STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TECHNICAL EMPLOYEES' ASSOCIATION, Complainant, vs. KING COUNTY, Respondent.	CASE 26738-U-14 DECISION 12632-A - PECB DECISION OF COMMISSION

Erica Shelley Nelson, Attorney at Law, Cline & Casillas, for the Technical Employees' Association.

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Robert H. Lavitt, Attorney at Law, Schwerin Campbell Barnard Iglitzin & Lavitt LLP, for the Professional and Technical Employees, Local 17.

The Technical Employees' Association (TEA) filed an unfair labor practice complaint and twice amended its complaint. The TEA alleged that King County (employer) refused to bargain by skimming TEA bargaining unit work by assigning the project management of five projects to employees in other bargaining units and by refusing to supply information necessary and relevant to the TEA's bargaining obligations. The Professional and Technical Employees, Local 17 (PTE) moved to intervene, and the Examiner granted the motion.

Examiner Jamie Siegel conducted a hearing and issued a decision. The Examiner found that the employer skimmed bargaining unit work by assigning (1) the project management of the North Facilities transit security system work to employees represented by the PTE and (2) the design, project management, and implementation of electrical modifications at the Atlantic Base fuel and wash building to employees represented by Teamsters Local 117. *King County*, Decision 12632 (PECB, 2016). The Examiner dismissed the other three skimming allegations and the failure to provide information allegation.

On December 7, 2016, the TEA, the PTE, and the employer appealed the Examiner's decision.[1] The appeals present five issues: Did the employer refuse to bargain when it assigned the project management of (1) the North Facilities transit security system project, (2) the diesel exhaust fluid system infrastructure, (3) the electrical modifications at East Base, (4) the Route 48 South Electrification and 23rd Avenue Corridor Improvement project, and (5) the Atlantic Base fuel and wash building radiant heating system to employees outside the TEA bargaining unit?

We have reviewed the transcript, the exhibits, and the parties' briefs. We reverse the Examiner's decision that the employer refused to bargain when it assigned the project management of the Atlantic Base fuel and wash building radiant heating system to employees outside of the TEA bargaining unit. The work in question was not bargaining unit work. We affirm the Examiner on the remaining issues.

The Commission announced a new contracting out standard in *Central Washington University*, Decision 12305-A (PSRA, 2016). The Examiner applied that standard in this case. We agree with the Examiner that the same standard applies in skimming cases.

Applicable Legal Standards

Standard of Review

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

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[1] The employer's appeal was filed at 5:12 p.m., after the agency closed for business. Thus, the employer's appeal was deemed filed on December 8, 2016.

Skimming

The threshold question in a skimming case is whether the work that was assigned to non-bargaining unit employees was bargaining unit work. If the work was not bargaining unit work, then the analysis stops and the employer would not have had an obligation to bargain its decision to assign the work. If the work was bargaining unit work, then we apply the *City of Richland* balancing test to determine whether the decision to assign bargaining unit work to non-bargaining unit employees is a mandatory subject of bargaining. *Central Washington University*, Decision 12305-A.

The *City of Richland* balancing test weighs the competing interests of the employees in wages, hours, and working conditions against "the extent to which the subject lies 'at the core of [the employer's] entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). Recognizing that public sector employers are not "entrepreneurs" in the same sense as private sector employers, when weighing entrepreneurial control the balancing test should consider the right of a public sector employer, as an elected representative of the people, to control the management and direction of government. *See Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission*, 81 Wis.2d 89, 95 (1977).

If the decision is a mandatory subject of bargaining, then the next question is whether the employer provided notice and an opportunity to bargain the decision. If the employer did not, then the union will have met its burden of proving that the employer refused to bargain by skimming bargaining unit work.

If the bargaining unit employees are eligible for interest arbitration, an employer may not unilaterally change a mandatory subject of bargaining without bargaining to impasse and obtaining an award through interest arbitration. *Snohomish County*, Decision 9770-A (PECB, 2008). Interest arbitration is applicable when an employer desires to make a midterm contract change to a mandatory subject of bargaining. *City of Yakima*, Decision 9062-A (PECB, 2006).

