STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 280, Complainant, vs. CITY OF KENNEWICK, Respondent.	Case No. 1437-U-78-179 DECISION NO. 482-A PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES:

E. W. "Bill" Clifford, Business Representative, appearing on behalf of the complainant.

William L. Cameron, Attorney at Law, appearing on behalf of the respondent.

International Union of Operating Engineers, Local No. 280, (hereinafter referred to as the "complainant" or "union") filed a complaint with the Public Employment Relations Commission on March 20, 1978 (amended November 14, 1978), wherein it alleged that the City of Kennewick (hereinafter referred to as the "respondent" or "city") has committed certain unfair labor practices. The material portions of the complaint state:

> "Basis of Charge
>
> The City has refused to bargain with the Union in violation of RCW 41.56 by unilaterally contracting out of janitorial services formerly performed by unit employees."
>
> "Relief Sought
>
> The City shall reinstate unit employee/employees to do the custodial services."

The case was assigned to Examiner Jack Cowan of the PERC staff in October 1978. A hearing was held January 18, 1979.

BACKGROUND

From 1972 to early 1978, the city employed two janitors to work at city hall. The classification and wage rates for these positions are included in the January 1, 1978 through December 31, 1979 collective bargaining agreement between the parties and in earlier agreements. One of the positions became vacant in early January, 1978, at which time the city subcontracted part of the city hall janitorial work to a private firm. The city readily admits that it made no effort to notify the union or to open bargaining with the union prior to entering into the contract for custodial service. The city kept one bargaining unit employee working at city hall and filled the then vacant second position with a contracting service. The subcontracting became known to the union when one of the city supervisors, Mr. Walker, told Daryll Ayers, a city employee, that a contracting service was coming in to do custodial work at city hall. Based on this information, the union approached the city manager and asserted an alleged contract violation. The city manager remained firm in his intent to subcontract and the union subsequently filed both a formal grievance alleging a violation of the bargaining agreement and this unfair labor proceeding.

The arbitral issue was:

> "Did the City of Kennewick violate any specific provisions of its Collective Bargaining Agreement with Local 280 IUOE when the custodial work, which is the subject of the Union's grievance, was let to contract so as to be performed by non-unit employees."

In an arbitration award dated July 10, 1978, the arbitration panel denied the grievance, finding no violation of the "specific provisions" of the bargaining agreement, but accorded members of the union's bargaining unit a continuing claim to the contracted custodial work by guaranteeing unit employees the custodial job in the event of a layoff from other city work. The arbitration panel expressly declined to consider the union's "refusal to bargain" allegations made under RCW 41.56, and the Executive Director of the Public Employment Relations Commission denied the city's motion for deferral to the arbitration award. The city's subcontracting of custodial work continues in effect.

POSITION OF THE UNION

The union alleges the city is in violation of RCW 41.56 because of a failure to negotiate with the union before subcontracting the janitorial work at city hall.

POSITION OF THE CITY

It is the position of the city that the decision to subcontract was economically justified, that there was no adverse effect to city employees and that there was no refusal to bargain on the part of the city.

DISCUSSION

In a pre-hearing conference held on November 9, 1978, the parties agreed and stipulated the matter in dispute (which was to be the matter for subsequent resolution at the hearing) as:

> "Did the City refuse to bargain with the union, in violation of RCW 41.56, by unilateral contracting out of janitorial services formerly performed by unit employees?"

RCW 41.56.140 defines unfair labor practices as follows:

> "Unfair labor practices for public employer enumerated.
>
> It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
> (2) To control, dominate or interfere with a bargaining representative;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining."

Collective bargaining is defined in RCW 41.56.030(4) as:

> "...the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and 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." (emphasis added)

The respondent claims that despite a lack of bargaining concerning the subcontracting, there was no adverse effect--no city employees were displaced. The city cites Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964). In that case, the court held that the employer had a duty to notify the union and afford an opportunity to bargain prior to subcontracting unit work if the effect of the subcontracting is detrimental to the bargaining unit employees. In Fibreboard, employees were displaced by the contracting out of unit work, whereas in the instant case, the subcontracted positions were vacant. In Westinghouse Electric Corp., 150 NLRB 1574 (1965), the National Labor Relations Board, in a definitive explanation of the Fibreboard decision, established a series of tests to determine whether a particular subcontracting decision necessitates bargaining. The board stated subcontracting of unit work does not require bargaining if, (1) the subcontracting is motivated solely by economic reasons; (2) it has been customary for the employer to subcontract various kinds of work; (3) no substantial variance is shown in kind or degree from the established past practice of the employer; (4) no significant detriment results to employees in the unit; and (5) the union has had an opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

There is a basic and difficult problem in maintaining a proper balance between the employer's legitimate interest in efficient operation and effectuating economies as contrasted with the union's legitimate interest in protecting the job security of its members and the stability of the bargaining unit. Perceptions of potential loss of work or of employment and bargaining unit security are ordinary events in labor relations when contracting out of work is proposed.

The city asserted that the decision to subcontract was motivated by a desire to improve business efficiency. However, the coincidence of cost savings appears to be an indirect result of turnover and job progression rather than a motive force. Turnover and progression assume prominence comparable with that of cost savings and hazard any contention that subcontracting was prompted solely by economic reasons.

