STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFL-CIO, Complainant, vs. KING COUNTY, DEPARTMENT OF YOUTH SERVICES, Respondent.	CASE NO. 5386-U-84-979 DECISION NO. 2193 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Anthony Hazapis, Representative, WSCCCE, and Kenneth Jennings, Vice-President, Local 2084, appeared on behalf of the complainant.

J. Wes Moore, Administrative Assistant, Labor/Employee Relations, appeared on behalf of respondent.

Washington State Council of County and City Employees Union, AFL-CIO (hereinafter union) filed a complaint on August 3, 1984 wherein it alleged the King County Department of Youth Services, a department of King County (hereinafter employer), had committed an unfair labor practice within the meaning of RCW 41.56.140(4). The allegations of the complaint involve creation and filling of new positions without notice to or bargaining with the union, and contain reference to a dispute concerning whether the new positions should be included in the bargaining unit. A hearing was held on the matter on October 25, 1984 in Seattle, Washington, before Ronald L. Meeker, Examiner. Briefs were not filed in the matter.

FACTS

Among other services, King County operates a Department of Youth Services. The county has recognized Local 2084 of the Washington State Council of County and City Employees, AFSCME, AFL-CIO, as exclusive bargaining representative of certain employees of the Department of Youth Services. The parties have a collective bargaining agreement effective for the period January 1, 1983 through December 31, 1985. The bargaining unit is described in that agreement by a listing of specific classification codes and titles. Among those listed are:

Class Code	Classification
1338	Juvenile Corrections Officer
1339	Juvenile Corrections Officer Supervisor
1334	Juvenile Probation Officer
1335	Juvenile Probation Officer Supervisor

The contract contemplates additions to the list of covered classes, as follows:

> Section 10. The County will advise the Union in writing and in advance about the creation of any new or reclassified position. Such notification will include a list of duties and responsibilities, along with a statement about to (sic) desirable qualifications. The County and the Union will review and attempt to reach a mutual agreement in determination of inclusion or exclusion in the bargaining unit of any newly created or reclassified positions. Should the parties fail to reach a mutual agreement, the matter will be referred to the Public Employment Relations Commission for unit clarification. In the event that the County wishes to fill the position pending the unit clarification decision, the County will make a good faith attempt to fill the disputed position on a temporary basis with a qualified employee from within the existing bargaining unit.

There are references in the collective bargaining agreement to the county's career service guidelines.

In February of 1984, the Department of Youth Services received special funding to create and operate an Intensive Services Project through June of 1985. A key component of this project was the designating of an employee from the classification of juvenile probation officer (referred to by these parties as a JPC) as "JPC Coordinator". A juvenile corrections officer (JCO) and outreach workers were also to be assigned to the project.

Under date of February 3, 1984, Perry F. Wilkins, Director of the Department of Youth Services, sent a memo to all employees classsified as JPC, advising them of the project and of the intent to designate one of them as the "Lead JPC". He requested any JPC interested in such assignment to submit a brief summary of any experience or training that may directly relate to such project. The union was evidently not provided a copy of that notice. The names submitted were to be reviewed and the selection made at a later date. On February 28, 1984, Marion Elliot was appointed to the Lead JPC position for the Intensive Services Project.

On March 9, 1984, Director Wilkins sent a memo to all employees in the JCO classification, advising of the intent to designate one of them as the "Lead JCO" in this same project. Again, there was not a copy to the union. The procedure used for this selection was the same as was used in the selection of the Lead JPC. Brenda Kershner was appointed as the Lead JCO on March 28, 1984.

Following the appointment of Brenda Kershner to the Lead JCO position, the union raised issues about the positions at a labor/management meeting. On April 12, 1984 the union directed a letter to the employer, as follows:

> At this time, Local 2084 challenges the validity of designating the Intensive Service Program position as "Lead Worker" within the JCO classification. We believe that this designation is improper under Section 35.65 of the Career Service Guidelines. That section establishes two requirements for "Lead Worker" designation, 1) the designee must be performing the same duties as other employees in that classification; and 2) the designee must be performing supervisory duties over other employees in the same classification or a classification having the same entrance salary.
>
> Our opinion is that neither of these two requirements is met by the Intensive Service Program position. We therefore conclude that the position is either new or reclassified and subject to the provisions of Article V, Section 10 of the Collective Bargaining Agreement. As such, Management should have notified Local 2084 and attempted to reach mutual agreement on whether or not the new position should be included in the Collective Bargaining Unit. Management should have done this prior to filling or designating the position as "Lead Worker".
>
> Since this was not done, the Executive Board of Local 2084 has tentatively decided to treat the Intensive Service Porgram psoition (sic) as being outside of the Collective Bargaining unit. This could result in a decision on our part to exclude from union membership any person who occupies the new position. As you may know, union membership is controlled by A.F.S.C.M.E. or its subordinate bodies as provided by our International Constitution. The consequence of possible exclusion from membership is that the affected employee will subsequently be inelligible (sic) for employment in any classification in the bargaining unit as listed in "Addendum A" of the bargaining agreement.
>
> We propose that Management immediately negotiate this matter with Local 2084 as provided in Article V, Section 10 of the bargaining agreement. We also suggest you notify the employee in the Intensive Service Program position of this development. We will do likewise.
>
> Let us know at your earliest convenience how you intend to respond to this problem. You may do so by contacting our Presidendt, Sharon Schmidt. Please do so by way of written memorandum.

