STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1537, Complainant,	)	CASE 14629-U-99-3665
vs.	)	DECISION 6863-B - PECB
CITY OF ANACORTES, Respondent.	)	DECISION OF COMMISSION

Cogdill Nichols Rein, by *W. Mitchell Cogdill*, Attorney at Law, appeared on behalf of the union.

Foster, Pepper and Sheffelman, by *P. Stephen DiJulio*, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on an appeal filed by the City of Anacortes, seeking to overturn the findings of fact, conclusions of law, and order issued by Frederick J. Rosenberry, Examiner.[1] We affirm.

PROCEDURAL BACKGROUND

On June 8, 1999, International Association of Fire Fighters, Local 1537 (union) filed a complaint charging unfair labor practices against the City of Anacortes (employer). A hearing was held on March 13, 2000, and May 17, 2000, before Examiner Rosenberry. During the hearing, the parties stipulated that the employer

[1] *City of Anacortes*, Decision 6863-A (PECB, 2000).

engaged in good faith bargaining regarding the effects of the "student" fire fighter program, reserving to the union its claim that the employer's unilateral decision to implement that program constituted an unfair labor practice. The Examiner ruled that the employer failed to bargain in good faith and interfered with employee rights. On December 8, 2000, the employer filed a notice of appeal.

FACTUAL BACKGROUND

The facts are fully detailed in the Examiner's decision and are only addressed here in relevant part.

Richard Curtis has been fire chief since 1996. The employer operates two fire stations known as "Station 1" and "Station 2."[2] Historically, the employer has staffed Station 1 with full-time fire fighters/paramedics seven days a week, 24 hours a day.

The union represents a bargaining unit of full-time lieutenants and fire fighters. That bargaining unit is composed of 15 employees who meet the definition of "uniformed personnel" under RCW 41.56.030(7)(e). Normally, there are two or three bargaining unit employees on duty at all times, one of which is a lieutenant and usually the on-site person in charge.

In addition to full-time fire fighters, the employer has historically maintained a "volunteer" fire fighter program. There are usually between 20 and 30 participating volunteers.

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[2] The employer built Station 2 in about 1994. Although it has not always staffed that station on a regular basis, it has kept an ambulance and fire apparatus there.

On March 18, 1998, Chief Curtis submitted a staffing plan at a city council meeting. That was the union's first notice that the employer was considering a program to provide additional staffing at the fire stations.[3] The mayor had asked the chief "to look into an economical method" of solving issues facing the employer, and the chief proposed both using a new category of student fire fighters and hiring additional full-time fire fighters. Under the chief's proposal, student fire fighters were to perform many of the same duties under the same working conditions as full-time fire fighters. The chief also proposed that maximum staffing levels for both stations include student fire fighters in addition to bargaining unit members.[4] "By taking advantage of the added staff," the chief reasoned that callback would be reduced substantially for bargaining unit members, that response time would decrease, and that the fire department would have greater fire suppression capability.

Request for Bargaining -

On the same day that the union learned of the chief's proposal, it sent a letter to the employer's human resources director and formally requested to bargain both the decision to implement the student fire fighter program and the effects of that decision. On March 20, 1998, the employer responded that it would negotiate the effects of any future implementation of its proposal, but that it would not negotiate its decision to implement the student program. The employer asserted that the decision to take such action falls within the employer's management rights clause in the parties

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[3] The parties were in contract negotiations for a successor collective bargaining agreement at the time the student program was proposed by the chief.

[4] The chief's proposal, including the staffing outline, was not implemented in its entirety by the employer.

collective bargaining agreement and that its position was further supported by case law. It also stated that it was some way from actually implementing any program.

From April until October 1998, there was a considerable amount of communication between the union and the employer regarding the decision to implement and the effects of implementing the student fire fighter program. Throughout this time, the parties' positions remained the same, with the employer agreeing to negotiate the effects but not the decision, and the union requesting to negotiate both the decision and the effects.

In October 1998, the employer began staffing both stations with bargaining unit personnel. The employer added three full-time fire fighter positions to its workforce in December 1998.

