Clover Park School District, Decision 6072-A (EDUC, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CLOVER PARK EDUCATION ASSOCIATION, Complainant,	)	CASE 13046-U-97-3153
vs.	)	DECISION 6072-A - EDUC
CLOVER PARK SCHOOL DISTRICT, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Eric R. Hansen, Attorney at Law, appeared for the complainant.

Vandeberg, Johnson and Gandara by William A. Coats, Attorney at Law, appeared for the respondent.

On March 20, 1997, the Clover Park Education Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. The union alleged that the Clover Park School District (employer) had violated RCW 41.59.140(1)(a) and (e), by implementation of a $20 per hour payment for teachers attending parent conferences outside the normal school day. A hearing was held at Lakewood, Washington, on October 14, 1997, before Examiner Vincent M. Helm. The parties filed post-hearing briefs.

PROCEDURAL BACKGROUND:

The union's complaint in this case was reviewed by the Executive Director pursuant to WAC 391-45-110, and was found susceptible to an interpretation that a "violation of contract" claim was being advanced, in addition to "unilateral change" and/or "circumvention

of bargaining representative" claims. A deficiency notice was issued on May 13, 1997, citing City of Walla Walla, Decision 104 (PECB, 1976) for the proposition that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. The union was given a period of 14 days in which to file and serve an amended complaint clarifying its contentions with respect to the unilateral change and circumvention issues.

An amended complaint filed by the union on May 21, 1997, clearly alleged a circumvention of the exclusive bargaining representative, by means of the employer's communicating its offer of pay for parent conferences to bargaining unit employees prior to satisfying its bargaining obligations with the union. The amended complaint also clearly alleged a unilateral implementation of the pay for parent conferences prior to meeting its bargaining obligations. On June 11, 1997, the Executive Director issued a preliminary ruling under WAC 391-45-110, finding that the amended complaint stated a cause of action and appointing the Examiner.

The employer filed its answer to the amended complaint on June 30, 1997. A notice was issued, setting the matter for hearing.

On September 25, 1997, the employer filed a motion for continuance supported by an affidavit of its counsel. The motion was predicated upon the proposition that a grievance was being processed to arbitration with respect to many of the issues involved herein.

On September 30, 1997, counsel for the union filed a declaration in opposition to the employer's motion. The opposition was premised upon a contention that, at the arbitration hearing referenced in the motion, the employer had refused to stipulate that an issue concerning a unilateral change of terms or conditions of employment was before the arbitrator, and that the arbitrator clearly has no

authority to remedy the circumvention violation being asserted by the union.

On October 8, 1997, the Examiner denied the employer's motion, on the basis that violations of a statutory duty to bargain in good faith (e.g., in this case, by virtue of bypassing the union to communicate an offer to employees and implementing an offer without fulfilling a bargaining obligation) may not be remedied by an arbitrator's award.[1]

No evidence was offered in this proceeding with respect to an arbitration award issued in the parallel proceedings.[2]

FACTUAL BACKGROUND

The union is the exclusive bargaining representative of the employer's non-supervisory certificated employees. There is little or no dispute with respect to the essential facts upon which the union buttresses its complaint of unfair labor practices.

Actions Alleged to be Violative of the Statute

During the course of a labor-management meeting held by the parties on January 22, 1997, the employer's superintendent, Hugh Burkett, stated he was considering paying teachers $20 an hour for parent teacher conferences outside the normal school day. Christine Turner, who was then president of the union, objected to this

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[1] Clover Park School District, Decision 6072 (EDUC, 1997).

[2] In its post-hearing brief, the employer argued that an arbitration award had been issued, and that the arbitrator found the employer's action did not violate the parties' collective bargaining agreement.

course of action and noted that such payment had been a major issue in recently-concluded contract negotiations.[3]

On January 27, 1997, Burkett issued a memorandum (Exhibit 2) to all of the employer's elementary school principals, advising them that (as had been discussed at a principals' work session held a few days earlier) he was authorizing the payment of $20 per hour for teachers conducting parent teacher conferences in the spring. A maximum of six hours outside of the normal work-day was specified.[4]

The pleadings and testimony establish the following with respect to communication and implementation of the employer's offer:

- In January and mid-February of 1997, bargaining unit employees at two elementary schools were apprized of the $20 per hour payment, either through receipt of a copy of Burkett's January 27 memorandum, or through communications from a principal.

