

The employer duly submitted its answer on May 26, 1998. A hearing was held on April 27 and May 3, 1999, before the Examiner.² The parties' post-hearing briefs were due June 29, 1999.

From the evidence and arguments presented by the parties, the Examiner concludes that this employer had no duty to bargain its decision to get out of the business of providing emergency dispatch services by transferring that function to another governmental agency. Furthermore, that the union waived its right to bargain the effects of that decision by failing to request bargaining and/or by failing to respond to the multiple offers to bargain advanced by the employer.

BACKGROUND

The Skagit Emergency Communications Center

For many years, the City of Anacortes operated an emergency dispatch center within its police department, providing services for the Anacortes Police Department, the Anacortes Fire Department, the LaConner Police Department, the Swinomish Tribal Police, and two local fire districts. The dispatch center also had a contract to dispatch emergency medical services. Funding for the Anacortes

practice proceedings before the Public Employment Relations Commission.

² The Examiner was assigned three related cases involving three separate employers (who were all represented by the same attorney) and three separate units (two of which were represented by another). The Examiner attempted to schedule a consolidated hearing for all three cases, but that effort was abandoned after one of the cases was settled by the parties, the union in another of the cases changed attorneys, and several postponement requests were received. This complaint was then scheduled for hearing separate from the other remaining case.

dispatch operation was from the employer's general fund, income from the contracted dispatch services, and from money rebated to the employer from the county emergency services tax.³

The technology in place at Anacortes had limitations. The only means to identify incoming calls was an automatic number identification which gave the dispatcher limited information about where the call originated. The specific address would then have to be obtained by use of a cross-directory, or by calling a telephone company operator. From time to time, the Anacortes center received calls from outside its service area, and had to transfer such calls to another dispatch center. The reverse of that situation also occurred, when other dispatch centers received calls for services dispatched from the Anacortes center, and had to transfer those calls to the Anacortes center.

In 1991, the Washington State Legislature passed amendments to Chapter 38.52 RCW, titled "Emergency Management", including:

RCW 38.52.510 STATE-WIDE 911 ENHANCED SERVICE--FUNDING BY COUNTIES. By December 31, 1998, each county, singly or in combination with adjacent counties, shall implement district-wide, county-wide, or multi-county-wide enhanced 911 emergency communication systems so that enhanced 911 is available throughout the state. The county shall provide funding for the enhanced 911 communication system in the county or district in an amount equal to the amount the maximum tax under RCW 82.14B.030(1) would generate in the county or district or the amount necessary to provide full funding of the system in the county or district, whichever is less. The state enhanced 911 coordination office established by RCW 38.52.520 shall assist and facil-

³ The portion of the county tax paid to the Anacortes dispatch center subsidized the time and expenses of the least-senior full-time employee and the cost of the emergency services telephone lines.

itate enhanced 911 implementation throughout the state.

Portions of that legislation were referred to the electorate under a ballot title of: "Shall enhanced 911 emergency telephone dialing be provided throughout the state and be funded by a tax on telephone lines". That ballot measure was approved.

Various public entities in Skagit County began working towards the development of a Skagit County Emergency Response system which would supplant the existing dispatch systems operated by the county and various municipalities.⁴ They signed an Interlocal Cooperation Agreement for a County-Wide Public Safety Communications Center on April 13, 1998. The purpose of the new Skagit Emergency Communications Center (SECOM) formed by that agreement was stated as:

SECOM shall provide law enforcement, fire and emergency medical services communications support to the signatories of this Agreement and to other contract agencies. SECOM shall provide services by radio an/or telephone. Nothing within this Agreement shall relieve the units, entities, or agencies from their responsibilities to provide their own equipment for receiving communications from SECOM and their own equipment for communication between their own personnel. SECOM will also maintain such records and reports as are necessary for the execution of this Agreement. These reports shall include financial, statistical, and operational information and shall be provided to all parties of this Agreement on a monthly basis.

Arrangements for the governance of SECOM were described in section 4 of the same document, as follows:

⁴ The participants included at least: Skagit County; the cities of Anacortes, Burlington, Mount Vernon, and Sedro-Woolley; and the towns of Concrete, Hamilton, LaConner, and Lyman.

SECOM To Be Managed By The Skagit County Emergency Management Council: SECOM shall be governed by the Skagit County Emergency Management Council, hereinafter referred to as the "Council", that is composed of the following elected officials: Mayor of Anacortes, Mayor of Burlington, Mayor of Concrete, Mayor of Hamilton, Mayor of LaConner, Mayor of Lyman, Mayor of Mount Vernon, Mayor of Sedro-Woolley, Board of County Commissioners per County Ordinance #8859 and Interlocal Agreement. The Council shall determine the specific services to be rendered and shall:

- Approve policies and procedures related to the operation of SECOM.
- Determine financial responsibility and participating agency costs.
- Approve the SECOM budget.
- Appoint/terminate the SECOM Director.

