STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609 Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	)	CASE NO. 4227-U-82-673 DECISION 2079-C PECB DECISION OF COMMISSION

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

Perkins, Coie, Stone, Olsen and Williams, by Russell L. Perisho, Attorney at Law, appeared on behalf of the respondent.

This case involves a number of unfair labor practice charges filed by the International Union of Operating Engineers, Local 609, against the Seattle School District. Those charges arose from a course of bargaining which took place during 1982-83. The examiner's first decision in this case, Seattle School District, Decision 2079 (PECB, 1984), was reversed by the Commission and remanded to the examiner for further consideration. Seattle School District, Decision 2079-A (PECB, 1985). The examiner issued a second decision, Seattle School District, Decision 2079-B (PECB, 1986), in which the examiner ruled on ten charges filed by the union against the school district. The examiner found in favor of the school district on four of those charges, and for the union on the remaining six. The examiner issued a remedial order which included both cease and

desist and affirmative obligations, but did not include a monetary award to the union.

The union petitioned for review, contending that the examiner erred in failing to provide a monetary remedy. The union raises two issues:

1. Did the examiner err in not ordering a "make-whole" award to remedy the school district's unfair labor practice which downgraded the pay grade of custodians doing night cleaning at elementary schools?

2. Did the examiner err in not ordering a monetary "make-whole" award to remedy the school district's unfair labor practice committed when it implemented its last contract offer?

The school district then filed a cross-petition for review, challenging certain of the examiner's unfair labor practice findings and raising three additional issues:

3. Did the school district commit an unfair labor practice by implementing, at impasse, its last contract offer, because the offer contained a "duration clause" which would "close the door" to bargaining until after the proposed contract's expiration date?[1]

4. Was a factual, noncoercive school district letter to employees concerning the "last best offer" implementation rendered unlawful because the implementation of the last contract offer was unlawful?

5. Did the school district commit an unfair labor practice when it altered, during bargaining, its method of granting leave for union activity and when it asserted a non-contractual precondition for the processing of the grievance on the leave of absence issue?

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[1] If the examiner's ruling on this issue is reversed, another issue emerges that was not decided by the examiner, i.e., whether the implemented contract was materially different from the items on the table.

Because our disposition of the remedial issues raised by the union depends, in part, upon the outcome of our review of one of the unfair labor practice findings challenged by the school district (item 3, above), we consider the school district's arguments first.

DISCUSSION

The Implementation of the Last Contract Offer.

The examiner concluded that by February 22, 1983, after nine months of negotiations and 22 formal bargaining sessions, the parties had reached an impasse. While the union argued otherwise in the proceedings before the examiner, this conclusion is not now challenged by either of the parties.

Upon reaching this impasse, the school district implemented its last offer, which had taken the form of a complete proposed contract. That proposed contract included "duration clause" language which had a beginning date of September 1, 1982 and an expiration date of August 31, 1983. The union's arguments before the examiner were centered in the absence of an impasse and in claims of variance between the employer's offer and the changes that were implemented. The examiner took a different approach, however, starting from the premise that the impasse only temporarily suspended the duty to bargain. Inferring that the purported implementation of an entire contract, including a duration clause, had closed the door to bargaining until the expiration date set forth in that "implemented contract", the examiner concluded that the school district committed a refusal to bargain unfair labor practice rising to the level of a per se violation. We believe that the examiner erred in going that far on the record made in this case.

