STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE DISPATCHERS' GUILD, Complainant,	)	CASE 18375-U-04-4684
vs.	)	DECISION 9173 - PECB
CITY OF SEATTLE, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Cline & Associates, by *Christopher J. Casillas*, for the union.

Seattle City Attorney Thomas A. Carr, by *Angelique M. Davis*, for the employer.

The Seattle Police Dispatchers' Guild (union) represents dispatchers who work in the City of Seattle Police Department. It filed an unfair labor practice complaint with the Public Employment Relations Commission on April 1, 2004, alleging the City of Seattle (employer) committed certain unfair labor practices. The Unfair Labor Practice Manager issued a preliminary ruling on April 27, 2004, finding causes of action existed based on allegations that the employer implemented unilateral changes by: (1) changing employees' use of vacation and holiday leave, and (2) removing work from the bargaining unit through use of an automated telephone directory. If proven, these actions violate the statute by interfering with employee rights and refusing to bargain.

In 2003, the employer was threatened with funding withdrawal if it failed to increase its speed of answer for emergency 911 calls in the police department Communication Center. The employer reacted first by raising the minimum staffing level in the center without adding more staff. This had the effect of reducing available time off for employees. Then the employer installed an automated

telephone directory to divert non-emergency calls out of the police department Communication Center.

Examiner Sally B. Carpenter held a hearing on September 28, 2004. The parties filed post-hearing briefs on December 29, 2004.

ISSUES

There are two major issues in this case, each of which has multiple parts.

ISSUE 1 - Did the employer unlawfully implement a change in staffing levels which decreased use of leave opportunities?

> Issue 1.1 - Did the employer's increase in minimum staffing levels (without notice or bargaining) constitute an unlawful unilateral change? YES.
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> Issue 1.2 - Did the union waive its bargaining rights, by contract, about staffing levels? NO.
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> Issue 1.3 - Was there a business necessity or emergency which required action without an opportunity to bargain? NO.

ISSUE 2 - Did the employer unlawfully implement an automated telephone directory system?

> Issue 2.1 - Did the union have a right to effects bargaining about work that was mechanized by the automated telephone directory? YES.
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> Issue 2.2 - Did the union have a right to effects bargaining about work that was discontinued? YES.
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> Issue 2.3 - Did the employer unlawfully transfer bargaining unit work to its employees outside the bargaining unit? YES.
> Issue 2.4 - Did the union waive its bargaining rights, by contract, about automation? NO.
>
> Issue 2.5 - Did the employer have a business necessity or emergency which required action without an opportunity to bargain? NO.

ISSUE 1.1 - Did the employer's increase in minimum staffing levels (without notice or bargaining) constitute an unlawful unilateral change?

Facts - Leave Time

The employer's Communication Center is an around-the-clock operation staffed every day of the year in five shifts. It is part of the Seattle Police Department, headed by a director of communications who is a captain in the department. Call takers are called "dispatchers." Uniformed police officers manage the center. The bargaining unit consists of approximately 100 employees, most of whom are dispatchers, and several of whom have non-dispatcher technical positions.

Funding from E-911 state tax money flows to King County, which then distributes the money to any jurisdiction in the county operating an emergency call center. There are thirteen primary Public Safety Answering Points (E-911 centers) in King County. The City of Seattle police department Communication Center is one of those centers. The county transmits payments to the City of Seattle general fund in varying amounts each year. Receipt of E-911 funds is conditioned on meeting speed-of-answer standards.[1] Prior to 2003, the employer received about $540,000 per year for this call center. In 2003 and 2004, the employer received a total of about 1.4 million dollars from the county E-911 office.

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[1] Standards are set by the National Emergency Number Association (NEMA) and the Association of Public Safety Officials (APSO). The joint standards require calls to be answered 90 percent of the time within 10 seconds (the 90/10 standard). For no more than six hours a day may the 90/10 standard be missed.

In addition, King County's funding standards permit further deviation from the national standards. If one quarter does not qualify, but the next quarter does meet national standards, the county funds the Communication Center for both quarters.

King County and the police Communication Center debated the center's speed-of-answer through several years of discussion over how calls are counted. Throughout that time period, funding to the employer was in jeopardy over the speed-of-answer issue. The employer installed a new call-counting system in 2002, which ended the debate; the new system showed the speed-of-answer standard was not met. Prior to autumn 2003, for ten out of twelve quarters, the employer's 911 center failed to answer calls 90 percent of the time within 10 seconds.

In 2003, the county conditioned continued funding on meeting its variant of the 90/10 standard. The employer hired a consultant, Kimball and Associates, who evaluated the employer's 911 center in August 2003.

The Kimball report analyzed the number of overtime hours against the staffing level for the first six months of 2003. It found that 4,884 overtime hours were accumulated in that period, with the highest number in months when the staff roster was lowest. The report also pointed out that the E-911 center answered non-emergency calls, as well as 911 calls.

Kimball made three recommendations:

- increase staffing,[2]
- decrease average call durations, and/or
- decrease the overall volume of calls.

The employer increased staffing in October 2003 by increasing the minimum number of dispatchers working on each of the five shifts without hiring additional dispatchers. For one shift, the change increment was three positions, changing the number from 18

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[2] At the time of the Kimball report, the Communication Center had eleven unfilled positions for dispatchers.

employees to a minimum of 21 employees required on the shift. The change lasted for four months, then the non-emergency calls were diverted out of the Communication Center.

Before October 2003 there were minimum staffing levels for all shifts. The numbers for each shift had minimal and normally predictable variations. Some changes were based on seasonal shifts (more calls in the late summer) and on special events, such as SeaFair, Fourth of July, or the demonstrations against the World Trade Organization meeting. Mondays were a high call volume day, and were always staffed at a higher level. Such changes in minimum staffing could normally be anticipated, were rarely changed by more than one or two positions, and were a routine past practice in the Communication Center.

After the employer's increase in minimum staffing level for each shift, the opportunity to use accrued leave time for a one day absence was affected.[3] This change lasted until the non-emergency

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[3] Practice in the department for use of vacation time is multi-layered. First, there is an annual seniority-based bidding procedure for vacations of ten or more days. Second, there is a bidding process for vacations of nine days or less. Third, there is a process, which can be used up to the last minute, to seek approval of leave use which the parties call the "rule of two." For every shift, there can be two employees on leave, even if the shift minimum staffing has to be filled with a person on overtime. If both leave slots are taken, and there are more employees on duty than required by the minimum number for the shift, an additional person may use leave time. This third option permits employees to use accrued leave for one day at a time.

The effect of raising the minimum staffing level is that the minimum "rule of two" allowed on leave tends to become a "maximum of two" employees allowed to use leave time when overtime would be incurred. As an example of how this is applied, the union introduced documentary evidence that there were eight times on one of the shifts in the first half of December 2003 when no leave was available in excess of the "rule of two." Testimony indicated that the pattern was repeated on other shifts.

calls were diverted out of the call center about the end of January 2004.