Implementation of First Student Program -
On December 10, 1998, the employer notified the union that two people had started working in the employer's student fire fighter program on December 9, 1998. The employer assigned the students to work at Station 1 on weekdays between the hours of 8:00 a.m. and 5:00 p.m., with the exception of Wednesdays, when they were scheduled to work from 1 p.m. to 9:00 p.m. Many of the duties and working conditions originally proposed by the chief were the same as those performed by these students.

On December 12, 1998, the union responded to the employer's implementation of its decision by stating that the employer was skimming bargaining unit work, requesting bargaining of both the decision and its effects, asking the employer to cease any implementation of the program, asking the employer to complete the bargaining process prior to implementation of the program, and

stating a resolve to file an unfair labor practice if bargaining did not occur.

On December 16, 1998, employer representatives, including the chief, met with union representatives to discuss the student program, and the chief made it clear that he believed the employer wanted student fire fighters to be part of the first response team.[5] The program remained in effect until May 1999 when the employer terminated that program.

In early 1999, the City of Anacortes annexed property and consequently, increased the employer's service area.

On June 8, 1999, the union filed this unfair labor practice complaint. Although the student program had been terminated in May 1999, the employer did not agree to cease any future implementation, and the parties continued to disagree.

Implementation of Second Student Program -

In January 2000, the employer again implemented the student fire fighter program with two new students.[6] These student fire fighters worked alongside the full-time fire fighters, and the employer established training and expectation benchmarks for the students.

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[5] "First response" means that fire fighters immediately respond to the incident directly from the fire station with the necessary equipment.

[6] Evidence concerning subsequent events was received at the hearing without objection from either party as to the subject matter.

DISCUSSION

The issue presented on appeal is whether the employer violated RCW 41.56.140(1) and (4) by refusing to bargain with the union, upon request, its decision to implement a student fire fighter program. The Commission holds that by unilaterally making the decision to assign students to perform work of the type historically performed by bargaining unit employees and by refusing to bargain that decision, upon request, the employer violated its statutory bargaining obligation and by so doing interfered with the rights of bargaining unit members.

Duty to Bargain

The Public Employees' Collective Bargaining Act imposes a duty to bargain. RCW 41.56.030(4). That duty is enforced through RCW 41.56.140(4), and unfair labor practices are processed under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270. The determination as to whether a duty to bargain exists is a question of law and fact for the Commission to decide. WAC 391-45-550. Thus, it is necessary for us to determine if the correct legal standard has been applied and if there is substantial evidence in the record to support the Examiner's findings.

Subjects of Bargaining -

A "mandatory" subject of bargaining is a subject that an employer is obligated to bargain. *Federal Way School District*, Decision 232-A (EDUC, 1977), *aff'd*, WPERR CD-57 (King County Superior Court, 1978). The scope of mandatory bargaining includes matters of direct concern to employees. *City of Anacortes*, Decision 6830-A (PECB, 2000) (citing *International Association of Fire Fighters*,

Local 1052 v. PERC (Richland), 113 Wn.2d 197 (1989)). It is well settled that wages (including overtime compensation), premium pay (such as callback pay), and hours of work (including shift schedules and work opportunities) are all mandatory subjects of bargaining. *City of Kalama*, Decision 6773-A (PECB, 2000); *City of Kalama*, Decision 6739 (1999).

"Permissive" subjects of bargaining are matters of management or union prerogatives that do not affect wages or hours, or that are considered remote from terms and conditions of employment.

Skimming Bargaining Unit Work -

A bargaining unit has a legitimate interest in preserving the work it has historically performed, and under *South Kitsap School District*, Decision 472 (PECB, 1978), unlawful "skimming" of bargaining unit work occurs when an employer fails to give notice to or bargain with the union before transferring work historically performed within the bargaining unit to employees outside of the bargaining unit. *Spokane Fire District 9*, Decision 3482-A (PECB, 1991); *South Kitsap School District, supra*.[7] Both the decision to transfer bargaining unit work and the effects of that decision on bargaining unit employees may be mandatory subjects of bargaining. *Community Transit*, Decision 3069 (PECB, 1988); *Battle Ground School District*, Decision 2449-A (PECB, 1986); *City of Kelso*, Decision 2120-A (1985); *Newport School District*, Decision 2153 (PECB, 1985).