- In some instances, bargaining unit employees were advised that utilization of this procedure was voluntary.

- In other instances, bargaining unit employees were told that utilization of this procedure was mandatory.

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[3] While the witnesses differed as to how significant the issue of the amount of payment for parent conferences outside the normal work day had been in the total scheme of negotiations, they agreed the employer had been unable to overcome the union's objections to any rate other than the employee's "per diem rate" for such work.

[4] The document is in evidence as Exhibit 2. Contrary to that document, Burkett testified he did not commit to the $20 per hour at the principals' meeting, but considered the matter for a few days.

At a labor-management meeting held later, on or about February 3, 1997, Turner again told Burkett he should not offer the $20 per hour payment for parent conferences, and asked him to withdraw his offer. Burkett said he did not believe he could comply with that request. While objecting to the implementation of the payment of $20 per hour, the union made no request to bargain with respect to the matter.

Certain bargaining unit employees, in fact, accepted the superintendent's offer and received the payment of $20 per hour.

POSITIONS OF THE PARTIES

The union contends that the employer's communication of its offer of $20 per hour for time spent in parent conferences outside the normal work-day was an unlawful bypassing of the exclusive bargaining representative, since the offer was transmitted to the employees without bargaining with the union upon the subject. Both at hearing and in its post-hearing brief, the union also contended that implementation of the $20 per hour payment was a unilateral change which violated the statute. The union, while admitting it made no request to bargain, contends that it was excused from any obligation to request negotiations under these circumstances, because the employer either effectively precluded meaningful negotiations or presented the union with a fait accompli, by: The timing of its announcement of the payment to the union; its communication of its offer to bargaining unit employees; and the implementation of its offer. The union thus urges that the employer nullified any obligation to request negotiations.

The employer appears to predicate its defense solely upon the contention that the parties' collective bargaining agreement provides for payment of a $20 per hour rate to employees for time

spent in parent conferences outside of the normal work-day. The employer also appears to assert the equitableness of its offer, and the enhanced pay opportunities created for bargaining unit employees, as additional support for its position.

DISCUSSION

No "Violation of Contract" Jurisdiction

Both parties displayed a distressing tendency to focus on the negotiations antecedent to the collective bargaining agreement which was in effect at the time this dispute arose, and to dwell on the terms of that agreement as affecting their rights and obligations in this case. At the risk of restating the obvious, the Commission does not vindicate rights under collective bargaining agreements or provide remedies for violations thereof. See, Spokane County, Decision 6012 (PECB, 1997).

Mandatory Subject of Bargaining

In this case, the employer developed a new $20 per hour payment to bargaining unit employees for parent conferences held outside the employees' normal work day. Since that payment clearly affected both the "wages" and "hours" of bargaining unit employees, and perhaps even touched upon their "other terms and conditions of employment", it was a mandatory subject for collective bargaining under RCW 41.59.020(4).

Continuing Duty to Bargain

The mere fact that a collective bargaining agreement does not, by its terms, prohibit certain conduct does not preclude a finding that such conduct may be violative of the statute. Seattle School

District, Decision 5733-A (PECB, 1997). Unilateral changes in a mandatory subject of bargaining and direct dealings with employees on such matters violate the statute. City of Redmond, Decision 2475 (PECB, 1986); Aberdeen School District, Decision 3063 (PECB, 1988). Absent a clear waiver by contract or express contract languages dispositive of the matter, the existence of a collective bargaining agreement is collateral to the determination of whether a party by its actions has violated its good faith bargaining obligations under the statute. King County, Decision 5810-A (PECB, 1997).

