STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL #280, Complainant,	CASE NO. 6251-U-86-1195
vs.	DECISION NO. 2603 - PECB
CITY OF PASCO, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Ron McLean, Business Agent, appeared on behalf of the complainant.

Cabot Dow Associates, by Lawrence J. Wittenberg, Labor Relations Consultant, appeared on behalf of the respondent.

Unfair labor practice charges were filed by the International Union of Operating Engineers, Local 280 (union) on February 25, 1986, naming the City of Pasco (employer) as respondent. Walter M. Stuteville of the Commission's staff was appointed as Examiner. A hearing was held on April 16, 1986, in Pasco, Washington. The parties submitted post-hearing briefs.

BACKGROUND

The parties have had a continuing collective bargaining relationship since 1970 which covers certain employees of the public works department of the city. At the time of the hearing, the parties' 1983-1985 agreement had expired. The

parties had been in negotiations since October, 1985, but a successor agreement had not been completed.

The public works bargaining unit historically included a meter reader/repair position. All of the approximately 6,500 water meters within the city were read for billing purposes once every two months. The meter reading function was performed in conjunction with the employer's finance department in that record books from the finance department were used by the meter reader to document meter readings for billing. Although water meter repair had originally been a part of the responsibilities of this position, this has ceased to be the practice. Water meters are now replaced when defective rather than repaired. The employee holding the meter reader/repair position was responsible for the replacement of defective water meters.

The public works department employee who held the meter reader/repair position announced in July of 1985 that he was going to retire in 1986. His announcement caused the employer to re-evaluate how meter reading services should be performed. On September 6, 1985, the employer contacted the union concerning a proposal to sub-contract the duties of the position.

The union responded on September 13, 1985, referring the issue to the upcoming contract negotiations for the public works bargaining unit. The parties met for negotiation of a successor agreement on November 13th, and December 2nd, 12th, and 16th in 1985 and on January 7th, 14th, 27th, and 28th in 1986. The issue at hand was not discussed, however.

During the time period of the negotiations, the employer decided, based upon an internal evaluation of operations and related costs, that the meter reader/repair function should be contracted out once the incumbent meter reader/repair employee

retired. On January 27, 1986, the employer notified the union that it was taking such a proposal to the city council.

On February 6, 1986, a meeting was held between the union and the employer to discuss the issue of subcontracting meter reading. Attending the meeting for the city were its manager, Gary Crutchfield; its labor relations consultant, Larry Wittenberg; and its attorney, Greg Rubstello. Attending for the union were its business representative, Ron McLean; and its chief steward, Eugene Burris. They took the position that the decision to subcontract was not bargainable, but that the effects of the decision on the bargaining unit were appropriate for discussion and bargaining. The union position was that the decision to subcontract was bargainable and that thus the city was refusing to bargain as required by state law. No resolution was achieved.

On February 10, 1986, the Pasco City Council discussed the subcontracting proposal in an open "workshop" meeting. Union representatives were present at the meeting, but made no comment on this issue. On February 18, 1986, the city council, after some further discussion, passed Resolution 1714 approving a services contract with Western Meter Reading Corporation for the regular reading and replacement, when necessary, of Pasco's water meters. The union then filed this unfair labor practices charge, alleging that the emploer refused to bargain on the subcontracting of meter reading services.[1]

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[1] The Examiner notes the existence of a parallel proceeding pending before the Commission. Case No. 6109-C-85-310 is a unit clarification proceeding filed on November 12, 1985 in which the union sought a ruling on a "Customer Service Representative" position. It appears that duties were transferred upon the retirement of the meter reader/repair employee, and that the employer was taking a position that the position should be assigned to a unit of clerical employees.

POSITIONS OF THE PARTIES

The union contends that the employer has consistently refused to bargain concerning this loss of bargaining unit work. It argues that the employer had engaged in secret negotiations with a potential vendor towards subcontracting meter reading, and refused to sit down to meaningful negotiations with the union on the issue. It claims that it was ready to bargain, and attempted to do so at the February 6th meeting, but the employer refused. The union also alleges that the decision, in itself, shows discrimination and malicious intent against the union and its membership.