Legal Standards - Leave Time

The duty to bargain requires more than signing a collective bargaining agreement. There is a continuing duty to bargain issues involving any proposed changes in wages, hours and working conditions. The statutory framework is:

> RCW 41.56.140 *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;
>
> . . . .
>
> (4) To refuse to engage in collective bargaining.

Unfair labor practices are processed under Chapter 391-45 WAC. The complainant has the burden of proof. WAC 391-45-270. The determination as to whether a duty to bargain exists is a question of law and fact.

The scope of mandatory bargaining subjects includes wages, hours and working conditions, all of which are matters of direct concern to employees. *City of Anacortes*, Decision 6830-A (PECB, 2000) (citing *International Association of Fire Fighters, Local 1052 v. PERC (Richland)*, 113 Wn.2d 197 (1989)). The nature of the impact on the bargaining unit determines whether an employer has a duty to bargain the matter. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1990). The duty to bargain arises only from a change that has a material effect on the employees' wages, hours, or working conditions. *Seattle School District*, Decision 5733-B (PECB, 1998). In *Seattle School District*, one high school's site committee changed from a two-lunch period to a one-lunch period

schedule. That had the effect of changing both wages and working conditions of food service workers at that school. The Commission held that the employer had a duty to give notice and to bargain over any proposed changes. Wages (including overtime compensation), premium pay and hours of work (including shift schedules and work opportunities) are all mandatory subjects of bargaining. *City of Kalama*, Decision 6773-A (PECB, 2000); *City of Kalama*, Decision 6739 (PECB, 1999).

City of Yakima, Decision 3564-A (PECB, 1991), explores leave issues in depth. The result in *Yakima* turned on whether the fire chief's written confirmation of a former policy was, or was not, a change in working conditions. The Commission overruled the examiner's factual determination that the fire chief's policy was a change, but strongly reiterated the policy that an actual change in how leave is available is a mandatory subject of bargaining.

In *Community Transit*, Decision 3069 (PECB, 1988), the employer created new bus routes and assigned them to a private contractor. The examiner found a violation of the duty to bargain, and noted the purpose of the bargaining requirement:

> It must be remembered that the collective bargaining process is designed to provide the opportunity for labor and management to express their relative concerns about a broad range of employment issues. Such dialogue is intended to be free and unencumbered, and the participants must be placed in relatively equal bargaining positions.

Lake Washington Technical College, Decision 4721-A (PECB, 1995), summarizes the employer's duty to give notice. "If the union is adequately notified of a contemplated change *at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action*, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a *fait accompli* should not be found." (emphasis

added.) This notice prior to making a final decision requirement is intended to meet the "free and unencumbered", "relatively equal bargaining positions" standards enunciated in *Community Transit*. "A party to a bargaining relationship commits an unfair labor practice if it fails to give notice of such changes (*i.e.*, presents a party with a *fait accompli*), or fails to bargain in good faith upon request." *Seattle School District*, Decision 5733-B (PECB, 1998).

City of Clarkston, Decision 3286 (PECB, 1989), requires the employer to give notice to the union before making a decision regarding a leave usage change. In *Clarkston*, the employer adopted a modified work schedule within the hours of the fire fighters' work day. The new policy in part added a requirement that employees must give seven days notice of a request for days off. *Clarkston* rules:

> Finally, the employer's contention that it was willing to negotiate the changes, and invited the union to do so, is not persuasive. It is well settled that an employer cannot satisfy its duty to bargain by first making a change in working conditions and then offering to bargain. The union is entitled to influence the decision before it is finalized and implemented, and is not obligated to engage in a futile negotiations to restore the original conditions.

Clarkston holds that a union is not required to engage in futile negotiations when faced with an employer's fixed intent to make a unilateral change.

A *fait accompli* was found in *City of Seattle*, Decision 8916 (PECB, 2005). That case was between the same parties as in this case. The examiner notes, "A long line of cases holds that a union presented with a *fait accompli* is not required to make a bargaining demand in order to preserve its rights." Where an employer does not provide adequate notice and offer to engage in meaningful bargaining, the union's failure to request bargaining is not a waiver by inaction. *Skagit County*, Decision 8886 (PECB, 2005).

Analysis - Leave Time

Testimony differed on whether the change had an actual impact on use of leave time. The former supervisor in the Communication Center, Sergeant Robert Robbin, did an analysis of vacation usage before and after the four-month increase in minimum staffing. He testified that, "It appeared that there was no effect on vacation time as far as the ability to get vacation time off." Union President Scott Best produced watch logs and analysis which showed, "When this change was made, there was a significant decrease in the ability to take time off." The difference between the numbers presented by the employer and those presented by the union seem to be based on what facts were analyzed. The union's analysis looked at shift-by-shift, day-by-day schedules. I find that the union's evidence is more directly related to the issue, and thus has persuasive weight.

The employer did not notify the union. Employees discovered the change in shift staffing on their work schedules. On November 4, 2003, the union requested bargaining of the increased minimum staffing, writing that, "The impact of this change in working conditions is that our members do not have the same ability to use accrued discretionary time because of the increased staffing levels. . . . The Guild demands to bargain these impacts."

The employer responded by e-mail stating that, "With respect to your November 4 letter, it is the City's position that minimum staffing levels are not a mandatory subject of bargaining." The employer met with the union in December 2003. The union brought a proposal to change the "rule of two" to a "rule of three" as a compromise to ameliorate the effects of the change. The employer explained its change, but it did not respond to the union's proposal nor did it make a proposal. The employer took the position that it had no duty to bargain. It explained its decision, but it refused to engage in bargaining.

A reduction in the availability of leave use is clearly a change in a mandatory subject of bargaining. *City of Yakima*, Decision 6773-A. The change as described in the facts above meets the standard in *Seattle School District*, Decision 5733-B, for a material change in working conditions. The employer had a legal duty to provide notice before making a change. If requested by the union, it had a duty to bargain the decision and any impacts. *City of Clarkston*, Decision 3286. Upon request from the union, the employer may not implement a decision until bargaining has been completed.

Faced with this *fait accompli*, the union had no duty to request bargaining. It was free to file its unfair labor practice charge. But the union did request bargaining; it wrote, "The Guild demands to bargain these impacts." The union cannot have a remedy which restores the status quo when it did not demand decision bargaining.

There are competing interests which were balanced to reach this result. The union interest is to be free to demand bargaining without passing every word and phrase through a legal sieve so fine as to choke off its communications to the employer. The employer interest is to rely on what the union says it is demanding to bargain. In this case, the employer was on notice that effects bargaining was demanded; the employer had scant notice that decision bargaining was demanded. The union may have believed that its intent was to demand both decision and effects bargaining, but was unclear in expressing its desire. The employer needs to know what is being demanded of it.