The examiner correctly observed that an impasse only temporarily suspends the duty to bargain. See discussion and cases cited at 1 The Developing Labor Law, 638 (C. Morris ed. 1983). It follows that neither party is in a position to unilaterally foreclose bargaining for a specific period of time. Nor is a party in a position to unilaterally implement waivers or partial waivers of the statutory bargaining rights of the opposite party. See, City of Dayton, Decision 2111-A (PECB, 1985). The determination of whether a party has refused to bargain (including after impasse has been reached) is, however, a question of fact to be determined by considering all the relevant circumstances in the particular case. City of Snohomish, Decision 1661-A (PECB, 1984). The existence of a duration clause in the "contract" document implemented by the school district is only one of the facts and circumstances to be considered. It was not attacked by the union on the basis of its having included a "duration" clause, and may only be reflective of the style adopted by the parties in their negotiations paperwork to identify proposed changes.[2] It is far from clear that the message sent by the duration clause (let alone heard by the union) was that the school district intended to suspend bargaining until August 31, 1983. There is nothing in the record of other conduct of the school district that suggests that the duration clause was intended as an expression of intransigence by the school district on the question of future bargaining. Accordingly, we reverse the examiner on this point.

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[2] In fact, clarity of proposals for change is strongly preferable to ambiguity. See: South Columbia Irrigation District, Decision 1404-A (PECB, 1982) where an ambiguous employer proposal led to finding an unfair labor practice violation against it.

Comparison of Implemented Items With Prior Proposals.

Although not raised by the union in its petition for review, the union argued before the examiner that the changes implemented by the school district contained a number of differences from the proposals which the employer had placed on the bargaining table.[3] Because of her ruling on the previous issue, the examiner did not decide this issue. We now find it necessary to consider those arguments.

The accepted test for implementation after impasse under the National Labor Relations Act is set forth in Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enf'd sub. nom. AFTRA v. NLRB, 397 F.2d 611 (D.C. Cir., 1968). That test is whether the employer's unilateral changes are "reasonably comprehended within his pre-impasse proposals." Although the examiner did not rule on this issue in her more recent decision, she did comment, in Decision 2079:

> The [school district's] proposal also contained language on certain issues that Daugharty testified he had never seen before; however, creditable testimony shows that the concepts had been discussed previously.

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3 In its December 7, 1983 brief, the union specified:

> A new probationary period was proposed for promotions (Article XII, Sec. B., p. 10-12, Ex. 38). No such language had been proposed before (TR 499, 1. 9-22). The cutoff for eligibility for fringe benefits was increased to 90 hours per month from 70 (Article XII, Sec. H, Ex. 38). It had not been proposed before (TR 501 1. 5-10). An entirely new layoff and recall procedure was proposed (Article XIV, Sec. B., Ex. 38; TR 501 1. 2-4). There was also new language concerning the impact of the wage-freeze law, "SHB 166" (Article XII, Sec. A(4)).

The school district apparently denied that the implemented changes were new, except for a change concerning eligibility for fringe benefits. Tr. 503. As to that, it maintains that a 90-hour threshold was mistakenly proposed, and was never implemented. Tr. 608.

We also have reviewed the record, and we find that the changes implemented by the school district were reasonably comprehended within its pre-impasse proposals.

Letter to Employees

In her first decision in this case, the examiner made a finding of fact that a February, 1983 letter, sent by the school district to employees was non-coercive in nature and substantially factual. The examiner's decision on remand concluded that school district committed an unfair labor practice, because the letter explained an unlawful action, viz: the implementation of the district's last contract offer. The examiner concluded, therefore, that the letter had the effect of illegally undermining the union.

The examiner's conclusion on this issue is predicated upon her prior conclusion that the employer committed an unfair labor practice when it implemented its last contract offer. Since we have reversed the prior holding, we also must reverse the ruling on the letter to the employees.

Leaves of Absence for Union Activity

The examiner's decision on remand affirmed her prior decision holding that the school district committed unfair labor practices when it: (1) unilaterally changed its method of granting leaves of absence for union activity, and (2) asserted

a new, non-contractual precondition for the processing of the grievance concerning the leave of absence.