Application of Standards

Employees in the Design and Construction (D&C) Section are represented by the TEA. D&C employees design and manage capital projects in various stages of development. Project management involves managing a project from initial conception through construction closeout. This includes designing the facility, permitting the project, overseeing contractors, working with local jurisdictions, managing the budget, and ensuring the project is on schedule and completed. D&C employees also act as consultants when other work groups encounter problems. As one employer witness noted, "[T]hey are the in-house experts in designing and constructing projects of technical expertise, and passing it back to the clients where it's operating."[2]

Employees in other work groups also manage projects. Examples of those projects include supervising a contractor hired to upgrade an existing system and managing the employer's obligations for projects initiated by an outside jurisdiction. The employer uses the term "project manager" for someone who manages employer-initiated capital projects. The employer uses the term "project lead" for someone who manages a project designed and built by another jurisdiction.

Each work group has program managers. It is up to the program managers to determine if they are going to use D&C's services. Program managers may be able to use in-house expertise or a vendor. Program managers use D&C when the section's knowledge will add value to a project.

North Facilities Transit Security System

Substantial evidence supports the Examiner's decision that the employer skimmed TEA bargaining unit work when the employer assigned the project management of the transit security system work at North Facilities to the PTE bargaining unit. TEA bargaining unit work includes managing transit security system projects that involve new transit security systems. D&C employees have managed 16–18 transit security projects. Transit security projects that fall within the TEA's work jurisdiction include new transit security systems and adding a transit security system to an existing facility where none existed before.

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[2] Tr. 261:10–13.

North Facilities did not have a security system when it was built, but it had the capacity to have a security system. Having the capacity to add a system in the future does not equate to having a system. At some point in time the employer added a card reader to North Facilities. However, the employer did not add a complete security system until the employer initiated the project at issue in this case.

The PTE argued that the TEA had to prove the bargaining unit work was "exclusive" bargaining unit work. We disagree. A union must show that the work is bargaining unit work. *Central Washington University*, Decision 12305-A. A union is not required to prove that the work is "exclusive" bargaining unit work. Whether other employees have performed the work is something for an examiner to consider when determining whether the work is bargaining unit work.

In this case, the TEA proved the work was bargaining unit work. The Examiner correctly found that the union's interest in preserving bargaining unit work outweighed the employer's interest in assigning work. We disagree with the Examiner that safety weighs in the TEA's favor in the balancing test. Here, the safety consideration does not directly relate to the safety of TEA-represented employees. Rather, it concerns employees' safety when performing the installation work or the safety at the location after installation—both of which include TEA-represented employees, other employees, or the general public. It is the employer's interest to have the work performed in compliance with applicable codes.

The employer operates Metro Transit. Transit employees are eligible for interest arbitration. RCW 41.56.492. Accordingly, the employer could not assign the North Facilities transit security system work to non-TEA bargaining unit employees without giving notice to the union, providing an opportunity to bargain, and negotiating to an agreement or obtaining an award through interest arbitration.

The employer placed the North Facilities transit security system work on hold when the TEA filed its unfair labor practice complaint. We affirm the Examiner's order restoring the *status quo ante* and assigning the work to the TEA bargaining unit.

Diesel Exhaust Fluid System Infrastructure

Substantial evidence supports the Examiner's conclusion that the design and project management of the diesel exhaust fluid (DEF) system infrastructure were not bargaining unit work. Work has to be assigned to the bargaining unit for it to attach to the bargaining unit. *See Port of Bellingham*, Decision 12317-A (PORT, 2015).

As a result of regulatory changes, the employer had to add DEF to certain coaches. Initially, the employer purchased DEF in 500 gallon totes. Millwrights represented by the Amalgamated Transit Union, Local 587 (ATU) were responsible for creating and installing the system to dispense DEF from the totes. As the employer's need for DEF increased, the employer assigned employees from different bargaining units to work on the project. The employer assigned a D&C employee as a consultant early on. Later, the employer assigned some DEF system work to D&C employees, such as preparing cost estimates and providing some consulting. Ultimately, the employer assigned an employee represented by the PTE to manage the DEF project while employees represented by the ATU continued to install the DEF system infrastructure. We affirm the Examiner's conclusion that the DEF system infrastructure project was not TEA bargaining unit work.