SECOM also provides emergency communications services for entities that are not members of the council, including communities or health service providers within Skagit County.⁵

The Anacortes Transition

The Anacortes Police Services Guild has been the exclusive bargaining representative of employees in the Anacortes Police Department since 1989. City of Anacortes, Decision 3150 (PECB, 1989). Mike Catlin was president of the union at the outset of this controversy. He was succeeded by Lou D'Amelio.

On June 23, 1997, employer Human Resources Director Kimberley Somers sent a letter to Catlin, concerning the transition from employer-provided dispatching to the county-wide dispatch center. That letter provided information and solicited bargaining:

⁵ Those entities include the Swinomish Tribal Council, the Upper Skagit Tribal Council, Affiliated Health Services, and a county medical program.

As you know, with the planned establishment of a new county-wide consolidated dispatch system, we will no longer provide our own dispatch service. This decision is the equivalent of the City and the other public agencies "getting out of the business" and allowing the new public agency to assume those functions. Even though the City is not obligated to negotiate the decision to consolidate, **we will negotiate the effects of this decision on your bargaining unit members, if you desire.**

First, by way of background, all public agencies with police and fire dispatch staffs in Skagit County intend to consolidate their functions in one new independent public communications center. As you are no doubt aware, this consolidation is an outgrowth of the initiative passed by the voters to provide enhanced 911 service. All of the public agencies in the County have agreed to join in this consolidated dispatch for reasons that have no connection with labor rates or benefits contained in your contract or the other four union contracts involved. Rather, this consolidation is to provide superior 911-dispatch service to members of the public, increased protection for public safety employees who depend on dispatch and increased efficiencies from one centralized dispatch. A consolidated dispatch is also an important step to secure significant state grants.

A newly created independent municipal corporation will operate the center, not Skagit County nor any of the involved cities. The employees currently performing dispatch functions will not automatically become employees of this independent agency.

We are aware of the impacts of this consolidation and share your concern about the effects on our employees. To this end, we will do our best to keep you apprised of policies and decisions of the Emergency Management Council that affect your members. We are also more than happy to clarify the reasons for the decision to consolidate dispatch functions. We look forward to the opportunity to explore with you appropriate responses to the impacts of this exciting consolidation decision.

[Emphasis by **bold** supplied.]

Catlin acknowledged having "several" conversations with Somers and another management official following receipt of that letter. He testified that the union did not respond formally because it did not have sufficient information available to it. Specifically, the union wanted more information concerning the timetable for construction of the new dispatch center and for the consolidation of services, how many employees would be impacted, and the manner in which employees would be impacted. Catlin testified that the information was necessary for the union to formulate reasonable proposals concerning the effects of the consolidation decision.

Union representatives, Somers, and representatives from other impacted unions and employers attended a meeting on November 14, 1997, where they were given tentative timetables of one month for the hiring of a director and five months for the opening of the new dispatch center. It was estimated that approximately 43 employees would be affected by the consolidation county-wide (i.e., hired by the new center, given other assignments with their existing employers, or lose their jobs), and that 27 to 31 dispatchers would be hired by the new center. Attendees were told the Skagit County Emergency Management Council had decided consolidation of the dispatch centers was necessary to fulfill the mandate from the state legislature. Bruce Schroeder, an attorney representing some of the employers involved, stated that the director of the new center would be responsible for filling its dispatch positions.

Later in the same month, Anacortes Police Chief Mike King wrote to the union, as follows:

This letter is to inform you that Police, Fire and EMS agencies within Skagit County have begun the process to work toward a consolidated 911/Dispatch Center within the County.

This decision, which may take up to two years to achieve if it occurs, does have a potential to impact some members of your Guild.

At this stage I do not know for sure what this impact, if any, may be. I do know that I do not want anyone to be uninformed about the possibilities of these changes.

To assure that everyone is informed, I would invite you to discuss any questions or concerns that are brought to you. Please feel free to contact me. At this state, I do not have any information other than the initial proposal which is just now being released to all involved entities.

Please contact me to set up a meeting time so I can bring you up to date on the draft proposal.

[Emphasis by **bold** supplied.]

The record does not indicate any direct response by the union to that invitation.

Staffing of the new dispatch center was the subject of an exchange of e-mail messages between one of the affected employees and Chief King. On December 17, 1997, Dispatcher Bradford Stavig wrote:⁶

Perhaps you could shed some light on rumors flying around concerning the director's position. Since you are on the head-hunting committee ...

Previously, I heard that there were sixteen applicants and that list was narrowed down to three (per Stephanie Wood), and the position was to be filled as of December 1, 1997. Now, as rumor has it, the whole process has been killed, and it is starting all over. The reason?

Rumor has it, that the qualifications needed did not fit John Church's background, and he did not make the final three applicants. Rumor also has it that the qualification have been revamped so he will now qualify for consideration.

⁶ Stavig was vice-president of the union at that time.

If you could dispell or verify this it would be appreciated.

On another issue:

As you are aware, the wagons are being circled by various guilds and union interests regarding the combined center. Per those who attended the December 8th meeting and what was reported in the Skagit Valley Herald, it appears that the ILU and the final budget will not be ratified until April or May of next year. During this time, construction on the new center will continue as planned.

