STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2876, Complainant,	)	CASE 14310-U-98-3550
vs.	)	DECISION 7064-A - PECB
KITSAP COUNTY FIRE DISTRICT 7, Respondent.	)	DECISION OF COMMISSION

Webster, Mrak & Blumberg, by *James H. Webster*, Attorney at Law, represented the complainant.

Richard A. Gross, P.S., Attorney at Law, represented the respondent.

This case comes before the Commission on an appeal filed by International Association of Fire Fighters, Local 2876, (union) seeking to overturn findings of fact, conclusions of law, and an order of dismissal issued by Examiner Pamela G. Bradburn.[1] The Examiner's decision is reversed.

BACKGROUND

Kitsap County Fire District 7 (employer) provides fire suppression and medical emergency services to a portion of Kitsap County. Mike Brown has been the employer's fire chief since 1991.

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[1] *Kitsap County Fire District* 7, Decision 7064 (PECB, 2000).

International Association of Fire Fighters, Local 2876, represents a bargaining unit of the employer's non-supervisory uniformed personnel,[2] including the ranks of lieutenant and fire fighter. Lieutenant Doug Richards was president of Local 2876 during the period relevant to this case.[3]

Historical Overtime Practices -

The employer promulgated a Standard Operating Procedure (SOP) with an effective date of March 1, 1993, regulating both the qualifications needed to work on an "acting" basis in a higher rank and the procedures for making overtime assignments:

- To serve as an acting lieutenant, a fire fighter had to have at least two years of career experience with the employer and must have completed a specified course.
- A minimum of 10 employees on duty was prescribed, including three lieutenants and three paramedics.
- Overtime work was authorized if the number of employees on duty fell below the minimum prescribed in the SOP.[4]
- When overtime was necessary, the work was to be offered to an employee in the same rank as the employee whose absence caused

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[2] *See* RCW 41.56.030(7)(e). This bargaining unit is subject to interest arbitration under RCW 41.56.430-.490.

[3] The "Local 2876" designation is used consistently, for purposes of clarity. During the course of events relevant to this case, the employer extended voluntary recognition to Local 2876 as the successor to IAFF Local 2819, which formerly represented multiple bargaining units of fire department personnel on the Kitsap peninsula. That transition is not at issue in this case.

[4] We infer that employees were not called to work overtime when an absence left the staffing level above the minimum prescribed in the SOP.

the staffing level to fall below the minimum.[5] Thus, if the absence of a fire fighter who was scheduled to work as acting lieutenant put the staffing below the minimum, another fire fighter would be called back to work as acting lieutenant.[6]

The collective bargaining agreement in effect until December of 1996 conformed with that SOP. There was no mention of battalion chiefs in either that collective bargaining agreement or that SOP, because no such rank designation was used by the employer when those documents were written.

Creation of Supervisor Positions -

The employer created the battalion chief rank in November 1996, as part of a reorganization designed to provide a supervisory presence on a continuous basis.[7] Prior to the creation of the new rank, the chief and assistant chiefs (who worked Monday through Friday day shifts) supervised 24-hour shift personnel by rotating a duty-chief-on-call assignment among themselves.

Contract for Non-supervisory Unit -

A collective bargaining agreement covering the non-supervisory employees was signed in December 1996, with a term of January 1,

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[5] The parties characterize this as a "rank-for-rank" procedure. We choose not to adopt their terminology, for reasons set forth below.

[6] An exception would be made if there was not an employee with three years of experience at each station.

[7] The battalion chiefs are also "uniformed personnel" under RCW 41.56.030(7)(e), which includes, "fire fighters as that term is defined in RCW 41.26.030." Chapter 41.26 RCW creates the Law Enforcement Officers and Fire Fighters Retirement System (LEOFF) applicable to both "anyone who is actively employed as a full time fire fighter . . ." and "supervisory fire fighter personnel." RCW 41.26.030 (4)(b) and (c).

1997 through December 31, 1999.[8] That contract only addressed the battalion chief position by stating the experience a lieutenant was required to have to serve as an acting battalion chief. The provisions of that contract concerning overtime were as follows:

> 9.3.1 All overtime as a result of callback shall be distributed and rotated equally among eligible employees within any given classification.

Procedural details set forth in the previous contract were omitted, with the understanding that both parties desired to change the overtime procedure and did not want to delay execution of a contract while changes were negotiated and issued in SOP format.

Period of Uncertainty

There is evidence that the practices set forth in the 1993 SOP were not being followed prior to the signing and implementation of the 1997-1999 contract covering the non-supervisory employees. Under direct examination by the employer's representative at the hearing in this matter in February 2000, Chief Brown testified:

> Q. [By Ms. Meglemre] . . . Did the fire fighters themselves ever express a desire to change existing overtime policies?
>
> A. [By Chief Brown] Yes, they did.
>
> Q. Can you go into that a little bit?
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> A. . . . I can try. I think probably for the last four years we have been attempting to come up with an overtime policy that would resolve the concerns of all the members of our department, and they've been, you know, multiple issues that have come up.