Based on the facts in this case, I find that a union faced with a *fait accompli* on a mandatory subject of bargaining must either remain silent and file its unfair labor practice charge, or be limited in remedies to the specific kind of bargaining requested in its demand.

Conclusion - Staffing Levels and Use of Leave Time

The employer increased minimum staffing levels for about four months in late 2003 - early 2004. That change materially impaired employees' ability to use accrued vacation time. The employer's assertion to the union that this is not a mandatory subject of bargaining is wrong. Because the employer's minimum staffing change impacted use of vacation leave, the employer had a duty to provide notice to the union well in advance of the proposed change, and to bargain the decision and any effects of the decision.

Where there is a *fait accompli*, and a union chooses to demand bargaining, its bargaining rights and remedies will be limited to the kind of bargaining it demanded.

Issue 1.2 - Did the union waive its bargaining rights, by contract, about staffing levels?

Affirmative Defenses Raised The employer raised two affirmative defenses at the hearing in this proceeding, although it should be noted that neither was identified in its answer. The employer argues, (1) the union waived its bargaining rights in language contained in the collective bargaining agreement, and (2) there was a business necessity to reduce the number of employees on leave.

Facts - Contract Waiver Affirmative Defense

The collective bargaining agreement provides, under "Management Rights," section 4.2, that the employer may "determine the number of shifts and the number of personnel assigned to such shifts." The employer asserts this clause allows it unfettered discretion to change minimum staffing even when it affects how accrued leave time may be used.

The union agrees that the collective bargaining agreement gives the employer the right to set staffing levels. However, former union president Gene Lawson testified that section 4.2 came into the contract in 1995, and had been unchanged since that date. He said that the meaning of the word "shifts" in the collective bargaining agreement was intended to convey that management has the right to set the number of shifts and the days and hours those entire shifts worked:

> Determining the number of shifts meant how many shifts would operate within the section; meaning that there would be a day shift, there would be a swing shift, there would be a night shift, there may be a couple of other different shifts, also known as 4th watch and/or 5th watch. . . . And the number of personnel assigned to such shifts related to how many total people -- not just people who would show up on a given day -- but how many total people were assigned to one of those shifts.

No testimony as to the intent of the section was offered by the employer's witnesses.

Legal Standard - Contract Waiver

A "waiver by contract" is an affirmative defense, and the party asserting it has the burden of proof. *Lakewood School District*, Decision 755-A (PECB, 1980) (cited with approval in *Chelan County*, Decision 5469-A (PECB, 1996)). The Commission has consistently held parties to a high standard concerning the specificity of language that would constitute a waiver by contract; if a union waives its bargaining rights by contract language, an action in conformity with that contract will not be an unlawful "unilateral change."

In *City of Yakima*, 3564-A (PECB 1991), the Commission wrote, "In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language

relied upon by the employer." The Commission found no waiver by contract language in *Yakima*, because contract provisions were either ambiguous or added no substance to the matter at issue. *Yakima* involved an employer directive concerning vacation and sick leave scheduling. Where the directive in part established a new limit on the number of employees permitted to be on vacation, the employer had a duty to bargain.

Analysis - Contract Waiver

Lawson made a logical and customary explanation of the meaning of the clause; the clause allows the employer to set the total number of people it hires and assigns to a shift. The employer offered no alternative view of the language. The party asserting an affirmative defense has the burden of proof. *City of Yakima*, 3564-A. That burden of proof has not been met.

Conclusion - Contract Waiver - Leave Issue

The employer has failed to carry its burden of proof. The affirmative defense should be denied.

Issue 1.3 - Was there a business necessity or emergency which required action without an opportunity to bargain?

Legal Standard - Business Necessity Defense

Where a party to a collective bargaining relationship is faced with a compelling legal or practical need to make a change affecting a mandatory subject of bargaining, it may be relieved of its bargaining obligation to the extent necessary to deal with the emergency, *Cowlitz County*, Decision 7007 (PECB, 2000). For example, in *City of Kalama*, Decision 6739 (PECB, 1999), the employer had to obtain a different health insurance plan after the employees changed their exclusive bargaining representative.

Kalama held that the lack of medical insurance was an emergency and that the employer was not required to delay the new insurance policy carrier decision until bargaining with the new representative was completed.

However, even if an employer has no duty to bargain on a particular subject due to a business or legal necessity defense, it is still required to give notice and bargain the effects of any change. *Val Vue Sewer District*, Decision 8963,[4] (PECB, 2005) citing *Wenatchee School District*, Decision 3240-A (PECB, 1990); *Mukilteo School District 6*, Decision 3795 (PECB, 1991), *rev'd on other grounds*, Decision 3795-A (PECB, 1992).

In summary, a respondent claiming a defense of legal necessity to a unilateral change must prove that (1) a legal necessity existed; (2) the respondent provided adequate notice appropriate to the situation of the proposed change; and (3) bargaining over the effects of the change did in fact occur or the complainant waived bargaining over the effects of the change.

Analysis - Business Necessity

The employer asserts that a threatened funding withdrawal created an emergency in the Communication Center. In 2002, the employer's Communication Center installed a new call counting and measuring program. The new technology proved that the employer did not meet the speed-of-answer standard. Before the new technology, King County and the employer debated for several years whether or not the employer met the speed-of-answer requirement. King County suspected the employer of failing the standard, but the employer argued that it was not sure because the data was insufficient.

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[4] *Val Vue Sewer District* is on appeal to the Public Employment Relations Commission. The reasoning of the examiner's decision is adopted for this discussion.

Thus the history of the funding dispute dates back several years, culminating in the threatened withdrawal of funding in 2003 as described above. In the summer of 2003, the employer began to shape a response to the speed-of-answer problem. This was not an emergency brought on by nature or outside forces, it was a lack of planning. Nothing in this situation rises to the level of a compelling need such as that described in *City of Kalama*, Decision 6739. Nor was there any notice to the union as required in *Val Vue Sewer District*, Decision 8963.

Nothing in the record suggests the remotest possibility that the employer did not have time to notify the union, and if requested, to bargain with the union over its proposed change in minimum staffing levels.

Conclusion - Business Necessity, Changed Use of Leave Time

There was no business necessity to make an emergency change in minimum shift staff levels. No notice was given to the union. When it discovered the change, the union demanded effects bargaining. The employer refused to bargain the change.

ISSUE 2 - Did the employer unlawfully implement an automated telephone directory system?

Facts

For as long as any witness could remember, and up through 2003, police department Communication Center dispatchers answered three telephone numbers: 911 emergency calls, non-emergency calls to telephone number 625-5011, and an insignificant small number of calls to activate alarm systems. In 2003, the employer decided to partially replace the dispatchers with an automated telephone directory for the non-emergency 625-5011 calls, which was about 25% to 30% of dispatchers' work.