Please correct me if I'm wrong, but how is it possible to build a new center to the point of final completion without having an ILU signed beforehand for 100% compliance, as well as an operating budget. And when are public comments going to be heard regarding the entire process?

It appears to a good many of us that by postponing any public comments and the final budget/interlocal agreement until 4-5 months from now, that the project will be a "point of no return," that is, if any jurisdiction decides not to be a part of it, the funding issue is not resolved or there is an outpouring of opposition, that taxpayers could be left with a shell of a building. ...

King replied by means of an e-mail message sent to Stavig that same day, as follows:

Brad, in response to your e mail of this morning I have responded to your questions below.

With regard to the Directors position what you are hearing is rumor. What happened was that 16 original applications were received. These were then screened down to 6 for interview. A few days before the interview date two of the six dropped out. On the day of the interview one more dropped out. This left three applicants to be interviewed. Each of the three were interviewed. At the end of the interview process the group doing the interviews felt that because we only had three applicants to choose from we would readvertise [sic] to get

the best candidate possible. At this stage I feel that Mr. Church could have left his application in place and competed with the next group. Mr. Church was not pleased with the results and has voiced that openly. He has told me that he has no intention of competing for the job at this point. The group is scheduled to meet this Friday to screen a new set of applicants and set up an interview date for those new applicants.

With regard to construction of the new center, it needs to be remembered that the building is not just a communications center. It will also house the Department of Emergency Management, a county-wide emergency operations center, and the county-wide Emergency Medical Services Office. To do this, the building is to be paid for from a number of different sources. The 911 portion of the building is being paid for with state funds under the E911 grant. It is possible that if everyone chose to do their own dispatching the county would still operate a E911 answering point and then direct calls to the appropriate dispatch centers. As you can see, your concern about an empty building is not likely to take place.

As for the interlocal agreement, I am sure that until a more firm budget is in place for all of us to see no one is going to sign up. That is why we have been trying to get a director in place to firm up the budget and answer many of these questions.

I would be happy to sit down with you and give you some of the history and background about this whole system that is currently in place. This may help you understand why things are happening they they [sic] are. Please feel free to come in and see me if you would like. Thanks for asking about these things.

The record does not indicate that Stavig or any other union official took up the chief's invitation to discuss the matter.

Several months later, King sent all the Anacortes dispatchers an e-mail concerning an article that appeared in the local newspaper:

I am writing this in response to the article about the new 911 director.

I talked with some of the people that were present at the Emergency Management Council when we discussed the hiring of the new centers [sic] employee to be sure I had understood the conversation at that time.

I can tell you that no firm method or process has been set out to staff the new center at this time to my knowledge nor to the knowledge of the people I spoke with. I am still committed to the idea, as are others, that the dispatchers currently working in the existing dispatch operations in the county will get the first opportunity to staff the new center.

I do not know where the reporter obtained his facts. No one that I have spoken to recalls this information.

We have not made any decisions about a process at this stage. I will continue to support the concept of the new center being staffed from within the existing [sic] centers in some fashion. If I can answer any questions please feel free to ask.

Again, the record does not indicate that any union official took up the chief's invitation to discuss the matter.

By letter of April 21, 1998, Somers gave the union notice of the transfer of 911 emergency dispatch duties from the employer's Police Department to the new central dispatch center:

This letter is to notify you that the planned transfer of 911 and dispatch duties currently conducted by the City of Anacortes to the newly formed Skagit Emergency Communications Center (SECOM) will take place on approximately September 15, 1998. An employment announcement will be sent to all current dispatchers by April 30th so they can apply for the dispatch positions at SECOM. I will be sure you receive a copy of that announcement.

Chief King and I would like to meet with you, as the Police Services Guild representative, to discuss the impacts this change will have

on you members. We are available to meet with you during a variety of times during the first two weeks of May. Please advise me of any dates you have available during that period. Of course, these discussions are separate from our on-going contract negotiations. (Which reminds me, have you set any thing up with Pat Emmal?)

[Emphasis by **bold** supplied.]⁷

Again, the record does not indicate that any union official responded to the employer's invitation to discuss the matter.

On April 28, 1998, the newly appointed director of the new dispatch center, Hank Cramer, sent letters to the Anacortes dispatchers, offering them the opportunity to apply for the 27 dispatch positions and 3 supervisor positions at the new center. Cramer indicated he would be accepting applications until May 29, 1998, that he expected to hire the dispatchers in late August, and that the new center would be fully operational on September 15, 1998. While Cramer emphasized that he would be selecting the 27 dispatchers based upon seniority among the applicants (and not based upon a competitive selection process), he stated that all of those hired for the new center would be on probation for one year in order for him to evaluate the performance, job skills, and attitudes of all new staff members. He also outlined rates of pay, benefits, and generally described the new work environment.

Also on April 28, Chief King sent an e-mail to the Anacortes dispatchers concerning the hiring process for the new center:

⁷ The reference to the "on-going" contract negotiations reflects an agreement between the parties, requested by the union, to refrain from discussing the new dispatch center or the transfer of the dispatch work to the center in the contract negotiations. Patrick Emmal was the attorney representing the union in those negotiations.