Before determining whether a duty to bargain exists, a key element in the proof of a skimming violation is establishing that the work at issue is or could be bargaining unit work. *City of Anacortes,*

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[7] The standards for analyzing an employer's duty to bargain are the same regardless of who gets the work. *See Spokane County Fire District 9, supra.*

Decision 6830 (PECB, 1999), *aff'd, City of Anacortes*, Decision 6830-A, *supra*; *Spokane Fire District 9, supra*.

Unilateral Changes -

Longstanding Commission precedent indicates that an employer's duty to bargain includes a duty to give notice to and an opportunity for bargaining, upon request, with the exclusive bargaining representative of its employees *prior to* implementing changes concerning mandatory subjects of bargaining. That includes transferring bargaining unit work to persons outside the bargaining unit. *Yakima County*, Decision 6594-C (PECB, 1999); *Spokane Fire District 9, supra*; *South Kitsap County, supra*. Thus, an employer violates RCW 41.56.140(4) and (1) if it imposes a new term or condition of employment or changes an existing term or condition of employment of its represented employees and fails to honor its statutory bargaining obligations. *Yakima County, supra; Spokane Fire District 9, supra*.

On numerous occasions the Commission has considered five factors when determining whether a duty to bargain exists concerning the transfer of bargaining unit work. *Spokane County Fire District 9, supra; Clover Park School District*, Decision 2560-B (PECB, 1988). Those factors include:

> (1) The employer's previously established operating practice as to the work in question, i.e., had nonbargaining unit personnel performed such work before;
> (2) Did [the transfer of work] involve a significant detriment to bargaining unit members (as by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);
> (3) Was the employer's motivation solely economic;

> (4) Had there been an opportunity to bargain generally about the changes in existing practices; and
> (5) Was the work fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions?

Spokane County Fire District 9, supra.

The initial inquiry in a "unilateral change-refusal to bargain" unfair labor practice charge involving skimming is whether there has been an actual change in the employee's wages, hours, or working conditions. *Evergreen School District*, Decision 3954 (PECB, 1991). Absent such a change, there is no basis to find a refusal to bargain violation by an employer. *Evergreen School District, supra* (citing *City of Seattle*, Decision 2935 (PECB, 1988)). There has been no change in the employee's terms and conditions of employment where there has been a long-standing and established policy, with the union's knowledge and acquiescence, of others performing what might be claimed as unit work. *Evergreen School District, supra.* No duty to bargain arises from a change that has no material effect on the employee's wages, hours, or working conditions. *Evergreen School District, supra.*

Substantial Evidence -

When considering appeals from this agency, Washington courts look for substantial evidence supporting our decisions. *City of Federal Way v. PERC*, 93 Wn. App. 509 (1998). Likewise, the Commission has affirmed decisions issued by staff members in numerous cases where, after reviewing the record on appeal, substantial evidence was found to support the findings of fact, and those findings of fact supported the conclusions of law. *Cowlitz County*, Decision 7007-A (PECB, 2000); *King County*, Decision 7104-A (PECB, 2001). Substantial evidence exists if the record contains evidence of sufficient

quantity to persuade a fair-minded, rational person that the finding is true. *Bering v. Share*, 106 Wn.2d 212 (1986); *Cowlitz County, supra; King County, supra;* RCW 34.05.570(3)(e). The rule is based upon the notion that the trier of fact is in the best position to decide factual issues. *Cowlitz County, supra.*

Application of Standards

In this case, the Examiner correctly applied the five factor test. There is also substantial evidence in the record to support the Examiner's findings, and those findings of fact support the conclusions of law.