On April 23, 1984, the employer responded to the union's letter of April 12, 1984. It disagreed with the union as to whether the Lead JCO position met the description of lead worker as defined in Section 35.65 of the Career Service Guidelines. It indicated acceptance of the union's proposal concerning exclusion from the unit.

There is evidence of further discussion of the matter by the parties on May 10, 1984. On May 18, 1984, Judy Chapman, Administrative Service Manager of the Department of Youth Services, communicated by letter with Tony Hazapis of the union. That correspondence contained a proposal on the lead positions, as follows:

Proposal

1. Juvenile Probation Counselor, Intensive Services Project, Lead: No change from process used or employee selected will occur.

2. JCO, Intensive Services: This job slot will be deleted.

3. Outreach Worker: The County and Local 2084 will review a new classification (as determined by King County Personnel) per Article V Section 10 of the Collective Bargaining Agreement. While this still has to be done formally, from the information currently available to both parties, Management could concur that the job class is similar to Bargaining Unit work and Local 2084 could agree to cover the job class (See attached).

4. Filling of three Outreach Worker positions: The positions will be advertsied (sic) per Article XVI, Section 2. Because project work must continue, however, and no employment register currently exists, DYS will appoint Brenda Kershner provisionally to one of the Outreach Worker positions. She will then compete for a position as required by the Guidelines for the Career Service.

5. Management may designate a lead Outreach Worker from among the three employees filling the Outreach Worker positions. It is not necessary that a competitive process be used to select the employee so designated.

Terms of Compromise

There are two terms that Management will require to continue their concurrence with the proposal: 1) that the existing grievances will not be pursued by Local 2084 and no additional grievances on the same issues or in conflict with the proposal are presented to Management by Local 2084; 2) that Local 2084 does indeed agree to cover the Outreach Worker positions. PROVISO ADDED MAY 21, 1984, see below.

PROVISO: The above Agreement is a compromise between the two conflicting positions on the issue of filling new job slots which are designated lead workers. In the unlikely event that similar circumstances occur again. Management and Local 2084 will discuss the issues in advance of any action by Management.

On June 8, 1984, the union replied, by letter, to Chapman with a counter-proposal concerning the lead workers, as follows:

> The purpose of this letter is to advise you of the present position of the Local 2084 Executive Board and to present a counter proposal to the previous proposal, dated May 18, 1984, to resolve the grievances and Executive Board concerns around the issue of "lead workers" in the Intensive Services Project.

The Executive Board feels that we are in basic agreement in respect to the "Lead JCO" position. The major difference in the proposals is that we would suggest that the "Lead JPC" position be dealt with in a similar fashion. We feel it is necessary to take this stance due to the fact that the previous proposal appears to be in violation of the Collective Bargaining Agreement on this point, and that it would be inappropriate for the Board to indicate approval of such a violation.

Proposal

1. Juvenile Probation Counselor, Intensive Services Project, Lead: This position should be reclassified as "Intensive Services Project Supervisor" (as determined by King County Personnel) per Article V, Section 10 of the Collective Bargaining Agreement. From the information currently available to both parties, Management could concur that the job class is similar to Bargaining Unit work and Local 2084 could agree to cover the job class.

   This position should then be advertised per Article XVI, Section 2 of the Collective Bargaining Agreement. Because we agree that Project work must continue and because no employment register presently exists, DYS should appoint Marian Elliott provisionally to the position. She should then compete for the position as required by the Guidelines for the Career Service.

2. JCO, Intensive Services Project: This job slot should be deleted.

3. Outreach Worker: The County and Local 2084 will review a new classification (as determined by King County Personnel) per Article V, Section 10 of the Collective Bargaining Agreement. From the information available to both parties, Management could concur that the job class is similar to Bargaining Unit work and Local 2084 could agree to cover the job class.

4. Filling of three Outreach Worker positions: The positions will be advertised per Article XVI, Section 2 of the Collective Bargaining Agreement. Because Project work must continue, however, and no employment register currently exists, DYS will appoint Brenda Kershner provisionally to one of the Outreach Worker positions. She will then compete for one of the positions as required by the Guidelines for the Career Service.

