiate with Local 280 concerning what it characterizes as a staffing decision that is not a mandatory subject of bargaining. It further asserts that, as long as the position remains listed in the parties' collective bargaining agreement, the union should not be involved in decisions as to whether the position is actually filled. Finally, it argues that the complaint was untimely, because the union had notice of the employer's intentions more than six months prior to the filing of the complaint.

DISCUSSION

This case raises two legal questions which will be addressed seriatim. The first question is whether the employer had a duty to bargain in this case. If the answer to the first question is in the affirmative, then it will be necessary to address the employer's defense that the union waited too long before filing its unfair labor practice complaint.

The Duty to Bargain

The duty to bargain under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit ...

That definition, and Chapter 41.56 RCW in general, are patterned after the National Labor Relations Act of 1935 (NLRA), as amended by the Labor-Management Relations Act of 1947 (LMRA). The Supreme Court of the State of Washington has ruled that decisions construing the federal statute are persuasive in interpreting state laws which are similar to or based on the federal law. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

The Commission has followed National Labor Relations Board (NLRB) and federal court precedents which distinguish between "mandatory", "permissive" and "illegal" subjects of bargaining. Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg Warner, 356 U.S. 342 (1958). Thus:

- Mandatory subjects of bargaining are matters affecting the wages, hours, and working conditions of bargaining unit employees;
- Permissive subjects of bargaining are matters considered remote from "terms and conditions of employment", or those which are regarded as prerogatives of employers or of unions;
- Illegal subjects of bargaining are matters which neither the employer nor the union have the authority to negotiate,

> because their implementation of an agreement on the subject would contravene applicable statutes or court decisions.

Decisions concerning the "scope" of collective bargaining must be made on a case-by-case:

> Every case presents unique circumstances, in which the relative strengths of the public employer's need for managerial control on the one hand and the employee's concern with working conditions on the other, will vary.
>
> IAFF v. PERC, 113 Wn.2d 197 at 207 (1989), remanding City of Richland, Decision 2448-B (PECB, 1987).

The Commission and its Examiners thus go beyond characterizations and labels to analyze the facts demonstrated by a full evidentiary record.

Precedent on Skimming of Unit Work -

The Commission has long held that transfers of bargaining unit work to employees outside of the bargaining unit are a mandatory subject of bargaining:

> The agency has held from its infancy that the transfer of bargaining unit worked to persons outside the bargaining unit is a mandatory subject of bargaining. South Kitsap School District, Decision 472 (PECB, 1978); City of Kennewick, Decision 482-B (PECB, 1980).
>
> King County Fire Protection District 36, Decision 5352 (PECB, 1995).

The term "skimming" has been used to describe transfers of unit work to other employees of the same employer, which has the same effect on a bargaining unit (and invokes the same duty to bargain) as "contracting out" of bargaining unit work. See, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

Employer characterizations of decisions as "staffing" have not evaded or avoided the "skimming" precedents in the past:

> 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).

City of Tacoma, Decision 5634 (PECB, 1996).

And:

> It is well-established that an employer must give notice to the exclusive bargaining representative of its employees, and provide an opportunity for bargaining upon request, before transferring the work of bargaining unit employees to either: (1) employees of another employer; or (2) its own employees who are either unrepresented or members of a different bargaining unit. South Kitsap School District, Decision 472 (PECB, 1978).

Wishkah Valley School District, Decision 4093-A (PECB, 1993).

In Spokane Fire Protection District 9, Decision 3482-A (PECB, 1901), citing Clover Park School District, Decision 2560-B (PECB, 1989), the Commission used a two-step analysis to determine whether a skimming violation has occurred:

1. Is the work bargaining unit work?
2. If so, is the employer obligated to bargain before transferring the work outside of the bargaining unit?

Where the answer to the first of those questions was in the affirmative, the Commission used a five-step factual analysis to answer the second question in Spokane Fire Protection District 9, supra:

1. Previous practice - had non-bargaining unit personnel ever performed the work.
2. Does the transfer of the work involve a significant detriment to the members of the bargaining unit?
3. Was the employer's motivation solely economic?
4. Had there been an opportunity to bargain generally about the changes in existing practices, and
5. Was the work fundamentally different from regular bargaining unit work?[3]

Thus, the focus remains on the work which continues to be performed, rather than on the identities or numbers of employees.

Disputed Work Was Unit Work -

In the case now before the Examiner, the answer to the first question posed in Spokane Fire District 9, supra, is clearly in the affirmative. Both parties have acknowledged that the warehouse work done by the disputed storekeeper position has been the work of the bargaining unit represented by Local 280 since the inception of the position. Moreover, that work was clearly distinguished in the past from the parallel warehouse work performed (albeit on different supplies and parts) by members of the bargaining unit represented by IBEW Local 77.