I have been advised of the procedure that will be used for the hiring of dispatchers for the consolidated 911 center. Each of the current dispatchers in the 5 existing [sic] dispatch centers will be receiving a letter and application for the job of dispatcher in the new center. These applications will be coming out in the next week and will have a deadline of late in mail [sic] to be submitted.

Once the deadline passes all of the submitted applications will be rank ordered by seniority and the senior 27 applications will be given interviews and background checks and unless there is some security concern they will be offered jobs. These jobs will have a one year probation [sic] period. Information regarding pay and benefits will be in the application packet.

At this time the projected start up date has been set for the 5th of September. The three supervisory positions will be filled by an application process that will be open to anyone. I [sic] any or all of the supervisors are selected from the 27 dispatch applicants, the remaining dispatchers on the seniority list who applied will be given an opportunity to be hired so the potential is for 30 persons to be hired in the new center.

If you have any questions about this process please contact me and I will try to get an answer for you. I believe that you will get a great deal of your questions answered once the applications arrive.

[Emphasis by **bold** supplied.]

In a May 11, 1998 letter to Catlin, Somers again invited the union to discuss the impacts of the transfer of the dispatch work:

As you know, plans are well underway to move our current 911 operation into the combined county-wide facility, Skagit Emergency Communications (SECOM). We anticipate the new center will be operational, at least to some degree, in September. All of our current dispatchers received application packets for the new center's dispatch positions and should

return those forms by the deadline date if they wish to be considered for the SECOM jobs.

We would like to keep a maximum of four of the City's ten dispatch positions, subject, of course, to Council budget approval. Because the budget process does not begin until well after the application deadline as SECOM, I think it would be prudent for all of the current staff to apply to the new center.

Under the language of the current bargaining agreement, layoffs (which this in essence is) are determined on the basis of seniority. Carol George, Larry George, Paulette Henry and Belinda Roost are the most senior dispatchers. If four records positions are retrained, they will be offered those jobs. In the event one or more of them moves to SECOM, we will move down the seniority list to fill our positions.

The records staff we keep will have revised duties. **We have presented you and Brad Stavig with proposed job descriptions for those we do retain. I hope we can meet again soon to continue our discussions regarding the job descriptions and other impacts of the changes.** In the meantime, please contact me if you or any of your members have questions regarding this process.

[Emphasis by **bold** supplied.]

During this time period, Stavig became the interim president of the union. In a May 31, 1998 letter to King, Stavig wrote that the union recognized the employer was proposing to change the job descriptions, that it was the union's contention that such a change was a mandatory subject of bargaining, and that "...its effects are subject of bargaining between both parties".

King replied on June 2, 1998, stating that he and Somers discussed the issue with Catlin in the early part of May, and that the employer was expecting further input from the union. Therefore, he concluded, the parties were, in fact, bargaining on the issue, and he expected that bargaining to continue.

In late June, 1998, SECOM made offers of employment to dispatchers from throughout the county who had applied for positions. Those letters included a notice that SECOM intended to begin operations on September 15, 1998.

In early July, 1998, King sent out termination letters to those dispatchers who were losing their positions with the City of Anacortes.

POSITIONS OF THE PARTIES

The union argues that the employer did not "get out of" the dispatch business. It contends the employer simply contracted with the county-wide agency to provide the same services, that the SECOM contract provides for its participants to "opt out" if they so choose, and that the employer was under no legal or technological mandate to contract with the dispatch center. The union further asserts that the employer had an obligation to negotiate the layoffs, the job duty changes, and the effects of its contract with the county-wide dispatch center. Finally, the union asserts that the employer unlawfully restricted the scope of effects bargaining, and that its failure to provide requested information interfered with the ability of the union to negotiate.

The employer asserts that it did not have a duty to bargain the decision to discontinue providing emergency dispatch services, because its decision to get out of the emergency dispatch business was not a mandatory subject of bargaining. It asserts that the employer ceded control and responsibility for dispatching emergency services to the newly-formed county-wide agency, and that it fundamentally changed the way it was doing business. Concerning the second prong of the union's case, the employer defends that it consistently solicited bargaining from the union, but that the

union did not respond, request any meetings to bargain effects, or make any proposals concerning the effects of the employer's decision. It asserts that the union was never refused a forum in which to discuss the effects of the employer's decision, and that the union has waived any right to now challenge the fact that no layoff effects bargaining has taken place.

DISCUSSION

Post-Hearing Argument

Following the receipt of the parties' briefs on July 15, 1999, the employer sent a letter to the Examiner complaining that the union had argued in its brief a third allegation that had not appeared in the union's Complaint or Amended Complaint. It stated that, in addition to the charges that the employer had refused to bargain its decision to shut down its emergency dispatch center and had failed to bargain the effects of that decision; the union added a "refusal to provide timely and complete responses to the Guild's request for information" charge.

The union responded on July 28, 1999. It stated that the refusal to provide information was "... part and parcel of that refusal to bargain." It further stated that it had no objection to the employer providing a supplemental brief on that issue. The employer did not submit a supplemental brief and no further correspondence was received on this issue.