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[8] When Local 2876 replaced Local 2819, the provisions of that collective bargaining agreement were kept in effect.

> The first being that Lieutenant Richards brought to my attention that our previous contract stipulated how we would assign overtime, but in fact we weren't doing it that way by choice of the membership, not by knowledge of the fire district but that they just decided we don't like doing it the way the contract says.
>
> And so we started a process of, one, modifying the overtime policies, and then when we entered into collective bargaining, we agreed to take the language out of the contract that the members didn't like and agreed to then to continue to work out some kind of a resolution in the policy.

There is also evidence that no set procedure was observed for filling vacant battalion chief shifts during the first 18 months after the battalion chief rank was created. Chief Brown testified that overtime was allocated in several ways, including calling in one of the assistant chiefs when a battalion chief was absent and the number of employees on duty fell below the minimum.[9]

A union proposal to the employer in January 1997 suggested a minimum of 11 employees on duty, including one battalion chief, two lieutenants, and three paramedics. That proposal contained detailed procedures for calling in employees on overtime when the staffing level fell below the minimum, including multiple actions to be taken by the battalion chiefs. A chart within that proposal appears to indicate circumstances when a battalion chief was to be called in for mandatory overtime, and language concerning "Acting Battalion Chief Positions", included: "If there are no individuals willing to accept the Acting Battalion Chief position then a Battalion Chief will be called back on overtime." The employer did not accept that proposal. The parties exchanged a number of drafts and met a number of times through 1997 and well into 1998.

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[9] Transcript 122-123.

On or about June 1, 1998, the employer made a proposal to Local 2876, as follows:

> CALL-BACK PROCEDURE
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> If staffing levels fall below minimum, the Duty Chief shall use the following process:
>
> Determine the rank or position to be filled.
>
> Use the list for the rank or position to be filled.
>
> Phone the members on that list, beginning with the member with the least amount of total overtime hours and working towards the member with the most.
>
> The first member contacted will be mandatoried if no one else accepts the overtime.
>
> ELIGIBLE MEMBERS
>
> All eligible members shall be contacted and offered the overtime work.
>
> Overtime work shall be offered to the position that creates the overtime.
>
> . . .
> *In the event a lieutenant is assigned as the Acting Duty Chief and the lieutenants position creates the overtime work, a permanent duty chief will be offered the overtime first.* If a permanent Duty Chief accepts the overtime work, then the Acting Duty Chief shall drop and fill the lieutenants position. . . .

(emphasis added).

A union witness testified of having a concern that battalion chiefs would get a first right of refusal even when the absence of a fire fighter caused the on duty staff to fall below the minimum.

Separate Unit of Supervisors -

From the outset, the battalion chiefs sought representation for the purposes of collective bargaining. They approached the union that

represented the non-supervisory employees, but its membership voted to reject inclusion of the battalion chiefs. Concerns were expressed about a potential for conflicts of interest.

The battalion chiefs proceeded to form a separate local union, as IAFF Local 3817, and it filed a representation petition with the Commission. On February 25, 1998, Local 3817 was certified as exclusive bargaining representative of the battalion chiefs in a separate unit of supervisors. *Kitsap County Fire District 7*, Decision 6221 (PECB, 1998).

The employer and Local 3817 entered into collective bargaining, and signed their first collective bargaining agreement on June 11, 1998. That agreement provided for overtime work, as follows:[10]

> 7.3 CALLBACK . . .
> . . .
> 7.3.3 The Employer may fill vacancies within this classification with out-of-classification move-ups, callback, or day shift battalion chiefs. *When the overtime vacancy is created by the Lieutenant position, Battalion Chiefs shall have the first right of refusal.* Chief officers may fill vacancies for administrative purposes . . . long term illnesses or disabilities.
> 7.3.4 Day time employees may be placed on the overtime list and work overtime as it becomes available.
>
> (emphasis added).

That contract did not deal expressly with vacancies caused by the absences of fire fighters.

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[10] The parties characterize this as a "domino" procedure. Again, we choose not to adopt their terminology, for reasons set forth below.

Onset of this Controversy -

On approximately July 6, 1998, officers of Local 2876 learned of the collective bargaining agreement signed by the employer and Local 3817, and of the overtime provisions it contained. Local 2876 and the employer continued to disagree about the overtime procedure. On August 17, 1998, the employer sent an e-mail message to the leaders of both local unions,[11] proposing a meeting to discuss "application of OT when created, by BC's, ABC's and LTS."[12] The meeting was scheduled for 10:00 a.m. on August 20, 1998.