Contracting of this type represented an innovation for the city. Subcontracting had not been used in the past. The requirement of "customary practice" is not satisfied, since the new use of subcontracting constituted a substantial variance from the established past practice of the employer.

While the contracting out was not a malicious design by the city, and not intended to discriminate against the union, the net effect of the action prejudiced the status and integrity of the bargaining unit. Potential unit membership was decreased by one position and the possibility of progression from such a position was eliminated. However, no current members of the bargaining unit were displaced, deprived of jobs previously available to them or laid off by reason of the subcontracting since the affected position was vacant.

Evidence was offered to show that employees have traditionally used the custodial positions as entry level stepping stones to access higher and better paying positions. As emphasized by the arbitration panel, employees who had so utilized the custodial positions and who may later become subject to force reduction are afforded protection in Article XVIII of the current bargaining agreement which assures unit members a continuing right to the custodial positions.

Neither the current nor the previous bargaining agreement speak to the matter of subcontracting. No evidence was introduced to indicate whether the subject had ever been discussed during the bargaining process. Employer rights as contained in Article IV of both agreements are stated as follows:

> "Section 1. Any and all rights concerned with the management and operation of the Departments are exclusively that of the employer, unless otherwise expressly provided by the terms of this agreement."

The city moved to subcontract the vacant position without extending the courtesy of a simple notification to the union and an opportunity to exchange ideas. Only after the union became aware of the action through indirect and adventitious means did the city indicate a willingness to discuss the matter. During the course of the ensuing discussion, the union never requested negotiation, nor did the city offer to negotiate the matter. The city has since indicated a further receptivity to sitting down with the union to work out solutions to the problems which originally caused the city to contract the work out.

The union has a right to ask at any time to negotiate the matter but did not choose to do so. To make such a request after the subcontracting had begun would have been a futile gesture. The

subcontracting was presented to the union after the fact as a "fait accompli". The requirement of allowing the union an opportunity to negotiate as defined in the Westinghouse case has not been satisfied.

The city's unilateral contracting out the janitorial function did constitute a refusal to engage in collective bargaining under the meaning of RCW 41.56.140(4).

FINDINGS OF FACT

1. The city of Kennewick is a "public employer" within the meaning of RCW 41.56.020 and RCW 41.56.030(1).

2. The International Union of Operating Engineers, Local No. 280, is a "labor organization" within the meaning of RCW 41.56.010 and is the "bargaining representative" of certain employees of the city employed in the appropriate bargaining unit described as:

> "beginning, limited and general craftsman; limited equipment operator; equipment operator; plant operator; chief plant operator; general craftsman leader; general foreman; mechanic foreman; and city electrician."

3. As of January, 1978, the city and the complainant were parties to a collective bargaining agreement which made no specific mention of contracting out of work and which neither reserved to the employer a right to contract out work nor constituted a waiver of the complainant's right to bargain such matters.

4. In January, 1978, the city elected to subcontract the custodial work in city hall.

5. The city did not notify the complainant of the proposed change nor offer to consult or negotiate the matter with the complainant.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to RCW 41.56.160.

2. By unilaterally implementing changes in the manner and under the circumstances set forth, the city did refuse to bargain the contracting out of work with the complainant and has committed an unfair labor practice within the meaning of RCW 41.56.

ORDER

Upon the basis of the above 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 city of Kennewick, its officers and agents, shall immediately:

1. Cease and desist from:

(a) refusing to bargain with the International Union of Operating Engineers, Local No. 280,

(b) making unilateral changes of working conditions without notice to IUOE, Local No. 280, and

(c) subcontracting the work of bargaining unit positions without giving notice to and bargaining with IUOE, Local No. 280 as the representative of all employees in the bargaining unit described in the foregoing findings of fact.

2. Take the following affirmative action which the examiner finds will effectuate the policies of RCW 41.56:

(a) Terminate any contract for performance of custodial work formerly performed by bargaining unit employees and restore all bargaining unit positions whose work has been improperly contracted out.

(b) Upon request by the union, bargain collectively in good faith with the IUOE, Local No. 280 as the exclusive representative of the city's employees in the appropriate unit with respect to working conditions and specifically with respect to any decision to transfer unit work from bargaining unit employees to other employees.

(c) Post in conspicuous places where notices to all 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 city of Kennewick, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the respondent to ensure that said notices are not altered, defaced or covered by other material.

(d) Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this order what steps have been taken to comply herewith.

DATED at Olympia, Washington this 5th day of October, 1979.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

By: JACK T. COWAN, Examiner

"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 IUOE, Local No. 280 with respect to terms or conditions of employment.

WE WILL NOT unilaterally change hours of employment or other terms or conditions of employment without first giving notice and bargaining with respect thereto with IUOE, Local No. 280.

WE WILL NOT continue to use custodial employees not represented by IUOE, Local No. 280.

WE WILL reinstate the employment practices in existence prior to January, 1978, by using employees represented by IUOE, Local No. 280.

WE WILL negotiate any future proposed changes in working conditions with the affected bargaining unit.

DATED: _____

CITY OF KENNEWICK

BY: _____

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 or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.