In this case, the parties' collective bargaining agreement contains no express language which sanctions the employer's $20 per hour payment for parent conferences. At the same time, that contract contains no language which unequivocally waives the right of the union to bargain upon the subject matter involved herein. In the face of contractual silence, the employer was obligated to give notice to the union and provide opportunity for bargaining

The Effect of a *Fait Accompli*

When a unilateral change is made without prior notice and opportunity to bargain, the union is not required to request negotiations, Seattle School District, supra. Whether a union has been confronted with a fait accompli excusing its failure to request negotiations is a question of fact. King County, supra.

While the employer may have first presented this on January 22 as an idea being "considered", it moved precipitously from that first announcement to implementation:

- The union clearly objected to the employer's proposal in timely fashion at the meeting on January 22.

- Although the union did not request negotiations on January 22, neither did the employer announce that it was implementing its proposal, set a deadline for finalizing the idea it was "considering", or even indicate any urgency to do so.

- Without any further notice to or negotiations with the union, the employer presented the $20 per hour payment to the school principals who are the supervisors of bargaining unit employees. Since this occurred "a few days before" January 27, it must have been very soon after the labor-management meeting held on January 22.

- Without any further notice to or negotiations with the union, the employer's January 27 memo to the school principals formally implemented the $20 per hour payment for parent conferences to be held "in the spring". In the absence of any evidence to the contrary, it is inferred that the $20 per hour rate was put in place a month or more ahead of its actual utilization.

- Without any further notice to or negotiations with the union, the employer began communicating the availability of the $20 per hour payment directly to bargaining unit employees in late January and early February. This was done by the school principals, who must be regarded as the employer's agents for this purpose, and by copies of the superintendent's January 27 memo.

- When the employer was confronted by the union at what was impliedly the next meeting between the parties, on February 3, the employer refused to unravel what it had done. In the absence of any evidence to the contrary, it is inferred that the $20 per hour rate would not have been actually utilized by the date of this meeting.

The union's failure to request negotiations was excused by the employer's rapid sequence of determining, announcing, and implementing its unilateral course of conduct, as well as by indication through Burkett that it would not change its decision. The employer's actions obviated the requirement to request negotiations, either because such negotiations would have been a futile gesture, or because the union was confronted with a fait accompli.

Accordingly, the employer's actions, as set forth above, constituted a clear violation of its bargaining obligations under the statute.

FINDINGS OF FACT

1. The Clover Park School District is a common school district organized and operated under Title 28A RCW, and is an employer within the meaning of RCW 41.59.020(5). Hugh Burkett was superintendent of schools at all times pertinent hereto.

2. The Clover Park Education Association, an employee organization within the meaning of 41.59.020(1), is the exclusive bargaining representative of non-supervisory certificated employees of the Clover Park School District. Christine Turner was president of the Clover Park Education Association in January and February of 1997.

3. At all times material herein, a collective bargaining agreement was in existence between the parties covering wages, hours and other terms and conditions of employment for non-supervisory certificated employees represented by the Clover Park Education Association.

4. During their negotiations for the collective bargaining agreement referred to in paragraph 3 of these Findings of Fact, the parties were unable to reach agreement on the monetary amount to be paid to bargaining unit employees for time spent in parent conferences outside of their normal work day or for other activities. The primary area of disagreement lay in the union's desire for "per diem" pay for such time. and the employer's willingness to pay $20 per hour.

5. As a result of the disagreement described in paragraph 4 of these Findings of Fact, the collective bargaining agreement referred to in paragraph 3 of these Findings of Fact neither provided for, nor constituted a clear and unmistakable waiver of the union's right to bargain concerning, an hourly payment for bargaining unit members who conduct parent conferences outside of their normal work day.

6. On January 22, 1997, Burkett told union representatives, in the course of a labor management meeting, that he was considering paying bargaining unit employees $20 per hour for time spent in parent conferences outside the normal work-day. Turner voiced timely objections, noting that matter had been a major unresolved issue in the contract negotiations.

7. On an uncertain date prior to January 27, 1997, Burkett held a meeting with school principals who are the supervisors of bargaining unit employees, wherein he advised the principals of his proposal to pay bargaining unit employees $20 per hour for time spent in parent conferences outside the normal work day.