A lieutenant named Wright scheduled to work as acting battalion chief on the shift beginning at 8:00 a.m. on August 20, 1998, and the absence of an employee named Espy put the number of employees scheduled to be on duty at the minimum. At 6:50 a.m. on that day, a fire fighter named Hannem reported that he would be absent. That absence triggered a need to offer overtime work.[13] At the direction of an assistant chief, a battalion chief named Olson was called back on overtime for the shift beginning at 8:00 a.m. on August 20, 1998, and Lieutenant Wright was reverted to a lieutenant position for that shift. This was the first known occurrence of the situation that was of concern to the Local 2876 representatives when they reviewed the employer's proposal of June 1, 1998.

While Chief Brown's testimony included several justifications for the assignment of Olson to work overtime on August 20, 1998, one

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[11] Exhibit 1-L.

[12] We interpret: "OT" to stand for overtime; "BC's" to stand for battalion chiefs; "ABC's" to stand for acting battalion chiefs; "LTS" to stand for lieutenants.

[13] A reference to Hannem as "ALT" in the employer's log book and overtime record is understood to indicate he was scheduled to work as an "acting lieutenant" on that day.

possible interpretation of that testimony is that the assignment was made to provide a test case for Local 2876 to grieve. When the representatives of the employer and both unions met on August 20, 1998, they were not able to resolve their differences.

Local 2876 initiated this unfair labor practice case on December 30, 1998. Its complaint alleged a unilateral change with regard to a change of policy in the contract between the employer and Local 3817 implemented in the overtime assignment made on August 20, 1998.[14] Local 2876 did not assert any claim with regard to the negotiations conducted between it and the employer up to August 20, 1998. The preliminary ruling issued on May 11, 1999, only described a cause of action for "skimming" of bargaining unit work.

A hearing was held on February 22, 2000.[15] The Examiner dismissed the complaint, holding that the union failed to sustain its burden of proving that working as acting battalion chief was its bargaining unit work or that the employer violated RCW 41.56.140(1) and (4), when it enforced the callback procedure of the agreement it had negotiated with Local 3817, giving battalion chiefs a first right of refusal to overtime under certain circumstances.

Local 2876 filed a notice of appeal on June 7, 2000, and filed an appeal brief with a request for oral argument on June 21, 2000. The employer filed an appeal brief on July 7, 2000, and opposed the

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[14] Local 2876 cites instances that occurred on at least June 1, 1999, July 26, 1999, and August 17, 1999. Those additional incidents occurred after the complaint was filed, and the complaint was never amended to properly put them at issue before the Commission.

[15] The hearing process was substantially delayed due to the illness of the attorney who represented the union initially and a change of counsel for the union.

request for oral argument.[16] The parties were notified on December 18, 2000, that the Commission had granted the request for oral argument. Counsel for both parties made oral arguments before the Commission on February 9, 2001.

POSITIONS OF THE PARTIES

Local 2876 alleges the employer unilaterally changed working conditions without bargaining and skimmed work from the bargaining unit it represents. It asserts the dispute concerns the opportunity to work overtime in a bargaining unit classification, rather than the opportunity to work as acting battalion chief. Local 2876 argues that overtime work must be offered to an employee in the classification that causes the overtime need, consistent with long-standing practice. Thus, when (1) a battalion chief is absent, and (2) a lieutenant is scheduled to work as acting battalion chief, and (3) the number of on duty employees falls below the minimum, we understand Local 2876 to support calling in: A fire fighter to replace an absent fire fighter; a fire fighter to replace an absent acting lieutenant; a lieutenant to replace an absent lieutenant; and a lieutenant to replace an absent acting battalion chief. During the oral argument, Local 2876 contended the procedure negotiated by the employer and Local 3817 wrongly gives battalion chiefs a first right of refusal where a fire fighter does not report to work as a fire fighter, and it proposed resolution of the controversy through tri-partite negotiations involving the employer and both unions.

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[16] The employer's brief was due July 5, 2000, but Local 2876 has not shown that it would be prejudiced by the delay. The Commission waives the deadline to effectuate the purposes of the statute. *See* WAC 391-08-003.

The employer argues that what first must be done is to determine whose bargaining unit work is at issue, and then give the union representing that bargaining unit control over its own work. The employer claims the overtime in question belongs to Local 3817, reasoning that a lieutenant could not be an acting battalion chief except due to the absence of a battalion chief. The employer claims battalion chiefs should be given the first right of refusal for the overtime when a lieutenant assigned as acting battalion chief does not report to work and the number of employees on duty falls below the minimum, so that it did not skim work from Local 2876. The employer argues that allowing members of one bargaining unit to work from time to time in an acting capacity in another bargaining unit does not transfer the work between the units. The employer also defends that overtime issues were in flux for years, so that no status quo existed. The employer notes that if it were to give the battalion chief work to members of Local 2876, it would be in violation of its collective bargaining agreement with Local 3817. Responding during the oral argument to the examples set forth by Local 2876, the employer denied that the battalion chiefs would be given a first right of refusal where the need for overtime work is triggered by the absence of a fire fighter.