Past Practice -

The employer maintains that it did not skim work from the bargaining unit. It argues that it has long maintained a volunteer fire fighter program, that student fire fighters perform work that has long been performed by persons both inside and outside the bargaining unit, that bargaining unit members have not been displaced, and that the student program merely expands the volunteer fire fighter program. It contends that *student fire fighters* perform the same duties as *volunteers,* that the union failed to identify what exclusive work jurisdiction was eroded by the employer's decision and, that student fire fighters are clearly distinguishable from bargaining unit members.

On the other hand, the union contends that *student fire fighters* perform work substantially identical to work performed by *bargaining unit personnel* and thus, that the student program is not a mere extension of the volunteer program because students perform duties and have working conditions different from that of the volunteer fire fighters.

We hold that the appropriate comparison must be between the full-time fire fighters and the students. In large part, the employer's arguments compare two groups that are not relevant to the rights of this bargaining unit.

Unlike volunteer fire fighters, student fire fighters perform work historically performed by full-time fire fighters in the bargaining unit. We agree with the Examiner that even during their orientation period, the students are learning to perform work performed by the full-time fire fighters, and that the differences between the two groups disappear as the students gain experience. The essential job functions as well as the working conditions of the student fire fighters are nearly identical to the essential job functions and working conditions of the full-time fire fighters.

For example, unlike volunteers, both students and full-time fire fighters are required to report for scheduled 24-hour, on-duty shifts at the station house, provide the first response when responding to fire and emergency medical calls, regularly perform equipment and station maintenance, and wear employer issued uniforms. Furthermore, similar to full-time fire fighters, students must have someone cover their absences in certain situations, whereas volunteers can choose whether or not to respond to an emergency call. Also, similar to full-time fire fighters, students are paid a fixed amount for performing their job duties, whereas volunteers are paid only for calls they choose to respond to. Thus, there is substantial evidence in the record to support finding that the student fire fighter program changed the employer's past practices and resulted in the skimming of bargaining unit work.

In *Community Transit, supra*, although the employer had historically contracted to provide certain transit services, it had never before sought to expand the level of services provided by that contracted company. When the employer did expand its services, the Commission analyzed the type of services to be provided and found that the employer was using outside personnel to service additional routes and to perform work historically performed by bargaining unit members. *Community Transit, supra.* Thus, the work *could have been* performed by bargaining unit employees, and consequently, the union representing that bargaining unit had a legitimate and valid interest in the available work and a right to demand bargaining over both the decision and effects of the distribution of that work. *Community Transit, supra. See also Johanson v. DSHS*, 91 Wn. App. 737 (1998).

In *Battleground School District*, Decision 2449-A (PECB, 1986), the employer historically used students in its school cafeterias on a limited basis. Then, the employer implemented a new food program that added several food lines and began using more students as food servers. *Battleground School District, supra.* For the first time, students could be compensated with cash wages. *Battleground School District, supra.* The Commission found there was a unilateral change in working conditions.

Similar to the above two cases, in this case, although the employer historically has used volunteer fire fighters, the employer sought to expand the type of duties performed by people outside the bargaining unit with the use of student fire fighters. Student fire fighters began performing work that could have been performed by bargaining unit employees. For instance, full-time fire fighters already report to the station for scheduled 24-hour, on-duty shifts and already provide the first response to emergency

incidents. We agree with the Examiner that even if the initial group of students were involved to a lesser degree, the duties of the second complement of students closely align with the routine duties of bargaining unit members.

Significant Detriment to Bargaining Unit Members -
The employer maintains that the student program was not a detriment to the union because no work opportunities were diverted from the full-time fire fighter bargaining unit and that the student program did not materially affect the wages, hours, or working conditions of bargaining unit members. It also maintains that: (1) the union's attempt to demonstrate the safety impact is not persuasive because unit members control the assignment of duties to student fire fighters; and (2) volunteers are encouraged by the Commission.

The union claims that the student fire fighter program was detrimental to bargaining unit personnel because: (1) it affected reasonably anticipated work opportunities by decreasing callback time and compensation; and (2) it affected working conditions by requiring bargaining unit personnel to train student fire fighters and to work alongside inexperienced students in emergency situations.