5. Management may designate a "Lead Outreach Worker" from amoung (sic) the three employees filling the Outreach Worker Positions only after at least two of the three positions have been filled through the competetive (sic) process. The "Lead" designation shall be in compliance with the Guidelines for the Career Service, Section 35.65.

Terms of Compromise

1. The Executive Board of Local 2084 agrees not to pursue the existing grievances around the Lead Worker issue.

2. Local 2084 arees (sic) to cover the Outreach Worker, Family Therapist, and Intensive Services Project Supervisor positions.

3. In the event that similar circumstances occur again, Management and Local 2084 will discuss the issues in advance of any action by Management.

To summarize, it appears that the parties continued to differ at that point in time on the position held by Elliott (although the union was now back to wanting the position included in the bargaining unit) and continued to differ as to when the "Lead" outreach worker could be appointed (i.e., before or after the outreach worker positions were filled). The so-called terms of compromise appear to reach the same results, although the union makes reference to a "family therapist" not mentioned in the employer's proposal.

In a letter dated June 8, 1984, but not date-stamped by the employer until June 27, 1984, the union advised Chapman:

> Since we appear to be at an impass (sic) in our negotiations around the "Lead JPC" and "Lead JCO" positions, Local 2084 has requested the assistance of the Public Employee (sic) Relations Commission (PERC) in mediating these negotiations. We will be in contact with you when PERC responds to us with a decision.
>
> However, it is the feeling of the Executive Board of Local 2084 that the job classifications of Outreach Worker and Family Therapist, from the information currently available to us, appear to be similar to Bargaining Unit work. We are, therefore, of the opinion that these two new classifications should be covered by Local 2084 and by our Bargaining Agreement.
>
> Respectfully,
>
> Sharon C. Schmidt
> President
> Local 2084

The union filed its unfair labor practice charges on August 3, 1984. The Executive Director issued a preliminary ruling on September 7, 1984, characterizing the issues as:

> Refusal to bargain concerning positions properly within the complainant's bargaining unit or, in the alternative, unilateral transfer of bargaining unit work to persons outside of the bargaining unit.

No inquiries were made prior to the hearing concerning the propriety of deferral of the dispute to arbitration, since it appeared that the scope of the bargaining unit was at issue.

POSITIONS OF THE PARTIES

The union contends the employer committed an unfair labor practice by failing to bargain with the union prior to implementation of the "Lead" positions and making the accompanying changes in the wages, hours and working conditions of members of the bargaining unit represented by the union.

The employer denies the allegations contained in the complaint and contends the subject matter of the "Lead" positions should be resolved under the terms of the current labor agreement between the parties.

On November 7, 1984, following the close of the hearing and initial review of the positions taken and documents received in evidence at the hearing, the undersigned Examiner directed a letter to the parties asking for comment on the propriety of deferral of the matter to arbitration. It was noted that the initial understanding of the complaint was that there was a unit determination issue underlying the dispute, but that post-hearing examination of the collective bargaining agreement disclosed a number of contract provisions which might have a bearing on the matter.

The union responded in a letter dated November 19, 1984 and filed on November 21, 1984. The union again stated its position as against deferring the matter to the grievance procedure as its complaint was not premised on contract violations nor did it ask the examiner to interpret the provisions of the labor agreement. The union further argues that the employer was required to notify the union and give it an opportunity to bargain prior to filling the two positions, under the requirements of RCW 41.56.140(4).

The employer responded in the letter dated November 21, 1984 and filed on November 26, 1984, again stating the belief that the subject matter should be resolved under the grievance procedure of the current labor agreement.

DISCUSSION

Unit determination is a matter delegated by the legislature to the Public Employment Relations Commission. RCW 41.56.060. Parties may agree on units, but the Commission is not bound to accept the agreements made by parties. City of Richland, Decision 279-A (PECB, 1978). Grievance arbitration is merely an extension of the collective bargaining process between the parties, and so there is no benefit to deferral of unit determination issues

to arbitrators. This case looked like a unit determination problem at the outset, but the evidence discloses that it was the union, in its April 12, 1984 letter, that first put a "unit" question or characterization on this case. When it did so, it appears to have been attempting to put some pressure on the employer (and perhaps on the affected individuals). There is no charge before the Examiner from the employer or affected employees, and so no comment or ruling is made on the legality of the union's tactic in this regard. As the case now stands, the record would not support a conclusion that the employer took steps to remove either of the disputed positions from the bargaining unit.

There may be little question that the department management jumped the gun when it set about to implement the grant which it had received. Steps were taken to create and fill new positions without notice to the union. Once the union got notice and moved into the dispute, issues arose which are deeply involved with contractual rights and procedures. In particular, there is an issue of whether the new positions meet the "Lead" requirements or are entirely new classifications.

The Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of RCW 41.56 to directly remedy violations of collective bargaining agreements. City of Walla Walla, Decision 104 (PECB, 1976). The Commission is certainly not the proper forum to directly remedy violations of King County's career service guidelines. Thus, the Commission routinely defers to contractual grievance and arbitration machinery where an employer's conduct is arguably protected or prohibited by the collective bargaining agreement between the parties. The decisions issued by arbitrators will remedy any contract violations, identify matters as to which the employer had a contractual right (i.e., a waiver by the union of its right to bargain) to take the disputed action, and will also disclose situations where the contract is silent (so that a duty to bargain existed under the statute).

At the root of the problem in this case is the question of what, if any, duty was owed to the union under the statutory duty to bargain. One cannot reach that question without a determination of what, if any, bargaining rights the union has waived by contract. If the employer had a duty to bargain going all the way back to the designation of the positions as "Lead", then a remedial order in an unfair labor practice case could call for restoration of employees to the positions they would have enjoyed from the time of the employer's initial unilateral action. On the other hand, if the employer was within its contractual rights when it designated the position as a "Lead" and when it appointed Elliott, the union might be entitled to little or no remedy in an unfair labor practice case.

The agreement of the parties is not necessary for deferral of the matter to arbitration. City of Richland, Decision 246 (PECB, 1977). The matter will be held in abeyance pending the results of processing of the dispute through the grievance and arbitration machinery of the collective bargaining agreement.

FINDINGS OF FACT

1. King County is an employer within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees, AFL-CIO, Local 2084, is a bargaining representative within the meaning of RCW 41.56.030(3).

3. Local 2084 and King County are parties to a collective bargaining agreement effective through December 31, 1985 which contains provisions concerning classification and promotion and contains a grievance arbitration procedure.

4. On February 3, 1984, the employer sought volunteers to fill a temporary "Lead" juvenile probation counselor (JPC) position in an Intensive Service Project. Notices were sent to all employees in the JPC classification, but not to the union. On February 28, 1984, the position was filled.

5. On March 9, 1984, the employer sought volunteers to fill a temporary position of "Lead" juvenile corrections officer (JCO) using the same procedure used to fill the JPC position. Again, there was no notice to the union. On March 28, 1984, the position was filled.

6. On April 10, 1984, the union, at a labor/management meeting, questioned the appropriateness of the way the Lead JPC and Lead JCO positions were filled.

7. On April 12, 1984, the union, by letter, stated its position that the positions should be treated as new or reclassified positions subject to provisions of Article V, Section 10 of the collective bargaining agreement. The union was therein the first to suggest that the positions should be treated as outside the bargaining unit.

8. On April 23, 1984, the employer, by letter accepted the union's position that contested positions were outside the bargaining unit.

9. On April 27, 1984, the union appealed to the King County Personnel Manager and challenged the method used in the appointment of the contested positions.

10. On May 10, 1984, the union executive board met with management personnel concerning the contested positions, at which time the employer indicated it would review its position.

11. On May 18, 1984, the employer, by letter, made a proposal to resolve the dispute concerning the contested positions.

12. On June 8, 1984, the union made a counter-proposal to employer's proposal of May 18th.

13. The union thereafter notified the employer that it was at an impasse in negotiations and requested a mediator be assigned to assist in the negotiations.

CONCLUSIONS OF LAW

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

2. The question of whether the employer had a statutory duty to bargain with the union under RCW 41.56.140(4) is dependent on interpretations of the collective bargaining agreement which are properly deferred to arbitration under the grievance and arbitration provisions of the collective bargaining agreement between the parties.

ORDER

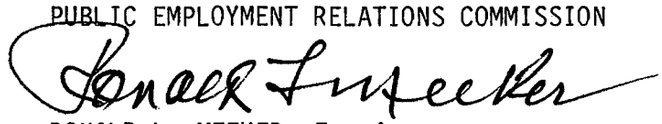
1. The unfair labor practice proceedings in the above-entitled matter will be held in abeyance pending the resolution through contractual grievance and arbitration procedures of any and all claims by the union of violation of the collective bargaining agreement between the parties in connection with the creation and filling of positions for the Intensive Services Program grant.

2. The parties are to notify the Executive Director of the Public Employment Relations Commission not less often than once per month, of the steps taken for the processing of the grievances.

3. This matter will be re-activated upon the motion of either party, following the conclusion of the grievance and arbitration proceedings or upon a showing that the employer has refused to proceed with the processing of the grievances involved.

DATED at Olympia, Washington this 23rd day of April, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



RONALD L. MEEKER, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.