DISCUSSION

Oral Argument

Local 2876 requested oral argument before the Commission, contending that this is a case of first impression on an important public policy issue and that the employer's appellate brief relied on several irrelevant matters. Neither Chapter 41.56 RCW nor Chapter 391-45 WAC makes oral argument a matter of right for any party.

The Commission has discretion to allow oral argument under the Administrative Procedure Act, at RCW 34.05.464(6), but oral argument has generally been reserved for cases where the issues are unique, or where the Commission has some sense that oral argument would help determine the dispute. *Snohomish County*, Decision 4995-B (PECB, 1996); *Snohomish County*, Decision 5578-A (PECB, 1996). Because of ambiguous language used in various proposals and contracts in this record, the Commission concluded that oral argument would help to determine the case.

Standards To Be Applied

The complaint filed by Local 2876 alleged the employer had engaged in skimming of bargaining unit work, the employer also sees this as a "unit work" dispute, and the Examiner analyzed this case as a "unit work" dispute, stating:

> The Commission has uniformly held since 1978 that skimming, a transfer of bargaining unit work away from the unit without prior bargaining, is an unfair labor practice. *South Kitsap School District*, Decision 472 (PECB, 1978). The complainant's right to the disputed work is the first factor that must be established to prevail on a skimming allegation. *King County Fire Protection District 36*, Decision 5352 (PECB, 1995).

We agree with the fundamental principle, but disagree with the Examiner and employer as to the application of that principle to the facts of the one incident that is properly before us.

Environment of the Controversy -

This case arises from the existence of two separate bargaining units among the uniformed personnel of this employer. Rather than

being a product of their own discretion, the existence of two separate bargaining units has been thrust upon the employer and both unions by operation of the statute and Commission decisions. The participants in this controversy must be expected to adapt themselves to their legal environment.

The battalion chiefs involved in this controversy are acknowledged to be supervisors. Under *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), supervisors have full collective bargaining rights under Chapter 41.56 RCW. Supervisors are routinely excluded, however, from the bargaining units that contain their rank-and-file subordinates. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

The determination of appropriate bargaining units is a function delegated by the legislature to the Commission. RCW 41.56.060. Unit determination is not a subject for bargaining in the usual mandatory/permissive/illegal sense and, although parties may agree on units, their agreement does not guarantee that the unit agreed upon is or will continue to be appropriate. *City of Richland, supra*. Separate bargaining units of supervisors are presumptively appropriate. *City of Tacoma*, Decision 95-A (PECB, 1977).

Proposed Tri-partite Bargaining Process -

At oral argument, Local 2876 asked the Commission to order a "three party" collective bargaining process involving the employer and both local unions. This Commission fully supports collective bargaining as the preferred method for resolving workplace disputes, and a global solution negotiated by the employer and both unions could be highly desirable. However, we find no basis to compel a tri-partite process in this proceeding.

Where collective bargaining is conducted on a multi-unit basis, a multi-employer basis, and/or a multi-union basis, such arrangements are always contingent upon the consent of all participants.[17] Local 2876 cites no precedent or statutory authority for this Commission to compel bargaining that includes Local 3817. Moreover, because Local 3817 is not a party to this proceeding, we have neither its consent for a multi-lateral process nor jurisdiction to impose a remedial order upon it.

We are mindful that collective bargaining has failed to produce an agreement. The procedure for overtime assignments was discussed in the negotiations for the collective bargaining agreement signed in December 1996, and then was negotiated by the employer and Local 2876 up to at least June 1, 1998. The agreement reached by the employer and Local 3817 through collective bargaining in 1998 is cited as both a basis for and defense to the complaint in this proceeding. The employer orchestrated bringing both unions to the same table for negotiations on the overtime issue in August of 1998, but that three-party process also failed to yield a resolution of the overtime issue. Local 2876 earlier indicated disdain at the prospect of having to negotiate with Local 3817, stating in paragraph seven of its complaint that it "objected to the . . . unilateral implementation of a change in overtime policy. The [employer] responded by telling [Local 2876] that it had to resolve the issue with [Local 3817]."

We are mindful that both of these bargaining units are subject to interest arbitration under RCW 41.56.430-.490, upon the occurrence

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[17] Public sector precedents in this subject area are scarce. The Executive Director described private sector precedents on the creation and termination of multi-lateral bargaining processes in *Spokane Public Library*, Decision 7231 (PECB, 2000).

of an impasse in collective bargaining. We find nothing that would allow or support conversion of the statutory interest arbitration process into a tri-partite process.