The effect of the automated telephone directory is three-fold:

A) Some bargaining unit work has been mechanized and is done exclusively by the new system.

B) Some bargaining unit work is no longer performed by anything or anyone - discontinued service.

C) Some bargaining unit work is now done by non-bargaining unit members - skimmed work.

A) Legal Standards - Telephone Directory - Mechanized Work

Seattle School District, Decision 2078-B (PECB, 1986), involved an employer's installation of computerized controls on boilers, leading to the transfer of four high school custodial employees who were no longer needed. *Seattle* holds that a capital investment in technology is within the prerogative of management, and thus there is no duty to bargain the decision. Mechanization removes work from the bargaining unit, but the work no longer exists except in the automated system. *Port of Seattle*, Decision 4989 (PECB, 1995).

Spokane County Fire District 9, Decision 3021-A (PECB, 1990), addressed several issues, one of which was whether the employer could mechanize work by the introduction of computers. *Spokane* holds, "A union has the right to demand collective bargaining under Chapter 41.56 RCW only as to matters that are 'wages, hours and working conditions.'" It goes on to summarize many management actions which are within the employer's discretion but notes, "Where the decision itself is outside of the scope of mandatory collective bargaining, the employer will nevertheless be obligated to bargain the effects of that decision on its employees."

A) Analysis - Mechanized Work - Telephone Directory

Testimony indicated that some calls to the 625 number were from citizens asking, for example, for a phone number they could call to report a power outage. Before the phone tree, the dispatcher gave the citizen the correct number to call. After the phone tree, the

citizen would press option 2, then listen to the menu and press option 4, and be given the number to the city services bureau.

When a citizen calls the telephone number given by the automated telephone directory, the citizen's question is answered by an employee at a precinct, or at some other division of the employer. The employees who now answer non-emergency questions are not bargaining unit members.

Applying the principle in the *Seattle School District* boiler case and the *Port of Seattle*, the employer has no duty to bargain the decision to mechanize the provision of a phone number. However, a timely demand was made for effects bargaining and the employer failed to bargain.

A) Conclusion - Mechanized Work - Telephone Directory

The employer had no duty to bargain its entrepreneurial decision with the union. With respect to work which had been done by dispatchers, but is now done entirely by the automated telephone directory, effects bargaining was required. The union requested bargaining, but the employer did not bargain. The employer violated RCW 41.56.140 (4) in failing to bargain.

B) Legal Standards - Discontinued Work - Telephone Directory

A public employer's decision to discontinue a service to the public is a decision about the basic scope of services offered. Commission precedents and decisions under the National Labor Relations Act hold that employer decisions which determine whether or not to offer a service or product are within the core "entrepreneurial control" of the employer, and are therefore not mandatory subjects of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), concurring opinion of Justice Stewart, *IAFF Local 1052 v. PERC*, 119 Wn.2d 504 (1992), *Port of Seattle* Decision 4989 (PECB, 1995), *Tacoma-Pierce County Health Department*, Decision 6929-A

(PECB, 2001). An employer has no duty to bargain its decision to change, reduce or eliminate services.

An employer does have the duty to bargain the effects of an entrepreneurial decision. *Port of Seattle*, Decision 4989. Notice of a change must be given sufficiently in advance of the change to provide an opportunity for the union to request bargaining and to allow time for bargaining over the impacts and effects of the change. *Tacoma-Pierce County Health Department*, Decision 6929-A. An employer violates RCW 41.56.140(4) if bargaining is requested and it fails to bargain in good faith. *Federal Way School District*, Decision 232-A (EDUC 1977), *North Franklin School District*, Decision 5945-A (PECB, 1998).

B) Analysis - Discontinued Work - Telephone Directory

The range of questions answered by dispatchers answering 625-5011 was broad. Some, or many, of those questions may no longer be answered. The record is silent on whether all the work that was done by dispatchers is still performed. To the extent that work which was previously done by dispatchers is no longer performed by any of the employer's employees, that work is discontinued.

The union requested bargaining. The employer refused to bargain. *Tacoma-Pierce County Health Department*, Decision 6929-A, requires bargaining the effects of an entrepreneurial decision.

As the parties bargain over effects of the employer's decision to implement a telephone directory, it would be appropriate for them to attempt to discern whether the employer ceased offering answers to all possible police department questions.

B) Conclusion - Discontinued Work - Telephone Directory

The employer's decision to terminate a portion of its work is not a mandatory subject of bargaining, and the employer is not required

to bargain the decision. Because the effects must be bargained, and a request was made by the union, the employer should be found to have violated its duty to bargain.

C) Legal Standards - Skimmed Work

The bargaining obligation applies where an employer removes work from a bargaining unit and gives it to other employees. If an employer transfers bargaining unit work to non-unit employees without notice, an opportunity to bargain, and bargaining if a demand for bargaining is made, an unfair labor practice will be found for unlawfully skimming work out of the unit. *South Kitsap School District*, Decision 472 (PECB, 1978); and *City of Spokane*, Decision 6232 (PECB, 1998).

City of Seattle, Decision 8313-A (PECB, 2004), summarizes the impact of decisions to transfer work outside the bargaining unit as follows:

> The harmful effect of skimming results from the prejudicial effect on the status and integrity of the bargaining unit. The detriment from skimming may only be felt in the future, such as when transfers of bargaining unit work eventually lead to erosion of work opportunities, loss of promotional opportunities, and adverse effects on the job security of bargaining unit employees.

(Citations omitted.)

Under *South Kitsap School District*, unlawful skimming of bargaining unit work occurs when an employer fails to give notice to or bargain with the union before deciding to transfer work historically performed within the bargaining unit to employees outside of the bargaining unit. In *South Kitsap*, the employer eliminated the positions of classroom aides and transferred their work to other employees who were in other bargaining units or unrepresented. The employer committed an unfair labor practice in making that change without notice to the union before making a final decision. In

Spokane County Fire District 9, Decision 3021-A (PECB, 1990), the employer put volunteer firefighters on paid standby status to respond to emergencies, without prior notice to the union representing professional firefighters. Both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees were found to be mandatory subjects of bargaining.

The initial element in the proof of a skimming violation is establishing that the work at issue is, or could be, bargaining unit work. *City of Anacortes*, Decision 6830 (PECB, 1999), *aff'd*, *City of Anacortes*, Decision 6830-A. If it is bargaining unit work, a five-factor test is applied to determine whether an employer has a duty to bargain.

The five factors considered in determining whether a duty to bargain exists are stated in *Port of Seattle*, Decision 7271-B (PECB, 2003). Those factors are:

> (1) The employer's previously established operating practice as to the work in question, *i.e.*, had non-bargaining unit personnel performed such work before;
>
> (2) Did the transfer of work involve a significant detriment to bargaining unit members (as by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);
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> (3) Was the employer's motivation solely economic;
>
> (4) Had there been an opportunity to bargain generally about the changes in existing practices; and
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> (5) Was the work fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions?