East Base Electrical Modifications

Substantial evidence supports the Examiner's conclusion that the design, project management, and installation of electrical modifications at the East Base vehicle maintenance building were not TEA bargaining unit work. The employer decided to make computers available to the vehicle maintenance work group. To do so, the employer had to have workstations installed. Automation occurred at all of the employer's bases, but the TEA only alleged that the work at East Base was bargaining unit work. The vehicle maintenance automation project included installing network infrastructure, including conduit paths, receptacles, cables, and J-boxes, and low-voltage electrical work. The TEA conceded that managing low-voltage electrical work was not bargaining unit work. However, the TEA contended that managing the installation of 120-volt electrical work and installing new conduit was bargaining unit work. The project included work that was outside of the scope of bargaining unit work. We affirm the Examiner's conclusion that the East Base electrical modifications were not TEA bargaining unit work.

Route 48 South Electrification and 23rd Avenue Corridor Improvement Project

Substantial evidence supports the Examiner's conclusion that the design, construction management, and project management of the Route 48 South Electrification and 23rd Avenue Corridor Improvement project were not bargaining unit work. The project was initiated by the City of Seattle, an outside entity. Employees represented by the PTE had historically managed projects with outside entities. Employer-initiated trolley improvement projects were managed by D&C employees. D&C bargaining unit employee Garrett Stronks testified that the line between his job and Power and Facilities (P&F) employee David Cantey's job blurred. The employer assigned Cantey to be the project lead. Stronks continued to consult on the trolley electrification portion of the project. Cantey had previously been the project lead on other projects with outside jurisdictions. When the employer promoted Cantey to a new position, the employer assigned the remainder of the project to Stronks. We affirm the Examiner's conclusion that the Route 48 South Electrification and 23rd Avenue Corridor Improvement project was not bargaining unit work.

Atlantic Base Fuel and Wash Building

Substantial evidence does not support the Examiner's conclusion that managing the installation of new controls on the radiant heating system was TEA bargaining unit work. Employees in D&C manage projects that involve replacements of entire heating systems. At Atlantic Base, the employer had some new conduit installed and the existing radiant heating system controls replaced with new controls (thermostats) to conserve energy. The employer did not replace the radiant heating system or install a new system. Installing new conduit and controls does not rise to the level of new installation of a heating system that would bring the project into the purview of D&C. We agree with the employer that the Atlantic Base project was an update to the existing system. We reverse the Examiner. The design, project management, and implementation of the Atlantic Base fuel and wash building radiant heating system were not TEA bargaining unit work.

Finding of Fact 40 states, "The employer did not give the TEA notice and an opportunity to bargain the transfer of the work involving the design, project management, and implementation of electrical modifications at the Atlantic Base fuel and wash building."

The employer did not appeal Finding of Fact 40. Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014). Finding of Fact 40 is a conclusion that the employer did not give notice to the TEA and provide an opportunity to bargain the decision on who the employer was assigning the Atlantic Base fuel and washing building project to. We find that the Atlantic Base project was not bargaining unit work; thus, the employer did not have an obligation to provide the TEA with notice or an opportunity to bargain. Finding of Fact 40 must be vacated because it is not consistent with our ruling in this matter.

CONCLUSION

Substantial evidence supports the Examiner's findings of fact and conclusion that the DEF system infrastructure project, the East Base electrical modifications, and the Routh 48 South Electrification and 23rd Avenue Corridor Improvement project were not TEA bargaining unit work. Substantial evidence supports the Examiner's findings of fact and conclusion that the North Facilities transit security system project management was bargaining unit work and that the employer refused to bargain when it assigned that work to non-TEA bargaining unit employees. We affirm the Examiner on those issues. We reverse the Examiner's conclusion that the Atlantic Base fuel and wash building radiant heating system project management was TEA bargaining unit work; the employer did not refuse to bargain when it assigned the Atlantic Base fuel and wash building radiant heating system project management to non-TEA bargaining unit employees.

ORDER

Findings of Fact 1 through 37 and 41 through 56 are AFFIRMED and ADOPTED as the findings of fact of the Commission. Finding of Fact 40 is VACATED. Findings of Fact 38 and 39 are modified as follows:

38. P&F employees have regularly and historically overseen the work of Siemens and have managed a work order contract with Siemens. P&F employees regularly manage projects.

39. At Atlantic Base, the employer had some new conduit installed and the existing radiant heating system controls replaced with new controls (thermostats) to conserve energy. The employer did not replace the radiant heating system or install a new system. Installing new conduit and controls does not rise to the level of new installation of a heating system that would bring the project into the purview of D&C.

ISSUED at Olympia, Washington, this 8th day of May, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

MARK BUSTO, Commissioner

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DECISION 12632-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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