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[3] The union argues that the five secondary factors unnecessarily complicate the analysis. This Examiner agrees, to the extent that they suggest a need for analysis of factors that simply do not apply. In this case, the employer's motivation was not "economic" and the fact that the lost work was not common among bargaining unit members is irrelevant.

Employer Had Duty to Bargain -

The employer would answer the second question in the negative based on its "staffing" characterization, but its arguments are not persuasive. Contrary to the employer's basic premise, a number of decisions have held that various aspects of "staffing" are bargainable working conditions. City of Centralia, Decision 5282 (PECB, 1995) reviewed the following cases:

- The broad category of "staffing" was subdivided in City of Yakima, Decision 1130 (PECB, 1981), where a ruling that the number of police officers in the department was a fundamental prerogative of management left open the possibility that lesser staffing decisions would be treated differently.[4]

- The decision in City of Spokane, Decision 4746 (PECB, 1994), holding that staffing was a management prerogative and not a mandatory subject of bargaining, was made in the context of arguments about overall shift and departmental staffing. Union arguments on safety were rejected as unsupported by the record in that case.

- In City of Richland, supra, the Examiner ruled that the union had lawfully proposed a wage reopener if equipment staffing levels were to change. The Commission reversed, on a finding that the union proposal was a transparent attempt to make staffing

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[4] Yakima does stand for the proposition that subjects remote from wages, hours and working conditions are regarded as a prerogative of management, and are not mandatory subjects of bargaining. Accord: Pierce County, Decision 1710 (PECB, 1983). See, also, City of Bellevue, Decision 3343-A (PECB, 1990), holding that a proposal to increase the number of budgeted "lieutenant" positions in the fire department was a permissive subject.

> decisions a mandatory subject of bargaining by a tie to wages. The Supreme Court vacated the Commission's decision, however, and remanded the case for a determination on whether equipment staffing affects safety. Citing Fibreboard, supra, the Court observed that the relationship the subject has to "wages, hours and working conditions" is on one side of a balance, and the extent to which the subject lies at the core of entrepreneurial control is on the other side of the balance.[5]

In Centralia itself, the Commission found a duty to bargain existed in the face of facts establishing the existence of safety concerns, where "shift staffing" and "equipment staffing" merged to become one-and-the-same.

Applying the balancing test in this case, the employer clearly had the right to decide whether to continue having a warehouse, and whether to continue having the tasks performed that had historically been the work of employees represented by Local 280. That does not, however, resolve this case. The employer did not just make an entrepreneurial decision to cut back or terminate its warehouse functions.

What the employer seeks to label as a "staffing" decision was, in fact, a unit work decision. The employer decided that work historically done by employees represented by Local 280 would henceforth be done by employees represented by IBEW Local 77. The letters from Johnston to the employer referred to Local 280's "unit work" claims on several occasions; the employer officials who received those letters apparently weren't listening.

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[5] There was no ruling by the Commission in response to the remand, because the parties resolved their differences prior to further action by the Commission.

The employer cites the fact that the disputed classification is still listed in its collective bargaining agreement with Local 280, but that argument is also without merit. The employer acknowledges the classification is not being utilized. Ultimately, however, this case is about *bargaining unit work*, not about the existence of a job title listed in a contract. The employer has "skimmed" work out of the union's bargaining unit, by giving it to employees who are included in a different bargaining unit.

The "Statute of Limitations" Defense

The statute authorizes and limits the processing of unfair labor practice charges, as follows:

> RCW 41.56.160 Commission to prevent unfair labor practices and issue remedial orders and cease and desist orders. (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That **a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.** ...
>
> [Emphasis by **bold** supplied.]

The complaint filed in this case on December 4, 1996 was timely, on its face, for actions occurring on or after June 4, 1996. The six-month period begins to run when the injured party has actual or constructive notice of the precise action for which a remedy is sought. Seattle School District, Decision 5237-B (EDUC, 1997).

The employer argues that the evidence "clearly establishes" that the April 4, 1996 letter, reproduced above, put the union on notice that the storekeeper position was vacant. It asserts that the June 3 and August 26, 1996 letters, also reproduced above, reinforce its argument that the union knew that the employer was intent on leaving the bargaining unit position vacant. It thus contends that

the union should have filed its unfair labor practice charges within the six months following April 4, 1996. Again, however, the employer's focus on its obligation to fill the vacancy is excessively narrow. Even if the correspondence clearly establishes that the union had notice that the storekeeper classification was vacant as of April 4, 1996,[6] the notice that the employer may not be filling the position "on a full time basis" (because of a revenue shortfall) did not give the union clear notice of the employer's intent to transfer the work outside of the bargaining unit.[7]

The union aptly argues that the action complained-of in this case is the transfer of bargaining unit work which occurred in October of 1996. Until that date, the storekeeper work historically performed within the Local 280 bargaining unit was being performed by a Local 280 member, and Local 280 had not suffered any change of its work jurisdiction. With the plan outlined by the department manager in his September 6, 1996 letter, and with announcement of the return of Becker to his former position, the storekeeper work historically performed within the Local 280 bargaining unit was transferred to the bargaining unit represented by IBEW Local 77. The actionable "skimming" thus occurred after the June 4, 1996 date for which the complaint in this case is timely.