The Examiner has not considered a separate "refusal to provide information" charge. The employer is correct, such a charge was not included in either the original or amended complaint. Furthermore, there were no facts presented at hearing, such as a specific demand for information, which would have supported a union

motion at hearing to amend the complaint to add this third allegation.

The subject did arise in testimony concerning the reasoning behind the union's failure to respond to the employer's repeated requests to meet and discuss the impacts of the impending layoffs. Therefore, the Examiner dealt with the issue in that context, as a part of the general fact pattern, but not as a separate issue.

The Duty to Bargain the Decision

The basic collective bargaining mandate covering employers and exclusive bargaining representatives is found in statute:

RCW 41.56.030 DEFINITIONS. As used in this chapter:

...
(4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative **to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions**, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ...

[Emphasis by **bold** supplied.]

Thus, issues relating to employee wages, hours and working conditions are considered to be mandatory subjects of bargaining.⁸

⁸ The potential subjects for bargaining between an employer and union are commonly divided into categories of "mandatory", "permissive" and "illegal". Matters affecting wages, hours, and working conditions are

If such an issue is raised by one party, it must be negotiated to finality or a refusal to bargain violation would properly be found. The essence of such a charge would be a change in the status quo without notice to or bargaining with the union. Rochester Institute of Technology, 264 NLRB 1020 (1982). Notice must be given sufficiently in advance of the change so as to afford the union the opportunity to present counter-proposals or arguments. NLRB v. Katz, 369 U.S. 736 (1964), at 743; Gresham Transfer, 272 NLRB 484 (1984); NLRB v. Citizen Hotel Company, 326 F.2d 501 (5th Circuit, 1964); NLRB v. W. R. Grace and Co. Construction Products Div., 571 F.2d 279, at 282 (5th Circuit, 1978); Sun-Maid Growers of California v. NLRB, 104 LRRM 2543 (9th Circuit, 1980). See City of Vancouver, Decision 808 (PECB, 1980), and City of Kelso 2633-A (PECB, 1988) [Kelso II], where similar conclusions were reached under Chapter 41.56 RCW.

In Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), cited with favor by the Supreme Court of the State of Washington in IAFF, Local 1052 v. PERC (City of Richland), 113 Wn2d 197 (1989), the Supreme Court of the United States held that an employer's decision to contract out bargaining unit work is a mandatory subject of bargaining. In a concurring opinion, Justice Stewart contrasted the recognition of work assignments as a mandatory subject with several matters at the heart of entrepreneurial control, and he listed several "permissive" subjects which he viewed as having little relation to working conditions: Advertis-

mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or which are regarded as prerogatives of employers or of unions have been categorized as "nonmandatory" or "permissive". See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, WPERR CD-57 (King County Superior Court, 1978) and Washington Public Power Supply System, Decision 6058-A (PECB, 1998).

ing, product design, commitment of investment capital, and **the basic scope of the enterprise**. A similar distinction was made by the Commission in Kelso II, *supra*, where the employer's decision to annex to a neighboring fire district (and thereby give up both the authority to collect taxes and responsibility for fire protection) was judged not to be a mandatory subject of bargaining. The annexation was distinguished from City of Kelso, Decision 2120-A (PECB, 1985) [Kelso I], wherein the employer merely decided to contract out for fire protection services, and had maintained control over the operation. In Kelso I, the employer was judged not to have gone out of the fire protection business, and so committed an unfair labor practice by failing to bargain.

Application of Fibreboard / Kelso Principles -

The concurring opinion of Justice Stewart in Fibreboard, *supra*, is of assistance in applying the analysis of Kelso I and Kelso II to the instant case:

The question remains whether this particular kind of subcontracting decision comes within the employer's duty to bargain. On the facts of this case, I join the Court's judgment, because all that is involved is the **substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer**. The question whether the employer may discharge one group of workers and substitute another for them is closely analogous to many other situations within the traditional framework of collective bargaining. Compulsory retirement, layoffs according to seniority, assignment of work among potentially eligible groups within the plant - all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.

Fibreboard at p. 224.

In Kelso I, the employer continued to have the work performed **under its control**. The city paid the fire district approximately the amount that it had budgeted for fire suppression services in the previous year, and the city maintained legal responsibility and rights for the maintenance of those services. In Kelso II, the fire district took over control of the funding, as well as the legal responsibility and rights for maintenance of the services, and so fundamentally changed the scope and direction of the enterprise. Citing Federal Way School District, supra, in Kelso II, the Commission found significance in the employer's decision to relieve itself from any legal involvement whatsoever in the services it had formerly provided, and ruled that such a "go out of business" decision is basic to the entrepreneurial nature of the employer, and is not a mandatory subject of bargaining. The instant case bears more similarities to Kelso II than to Kelso I. The employer has retained no control over the wages, hours or working condition at the new agency, or over its policies, except as one of nine entities on the governing board of the new agency. SECOM has assumed full responsibility for dispatching emergency services in Skagit County, and has the full liability for the quality of those services. SECOM uses its own new facility that it built in Mount Vernon, its own equipment, and its own employees.