Analysis - Skimmed Work

According to the Kimball report, approximately 220,000 calls a year came in to the non-emergency telephone number at the time of the

report. Testimony indicates a greater number a year later. Kimball's analysis indicated that the non-emergency calls consumed about 30% of dispatcher time.

Non-emergency calls which previously came into the Communication Center and are now answered by non-bargaining unit employees create potential skimming violations. The number of calls that are now answered by non-bargaining unit members, if any, is not in evidence - the parties did not provide any clear information on what happens to calls which no longer reach the Communication Center.

The parties must sort out at bargaining which of the 625-5011 calls are mechanized, discontinued, or skimmed. The record has no information whatsoever that would let an examiner determine what percent of the calls fall into each category.

Is it bargaining unit work? Chief Dispatcher Ronald Hale testified that 625 non-emergency calls were handled by coming into a primary E-911 operator's line. The primary operator would determine whether the issue was an emergency call. If it was not an E-911 call, the operator would transfer the call to a non-emergency 911 operator, who was also a bargaining unit member. The second dispatcher proceeded to take the required information, for instance, to process an abandoned vehicle report - name, address, phone number, location and description of the vehicle, and how long it has been there - and type it up as a computer form and send it via remote printer to the Parking Enforcement Office.

Non-emergency calls generated many different responses from dispatchers. It was possible that the caller merely needed another telephone number, such as to report a power outage. It was possible that the dispatcher needed to interview the caller and make a decision about what kind of action was required. As indicated above, the dispatcher might fill out a computer-generated

report for another division of the employer. The range of possible calls and possible responses was remarkably broad.

Dispatcher and Union President Scott Best described some kinds of calls which may come into the 625 number:

> Q. by Mr. Casillas: Can you explain generally what reasons citizens may be calling the non-emergency line for?
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> A. by Mr. Best: There would be a number of issues that people would call. It could be general Police Department questions. It could be information like "How do I become a police officer?" It could be questions like . . . laws about, you know, different traffic laws.
>
> You know, "Does a seven-year old have to have a car seat?" . . . "I have a handicapped sticker in my car. I want to get a yellow line painted on the curb in front of my house." It could be - it's endless, the questions that the public asks us and it just goes on and on. It could be about, you know, criminal versus civil.
>
> . . . [T]hey might say "Well, the neighbor's building . . . a fence and it's going over onto my property . . . is that something I need a police officer for?"
>
> Lot of times it's . . . . "Is this really a police matter or do I handle it a different way?" . . . we either answer the questions or we tell them . . . what city department they need to call.
>
> But if it's a police department question, we handle it. If we don't know the answer, we can go to our Chief Dispatcher or we can to the supervisor or whatever, but we get them the answer.
>
> Q: Were the dispatchers trained to handle those types calls and respond with the appropriate information?
>
> A: Yes. Been trained, trained to do that, and we have done that since I've . . . worked here.

Testimony also indicated that direct numbers to employer departments and divisions (police precincts, the jail, etc.), have always been available to the public. The record does not reflect whether general public inquiries by direct calls to departments and divisions were frequent before implementation of the automated telephone directory. The volume of calls into the non-emergency

number suggests that a primary contact point was through the police department Communication Center.

Where there are overlapping jurisdictions, the work remains bargaining unit work. Neither party addressed the possible issue of overlapping jurisdictions, nor was any evidence offered of what percent or proportion of total calls went directly to other divisions and departments before and after the automated telephone directory. The employer seemed to raise this at the hearing as another affirmative defense, but failed to state this in its answer or address the legal issue in its brief.[5]

The employer installed an automated telephone directory in early 2004 to answer the 625-5011 calls. That line is now answered by a mechanized menu of other telephone numbers to dial. The automated telephone directory only tells the caller the number to call for information. It does not provide any direct connection service to the other telephone numbers, except for a "stay on the line" option at the end of the menu which is ultimately answered by a dispatcher in the Communication Center.

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[5] The only evidence presented was that of witness Treadwell, who testified:

> When I first learned of the Department's interest in adopting this phone tree, I had some concern that with respect at least to the issue of abandoned vehicle reports, that the Dispatch Guild may in fact have had some exclusive jurisdiction of that work taking those reports and providing that information to Parking Enforcement.
>
> I looked into it, called the Parking Enforcement Unit, talked to the people there and found out that it was very much a shared jurisdiction because a number of the calls came either to the phone number for the Parking Enforcement Unit, to the abandoned vehicle hotline number, which was also in the phone book or to this non-emergency 625 number.

Is it a mandatory subject of bargaining? Answering the 625 number is bargaining unit work. The five-factor test of *Port of Seattle* must be applied to determine whether the change was a mandatory subject of bargaining.

(1) Previous practice: The dispatcher job description identifies non-emergency calls as part of the position, "Provides general information to callers including availability of services, jurisdictional limitations, program information and referral to appropriate departments and agencies." Testimony cited above greatly expands this brief list of bargaining unit members' duties, and indicates their historical work jurisdiction.

(2) Significant impairment: Top management in the Communication Center is made up of sworn police officers. The civilian career path goes up through the Dispatcher III position and some analyst/training positions, and then stops. The career ceiling is low because sworn officers manage the division. Seniority controls selection of shift, vacation and leave usage, and a host of other major working conditions. When the employer removed its need to hire more dispatchers, it froze existing dispatchers into their then-current seniority ranking. Overtime opportunities were significantly decreased. A clear detriment to working conditions is present.

(3) Economic motivation: The employer faced the issue of how to qualify to receive E-911 tax funds. It asked Kimball to help it analyze a method to reach the 90/10 speed of call standard. The Kimball report made three recommendations: increase staffing, decrease average call durations, and/or decrease the overall volume of calls. Evidence offered by the employer shows a very high rate of voluntary and mandatory overtime prior to the phone tree. The basis for the employer's decision to transfer work out of the bargaining unit was motivated by economics, specifically funding received and overtime costs incurred.

(4) Opportunity to bargain: The union was notified of the intention to implement an automated telephone directory sometime around the beginning of November 2003 after the employer had made a decision to install an automated telephone directory. The notice was oral and informal; the union president had a conversation with the director of the communications division. The decision was announced at a staff roll call meeting on November 21, 2003. On November 24, 2003, the union president requested a copy of the Kimball report and more information about the phone tree plan. (A previous written request was also made for the Kimball report on November 4, 2003.) The employer provided the Kimball report and the phone tree menu to the union president the next day. The union gave a written demand for bargaining to the employer on December 1, 2003. The employer met with the union to explain the automated directory, but it did not respond to the demand for bargaining. The union was not provided an opportunity to bargain.