8. On January 27, 1997, Burkett sent a memorandum to all elementary school principals confirming his previous announcement that bargaining unit members would be paid $20 per hour for up

to six hours for time spent in parent conferences outside the work day, and enclosed a form for employees to complete in order to obtain payment.

9. At various times in late January and early February of 1997, principals of at least three elementary schools informed bargaining unit employees, either orally or in writing, of the $20 per hour rate for time spent in parent conferences outside the normal work-day. In at least one instance, bargaining unit employees were told that utilization of the procedure was mandatory.

10. At a labor-management meeting on or about February 3, 1997, Turner again objected to the $20 per hour payment for parent conferences outside the work-day. Burkett refused to withdraw his offer.

11. Some bargaining unit employees, after becoming aware of the employers offer relative to payment for time spent in parent conferences, availed themselves of the opportunity and were paid for such conferences.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC.

2. The failure of the Clover Park Education Association to request bargaining with respect to the $20 per hour payment for time spent in parent conferences outside the normal work-day was excused by the timing of the Clover Park School District's actions and by the refusal of the Clover Park School District to rescind its order when such action was

requested in advance of actual utilization of the $20 per hour rate, because the union was presented with a fait accompli and such bargaining would have been a futile gesture not in keeping with the notice and bargaining obligations imposed by RCW 41.59.020(4).

3. By unilaterally developing and implementing a new payment to bargaining unit employees for time spent in parent conferences outside the normal work-day, without giving notice to the exclusive bargaining representative of its employees and providing opportunity for collective bargaining as required by RCW 41.59.020(4), and by circumventing the union by direct communication of its new payment to bargaining unit members, the Clover Park School District has refused to bargain and committed an unfair labor practices in violation of RCW 41.59.140(1)(e), and has interfered with, restrained, or coerced employees in the exercise of rights guaranteed in RCW 41.59.060 and committed an unfair labor practice in violation of RCW 41.59.140(1)(a).

ORDER

Upon the basis of the above Findings of Fact and Conclusions of Law and pursuant to RCW 41.59.150 of the Educational Employment Relations Act, it is ordered that Clover Park District, its officers and agents, shall immediately:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with the Clover Park Education Association by developing and implementing changes of the wages, hours or other terms and conditions of employment of employees in the bargaining unit

represented by that organization, specifically including an offer of $20 per hour for time spent in parent conferences outside the normal work-day.

b. Circumventing the Clover Park Education Association as the exclusive bargaining representative of its non-supervisory certificated employees, by communicating changes of wages, hours or other terms and conditions of employment directly to bargaining unit employees prior to having satisfied its bargaining obligations.

c. In any other manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed in RCW 41.59.060.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS to remedy its unfair labor practices and to effectuate the policies of the Act:

a. Rescind the $20 per hour rate for parent conferences held outside of the employees' normal work day.

b. Give notice to and, upon request bargain with, the Clover Park Education Association, prior to the implementation of any changes of the wages, hours or other terms and conditions of employment of employees in the bargaining unit represented by that organization, except insofar as such changes are authorized by or the union's bargaining rights are waived by a collective bargaining agreement between the parties.

c. 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, after being duly signed by an

authorized representative of the Clover Park School District, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Clover Park School District to ensure that said notices are not removed, altered, defaced or covered by other material.

d. Read the notice required by the preceding paragraph aloud at the next public meeting of the employer's board, and append a copy thereof to the official minutes of said meeting.

e. Notify the Clover Park Education Association, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide that organization with a signed copy of the notice required by the preceding paragraph.

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

Dated at Olympia, Washington, this 15th day of January, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Vincent M. Helm

VINCENT M. HELM, 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.

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:

1. WE WILL rescind the $20 per hour pay rate for parent conferences which we unlawfully implemented and announced in January and February of 1997.

2. WE WILL NOT refuse to bargain collectively with the Clover Park Education Association, by unilaterally implementing and communicating directly to bargaining unit employees changes of their wages, hours or other terms and conditions of employment.

3. WE WILL NOT, in any other manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed in RCW 41.59.060.

DATED: _____

CLOVER PARK SCHOOL DISTRICT

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.