The employer asserts that it is not obligated to bargain the decision to subcontract, but only the affects of the decision. The employer justifies its decision to subcontract on cost and on operational efficiency. General economic problems experienced by the city are claimed to have necessitated looking at all possible cost reductions that are termed a "necessity only" budget. The employer claims its evaluation showed the functions of the meter reader/repair position were "ill-placed, lacked backup staffing", and "not utilized to the best advantage". Finally, the employer argues that it has contracted out other city services in the past, including a traffic signal repair position represented by the union party here without objection by the union.

DISCUSSION

Following the close of hearing and the receipt of the briefs, the employer wrote a letter to the Examiner in which it asserted that the union's brief had gone beyond the scope of the hearing and the evidence presented at the hearing, had made

assertions which were not a part of the record, and included amendments to the request for relief which had not been discussed or moved during the hearing. The Examiner would not, in any case, decide the case except upon the evidence in the record, so that portion of the correspondence warrants no further comment. The complainant's brief did go beyond the scope of the complaint and the discussion at hearing in one respect: the union requested that relief should include reinstatement of a city employee as a "customer services representative" with back pay and benefits. As noted above, there is, at best, a dispute as to whether the customer service position is in the complainant's bargaining unit. The remedies available in this case could include the reinstatement of the meter reader/repair position, and hence the reversal of the transfer of duties referred to the unit clarification petition. The complainant has no standing, however, to directly raise an issue concerning a position outside the bargaining unit it represents.

On December 5, 1986, the employer filed a motion for order of dismissal. The motion was based upon the ratification of a successor agreement between the parties. The employer argued that, as a result of a new collective bargaining agreement between the parties, the issue in contention in this case is moot. The employer contends that clauses of the new agreement titled: "Management's Rights" and "Term and Scope of Agreement" give retroactive effect to the right of the employer to make personnel and job or position content changes. The motion is without merit and is denied. At issue in this unfair labor practice case are the procedures used by the employer, in relation to the union, in making the decision to subcontract at a time when there was no collective bargaining agreement between the parties. That is, whether the employer violated the state law requiring bargaining on issues relating to wages,

hours, and conditions of employment. The contract clauses referred to in the motion were not in effect at the time of the conduct that is the subject of the complaint. They deal with general, substantive decisions, not the decision process leading to contracting out the particular work at issue here. The statutory obligation to bargain was operative at the time of the conduct complained of, and the employer cannot claim that the subsequent collective bargaining agreement constitutes a waiver of those bargaining rights. City of Hoquiam, Decision 745 (PECB, 1979).

RCW 41.56.030(4) defines "collective bargaining" to mean:

> . . . the performance of the mutual obligation of the public employer and the exclusive bargaining representative 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 of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

RCW 41.56.140 enumerates unfair labor practices by public employers, including:

> It shall be an unfair labor practice for a public employer:
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> * * *
>
> (4) To refuse to engage in collective bargaining.

As the charging party, the union has the initial burden of proving that unfair labor practices have occurred. The union

complains that the employer failed to bargain issues concerning the deletion of the meter reader/repair position from the union's bargaining unit. Initially, therefore, the union must show that the work was bargaining unit work. This, the union has done.

Once it is established that the work is of a type historically performed by bargaining unit employees, Fiberboard Paper Products v. NLRB, 379 US 203 (1964) held that the subcontracting of work previously performed by bargaining unit members is a mandatory subject of bargaining. Apart from affecting the job security of employees directly affected, a loss of bargaining unit work can affect a variety of working conditions for other bargaining unit employees, such as entry opportunities, job progression, and promotional opportunities. Where work traditionally performed within a bargaining unit is to be transferred to employees outside of that unit (whether employed by the same employer or a different employer), a duty to bargain has been imposed in order to give the employees the opportunity, through their union, to seek to influence the decision of the employer. In South Kitsap School District, Decision 402 (PECB, 1978), the Examiner adopted the Fiberboard standard in a situation involving transfer of work within the employer's workforce, stating that "it would serve the intent of the statute to permit the union to collectively bargain to protect negotiated working conditions".

The inquiry turns to whether the union had notice of the proposed change and opportunity to bargain. In the many cases decided under Fiberboard and South Kitsap, the essence of the violation has been the implementation of a change in the status quo without giving notice to or bargaining with the union. Rochester Institute of Technology, 264 NLRB 1020 (1982). Notice must be given sufficiently in advance as to afford the

union an opportunity for counter arguments or proposals. Sun-Maid Growers of California v. NLRB, 104 LRRM 2543 (9th Cir., 1980). In the instant case, it is apparent that the employer at least initially did what it was legally obligated to do, giving notice to the union well in advance of making a final decision on the matter. The union does not dispute that it had notice of the subcontracting proposal as early as September of 1985.