Finally, the statutory terms "*exclusive* bargaining representative" (in RCW 41.56.080) and "the *unit* appropriate for collective bargaining" (in RCW 41.56.060) connote that the duty to bargain exists separately in each bargaining unit, as a two-party relationship between the employer and the union selected by the majority of the employees in that particular group. In the absence of a tri-partite process agreed upon by all participants, we must implement the statutory duty to bargain separately in each of these appropriate bargaining units.

Skimming of Bargaining Unit Work -

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer commits an unfair labor practice if it refuses to engage in collective bargaining with the exclusive bargaining representative of its employees. RCW 41.56.140(4). The term "collective bargaining" is defined in RCW 41.56.030(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* . . . .
>
> (emphasis added).

Matters affecting the wages, hours, and working conditions of bargaining unit employees are mandatory subjects of bargaining.

The term "working conditions" includes preservation of the scope of work historically performed by the employees in a bargaining unit, and the bargaining obligation applies where an employer seeks to remove work from a bargaining unit. *See City of Tacoma*, Decision 6601 (PECB, 1999). Unlawful skimming occurs when an employer transfers work from bargaining unit employees to employees who are either unrepresented or members of a different bargaining unit, without fulfilling its bargaining obligation. *South Kitsap School District, supra*. Thus, a potential for skimming inherently arises whenever a labor organization is either voluntarily recognized by an employer or certified by the Commission as the exclusive bargaining representative of an appropriate bargaining unit. At the same time, an employer has no duty to bargain with a union about work or positions *outside* of the bargaining unit represented by that union. *See City of Yakima*, Decision 2387-B (PECB, 1986).

The initial inquiry in any "unilateral change" case is whether there has been an actual change of employee wages, hours, or working conditions. *Evergreen School District*, Decision 3954 (PECB, 1991). There was no actionable "change" in *Evergreen School District, supra*, where the dispute concerned a long-standing and established policy, with union knowledge and acquiescence, of others performing what might be claimed as bargaining unit work.

A key element of proof in a skimming case is that the work at issue was bargaining unit work. *Spokane County Fire District 9, supra; King County Fire District 36, supra*. Bargaining unit work is defined as the work historically performed by bargaining unit employees. Where an employer assigns bargaining unit employees to perform a certain body of work, that work can attach to the unit and become bargaining unit work. *City of Tacoma, supra*.

An employer has the right to create supervisory positions which are outside of a rank-and-file bargaining unit. *Evergreen School District, supra.* But, employers sometimes run afoul of the skimming precedents if they have new positions perform non-supervisory work historically performed by bargaining unit employees. *City of Spokane*, Decision 6232 (PECB, 1998); *Evergreen School District, supra.* Job tasks which involved supervision of subordinate employees are looked at in a different manner than are tasks that could be performed by either a rank-and-file employee or a supervisor. *City of Spokane, supra.*

Commission precedents propound a two-part analysis to determine whether an employer has a duty to bargain a transfer of work to persons outside of a bargaining unit. *City of Spokane, supra.* The answers to the following two questions control this decision:

> Is the excluded position performing work that was historically performed by one or more bargaining unit employees?
>
> If so, are some or all of the transferred tasks of a type that would not warrant exclusion from the bargaining unit as a "supervisor" under Commission precedent?

See City of Tacoma, supra; City of Spokane, supra.

If the answer to both questions is in the affirmative, the employer will have been obligated to give notice to the union, provide opportunity for bargaining, and bargain in good faith if requested, before transferring the work to the excluded position. *See City of Spokane, supra.* The union claiming the work has the burden of proof. *Spokane County Fire District 9, supra.*[18]

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[18] A five-part analysis is sometimes used, but is not warranted here. *See City of Spokane, supra.*

Application of Standards

The August 20, 1998 Incident -

Our focus is on the events depicted in the log and overtime documents for August 20, 1998, which are as follows:

- The battalion chief for the incoming "C" platoon was to be absent from work;
- A lieutenant named Wright was scheduled to work as acting battalion chief, and was ready to carry out that assignment.
- A fire fighter named Hannem had been assigned to work as acting lieutenant.
- The "C" platoon was scheduled to have the minimum number of employees on duty, due to another absence for reasons not at issue here.

We focus on those facts, notwithstanding that the precise circumstances of August 20 were barely discussed by either party during the oral argument.[19]

Sorting Out Unit Work Claims -

Allocation of the overtime work at issue in this case requires a multi-faceted analysis, and that analysis discloses fundamental defects with the positions asserted by (or imputed to) all of the participants in this controversy:

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[19] At oral argument, Local 2876 provided a sheet of paper containing several examples. One of those appears to present a situation essentially the same as that which occurred on August 20, 1998. Curiously, when asked at oral argument about how that particular example would or should be handled, counsel for the employer appeared to concur that the overtime opportunity should go to a member of the bargaining unit represented by Local 2876.