(5) Work duties, skills, fundamentally different: Police Communications Dispatcher positions are within the Seattle Police Department. Witness Best testified about the range of caller questions, and concluded, "But if it's a police department question, we handle it." The employer required dispatchers to have knowledge of many aspects of police department operations. It also required dispatchers to question the caller to correctly identify the exact nature of the call, determine the information required to process the caller's request, and accurately fill out any forms available at the dispatcher's position for transmission of the work order to the operating division. The job description requires a broad range of knowledge and skills for response to a range of information requests. On-the-job and classroom training were provided for answering non-emergency calls.

It is bargaining unit work, and it is a mandatory subject of bargaining.

Did the employer give pre-decision notice? It appears that the decision to remove the 625 number from the Communication Center may have been made prior to the Kimball report analysis. In August, 2003, the Kimball report authors interviewed many significant people in the call center. The report included brief minutes of the content of those meetings. In an interview with the unit statistician on August 19, 2003, the meeting minutes indicate that the statistician "Said that a phone tree (voice menu) is being implemented." [6]

The evidence indicates that the employer had a fixed intent to implement a phone tree long before the union was told about it, similar to the facts in *Seattle School District* where the employer gave pre-implementation notice but only after having reached a fixed decision. Notice from the employer is required before the decision, not merely before the implementation. If requested by the union, the employer had a duty to bargain the decision and any impacts. *City of Clarkston*, Decision 3286.

The Kimball report suggested a call-reduction strategy as one of its three possible solutions to the speed-of-answer issue. It recommends "Implementing an interactive menu system on the non-emergency lines to allow callers to be routed to destinations outside of the PSAP[7] without call-taker intervention."

The union president indicated that he first heard of the automated telephone system "several weeks" before the employees were told about it at the November 21, 2003, roll-call. That first disclosure of a telephone system was made in a conversation between the

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[6] The unit statistician's position is within the bargaining unit, but she is not a union officer. She was called as an employer witness. Notice to her is not notice to the union, *Clover Park Technical College*, Decision 8534-A.

[7] A "PSAP" is a Public Safety Answering Point.

union president and the director of the call center. The record is silent on the purpose of the conversation, whether it was long or short, and what the extent of the disclosure was of plans for an automated telephone directory. The duty of an employer to provide notice to a union of proposed changes includes the duty to give the information in a clear manner to a union representative, not just to a member and not merely a casual mention, *Clover Park Technical College,* Decision 8534-A. The record points to actual notice being received at least by the November 21, 2003, roll call meeting.

Here, as in another case between the same parties, the union was presented with notice that the employer was going to implement a change. Nothing in the employer's conduct when it gave notice or when it met with the union indicated the slightest possibility that its decision was tentative. This was a *fait accompli*, just as in *City of Seattle*, Decision 8916 (PECB, 2005).

Did the union request bargaining? On November 24, 2003, the union president wrote the human resources director, ". . . This phone tree was discussed in our roll call on 11/21/03 and it appears there may be impacts to our membership as a result of this change. Please advise specifically what this phone tree will be used for so the Guild can determine if there are any mandatory subjects that will need to be bargained."

On November 25, 2003, the union received a copy of the non-emergency phone information menu. On December 4, 2003, the union sent a letter to the human resources director, ". . . The Guild has reviewed the material provided by the City and *has determined there are impacts of said implementation which involved mandatory topics of negotiation.* In part, those topics include: transfer of work which could result in a layoff of Guild members. Therefore, consider this letter a demand to bargain filing." (emphasis added.)

Was there a *fait accompli*? Again, this is the same issue of first impression; does a union lose its right to decision bargaining, and its remedies for failure to bargain, when it seeks bargaining of impacts and effects only? Having previously weighed the employer's interest in knowing what is asked of it versus the union's interest in protecting its right to bargain, the conclusion should be the same. The union should be limited to the bargaining it requested.

Did the employer bargain? The employer refused to bargain. The employer and union met in December, at which meeting the employer explained why it was implementing the automated telephone directory. No further discussions were held.

As stated in the employer's post-hearing brief, case law requires impacts bargaining for any unilateral change, including changes which are entrepreneurial. The employer's failure to bargain impacts is inexplicable.

C) Conclusion - Telephone Directory - Skimming

Based on the evidence taken as a whole, including testimony of the witnesses, history of the work involved, the position description for dispatcher, training for and utilization of this range of knowledge, and the sheer volume and variety of calls, the union has made a showing of skimming. As indicated by the employer, 220,000 calls are no longer coming into the dispatchers' work stations.

The employer violated RCW 41.56.140(4) in failing to bargain the effects of transferring work to non-dispatcher bargaining unit employees. The decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees are mandatory subjects of bargaining. However, the union did not ask for decision bargaining. The union requested effects bargaining. The employer failed to bargain effects.

Issue 2.4 - Did the union waive its bargaining rights, by contract, about automation?

Legal Standard - Contract Waiver Defense - Telephone Directory

The legal standards are described in the section on the use of leave change. The employer has the burden of proof, the contract language must be clear and specific. *City of Yakima*, 3564-A.

Analysis - Waiver by Contract - Telephone Directory

The collective bargaining agreement provides, under "Management Rights," section 4.1, that the employer may "diminish or change municipal equipment, including the introduction of any and all new, improved or automated methods of equipment."

The employer contended at the hearing that implementation of an automated telephone directory falls within this contractual management rights provision. The employer did not assert this affirmative defense in its answer. Its brief mentions this defense interwoven with other arguments, making it difficult to discern its argument on this point.

Testimony regarding this clause was that it had been in the contract for over 20 years, had never been discussed at the bargaining table to any witnesses' recollection, and that the constant technological changes in the Communication Center had not been a subject of dispute between the parties. None of the previous technological changes had the effect of removing bargaining unit work.

No bargaining history or past practice has been offered by either party. One reading of section 4.1 could support the employer's contention, but it has not offered any affirmative evidence showing

any specific discussion of this contract clause. The burden of proof is on the employer.

In addition, the employer's contention at hearing differs from that made when the union requested bargaining. The employer responded to the union's demand to bargain with a November 25, 2003, e-mail to the union president. In the e-mail, the employer wrote, "Here I am exercising the efficiency clause of Article 4 of the collective bargaining agreement." The employer relies on section 4.1, but it is unclear whether it is relying on the "efficiency" language or the "automated methods of equipment" language.

Conclusion - Contract Waiver - Telephone Directory

The employer has not carried its burden of proof that the contract language of section 4.1 is a waiver of the union's right to request bargaining the decision and its effects.

Issue 2.5 - Did the employer have a business necessity or emergency which required action without an opportunity to bargain?

Legal Standard - Emergency or Business Necessity - Telephone Directory

The legal standards are described in the section on the use of leave issue above. A compelling legal or practical need to make a change will excuse an employer from its bargaining obligation to the extent necessary to deal with the emergency, *Cowlitz County*, Decision 7007 (PECB, 2000).

