Seattle School District, Decision 5733 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609,	)	CASE 12079-U-95-2844
Complainant,	)	DECISION 5733 - PECB
vs.	)	
SEATTLE SCHOOL DISTRICT,	)	
Respondent.	)	ORDER FOR FURTHER PROCEEDINGS

The complaint charging unfair labor practices filed in this matter on September 28, 1995, was the subject of a preliminary ruling letter issued on October 19, 1995, pursuant to WAC 391-45-110.[1] A cause of action was found to exist on an allegation of refusal to bargain concerning the decision or effects of a change of food service work. Specifically, the Seattle School District (employer) is alleged to have reduced the number of lunch periods at Cleveland High School, without notice to or bargaining with International Union of Operating Engineers, Local 609 (union), as the exclusive bargaining representative of food service employees.

The employer filed an answer, and requested deferral to arbitration. Specifically, the employer cited provisions in Articles V and XII of the parties' contract as allowing the employer to change employee work schedules. The union opposed deferral, on the basis that its claims were based upon the statute.

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

It appeared that the conditions for deferral set forth by the Commission in City of Yakima, Decision 3564-A (PECB, 1991) were met, so the processing of the unfair labor practice case was deferred pending the outcome of related grievance and arbitration proceedings. The deferral letter issued on March 12, 1996, noted:

> If an arbitrator were to sustain the employer's view of the contract, that would precipitate dismissal of the unfair labor practice case.
>
> Deferral is not conditioned on the contract incorporating the statutory duty to bargain, and it is entirely possible that this controversy will need to be determined in two separate phases. If an arbitrator fails to sustain the employer's view of the contract, it would be appropriate for the Commission to proceed with this unfair labor practice case from that base of information.

The parties were directed to keep the Commission informed of steps taken in the grievance and arbitration process, and to supply the Commission with a copy of any settlement agreement or arbitration award on the related grievance.

The parties submitted the grievance dispute to Arbitrator Jane R. Wilkinson, who held a hearing on June 26, 1996. In her arbitration award issued on September 14, 1996, Arbitrator Wilkinson ruled that the employer did not violate the parties' collective bargaining agreement, and denied the grievance.

On October 18, 1996, the union filed a copy of the arbitration award with the Commission, under cover of a letter in which it: (1) Asserted that the arbitration award did not address the questions that are at issue before the Commission; (2) asserted that the Arbitrator ruled that nothing in the contract waived the union's statutory right to notice and bargaining; and (3) requested that the unfair labor practice case be reactivated.

On October 21, 1996, the employer filed a copy of the arbitration award with the Commission, under cover of a letter which characterized the arbitration award as holding: "[T]hat the District conduct challenged in the above-referenced unfair labor practice complaint was protected by" the parties' contract. The employer asserted that waivers of union bargaining rights were found by the Arbitrator, and asked for dismissal of the unfair labor practice case.

The procedure and standards for Commission action following an arbitration award were set forth City of Yakima, Decision 3564-A (PECB, 1991), which includes the following:

> A union may waive its statutory bargaining rights by contractual language which permits an employer to make changes on mandatory subjects of bargaining without fulfilling the notice and bargaining obligations that would otherwise be imposed upon it by statute. Seattle School District, Decision 2079-A (PECB, 1985). Indeed, among the defenses commonly asserted by employers in unfair labor practice cases involving "unilateral change" allegations is that the disputed change was permitted by a contract between the employer and the union. When such a defense is raised, interpretation of the collective bargaining agreement is necessary.
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> ...
> The deferral policy is not a tool by which respondents can avoid determinations as to whether they committed an unfair labor practice. It simply allows the parties an opportunity to utilize their contractual grievance and arbitration procedure to obtain a contract interpretation for consideration by the Commission.
>
> ...
> Regardless of whether a question of contract interpretation is decided by the Commission or by an arbitrator, there are three likely results:
>
> 1. Action protected by contract. If it is determined that the contract authorized the

> employer to make the change at issue in the unfair labor practice case, that conclusion by either the Commission or an arbitrator will generally result in dismissal of the unfair labor practice allegation. The parties will have bar-gained the subject, and the union will have waived its bargaining rights by the contract language, taking the disputed action out of the "unilateral change" category prohibited by RCW 41.56.140(4) [footnote citing cases applying principle omitted].
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> 2. Action prohibited by contract. If it is determined that the employer's conduct was prohibited by the contract, that conclusion by either the Commission or an arbitrator will also generally result in dismissal of the unfair labor practice allegation. Again, the parties will have bargained the subject, taking it out of the category of "unilateral change" prohibited by RCW 41.56.140(4) [footnote citing cases applying principle omitted].
>
> 3. Action neither protected nor prohibited by contract. If it is determined that the employer's conduct was not covered by the parties' contract, further proceedings will be warranted in the unfair labor practice case. Whether the Commission makes that determination itself, or merely accepts an arbitrator's decision on the issue, such a finding will be conclusive against any "waiver by contract" defense asserted by the employer in the unfair labor practice case. Unless the employer is able to establish some other valid defense, a finding of an unfair labor practice violation generally follows. See, e.g., Clover Park School District, Decision 2560-B (PECB, 1988).