Where notice has been given, the obligation shifts to the union to request bargaining if it desires to exercise its statutory right to bargain. A failure to make a timely request for bargaining will result in a finding of "waiver by inaction". City of Yakima, Decision 1124-A (PECB, 1981); Spokane County, Decision 2377 (PECB, 1986). The union made a timely response to the employer but only to defer any discussion to upcoming contract negotiations. The union acknowledges the passage of eight meetings between November 13, 1985 and January 27, 1986, when it could have raised the issue, but did not.

When bargaining is requested, it must be conducted in good faith, which presupposes negotiations with attendant give and take between parties having an intention of reaching agreement through compromise. Winn Dixie Stores, Inc., 243 NLRB 972 (1979). RCW 41.56.030(4) imposes a "mutual" obligation to bargain. It is here that the actions of both parties come under close scrutiny. When the union finally raised the issue with the city on February 6, 1986, it merely objected to the decision to subcontract without offering any counter-proposals relating to the issue. For its part, the employer (which was obligated under the above-cited cases to bargain the decision to subcontract as well as to bargain concerning the effects of any subcontracting decision) seemingly took a legally indefensible position concerning its duty to bargain the subcontracting

decision. On close analysis, however, it is concluded that the failure of the February 6, 1986 negotiations cannot be laid entirely at the employer's feet.

The employer's position on February 6th (and here) contradicts its own initial notice to the union in September of 1985 that the issue was open for discussion. More than four months had passed since the employer first gave notice to the union that it was considering contracting out the meter reading work. While the union ignored the issue through a number of bargaining sessions, the employer evidently solidified its views on the wisdom of contracting out the work. This case would be much more difficult to decide had the employer maintained its "no duty to bargain the decision" position in the face of substantive counter-proposals from the union, but those are not the facts. The union waited, at its peril, for the city to raise the issue a second time. The union has failed to prove necessary elements of a refusal to bargain charge. Both notice and opportunity to bargain collectively were present here. The union chose not to pursue its bargaining rights and must now live with that decision. Newport School District, Decision 2153 (PECB, 1985); Spokane County, supra. As this particular case has developed, the employer's statements concerning its duty to bargain were a harmless mis-statement of the law made in the context of otherwise appropriate actions in giving the union notice and in being available to bargain as well as a waiver of bargaining rights by inaction.

FINDINGS OF FACT

1. The City of Pasco is a political subdivision of the state of Washington and is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Union of Operating Engineers, Local 280 is a "bargaining representative" within the meaning of RCW 41.56.030(3). Local 280 represents an appropriate bargaining unit of employees in the public works department of the City of Pasco. Water meter reader/repair functions have historically been performed by employees in that bargaining unit.

3. In September, 1985, the employer gave notice to the union that it was considering subcontracting of water meter reading services.

4. The collective bargaining agreement between the employer and the union covering the public works bargaining unit expired on December 31, 1985. A successor agreement had not been negotiated at the time the hearing in this matter was held.

5. The union made a timely response to the employer's proposal to contract out meter reading work, but postponed discussion of matter to be taken in negotiations for a successor contract. Between November, 1985 and February, 1986, the parties met eight times in collective bargaining meetings, but the subcontracting issue was not raised. The city council had two open meetings during this period at which the subcontracting proposal was discussed, but the union raised no objections.

6. On February 6, 1986, the union took the position, for the first time, that the city's proposal to contract out meter reading work was in violation of the collective bargaining agreement. The union offered no substantive counter-proposals or alternatives to subcontracting. By that date, the employer remained willing and ready to discuss

the impact of the subcontracting decision on the bargaining unit, but no such discussion ensued. The parties were at impasse on this issue.

7. Neither party made any further requests to discuss the issue of subcontracting. The Pasco City Council adopted a formal resolution to subcontract meter reading services on February 18, 1986.

CONCLUSIONS OF LAW

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

2. By the events describes above in the foregoing Findings of Fact, International Union of Operating Engineers, Local 280 has waived its bargaining rights by inaction, so that the City of Pasco has not violated RCW 41.56.140(4) by its actions to contract out meter reading work.

ORDER

The complaint charging unfair labor practices is DISMISSED.

ISSUED at Olympia, Washington, this 23rd day of February, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-390.