According to the school district, these issues arose because the district initially believed that the union was abusing the leave provisions in the parties' contract. It therefore started deducting pay for allegedly unauthorized leave. The union grieved. The record shows that the school district told the union, by letter, that Step One of the grievance procedure would not occur until the three affected employees and the union representative appeared in the school district's office. No such pre-condition appears in the contract. The school district restored the pay and apologized as part of the grievance settlement. The school district now explains that certain misunderstandings concerning the application of the leave provisions led to the dispute, and the course that it took was not intended to interfere with union activities.[4]

Were this merely a "unilateral change" charge settled by means of the parties' contractual dispute resolution procedures, we would decline to take up the matter. City of Walla Walla, Decision 104 (PECB, 1976); Clallam County, Decision 607-A (PECB, 1979). Deferral to contractual processes may not be appropriate, however, when "anti-union" animus is alleged. Vesuvius Crucible Co. v. NLRB, 668 F.2d 162 (3rd Cir. 1981); Northeast Oklahoma City Mfg. Co., 230 NLRB 135 (1977). See, generally, Comment, The NLRB and Deference to Arbitration, 77 Yale L.J. 1191 (1968).

The examiner, in Decision 2079, wrote:

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[4] The school district's briefs do not address the precondition imposed by the school district on the processing of the grievance.

> Docking the pay of certain union bargaining team members while they were on union business appears to be another example of the employer working against itself. Clearly, the employees had a right to participate in union activity on "district time" as is shown in the contract language and the employer's later reversal of its position. Walsh's November 10, 1982 letter to Daugharty contained a condition for discussing the grievance that is not referred to in the bargained grievance procedure of the contract. As such it was an illegal pre-condition. The operation department's conduct was an unconcealed act of retaliation for union activity and as such a violation of the Public Employees Collective Bargaining Act.

In our previous decision in this case, we observed that it was the examiner "who saw and heard the witnesses." We believe that the examiner's factual findings of anti-union animus are supported by the record; therefore, her conclusion that an unfair labor practice was committed will be upheld.

Make-Whole Remedy for Unlawful Downgrading of Pay Grade.

The examiner ruled that the school district committed a "refusal to bargain" unfair labor practice when it unilaterally downgraded the night cleaning staff at elementary schools from "H" pay grade to "G" pay grade in September, 1982. The examiner's decision was premised upon an arbitrator's prior finding on this issue, which was that the school district had the contractual right to do what it did only upon negotiating an appropriate pay scale, which the district had failed to do. The arbitrator ordered the district to negotiate a wage rate and classification appropriate to the increased duties and responsibilities of the position in question, but did not order back pay.

The union contends that the examiner erred in not ordering back pay to the affected employees. The union cites several prior Commission decisions ordering back pay. It also contends that WAC 391-45-410, which states when an unfair labor practice is committed, "the commission or examiner shall issue a remedial order," mandates the issuance of monetary make-whole relief.

WAC 391-45-410 indeed requires a remedial order, but it leaves to the sound discretion of the examiner or commission as to what form the remedy will take. Contrary to the union's suggestion, "remedial" and "back pay" are not synonymous. The examiner was correct in deferring to the arbitrator's award, including its remedial aspects. There is nothing in the record to suggest, nor does the union argue, that the arbitrator's decision, including its remedial aspects, was not fair and regular, did not fully consider the issue, or that it was repugnant to the spirit and intent of collective bargaining laws. Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955). The examiner's ruling on this issue is affirmed.

Remedy for Unlawful Implementation

The union argues that the examiner erred by not ordering monetary compensation to employees who suffered losses by reason of the employer's unlawful implementation of its last contract offer. Since we hold that the employer's action in this regard was not unlawful, we need not consider this issue further.

FINDINGS OF FACT

The examiner's findings of fact in Decision 2079-B are affirmed and adopted as the findings of fact of the Commission, except as follows:

Paragraph 11 of the findings of fact is amended to read:

11. On or about February 22, 1983, the employer announced to the union bargaining team that it was unilaterally implementing its last offer in bargaining, which was in the form of an entire contract. The employer did not thereby, or by its other actions at that period of time, foreclose further bargaining between the parties for a fixed period of time. The changes implemented by the employer were reasonably comprehended within the proposals theretofore advanced by the employer in collective bargaining.