Similar analysis was applied in Snohomish County Fire District 1, Decision 6008-A (PECB, 1997), where the merger question was approached from the opposite perspective. The employer decided to withdraw from a cooperative providing paramedic services through an interlocal agreement. Even though the employer had been a founding member of the cooperative, and a participant in its board, the employer did not control the wages, hours and working conditions of the cooperative's employees. Its decision to withdraw from the cooperative was thus judged to be an entrepreneurial decision, and not a mandatory subject for bargaining with the union that represented the employees of the cooperative.

Legislative Preemption -

The employer decision at issue in this case was largely, if not entirely, forced upon this employer and other local government entities state-wide by action of the State Legislature and the state-wide vote of the people. The decision to implement "county-wide ... enhanced 911 emergency communication systems so that enhanced 911 is available throughout the state" is comparable to the decision of the Legislature to create and maintain a state-wide pension system for law enforcement officers and fire fighters. See, City of Seattle, Decisions 4687-B and 4688-B (PECB, 1997), affirmed 93 Wn.App 235 (Division 1, 1998), review denied ___ Wn.2d ___ (1999).

Absence of Labor Cost Motivation -

Even if one were to get beyond the entrepreneurial control analysis and the legislative preemption, the employer's decision in this case was not motivated by labor cost considerations amenable to resolution through collective bargaining. Different from many cases involving transfers or contracting of bargaining unit work, the decision to form and join SECOM was closely tied to the opportunity to utilize state-of-the-art technology, and to access dollars for equipment purchases that otherwise would not be available to this employer. As the employer argues, this situation fits into the analysis provided in Dubuque Packing Co., 303 NLRB 386 (1991) affirmed 1 F.3d 24 (D.C. Cir., 1993):

... If the employer shows that labor costs were irrelevant to the decision to relocate unit work, bargaining over the decision will not be required because the decision would not be amenable to resolution through the bargaining process. ... an employer would have no bargaining obligation if it showed that, although labor costs were a consideration in the decision to relocate unit work, it would not remain at the present plant because, for example, the costs for modernization of equipment or environmental controls were greater

than any labor cost concessions the union could offer. On the other hand, an employer would have a bargaining obligation if the union could and would offer concessions that approximate, meet or exceed the anticipated costs or benefits that prompted the relocation decision, since the decision then would be amenable to resolution through the bargaining process.

It would not have been "business as usual" if this employer had decided to refrain from joining the interlocal agreement and to maintain its own dispatch center. Agencies that had previously contracted with this employer for dispatch services (and were a source of income covering part of the costs for the employer's separate dispatch center) either became participants in SECOM or were contracting with SECOM for dispatch services.

The union asserted in testimony and in argument that the employer could have retained its own dispatch center as a "ring-down center", and could have had the Anacortes dispatch center continue to forward calls to the central dispatch center, but those arguments merely illustrate why such options were not amenable to collective bargaining:

First, the evidence establishes that the Anacortes center lacked the "enhanced 911" technology required by state law, so that substantial capital investment would have been required;⁹ and

Second, the establishment of a "county-wide" system conforming to the state law was designed to eliminate the need to transfer (and potential for loss of) calls requesting emergency services.

The union never indicated to the employer that it was willing to make (or even to discuss) the substantial cost concessions that

⁹ The "enhanced 911" equipment automatically determines the location of the caller, which the Anacortes equipment could not do.

would presumably have been needed to both upgrade the equipment in the Anacortes dispatch center to the "enhanced 911" level, and to offset the revenue lost when former customers of the Anacortes center transferred their services to SECOM. In the absence of any evidence that retention of the Anacortes center was a viable alternative, the Examiner finds the Dubuque Packing test to be dispositive in favor of the employer.

Much of the union's argument is focused on whether the employer's decision to consolidate emergency dispatch operations was a wise decision. However, the decision was not about who would provide the dispatching service (as characterized by the union), but rather about what and how services would be provided. In deciding to move from an independent system utilizing obsolete technology to a county-wide, centralized system utilizing state-of-the-art technology, the employer was making the kind of entrepreneurial decision that may have been an appropriate subject for political debate, but was not amenable to collective bargaining. The issue was far larger than the limited "personnel matters" of direct concern to employees. See, IAFF Local 1052 v. Public Employment Relations Commission, 113 Wn.2d 197 (1989).

Finally, the Examiner does not find the possibility of the employer withdrawing from SECOM to be a sufficient basis to find the employer had a duty to bargain the decision to join SECOM. By the terms of the interlocal agreement, the employer can only terminate its participation in SECOM by giving notice of intent to withdraw six months in advance of a December withdrawal. To meet the requirement of the state law, however, an employer withdrawing from SECOM would have to overcome the same technological, capital investment, and financial hurdles discussed above. Thus, the theoretical possibility of withdrawing from SECOM is so remote that the Examiner finds it is a practical nullity.

The employer made an entrepreneurial decision beyond the scope of mandatory collective bargaining. The employer did not commit an unfair labor practice when it continuously refused to bargain with this union concerning its decision to join SECOM.