The "supervisory duties" inquiry is inapplicable in this case. The employer has not asserted that work as "acting battalion chief" is of a supervisory nature, and there is no evidence in this record that would raise concerns of the type discussed in *City of Richland, supra*. Indeed, the contract negotiated by the employer with Local 3817 expressly authorizes "out-of-classification move-ups" from the rank-and-file unit.

The "minimum staff" concept historically used is defective because it fails to recognize that two separate work jurisdictions now exist within the employer's operation. The 1993 SOP prescribed a minimum number of employees on duty for the fire department as a whole, and all of the examples offered by the parties concern situations where an absence causes the number of employees on duty to fall below some department-wide minimum. At various times during the processing of this case, the employer has stated that it did not care which bargaining unit got the overtime work, implying that it continues to envision a seamless transition of personnel between the two bargaining units. Similarly, the employer has described taking steps to reduce the potential for overtime work affecting the battalion chiefs who are in one bargaining unit by adding more rank-and-file employees in the other bargaining unit. The concept of an employer-wide minimum became obsolete, however, with the certification of Local 3817 as exclusive bargaining representative of the separate unit of supervisors.

Each and every battalion chief vacancy belongs to Local 3817 and gives rise to a duty of the employer to bargain with that union. If the battalion chief work is performed by another member of Local 3817, that avoids any skimming claim. The employer would violate the rights of Local 3817, however, if it failed to give the members of the separate bargaining unit of supervisors at least a first

right of refusal to all battalion chief vacancies,[20] including "one-level transactions" where a person outside of the unit represented by Local 3817 was previously assigned to work in place of an absent battalion chief. Even if all members of Local 3817 decline a particular opportunity to work in place of another battalion chief,[21] that would not alter the inherent claim of Local 3817 to that work.

Local 2876 has reached for too much at various times during this controversy. In particular, its January 1997 proposal to the employer sought to specify overtime opportunities for battalion chiefs who were outside of the bargaining unit it represents, and it has laid claim here to overtime opportunities as acting battalion chief. Contrary to such arguments, Local 2876 has no right to bargain about the overtime opportunities of the battalion chiefs represented by Local 3817, and it never acquires any claim to work as acting battalion chief. Local 2876 can only bargain with the employer about distributing any "acting battalion chief" assignments which are offered to the members of the bargaining unit it represents.[22]

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[20] A union can waive its bargaining rights about one or more subjects for the life of a collective bargaining agreement. The contract between the employer and Local 3817 includes: "The employer may fill vacancies within this classification with out-of-classification move-ups, callback, or day shift battalion chiefs." Local 3817 is not a party to this proceeding, and we do not need to interpret the quoted language to rule on the specific incident that is before us in this case.

[21] The question of whether the opportunity to work overtime as battalion chief on August 20 was skimmed from Local 3817 is not before us. The time for Local 3817 to file an unfair labor practice complaint has long-since passed.

[22] We must presume Wright's assignment as acting battalion chief on August 20 was acceptable to Local 2876.

Local 3817 (appears to have) reached for too much in its collective bargaining agreement with the employer, which includes, "When the overtime opportunity is created by the lieutenant position . . . ." That language does not present a problem if it is limited to one-level transactions where the particular lieutenant who was to have been acting battalion chief is unable to perform that assignment, so that work at the battalion chief level is again available. That language presents a problem, however, if it purports to create an overtime opportunity for the battalion chiefs in a "two-level transaction" triggered by the absence of some employee other than the particular lieutenant who was to be the acting battalion chief (e.g., a fire fighter, a fire fighter who was to be an acting lieutenant, or a lieutenant who was to work as a lieutenant). Local 3817 never acquires any claim to such overtime opportunities in the rank-and-file unit.

The employer's 1998 proposal to Local 2876 was ambiguous in addressing situations where a battalion chief is absent and a lieutenant is assigned as acting battalion chief:

The June 1998 proposal included: ". . . and the lieutenants position creates the overtime work . . ." If the absent lieutenant is the particular lieutenant who was to have been the acting battalion chief (i.e., a one-level transaction), then it would be entirely appropriate for the employer to insist upon filling the battalion chief vacancy through whatever procedure is specified in its contract with Local 3817.[23]

The June 1998 proposal continued, however, with: "If a [battalion chief] accepts the overtime work, then the [acting battalion chief] shall drop and fill the Lieutenants position." If

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[23] If the facts of the one incident that is properly before us depicted such a one-level transaction, we would simply affirm the Examiner's dismissal of the complaint.

that refers to a two-level transaction triggered by the absence of a fire fighter or some lieutenant other than the particular lieutenant assigned to work as acting battalion chief, the employer was attempting to give battalion chiefs an overtime opportunity that belonged to the rank-and-file unit.