Paragraph 12 of the findings of fact is amended to read:

12. On or about February 22, 1983, the employer sent a letter to the home of each member of the bargaining unit, factually detailing that the employer was implementing its last offer to the union.

CONCLUSIONS OF LAW

The examiner's conclusions of law in Decision 2079-B are affirmed and adopted as the conclusions of law of the Commission, except as follows:

Paragraph 11 of the conclusions of law is amended to read:

11. By implementing its last offer, albeit in a form purporting to implement an entire contract including a duration clause, the Seattle School

District did not fail or refuse to bargain with Local 609, and did not violate RCW 41.56.140(4).

Paragraph 12 of the conclusions of law is amended to read:

12. By sending a direct mailing to the homes of bargaining unit employees and by posting notice on employee bulletin boards indicating that it had implemented its offer made in bargaining, the Seattle School District did not violate RCW 41.56.140(1) and (2).

ORDER

Upon the basis of the above and foregoing findings of fact and conclusions of law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that the Seattle School District, its officers and agents, shall immediately:

1. Cease and desist from:

a. Refusing to bargain collectively with International Union of Operating Engineers, Local 609;

b. Unilaterally implementing a wage rate for a revised job description of a bargaining unit position, without giving notice to and, upon request, bargaining collectively with International Union of Operating Engineers, Local 609;

c. Refusing to bargain, upon request, with International Union of Operating Engineers, Local 609, concerning the effects on bargaining unit

members of the decision to install computerized controls on the boilers in four high schools;

d. Controlling, dominating or interfering with the administration of the exclusive bargaining representative by changing, without bargaining or having reached a good faith impasse, the method of granting leave for union activities;

e. Attempting to establish pre-conditions not contained in the collective bargaining agreement for the processing of grievances;

f. In any other manner interfering with, restraining or coercing its employees in the free exercise of their rights guaranteed by the Public Employees Collective Bargaining Act.

2. Take the following affirmative action to remedy the unfair labor practices and to effectuate the policies of the Act:

a. Upon request, bargain collectively in good faith with the International Union of Operating Engineers, Local 609, as the exclusive bargaining representative of an appropriate bargaining unit, with respect to wages, hours and working conditions; and specifically with respect to the wage rate to be paid to the revised job description of "Assistant Custodian" and the effects of the decision to install computerized controls on school boilers.

b. Post, in conspicuous places on the employer's premises where notices to affected employees are

usually posted, copies of the notice attached hereto and marked "Appendix A". Such notices shall, after being duly signed by an authorized representative of the Seattle School District, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Seattle School District to ensure that said notices are not removed, altered, defaced, or covered by other materials;

c. Notify the Executive Director of the Commission, in writing, within twenty (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.

ISSUED at Olympia, Washington, this 3rd day of October, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R Wilkinson
JANE R. WILKINSON, Chairman

Mark C. Endresen
MARK C. ENDRESEN, Commissioner

Joseph F. Quinn
JOSEPH F. QUINN, Commissioner

Appendix "A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively with the International Union of Operating Engineers, Local 609.

WE WILL NOT make unilateral changes in wage rates for revised job descriptions of bargaining unit positions.

WE WILL NOT refuse to bargain the effects of the decision to install computerized controls on boilers in schools.

WE WILL NOT unilaterally change the method of granting leave for union activity.

WE WILL NOT assert pre-conditions not contained in the collective bargaining agreement for processing of grievances.

WE WILL NOT interfere with, restrain or coerce our employees in any other manner in the free exercise of their rights guaranteed them by the Act.

WE WILL, upon request, bargain collectively in good faith with the International Union of Operating Engineers, Local 609, as the exclusive bargaining representative of an appropriate bargaining unit with respect to wages, hours and working conditions, and specifically with respect to the wage rate to be paid to the revised job description of "Assistant Custodian" and the effects of the decision to install computerized controls on school boilers.

SEATTLE SCHOOL DISTRICT

BY:_____
AUTHORIZED SIGNATURE

DATED:_____

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

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.