Bargaining the Effects

The facts in this case support a conclusion that the union waived its right, under Fibreboard and numerous Commission precedents, to bargain the effects of the management decision upon the wages, hours and working conditions of the employees it represented. In examining the union's claim that the employer refused to bargain the effects of its decision to join SECOM, an abbreviated timeline of the key correspondence and events is useful:

- ◆ August, 1995 Skagit County submitted a preliminary plan to the state for a consolidated dispatch center.
- ◆ November, 1995 The employer notified the employees of the plan for a centralized dispatch center, and some of the changes which might potentially result.
- ◆ May, 1997 The employer sent a letter to the union, suggesting that vacant dispatch positions be filled on a temporary basis, in view of the planning for a consolidated dispatch center.
- ◆ June 23, 1997 The employer sent a letter to the union, inviting bargaining on "effects".
- ◆ November 14, 1997 Employer and union officials attended county-wide meeting of employers and unions affected by the consolidation of emergency dispatch functions.
- ◆ December 12, 1997 The employer sent a letter to the union, inviting a meeting to discuss issues relating to the new dispatch center, and responding to questions asked by a union officer.
- ◆ April 21, 1998 The employer sent a letter to the union, requesting a meeting to discuss the planned transfer of dispatch functions to the new center.

- ◆ May, 1998 The parties met and the employer presented the union with a draft job description for positions which would be retained by the employer.
- ◆ May 11, 1998 The employer sent a letter to the union, updating the employer's plan to retain some dispatch positions and lay off others, and expressing interest in meeting to discuss the job descriptions and other aspects of the changes.
- ◆ May 31, 1998 The union sent a letter to the employer, stating that the change in position functions for the retained positions is subject to bargaining.
- ◆ June 2, 1998 The employer informed the new union leader that it had met with the union on the new job description, and was waiting for a response from the union. The employer requested that the parties meet again to further discuss the issue.
- ◆ July 3, 1998 The employer notified dispatch employees that their jobs would end upon the transfer of dispatch functions to SECOM in September.
- ◆ July 17, 1998 The employer sent a letter to the union, again requesting that the parties meet to discuss the union's response to the draft job descriptions for remaining employees.

It is difficult to understand what else the employer was supposed to do to fulfill its bargaining obligation. On at least the six occasions over an 11-month period from June 23, 1997 to July 17, 1998 (as highlighted by **bold** in the foregoing timeline), the employer issued written invitations for the union to bargain the effects of the transfer of functions to SECOM. Silence will support finding a waiver by inaction. City of Burlington, Decision 5755-A (PECB, 1998).

The conclusion that the union waived its bargaining rights is reinforced by evidence that the union made an affirmative decision to exclude issues concerning the effects of the SECOM transfer from the parties' negotiations for a successor collective bargaining agreement. Thus, even when the most typical forum for negotiation

was available, the union rejected the opportunity. Having made that decision, it cannot now accuse the employer of refusing to bargain.

The union argues that it did not have enough information to engage in bargaining, but the evidence does not support that argument. The union had the cart before the horse: One of the purposes of negotiating effects is to exchange information, so the union needed to meet to discuss potential issues and discover what information would be relevant. The employer and union alike attended the county-wide meeting in November of 1997, where they were both given the same information by officials involved in the formation of SECOM. The correspondence shows that the employer was answering questions and providing information, upon request. When the parties did finally meet, in May of 1998, it was unable to get a response from the union despite repeated written requests. The union sat and waited, even though it is not at all apparent what it was waiting for. It cannot now complain that the employer was not forthcoming with information. King County, Decision 4893-A (PECB, 1995); Seattle School District, Decision 5755-A (PECB, 1998).

FINDINGS OF FACT

1. The City of Anacortes, a municipal corporation of the state of Washington within the meaning of RCW 41.56.020, is a public employer within the meaning of RCW 41.56.030(1). Kimberly Somers is the employer's Human Resources Director and Chief of Police Mike King heads the employer's police department.
2. The Anacortes Police Services Guild, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of City of Anacortes employees which historically included employees

performing emergency services dispatching functions. During the time period pertinent to this case, Officer Mike Catlin, Dispatcher Brad Stavig, and Officer Lou D'Amelio were, in succession, the chief spokesperson for the union.

3. Prior to September 1998, the Anacortes Police Department provided emergency dispatching services for the Anacortes Police Department and the Anacortes Fire Department and, under contractual arrangements, provided emergency dispatching services for at least the Town of LaConnor and the Swinomish Tribal Police. The services provided by the employer's dispatch center were not of the "enhanced 911" type.
4. RCW 38.52.510, enacted in 1991, required state-wide implementation, by December 31, 1998, of "enhanced 911" emergency communication systems through "district-wide, county-wide, or multi-county-wide" systems, and provided state funding for such systems subject to voter approval of a ballot measure to impose a tax on telephone lines. The ballot measure was approved by the voters.
5. In response to the requirements of RCW 38.52.510, Skagit County and various municipalities within Skagit County, including the City of Anacortes, began planning for a county-wide enhanced 911 emergency communication system. Those entities signed an interlocal agreement for creation of Skagit Emergency Communications (SECOM), to supplant the various local dispatching centers.
6. With the implementation of a county-wide enhanced 911 system by SECOM, revenues from Skagit County and from entities which had previously contracted with the employer for dispatch services would no longer be available to the employer to fund its own dispatch center.