The facts of the one incident that is properly before us depict a two-level transaction. Before the battalion chief positions and the separate unit of supervisors came into existence, all "fire fighter working in place of absent fire fighter", "fire fighter working in place of absent acting lieutenant" and "lieutenant working in place of absent lieutenant" situations were work opportunities for rank-and-file employees. The absence of Fire Fighter Hannem on August 20 neither created a vacancy in the battalion chief position nor upset the legitimate assignment of Wright as acting battalion chief.[24] By calling in a battalion chief to displace Wright from the acting battalion chief assignment on August 20, the employer implemented its contract with Local 3817 in a manner that reached down two levels. In other words, the "domino" procedure negotiated by the employer with Local 3817 cannot be applied to give battalion chiefs an overtime opportunity that invades the work jurisdiction of Local 2876.

Variance/absence of practice in filling battalion chief vacancies prior to August 20 does not constitute a defense for the employer, in this case. The complainant is Local 2876, and the clear answer to the first component of the two-part test set forth above is that the work at issue in this case was an overtime opportunity to perform work properly claimed by Local 2876.

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[24] The same reasoning applies to any absence of an employee represented by Local 2876, other than the particular lieutenant assigned as acting battalion chief.

Conclusion

We must reverse the Examiner's decision. Chapter 41.56 RCW regulates the creation of appropriate bargaining units and requires employers and unions to engage in collective bargaining in certain circumstances. RCW 41.56.030(4). In the absence of a tri-partite agreement, the employer was obligated to respect the separate work jurisdictions of both bargaining units existing within its workforce. While Local 3817 has a legitimate work jurisdiction claim (and Local 2876 has no claim) to all work in the battalion chief classification (including overtime opportunities created by the absence of a lieutenant who had been assigned to work as a battalion chief), Local 2876 has a legitimate work jurisdiction claim (and Local 3817 has no claim) to all work historically performed by fire fighters and lieutenants, including overtime opportunities created by the absence of an employee who had been assigned to work as a fire fighter or lieutenant.

The actual actions taken by the employer on August 20, 1998, constituted implementation of the ambiguous language of its previous bargaining proposal and its collective bargaining agreement with Local 3817 in a manner that transferred an overtime work opportunity from the bargaining unit represented by Local 2876 to a battalion chief outside of that bargaining unit. The employer thus engaged in skimming of work from the bargaining unit represented by Local 2876 and committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

Remedy

During oral argument, counsel for Local 2876 expressly stated that his client was not seeking a "make whole" remedy in this case. The

remedial order is thus limited to a cease-and-desist order with the customary posting and reading of notices.

AMENDED FINDINGS OF FACT

1. Kitsap County Fire District 7 is a public employer within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 2876, a bargaining representative within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of an appropriate bargaining unit of fire fighters and lieutenants employed by Kitsap County Fire District 7.

3. Prior to November of 1996, overtime opportunities were offered to employees in the bargaining unit described in Finding of Fact 2 only when an absence caused the number of employees on duty to fall below a prescribed minimum.

4. When occasions for overtime work actually arose prior to November of 1996, fire fighters and lieutenants were called in to work in place of absent employees who had been scheduled to work as a fire fighter, acting lieutenant, or lieutenant.

5. In November of 1996, the employer created a battalion chief classification designed to provide a supervisory presence on a 24-hour basis. The battalion chiefs were excluded from the bargaining unit described in Finding of Fact 2.

6. Detailed procedures for offering overtime work were omitted from a collective bargaining agreement signed in December 1996 to cover the bargaining unit described in Finding of Fact 2. The parties to that collective bargaining agreement continued

to negotiate on the subject of overtime procedures during 1997 and into 1998.

7. International Association of Fire Fighters, Local 3817, is a bargaining representative within the meaning of RCW 41.56.030-(3). In February 1998, Local 3817 was certified as exclusive bargaining representative of an appropriate bargaining unit of supervisors (battalion chiefs) employed by Kitsap County Fire District 7.

8. After the creation of the bargaining unit described in Finding of Fact 7, the continued use by the employer and both unions of the minimum staff concept described in Finding of Fact 3 appears to have been applied in a manner that obscured the separate work jurisdiction claims of the two separate bargaining units.

9. The employer and Local 3817 entered into negotiations for their initial collective bargaining agreement, including procedures for overtime work. Those parties discussed use of a so-called "domino" procedure under which battalion chiefs represented by Local 3817 would be given a first right of refusal to any and all overtime opportunities occurring while a lieutenant was assigned as acting battalion chief, including work opportunities of the type described in Finding of Fact 4.

10. On June 1, 1998, the employer made an ambiguous proposal to Local 2876 in the ongoing negotiations described in Finding of Fact 6. Under one available interpretation, the employer's proposal gave battalion chiefs represented by Local 3817 a right of first refusal to overtime work any time a lieutenant was assigned as acting battalion chief, including work opportunities in two-level transactions actually triggered by

the absences of fire fighters or lieutenants that would historically have been filled as described in Finding of Fact 4. Local 2876 did not accept that proposal.