Analysis - Emergency or Business Necessity - Telephone Directory

The employer argues that a threatened loss of funding was an emergency, creating a business necessity to implement a unilateral change. The employer did not announce its decision to install an

automated telephone directory until it had formed a fixed intent to do so. When faced with an emergency, an employer may make a change "to the extent necessary to deal with the emergency." *Cowlitz County*. If the employer was dealing with an emergency, it nonetheless could notify the union that it had an emergency, that immediate action was required, and that it would stay in touch with the union should bargaining obligations surface as the emergency was confronted. The employer's silence is troubling.

The record does not have any information on when the employer made its decision, or what time and process was required to reach its decision. In the absence of that information, it is impossible to discern facts upon which the employer could prevail.

Conclusion - Emergency or Business Necessity - Telephone Directory

The employer has failed to carry its burden of proof that it was faced with an emergency or a business necessity.

REMEDIES

Legal Standard - Remedies

The Public Employment Relations Commission imposes remedial orders to effectuate the purposes of Chapter 41.56 RCW. In unusual circumstances, it can impose extraordinary remedies. An extraordinary remedy often used by the Commission is an award of attorney's fees incurred by the opposing party.[8]

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[8] The union's charge filed in this case requested an advertisement posted in the Seattle PI and Seattle Times newspapers. The union's request is far beyond the remedial purposes of the statute, and not among the remedies previously ordered by the Commission. The union's request is denied.

An example of an award of attorney's fees is found in *Seattle School District*, Decision 8976 (PECB, 2005). In *Seattle School District*, the employer refused to supply information requested by the union in a timely manner. The examiner reviewed Commission cases awarding attorney's fees, and made the following analysis:

> Attorney fees are a sparingly used remedy. The three general grounds for an award of attorney fees are:
>
> - If the defense to the unfair labor practice is frivolous or meritless, or
>
> - If there has been repetitive illegal conduct or egregious or willful bad acts, or
>
> - If the respondent has engaged in a pattern of repetitive conduct showing a patent disregard of its statutory obligations.

In *Seattle School District*, Decision 8976, attorney's fees were awarded to the union.

A previous Seattle School District case, *Seattle School District*, Decision 5733-B (PECB, 1998) also awarded attorney fees to the union, holding that an award of attorney fees should be made when it is "necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless", citing *Municipality of Metropolitan Seattle v. PERC*, 118 Wn.2d 621 (1992).

Analysis - Remedies

This employer has shown a pattern of repetitive conduct. It has a recent history of taking unilateral action and then litigating, rather than carefully considering the collective bargaining agreement and the legal duties arising from its relationship with the union. *See City of Seattle*, Decision 8313-A and *City of Seattle*, Decision 8916.

The employer raised frivolous affirmative defenses. Before the hearing, the employer's answer requested deferral to arbitration,

but stated "the employer is not willing to waive any procedural defenses to arbitration." On September 7, 2004, three weeks before the hearing, the employer filed a motion for a deferral to arbitration and request for continuance. The basis of the continuance request was to permit time to rule on the deferral request. The union immediately filed a brief in response to the motion. The employer's motions were denied on the grounds that the employer continued its refusal to waive procedural defenses to arbitration.

The employer's answer did not raise contract clause affirmative defenses, nor did it assert the business necessity defense. Its motion for a deferral and a continuance were the first time the union was put on notice the employer was claiming contract language affirmative defenses. The employer raised the business necessity defense for the first time at the hearing.

The employer's brief concedes for the first time that the employer had a duty to engage in effects bargaining on its actions. The employer's brief barely touched on its contract language defenses. In response to the employer's moving target of defenses, the union devoted many pages in its post-hearing brief to thorough analysis on the contract waiver and business necessity issues.

The employer contended that changing staffing levels with the result of reducing use of leave time was exempt from bargaining. On November 4, 2003, the union advised it that, ". . . our members do not have the same ability to use accrued discretionary time because of the increased staffing levels." The human resources director replied to the union on November 20, 2003, stating that, ". . . it is the City's position that minimum staffing levels are not a mandatory subject of bargaining." The employer willfully disregarded the fact that leave time had been changed. The law has been very clear on leave time scheduling since *City of Clarkston*, Decision 3286, and cases cited in that decision. Well-settled law

existed to guide the employer; it does not appear that the employer considered that law before responding to the union.

The employer decided to implement an automated telephone directory, and received a request to bargain from the union. The employer responded by writing that it was exercising the efficiency clause of the contract. This was the employer' only response to union concerns regarding removal of 25% to 30% of bargaining unit work. The employer's brief after the hearing was its first concession that it had a duty to bargain.

Conclusion - Remedies

The employer should not be rewarded for its repeated failure to give prior notice and to bargain in good faith. Extraordinary remedies are appropriate. An award of attorney fees is required to make this order effective.

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.030(1).

2. The Seattle Police Dispatchers' Guild is a bargaining representative within the meaning of RCW 41.56.030(3).

3. The union represents a bargaining unit of police communications dispatchers and analysts employed by the employer.

4. At the time of the controversy in this matter, the employer and the union were parties to a collective bargaining agreement with a term of January 1, 2002, through December 31, 2004, which covered the dispatcher bargaining unit.

5. More dispatchers are assigned to each of the five shifts than are needed for operations, to allow for absences and leave use. The parties had a practice of permitting dispatcher employees to use accrued leave time for a one day absence if there were more dispatchers scheduled for a shift than required by the minimum shift staffing level.

6. Beginning in October 2003, for four months, the employer increased the minimum staffing levels for all shifts. The change reduced employees' opportunities to use leave time.

7. The employer did not notify the union of the change prior to its implementation.

8. On November 4, 2003, the union demanded effects bargaining.

9. The employer met with the union in early December. The employer refused to bargain the leave usage effects of the increase in minimum shift staffing.

10. The collective bargaining agreement, section 4.2, states that the employer may "determine the number of shifts and the number of personnel assigned to such shifts".

11. Uncontroverted testimony defined the meaning of section 4.2 to give the employer only the ability to set the total number of people it hires and assigns to one of the five shifts.

12. Nothing in the wording of section 4.2, nor in its prior application by the parties, permits the employer to reduce opportunities for leave use by increasing the number of people on a shift who have to be at work.

13. Funding to the employer of E-911 tax funds was conditioned on meeting an average speed of answer requirement. The employer knew of this requirement for at least two years prior to the

funder's insistence on compliance. The employer had substantial notice that it must improve speed of answer to continue funding.

14. There was no unforeseeable emergency or business necessity which required immediate change of shift staffing by the employer, preventing it from providing prior notice to the union and, if requested, to bargain the decision and effects.

15. About October 20, 2003, the employer notified the union that it was going to implement a telephone tree.

16. On November 24, 2003, the union made a written request for information from the employer asking for specifics on the phone tree. The employer provided the union with a copy of the automated telephone directory menu the following day.