The initial inquiry is whether there has been a change. *Battle Ground School District, supra; Evergreen School District, supra.* Once the union proves a change in practice occurred that reasonably can be inferred to have reduced bargaining unit work, the Commission views the obligation as shifting to the employer to demonstrate that the change did not have a significant impact. *Spokane County Fire District 9, supra.*

When an employer expands, intensifies, or changes a program so as to need additional hours of work performed or additional workers to perform the work, the additional work will normally be performed by or accreted to the bargaining unit of employees already performing similar work, and the exclusive bargaining representative of the employees doing that type of work will have a claim of work jurisdiction. *Battle Ground School District, supra*.

In this case, for many years there had been an increase in calls for service within the employer's jurisdiction, and there had been an increase in the employer's service area. In March 1998, the chief proposed staffing both stations with maximum staffing to include students. The employer began staffing both stations with bargaining unit personnel in October 1998. Although the employer added three full-time fire fighter positions to its workforce in December 1998, it also added two students during this time. Both student fire fighter programs added significant work hours to be performed.[8] Testimony was given that the addition of students decreased the amount of callback. Thus, substantial evidence supports the Examiner's credible inference that work or promotional opportunities that would have been commensurate with such an increase in the amount of bargaining unit work were not offered to bargaining unit employees. Nonbargaining unit personnel or students were performing work that could have been performed by bargaining unit personnel. *See Community Transit, supra*. The employer's evidence that the change did not have a significant impact falls short. *See Spokane County Fire District 9, supra*.

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[8] The first group of students added approximately 80 hours per week of work to be performed, and the second group of students added approximately 112 hours per week of work to be performed.

Therefore, this transfer of work was a change that created a significant detriment for bargaining unit members.

The reduction of callback was contemplated from the outset. At hearing, testimony was given that since the time the student fire fighters have started union members have experienced an actual decrease in callback time. Under the financial impacts portion of the chief's March 18, 1998, staffing plan, the chief stated that the annual estimated cost for "this proposal," which includes both the addition of full-time fire fighters and students, would result in a $72,750 reduction in callback.[9] This would be an average loss of approximately $5,000 per year for each bargaining unit member.[10] Thus, substantial evidence supports the Examiner's implicit finding that the use of students to do bargaining unit work would ultimately result in a reduction in callback for bargaining unit members. *See Spokane County Fire District 9, supra.*

In *Spokane County Fire District 9, supra*, volunteer fire fighters originally earned $5.00 for each drill they attended and points for participating in fire suppression and emergency medical service calls, as well as for attending meetings and teaching classes. The chief proposed a payment of $5.00 for each hour volunteers spent on standby. Although no bargaining unit personnel were laid off, lost any scheduled work hours, or experienced an actual decline in callback work, the Commission found that the new method of volunteer compensation was specifically designed to "sweeten the

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[9] The financial impacts portion also states that the reduction in callback is an estimation based on comparisons of existing staff and the three additional full-time fire fighters, but this reference does not mention students.

[10] Assuming there are 15 bargaining unit members.

pot" and increase the frequency with which volunteers would respond to standby calls. *Spokane County Fire District 9, supra*. The Commission found it could reasonably be inferred that the change in compensation diverted work opportunities away from the bargaining unit by reducing the likelihood that full-time employees would need to be called back and resulted in a skimming of bargaining unit work. *Spokane County Fire District 9, supra*.

Here, the $500 monthly stipend offered to students was designed to make the program more attractive, and consequently, it diverted work away from bargaining unit members. There was not much financial incentive for volunteers to respond to calls at $30 to $50 per month. Thus, the economic incentive used by the employer in this case is similar to the payments to volunteers that were found unlawful in *Spokane County Fire District 9, supra*.

Student fire fighters are often among the first response team at an incident, along with bargaining unit personnel. Testimony was given that when students are present at an incident they would be and have been assigned emergency response duties. Testimony was also given that the decision to not use students was not a practical reality because the bargaining unit member in charge would not decide to let a student idly stand by when responding to a particular incident, even though safety might be an issue and even though the student might be assigned duties beyond his or her training level. Testimony was also given that bargaining unit members are placed in a "Catch 22" situation regarding the decision to use students: if they do use them and something happens, they are responsible for it; and if they do not use them and there is a bad outcome, then they are also responsible.