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[6] In his June 7, 1996 letter, Hicks told the union that the "full time budgeted" storekeeper position "has been filled on an upgrade basis".

[7] The employer's arguments might be relevant if the union was attempting to enforce some perceived or real contractual right to have incumbents in all classifications listed in the parties' collective bargaining agreement. This is not, and could not be, such a proceeding. The Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

Review of the earlier correspondence as to details also reinforces a conclusion that the employer's claim of an earlier-implemented shift of the unions' work jurisdictions is not creditable. The employer's letters of July 24 and November 30, 1995, along with the union's letters of December 12, 1995, and April 4, June 3, August 26, 1996, all reference the "warehouse assistant" classification. Since Local 280 member Becker performed the storekeeper work continuously after the position was vacated by Local 280 member Hyland, it appears that none of that correspondence concerned the storekeeper work at issue in this case. The Examiner certainly does not read the early correspondence as giving any clear direction as to the employer's intent.

The union's letter of October 14, 1996 acknowledges that the union had received (oral) notice from the employer that the employer did not intend to maintain the storekeeper position *as a position represented by Local 280* after it was vacated by Scott Becker. This is the first event established by this record as showing the union had actual or constructive notice that the employer was moving the work previously assigned to the storekeeper to an employee represented by Local 77. The oral notice was confirmed in the employer's letter of October 16, 1996, and the latter correspondence was cited as "notice" by the deputy city manager in his letter of December 4, 1996. Thus, by verbal notice confirmed by the union on October 14, 1996, and by written notice on October 16, 1996, confirmed on December 4, 1996, the union had been provided the precise "complained-of action" that starts the tolling of the statute of limitations. That is well within the six months statutory requirement.

If the employer had intended in early 1995 to end the storekeeper functions historically performed within the Local 280 bargaining unit, it could easily have stated that intent directly. It did not do so and, indeed, the record supports an inference that the employer never intended to altogether end those functions. The

employer's intention to transfer the unit work may have existed long before September and October of 1996, but it consistently obscured such an intent behind the creation of a new warehouse assistant position and the use of vague terms such as "backfilling" and "upgrade on a temporary basis". The employer was not forthright about its intent to transfer unit work even after the union invoked that concept in its correspondence. As was stated by an Examiner in City of Yakima, Decision 3564 (PECB, 1990), "Gotcha" has no place in labor relations, and is not conducive to the public interest in stable employment relationships." To dismiss the unfair labor practice complaint in this case as untimely based on the early correspondence would be to reward the employer for being clever enough to obscure its real intent, and would be a basic injustice to the parties and the affected employees. It would also violate the intent and purpose of the statute:

> Declaration of purpose. The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matter concerning their employment relations with public employers.
>
> RCW 41.56.010

The complaint in this matter was filed within six months following the date when Local 280 had actual or constructive notice of the employer's intent to transfer bargaining unit work of the central stores storekeeper to persons outside of its bargaining unit.

FINDINGS OF FACT

1. The City of Richland is a public employer within the meaning of RCW 41.56.030(1). The employer's human resources manager

is Paul Elsey; Roger Hicks is the employer's maintenance and stores superintendent.

2. International Union of Operating Engineers, Local 280, a bargaining representative within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of a bargaining unit which includes approximately 100 operations and maintenance employees of the City of Richland. The union's business representative is Larry Johnston.

3. The bargaining relationship between the employer and Local 280 has been in existence since approximately 1959, and those parties have been parties to a series of collective bargaining agreements. The bargaining unit has historically included the employees who staff the employer's central stores function.

4. International Brotherhood of Electrical Workers, Local 77, is the exclusive bargaining representative of employees of the electric utility operated by the City of Richland. That bargaining unit has historically included employees who staff the employer's electrical warehouse function.

5. The employer's central stores and electrical warehouses are housed in separate sections of the same building. The two warehouses were historically staffed and operated separately, based on differences of the types of materials handled.

6. Beginning in May of 1995, Local 280 sent letters to the employer indicating concerns about staffing changes in the employer's warehouse functions, and indicating a request to bargain concerning any changes to the scope of work performed by the bargaining unit it represents.