7. On June 23, 1997, the employer formally notified the union, in writing, that it intended to utilize the enhanced 911 emergency communications services provided by SECOM and discontinue its own emergency dispatching operation. The employer acknowledged that it had an obligation to negotiate with the union concerning the effects of that decision on the wages, hours and working conditions of employees represented by the union, and it invited the union to bargain such effects.
8. The union did not respond to the employer's June 23, 1997 invitation to bargain the effects of the decision to transfer the emergency dispatching operation to SECOM. While the union has asserted that it did not have enough information to bargain the effects of the decision, the evidence does not indicate that it made any specific requests for information.
9. On November 14, 1997, employer and union representatives attended a county-wide meeting where the plans for implementation of the county-wide enhanced 911 system were explained in detail. They were specifically told that approximately 43 employees in dispatch centers throughout the county would be affected, and that SECOM would hire between 27 and 31 dispatchers.
10. In November of 1997, Chief King notified the union that the emergency dispatch functions historically provided within the Anacortes Police Department would be transferred to SECOM, he invited questions or concerns, and he requested a meeting to present a draft proposal. The union responded with several questions. Chief King responded to those questions on the same day he received them.
11. On April 10, 1998, the employer notified the union that the transfer of the dispatch operation to SECOM was scheduled to

occur on September 15, 1998. The employer requested a meeting with the union, to discuss the effects of that transfer.

12. The parties met in early May of 1998, at which time the employer presented a proposed job description for the certain employees that would be retained in the Anacortes Police Department. Following the departure of Catlin from his leadership role in the union, the employer had to inform Stavig of the negotiations already conducted and repeat its request for comment from the union on the proposed job descriptions.
13. Altogether, the union made minimal responses or failed to act in response to at least six written communications in which the employer invited bargaining on the effects of the transfer of the dispatch function to SECOM.
14. On May 11, 1998, Somers sent a letter to the union, requesting another meeting on the effects of the transfer of the dispatch operation to SECOM.
15. Early in July 1998, the employer notified members of its dispatch staff that their positions were being eliminated.
16. On September 15, 1998, a county-wide enhanced 911 emergency communication system was implemented through SECOM, and the City of Anacortes ceased to provide such functions.

CONCLUSIONS OF LAW

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

2. The decision of the City of Anacortes to participate in the creation of SECOM and to terminate its dispatch operation in favor of utilizing the county-wide enhanced 911 emergency communications provided by SECOM, was not a mandatory subject of collective bargaining under RCW 41.56.030(4).
3. By its inaction, as described in the foregoing Findings of Fact, the Anacortes Police Services Guild waived its bargaining rights under RCW 41.56.030(4) with regard to the transfer of dispatch functions to SECOM.
4. The City of Anacortes has not committed, and is not committing, any unfair labor practices under RCW 41.56.140(4) or (1), in connection with the transfer of dispatch functions to SECOM.

ORDER

The complaint charging unfair labor practices filed in this matter is DISMISSED.

Issued at Olympia, Washington, this 27th day of September, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, 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

603 EVERGREEN PLAZA BUILDING
P. O. BOX 40919
OLYMPIA, WA 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
SAM KINVILLE, COMMISSIONER
JOSEPH W. DUFFY, COMMISSIONER
MARVIN L. SCHÜRKE, EXECUTIVE DIRECTOR

RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6830 - PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, POSTAGE PREPAID, ADDRESSED TO THE PARTIES AND THEIR REPRESENTATIVES LISTED IN THE DOCKET RECORDS OF THE COMMISSION AS INDICATED BELOW:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ BETTY PASSMORE

CASE NUMBER: 13634-U-98-03336 FILED: 12/31/97

ISSUED: 09/27/99

FILED BY: PARTY 2 DISPUTE: ER GOOD FAITH

DETAILS: Er. Ref. 2 bargain Re: City participation in Skagit Co.911 service.

COMMENTS:

Employer: CITY OF ANACORTES
Attn: DEAN MAXWELL, MAYOR
PO BOX 547

STEPHEN E. MANSFIELD
CITY ATTORNEY
P.O. BOX 547

Rep by: ANACORTES, WA 98221
360-293-1900
RODNEY B YOUNKER
SUMMIT LAW GROUP
1505 WESTLAKE AVE N
SEATTLE, WA 98109
(206) 281-9881

ANACORTES, WA 98221
(360) 298-1900

Party # 2 ANACORTES POLICE SERVICES GLD
Attn: LOU D'AMELIO
1011 - 12TH STREET

JAMES M CLINE
CLINE AND ASSOCIATES
6800 E GREEN LK WAY N STE 250

Rep by: ANACORTES, WA 98221
360-293-4686

SEATTLE, WA 98115
(206) 524-3431