We agree with the Examiner that lieutenants act in such matters as agents of the employer with a responsibility to provide emergency services, not as agents of the union, and that it would not be appropriate for them to make decisions based on personal or union interests in such situations. As agents of the employer, they are obligated to make prudent decisions regarding the use of students and callbacks of bargaining unit members consistent with the employer's guidelines, and they would be subject to criticism if they failed to use student fire fighters in emergency situations. Thus, such detriments exist and bargaining unit members cannot control or eliminate them.

Solely Economic Motivation -

On appeal, the employer claims that it was motivated by a desire to encourage volunteer service, not to displace cost. It points out that it recently added six new members to the bargaining unit.[11] The union maintains that financial concerns motivated the employer's decision to implement the student fire fighter program.

The chief's staffing plan of March 18, 1998, states that the employer's full-time staff had remained the same over the last 40 years, while the services the employer provided had greatly increased. The chief's plan called for hiring three additional full-time fire fighters and expanding services to include assigning full-time fire fighters to work out of Station 2. While the chief also testified that it had become increasingly difficult to recruit volunteers that does not necessitate the mayor's directive to come up with an "economical" method to meet the increased demands facing the employer. Thus, substantial evidence supports the Examiner's

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[11] Three fire fighters were promoted to lieutenant and three additional people were hired by the employer as fire fighters.

conclusion that the student fire fighter program was proposed to avoid paying wages to additional newly hired bargaining unit members or for a solely economic motive.

No Opportunity to Bargain -

The employer claims that it bargained in good faith with the union over all mandatory aspects of the student fire fighter program.[12] Regarding the decision to implement the student program, it claims that it is the employer's prerogative to recruit volunteers and insists that the union does not take issue with the authority of the employer to establish or maintain the existence of such a program.

The union asserts that the employer failed to bargain in good faith with it the decision to implement the student fire fighter program and that the employer has an independent statutory obligation to bargain that decision regardless of whether it bargained the effects of the program. The essence of the union's position is that the decision to assign bargaining unit work to students outside the unit is a mandatory subject of bargaining.

At the time the union was informed the employer had implemented the student fire fighter program, the parties were in negotiations over a successor collective bargaining agreement. As the record clearly reflects, (1) the union on numerous occasions requested bargaining regarding the decision to implement a student fire fighter program; and (2) the employer on numerous occasions refused to bargain the decision. Thus, the employer violated its duty to bargain by failing to give notice to and an opportunity for bargaining, upon

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[12] Regarding the potential effects of this program on the bargaining unit, the employer correctly notes that the union stipulated that it negotiated in good faith.

request, with the exclusive bargaining representative of its employees prior to transferring bargaining unit work to persons outside the bargaining unit. *See Yakima County, supra*.

Work Not Fundamentally Different -
Both the full-time fire fighters and student fire fighters perform duties, skills, or working conditions of the same nature or type. *See Community Transit, supra; Clover Park School District, supra*. The nature of the two groups' work is not changed by the fact that students, as the title implies, are "in training" and must meet certain benchmarks or that full-time fire fighters may perform some duties not performed by the students such as acting as shift officer in charge.

Conclusion -
Substantial evidence and Commission precedent support the Examiner's findings, and those findings support the Examiner's conclusions. Students work side-by-side with the bargaining unit employees, report for scheduled 24-hour, on-duty shifts at the station, are the first to respond to incidents with the full-time fire fighters when dispatched, participate in the duty shift's routine activities, perform equipment and station maintenance, use equipment and clothing indistinguishable from the bargaining unit employees, and receive fixed compensation. The employer has not had a past practice of scheduling or calling upon volunteers to perform this relevant bargaining unit work. The transfer of work to student fire fighters did involve a significant detriment to bargaining members by changing conditions of employment and significantly impairing reasonably anticipated work opportunities. The employer's motivation for transferring work was economic. Although the union requested that the employer bargain the decision to implement the change, the employer refused to bargain the

decision. The relevant work was not fundamentally different from regular bargaining unit work. Thus, the employer should have given notice to the union prior to implementing the student fire fighter program; the union had a right to demand that the employer bargain the decision to implement the program. When the union requested bargaining and the employer refused, the employer violated its statutory bargaining obligation and interfered with the rights of bargaining unit members.