17. On December 1 and again on December 4, 2003, the union demanded effects bargaining.

18. The employer met with the union in mid-December to explain the automated telephone directory. The employer demonstrated a fixed intent to implement the change. The employer did not bargain effects of the implementation.

19. In January 2004 the employer implemented an automated telephone directory and removed 25% to 30% of dispatcher work from the bargaining unit. Some of the work was mechanized, some was discontinued, and some was transferred to non-bargaining unit employees.

20. The employer's decision to mechanize some work was an entrepreneurial decision.

21. The employer's decision to discontinue some work was an entrepreneurial decision.

22. The employer's automated telephone directory gives callers the phone number of non-bargaining unit employees of the employer to process information requests previously performed by dispatchers, thus transferring some bargaining unit work to non-unit employees.

23. The collective bargaining agreement, section 4.1, states that the employer may "diminish or change municipal equipment, including the introduction of any and all new, improved or automated methods of equipment." No evidence was offered as to the scope and intent of this section.

24. There is no history of the employer's implementation of a change in municipal equipment which had the effect of removing work from the union's bargaining unit and moving it to non-bargaining unit employees of the employer. History reflects gradual efficiency increases through equipment changes, without changing the calls coming in to bargaining unit members. The implementation of an automated telephone tree removed a large category of calls from bargaining unit members.

25. Funding to the employer of E-911 tax funds was conditioned on meeting an average speed of answer requirement. The employer had substantial advance notice that it must improve speed of answer to continue funding.

26. The employer had sufficient time to give prior notice to the union of its potential decision to implement an automated telephone directory.

27. The employer raised frivolous defenses, there have been repeated acts of illegal conduct, and the employer has shown patent disregard of its statutory bargaining obligations.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By its actions in implementing a unilateral increase in minimum staffing leading to reduction in available leave time as described in Findings of Fact 4, 5, and 6 above, the employer failed to bargain regarding a mandatory subject of bargaining and presented the union with a *fait accompli*, a violation of RCW 41.56.140(4).

3. By its actions in requesting only effects bargaining regarding the change in shift staffing and leave use, as described in Finding of Fact 8 above, the union waived decision bargaining and was entitled to effects bargaining only.

4. By its actions in failing to bargain the effects of the staffing change as described in Finding of Fact 9 above, the employer failed to bargain, and interfered with employee rights, violations of RCW 41.56.140(4) and (1).

5. As described in paragraph Findings of Fact 10, 11 and 12 above, the employer failed to carry its burden of proof that section 4.2 of the collective bargaining act is a union waiver of the right to bargain this leave usage decision, WAC 391-45-270(1)(b).

6. As described in Findings of Fact 13 and 14 above, the employer failed to carry its burden of proof that there was a business necessity or emergency which prevented it from carrying out its statutory obligation to bargain with the union, WAC 391-45-270(1)(b).

7. The employer's failure to bargain effects of the mechanized and discontinued bargaining unit work performed by the automated telephone directory, as described in Findings of Fact 15 through 21 above, when requested to do so by the union as described in Findings of Fact 17, the employer committed an unfair labor practice and interfered with employee rights in violation of RCW 41.56.140(4) and (1).

8. The employer's actions in implementing an automated telephone directory which removed some work from the union to non-bargaining unit employees of the employer, as described in Findings of Fact 19 and 22, the employer failed to bargain regarding a mandatory subject of bargaining and presented the union with a *fait accompli*, a violation of RCW 41.56.140(4).

9. By its actions in requesting only effects bargaining on the automated telephone directory, as described in Finding of Fact 17 above, the union waived decision bargaining and was entitled to effects bargaining only.

10. As described in Findings of Fact 23 and 24 above, the employer failed to carry its burden of proof that section 4.1 of the collective bargaining act is a union waiver of the right to bargain the effects of implementation of an automated telephone directory, WAC 391-45-270(1)(b).

11. As described in Findings of Fact 25 and 26 above, the employer failed to carry its burden of proof that there was a business necessity or emergency which prevented it from carrying out its statutory obligation to bargain with the union, WAC 391-45-270(1)(b).

12. The employer should be required to pay reasonable attorney fees incurred by the union in its prosecution of this charge.

ORDER

On the basis of Conclusions of Law 2, 4, 7, and 8 above, the complaint charging unfair labor practices by the City of Seattle against the Seattle Police Dispatchers' Guild, filed in case 18375-U-04-4684, is SUSTAINED on the merits.

The City of Seattle, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with the Seattle Police Dispatchers' Guild as the exclusive bargaining representative of the bargaining unit described in paragraph 2 of the Findings of Fact;

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Negotiate in good faith with the Seattle Police Dispatchers' Guild regarding the effects of any change in leave use availability.

   b. Negotiate in good faith with the Seattle Police Dispatchers' Guild regarding the effects of the automated telephone directory.

   c. Post, in conspicuous places on the employer's premises where notices to all bargaining unit employees are usually posted, copies of the notice attached hereto. Such notices shall be duly signed by an authorized

representative of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Read the notice attached to the order into the record at a regular public meeting of the City of Seattle City Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

e. Reimburse the Seattle Police Dispatchers' Guild, upon presentation of affidavits, for its attorney fees incurred in the prosecution of this matter.

f. Notify the Seattle Police Dispatchers' Guild, in writing, within 20 days following the date of the order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice required by this order.

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington this 23rd day of November, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Sally B Carpenter

SALLY B. CARPENTER, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE UNLAWFULLY failed to give notice prior to making a decision, and, upon request, to bargain in good faith with Seattle Police Dispatchers' Guild in connection with our change in minimum staffing which reduced employees' ability to use leave time.

WE UNLAWFULLY refused to bargain the effects of our change in minimum staffing when the union requested us to bargain the effects.

WE UNLAWFULLY failed to give notice prior to making a decision to remove bargaining unit work by implementation of the automated telephone tree.

WE UNLAWFULLY refused to bargain the effects of the automated telephone directory when the union requested us to bargain the effects.

WE UNLAWFULLY interfered with our employees in the exercise of the collective bargaining rights under state law.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL negotiate in good faith with the Seattle Police Dispatchers' Guild regarding the effects of any change in leave use availability.

WE WILL negotiate in good faith with the Seattle Police Dispatchers' Guild regarding the effects of the automated telephone directory.

WE WILL reimburse the Seattle Police Dispatchers' Guild, upon presentation of affidavits, for its attorney fees incurred in the prosecution of this matter.

WE WILL NOT unilaterally implement changes of the wages, hours or working conditions of employees in the bargaining unit represented by Seattle Police Dispatchers' Guild.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ City of Seattle

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 711 Capitol Way, Suite 603, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. A full copy of Decision 9173 will be published on PERC's website, www.perc.wa.gov.