As noted in the March 12, 1996 deferral letter, the arbitrator draws his or her authority from the collective bargaining agreement, and the question before the arbitrator is the interpretation of the contract.

Arbitrator Wilkinson set out, and appears to have considered, excerpts from several substantive provisions of the parties' contract, including: Article II (Recognition), Article V (Management Rights), Article VI (Noninterference Rights of Union Member-

ship), Article XII (Wages, Hours and Employee Rights), Article XIII (Staff Adjustments), Article XVIII (Time Production Standards), and Article XIX (Quality of Work Life Committee). At the outset of her discussion, the Arbitrator wrote:

> The Arbitrator's jurisdiction extends to an employer's failure to give notice and bargain changes in terms and conditions of employment (conditions not otherwise specified by contract) **only when the notice and bargaining obligation has been expressly made a part of the parties' agreement.**
>
> Several of the Union's arguments in this case concern issues of notice and bargaining. The Arbitrator **will not decide these arguments absent a contractually-specified obligation of the District to give notice and bargain.** While the District may have certain statutory obligations with respect to mid-term bargaining, those obligations must be resolved by the Public Employment Relations Commission (PERC) ....

[Emphasis by **bold** supplied.]

Arbitrator Wilkinson then proceeded to address the substantive issues in a manner consistent with that admonition.

Under a heading of "Did the District's Decision-Making Process Violate the Collective Bargaining Agreement?", Arbitrator Wilkinson rejected a union argument that it was entitled to deal with a "unified entity", in the absence of any contractual basis for the union's argument.

Under a heading of "Did the District Violate the Contract by Failing to Give the Union Notice and an Opportunity to Bargain?", Arbitrator Wilkinson concluded that various provisions cited by the union did NOT provide a contractual basis from which to conclude that any statutory duty to bargain was incorporated into the contract. Importantly, for purposes of the present inquiry, the arbitrator went on to expressly state: "[T]he Arbitrator will not

find that the Union waived any bargaining rights with respect to lunch period scheduling change when it agreed to ... language in [the management rights clause]. Most significant is that, in interpreting the management rights clause of the parties' contract, the Arbitrator ducked the waiver question, stating:

> Without the conditioning language ("within the limits of applicable State ... laws including" the FLSA), the provision would clearly constitute a waiver of the Union's bargaining rights on questions of starting and quitting time and the number of hours to be worked. However, the "within the limits of applicable State ... laws" could be read to include RCW 41.56. This raises the question of whether the Arbitrator should determine the "limits" of State law. Given the rather intricate legal relationship between duty to bargain statutes and the fruits of that bargaining (i.e., the collective bargaining agreement), the Arbitrator determines that "the limits of applicable State ... laws", as the question pertains to RCW 41.56, is one that falls within the expertise of PERC and is more properly within its jurisdiction. ... She declines to hold that Article V.A.3 (or any other provision of the Agreement) is a waiver of any statutory Union right to bargain the decision to adopt a *one period lunch schedule*. ...
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> [Emphasis by *italics* in original.]

Thus, the employer failed to obtain the "waiver by contract" interpretation of the management rights clause that it urged when it requested deferral to arbitration.

Under a heading of "Did the Decision to Eliminate the Lunch Period Violate the Contract?", Arbitrator Wilkinson ruled that "there is nothing in the Collective Bargaining Agreement that prohibits management from closing a school cafeteria or otherwise downsizing to meet operational needs", and that there was "insufficient evidence from which one could infer bad faith on the part of the District", but she fell short of holding that the contract reserved

the employer a right to act unilaterally. Importantly, for the purposes of the present inquiry, the conclusion was based upon contractual silence rather than upon contract language. The Arbitrator expressly declined to address the statutory duty issue in footnote 7 to her arbitration award.

While Arbitrator Wilkinson clearly rejected the union's various claims that the elimination of the second lunch period at Cleveland High School was "prohibited by the contract", close reading of the arbitration award does not support the employer's assertion that the arbitration award held the employer's actions were "protected by the contract". Whether the employer has won a battle and lost the war will be for an Examiner to decide in further proceedings under Chapter 391-45 WAC.

NOW, THEREFORE, it is

ORDERED

William A. Lang of the Commission staff is designated as Examiner to conduct further proceedings in this matter under Chapter 391-45 WAC.

Issued at Olympia, Washington, on the 31st day of October, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director