Remedy

The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change, making employees whole, posting notice of the violation, reading the notice into the record at a public meeting, and ordering the parties to bargain from the status quo.[13] *See Seattle School District*, Decision 5733-A, (PECB, 1997). *Clover Park School District, supra; South Kitsap School District, supra.*

Restoration of Status Quo -

The employer claims that the Examiner's order in this case was overbroad and that it should not be forced to terminate the entire student program if it can eliminate those duties from the student fire fighter program that were skimmed from bargaining unit members. The union asserts that the Examiner's order requiring the employer to terminate the student fire fighter program is appropriate because it restores the status quo that existed prior to the employer's unlawful implementation of the program.

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[13] If invoked, the parties to a case involving "uniformed personnel" would also have to complete interest arbitration proceedings under to RCW 41.56.430.

The Commission holds that the entire program was correctly terminated. Because the employer failed to engage in good faith bargaining regarding its decision, we cannot allow any part of the implemented decision to remain in place. If the employer desires to pursue the concept of using students receiving a fixed compensation for scheduled on-duty shifts and providing first responses, it must give notice and bargain.

Make-Whole Remedy -

The Examiner correctly entered a make whole remedy, including back pay, but he did not explicitly detail how back pay was to be computed, as per our usual practice. Therefore, the order is being amended to add computation details.

Attorney Fees -

The union argues that it should recover attorney fees incurred in responding to the employer's frivolous appeal. It states that the Commission should remember that this case involves an employer that intentionally failed to bargain in good faith with the union despite repeated requests and that knowingly made a decision to ignore its statutory obligation to bargain. The union also points out the financial burden this litigation has placed upon its small local. The union argues that the Commission is authorized to award attorney fees pursuant to its own rules, Chapter 41.56 RCW, and Commission precedent. The union raises no other grounds upon which attorney fees may be awarded; thus, the Commission will address those grounds.

RCW 41.56.160(1) and (2) provide the Commission with the power to issue appropriate remedial orders and direct it to take such affirmative action as will effectuate the purposes and policy of the statute. In *State ex. rel. Washington Federation of State*

Employees v. Board of Trustees, 93 Wn.2d 60 (1980), the Supreme Court of the State of Washington held that "remedial" action in RCW 41.56.160 is broad enough to permit a remedial order containing an award of attorney fees when necessary to make the order effective. *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992). The court added that such an allowance was not automatic, but should be reserved for cases in which a defense to the unfair labor practice charge could be characterized as frivolous or meritless. *State v. Board of Trustees, supra*.

The term "meritless" has been defined as meaning groundless or without foundation. *State v. Board of Trustees, supra*. Under the Rules of Appellate Procedure, an appeal is "frivolous" when, considering the record as a whole and resolving all doubts in favor of the appellant, the appellate court is convinced that it presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430 (1980). In *State v. Board of Trustees, supra*, the Supreme Court analyzed two cases, but found that only one was frivolous:

- In *Central Washington University*, the employer's conduct was characterized as "arbitrary" and as the type that neither comported with good faith bargaining nor served as a basis for a meritorious defense to an unfair labor practice charge. After months of bargaining, the employer decided to delete certain provisions of the contract that they had originally proposed. The Supreme Court found that a debatable or honest defense could not arise out of the underlying course of conduct. Attorney fees were awarded to make the remedial order effective.

- In *Spokane Community College*, the employer relied in good faith on the advice of its counsel that certain provisions of the contract would be unconstitutional and refused to ratify those sections. The Supreme Court found the college was obligated to reopen the negotiations instead of taking the unilateral action it did. However, attorney fees were not awarded because the Supreme Court found the employer's conduct defensible, and at the very least, the employer's actions were honestly debatable at the time it took the advice of counsel. Finally, the court did not find that awarding litigation expenses would prevent future unfair labor practices because such an award could not and should not deter the employer from seeking legal advice and acting in reliance on such advice.