7. In June of 1995, the employer added a warehouse assistant position to the staffing of the central stores warehouse. The

employer allocated that position to the bargaining unit represented by Local 77. Ensuing correspondence between the employer and Local 280 concerned whether the newly-created warehouse assistant position was doing Local 280 bargaining unit work, but did not put Local 280 on notice of an intent to transfer all warehouse work to persons outside of the Local 280 bargaining unit.

8. On September 6, 1996, employer official Hicks wrote a letter to the employer's deputy city manager, describing a plan to continue the employer's warehouse functions while eliminating Local 280 from representation of any employees performing those warehouse functions. That began with an acknowledgment of "an impact on a position in the IUOE Local 280".

9. Until October 7, 1996, the storekeeper work in the central stores warehouse continued to be performed by employees who were members of Local 280, whether in permanent or temporary status under the employer's personnel procedures.

10. On October 7, 1996, Local 280 was informed by telephone that a vacancy in the central stores storekeeper position was to be filled with an employee represented by Local 77. In an October 14, 1996 letter, Local 280 demanded to bargain the transfer of bargaining unit work to persons outside of its bargaining unit.

11. In a letter to Local 280 dated October 16, 1996, the employer stated that it considered the subject of the union's request to be a "staffing" matter that was neither a mandatory subject of bargaining nor, because of the parties' agreement", a permissive subject of bargaining.

12. The union filed its complaint charging unfair labor practices on December 5, 1996.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction this matter under Chapter 41.56 RCW.

2. Transfers of work from one bargaining unit to another affect the wages and working conditions of bargaining unit employees and the work jurisdiction claims of the exclusive bargaining representative of the bargaining unit, and are a mandatory subject of collective bargaining under RCW 41.56.030(4).

3. By transferring work historically performed by members of the bargaining unit represented by Local 280 to its employees outside of that bargaining unit, without notice to Local 280, and by refusing to bargain with Local 280 concerning either the decision or the impact of that decision, the employer has violated RCW 41.56.140(4) and (1).

4. The employer's defenses in this matter based upon its characterization of the disputed transaction as a "staffing" decision are without merit, and disregard Commission precedents establishing that transfers of bargaining unit work and even some staffing decisions give rise to a duty to bargain under RCW 41.56.030(4).

5. The employer's defenses in this matter based upon the statute of limitations imposed by RCW 41.56.160 are without merit, inasmuch as the complaint charging unfair labor practices was filed in this case within six months following the date on which Local 280 union knew or reasonably should have known of the employer's intent to transfer the central stores storekeeper function outside of the bargaining unit it represents, and also within six months following the actual transfer of bargaining unit work to an employee outside of the bargaining unit represented by Local 280.

ORDER

The City of Richland, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices and effectuate the purposes of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW:

1. CEASE AND DESIST from:

   a. Deciding upon or implementing transfers of work historically performed by employees in the bargaining unit represented by International Union of Operating Engineers, Local 280, to employees outside of that bargaining unit, without having first given notice to Local 280 and providing an opportunity for collective bargaining prior to the finalization of the decision.

   b. Refusing to bargain in good faith with Local 280, upon request, concerning transfers of bargaining unit work to persons outside of the bargaining unit represented by Local 280.

   c. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under Chapter 41.56 RCW.

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

   a. Restore and maintain the status quo ante, by assigning the work of the central stores storekeeper function to an employee or employees who are members of the bargaining unit represented by Local 280.

b. Give notice to Local 280 and, upon request, meet at mutually agreeable times and places to bargain collectively in good faith, concerning any future proposal by the employer to transfer work historically performed by employees in the bargaining unit represented by Local 280 to employees outside of that bargaining unit.

c. Post, in conspicuous places in the employer's warehouse facility and other locations 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 City of Richland, and shall remain posted for 60 days. Reasonable steps shall be taken by the employer to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice attached hereto at the regular public meeting of the City Council of the City of Richland which next follows the receipt of this decision, and permanently append a copy of the attached notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Notify International Union of Operating Engineers, Local 280, 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 Local 280 with a signed copy of the notice required by this order.

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.

Issued at Olympia, Washington, this 4th day of December, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

APPENDIX

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 immediately restore the status quo ante by assigning the work of the central stores shopkeeper to a member of the bargaining unit represented by the International Union of Operating Engineers, Local 280.

WE WILL meet with the International Union of Operating Engineers, Local 280, at mutually agreed-upon times and places to bargain collectively concerning the employer's proposal to transfer bargaining unit work to a member of another bargaining unit.

WE WILL post copies of the notice attached hereto and marked "appendix", in conspicuous places on the employer's premises, including the employer's central stores building.

WE WILL read the notice attached hereto and required by preceding paragraphs, at the regularly scheduled public meeting of the Richland City Council which immediately follows the receipt of this decision.

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.

DATED: _____

CITY OF RICHLAND

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.