11. On June 11, 1998, the employer and Local 3817 signed a collective bargaining agreement that could be interpreted as giving battalion chiefs represented by Local 3817 a right of first refusal to overtime work any time a lieutenant was assigned as acting battalion chief, including work opportunities in two-level transactions actually triggered by absences of fire fighters or lieutenants that would historically have been filled as described in Finding of Fact 4.

12. In July 1998, Local 2876 became aware of the collective bargaining agreement described in Finding of Fact 10, and it continued to object to the so-called "domino" procedure set forth in that contract.

13. On August 17, 1998, the employer invited both Local 2876 and Local 3817 to meet with employer officials at 10:00 a.m. on August 20, 1998. The announced purpose of that meeting was to reach a tri-partite agreement on overtime procedures. While it appears that Local 3817 agreed to attend that particular meeting, the record lacks evidence that both Local 2876 and Local 3817 affirmatively consented to resolve the pre-existing and ongoing dispute concerning overtime procedures through a multi-unit bargaining process.

14. For the work shift that was to begin at 8:00 a.m. on August 20, 1998, the battalion chief who would normally have worked on that day was scheduled to be absent and a lieutenant named Wright was scheduled to work as acting battalion chief.

15. Prior to 7:00 a.m. on August 20, 1998, a fire fighter who was scheduled to work in a position represented by Local 2876 reported that he was unable to work that day. The absence left the incoming platoon with fewer employees than the minimum prescribed as set forth in Finding of Fact 3, so that an opportunity for overtime work came into existence.

16. Prior to 8:00 a.m. on August 20, 1998, the employer called in a battalion chief represented by Local 3817 to work as battalion chief on an overtime basis, and it reverted Wright to his normal classification and duties.

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. By calling in a member of the bargaining unit represented by Local 3817, as described in Finding of Fact 16, to perform overtime work as described in Finding of Fact 4 and Finding of Fact 15, Kitsap County Fire District 7 has implemented its ambiguous collective bargaining agreement with International Association of Fire Fighters, Local 3817, in a manner which invades the work jurisdiction of International Association of Fire Fighters, Local 2876, and has committed an unfair labor practice in violation of RCW 41.56.140(4) and (1).

ORDER

Kitsap County Fire District 7, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Giving employees outside of the bargaining unit represented by International Association of Fire Fighters, Local 2876, a first right of refusal to overtime opportunities created by absences of employees assigned to perform work within the work jurisdiction of the bargaining unit of non-supervisory uniformed personnel represented by Local 2876.

   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. Give notice to and, upon request, negotiate in good faith with International Association of Fire Fighters, Local 2876, before transferring work or work opportunities within the work jurisdiction of that union to persons outside of the bargaining unit represented by Local 2876.

   b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked Appendix. 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.

c. Read the notice attached to this order into the record at a regular public meeting of the Board of Fire Commissioners of Kitsap County Fire District 7, 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.

d. Notify the complainant, in writing, within 30 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 complainant with a signed copy of the notice attached to this order.

e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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, on the 11th day of July, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

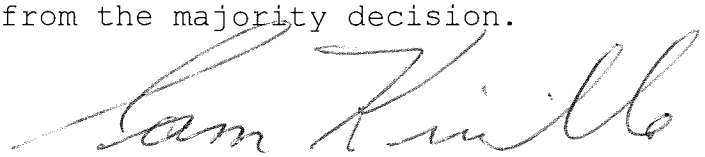
MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

DISSENTING OPINION

The employer in oral argument did not express a preference as to who did the work or who got paid for doing the work, as in either case, its fire fighting responsibilities would be carried out by qualified fire fighters. This then is an issue that may be settled by a group of consanguineous fire fighters, internally familiar with the circumstances, through collective bargaining, using the nonaffected employer as a conduit or by an incongruous agency in Olympia. I opt for the collective bargaining process. I therefore respectfully dissent from the majority decision.



SAM KINVILLE, Commissioner

APPENDIX

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 WILL NOT give employees outside of the bargaining unit represented by IAFF Local 2876 a first right of refusal to overtime opportunities created by absences of employees assigned to perform work within the work jurisdiction of the bargaining unit of non-supervisory uniformed personnel represented by Local 2876.

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.

WE WILL give notice to IAFF Local 2876 and provide opportunity for collective bargaining prior to transferring work or work opportunities within the work jurisdiction of the bargaining unit of non-supervisory uniformed personnel represented by Local 2876 to persons outside of that bargaining unit.

WE WILL read this notice into the record at an open, public meeting of the Board of Fire Commissioners, and will append a copy to the minutes of the meeting where it is read.

DATED: _____

KITSAP COUNTY FIRE DISTRICT 7

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, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.