In *Lewis County v. PERC*, 31 Wn. App. 853 (1982), the court stated that a pattern of bad faith bargaining may preclude a novel or debatable defense and focused on the employer's dilatory tactics and the need to prevent their recurrence when it awarded attorney fees.

The Commission uses the "extraordinary" remedy of attorney fees sparingly. *Pasco Housing Authority, supra*. For example, the Commission has not awarded attorney fees in the following cases:

- *City of Vancouver*, Decision 6732-A (PECB, 1999) (employer acted on the advice of counsel in good faith and there was no evidence of repetitive conduct).

- *City of Bremerton*, Decision 5079 (PECB,1995) (employer committed an inadvertent violation, apparently caused by an internal failure of communications, and has presented a case of first impression).

- *Anacortes School District*, Decision 2464-A (EDUC, 1986) (union pursued a complaint on unfair labor practice that had already been resolved by the parties; Commission explained that its remedial authority under RCW 41.56.160 is limited to correcting damage done by a violation of the law and no violation could be found against the union for exercising its statutory right to file its complaint against the employer).

Commission orders awarding attorney fees have usually been based on a repetitive pattern of illegal conduct or on egregious or willful bad acts by the respondent. *City of Bremerton*, Decision 6006-A (PECB, 1998): *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decisions 2633 (PECB, 1988).

Regarding the financial burden placed on the union, under the "American Rule" the prevailing litigant is ordinarily not entitled to collect attorney fees from the loser. *Louisiana-Pac. Corp. v. Asarco Inc.*, 131 Wn.2d 587 (1997); *Blue Sky Advocates v. State*, 107 Wn.2d 112 (1986). This rule has generally been the law in the United States for more than 200 years. *Estate of Jordan v. Hartford Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993).)

Regarding the employer's refusal to bargain its decision, the employer in refusing to bargain the decision relied upon the advice of its Labor Relations Consultant, James Hobbs, and the employer's Human Resources Administrator, Kimberly Summers. At hearing, Hobbs testified that he and Summers reviewed the Commission's decisions regarding volunteer fire fighters. Hobbs added that "we did not come to the conclusion that there was any case that spoke to the determination of allowing the decision to be bargained collec-

tively." Furthermore, the employer agreed to negotiate the effects of the student fire fighter program and throughout the relevant time communicated with the union. The employer in this case was concerned about following Commission precedent and obtained the advice of a labor relations professional. The type of behavior it engaged in is not the same type of behavior found in previous Commission decisions awarding attorney fees.

On appeal, the employer addressed the points raised in the Examiner's decision and did not raise new arguments for the first time on appeal. *See City of Bremerton*, Decision 2733-A (PECB, 1987). The employer exercised its statutory right to file an appeal when it argued to the Commission that the student fire fighters perform essentially the same duties as the volunteer fire fighters. *See Anacortes School District, supra*. Although above we found that the relevant comparison was full-time fire fighter work to student fire fighter work, we do not find that the appeal was frivolous. The employer's comparison presented at least a debatable issue as to the relevant comparison. Thus, the request that attorney fees be awarded for the employer's frivolous appeal is denied.

ORDERED

The findings of fact, conclusions of law, and order issued by Examiner Frederick J. Rosenberry in the above-captioned matter on November 21, 2000, are AFFIRMED, except for 2.b in the order which is amended as follows:

b. Make all employees adversely affected by the unilateral changes whole for all losses they suffered as a result of the unilateral changes. An award of back pay shall be

made equal to the average fire fighter rate of pay for those fire fighters who would have been called back on overtime to perform the duties and work of the student fire fighters during the time either student fire fighter program was in place. Money amounts due shall be subject to interest at the rate that would accrue on a civil judgment of the Washington state courts, from the date of the violation to the date of payment. Awards shall be made to the union for distribution to affected bargaining unit members.

Issued at Olympia, Washington, on the 10th day of September, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

Commissioner Joseph Duffy
recused himself in this case.