STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE POLICE OFFICERS' GUILD, Complainant,	)	CASE 15932-U-01-4058
vs.	)	DECISION 8313-A - PECB
CITY OF SEATTLE, Respondent.	)	MODIFIED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Aitchison and Vick, by *Hillary McClure*, Attorney at Law, for the union.

Marilyn F. Sherron, Assistant City Attorney, for the employer.

On July 31, 2001, the Seattle Police Officers' Guild (SPOG) filed a complaint charging an unfair labor practice with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Seattle (employer) as respondent. A preliminary ruling issued under WAC 395-45-110 on August 15, 2001, found a cause of action existed on allegations summarized as:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and derivative "interference" in violation of RCW 41.56.140(1)], by its skimming of water-related emergency call work without providing an opportunity for bargaining.

A hearing was held on June 17, 2003, before Examiner David I. Gedrose. The parties submitted post-hearing briefs. The Examiner issued a decision on January 5, 2004, finding that the employer committed an unfair labor practice by refusing to bargain with the

SPOG over a mandatory subject of bargaining.[1] The parties filed a stipulation on January 9, 2004, modifying the record as to the intended meaning of a settlement agreement previously signed by the parties.

The Examiner withdraws the decision previously issued in this matter and, based on the evidence and arguments advanced by the parties including the recent stipulation, the Examiner rules that the employer committed an unfair labor practice by refusing to bargain with the SPOG as to work jurisdiction, a mandatory subject of bargaining, concerning emergency water response work other than dive/rescues.[2]

BACKGROUND

The western boundary of the City of Seattle includes Elliott Bay (hereafter, the saltwater area). Within the city limits, a set of locks separates the saltwater area from Lake Union and a channel connecting to Lake Washington, which comprises the eastern boundary of the city (hereafter, the freshwater area).

The employer operates separate police and fire departments. The employees of those departments are represented in separate bargaining units. The SPOG represents sworn Seattle police officers up to and including sergeants. Within the Seattle Police Department a Harbor Patrol staffed by 30 boat operators and divers (29 of them within the bargaining unit represented by the SPOG)

---

[1] *City of Seattle*, Decision 8313 (PECB, 2004).

[2] As used in this decision, "dive/rescue" connotes efforts to rescue persons who have been in/under the water for one hour or less.

operates several types of boats, and historically had responsibility for water emergency responses in both the saltwater and freshwater areas. At the hearing, the SPOG provided testimony that dive work was a "very small part" of the work of the Harbor Patrol.

POSITIONS OF THE PARTIES

The SPOG alleges that the employer has unlawfully skimmed its bargaining unit work, by assigning water emergency response work other than dive/rescue in the freshwater area to Seattle Fire Department personnel.[3] The SPOG argues that the work in question has historically been the exclusive work of the Harbor Patrol employees in the bargaining unit it represents. The SPOG states that the employer refused to bargain over this issue when the SPOG demanded bargaining. The SPOG requests a return to the status quo, as well as compensation to unit members who have lost wages as a result of the employer's alleged actions.

The employer denies that it has assigned SPOG bargaining unit work to fire department personnel, and therefore asserts that it has no duty to bargain. The employer argues that it is adhering to agreements between the employer and the SPOG, and that the SPOG waived its right to contest the employer's actions taken within the boundaries of those agreements.

---

[3] At the hearing and in its brief, the SPOG argued that the employer's alleged skimming had encroached upon the work jurisdiction of the bargaining unit it represents in the freshwater area, without evident distinction between dive/rescue and other water-related activities. In the stipulation filed subsequent to the issuance of the original decision in this case, the employer and SPOG have stipulated that a sharing of dive/rescue work applied to both the saltwater and freshwater areas.

DISCUSSION

Applicable Legal Standards

The Duty to Bargain -

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is applicable in this case. It imposes a duty to bargain, at RCW 41.56.030(4), which is enforced through RCW 41.56.140(4). Unfair labor practice complaints 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.

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*, 113 Wn.2d 197 (1989)). It is well settled that wages (including overtime compensation), premium pay (including 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); *City of Anacortes*, Decision 6863-B (PECB, 2001).

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

Unilateral Changes -

Under longstanding Commission precedent, the duty to bargain includes a duty of the party that seeks changes of existing wages, hours and working conditions to: (1) give notice to the opposite party; (2) provide an opportunity for bargaining prior to making a final decision; (3) bargaining in good faith, upon request; and (4) bargaining to agreement or impasse concerning any mandatory subjects of bargaining. In the case of "uniformed personnel" within the meaning of RCW 41.56.030(7), such as the bargaining unit at issue in this case, an impasse must be resolved through interest arbitration under RCW 41.56.430 - .490. *City of Seattle*, Decision 1667-A (PECB, 1984).[4] Thus, an employer violates RCW 41.56.140(4) and (1) if it implements a new term or condition of employment or changes an existing term or condition of employment of its represented employees without having honored its statutory bargaining obligations. *Yakima County*, Decision 6594-C (PECB, 1999); *Spokane Fire District 9*, Decision 3482-A (PECB, 1991).

Skimming Bargaining Unit Work -

A bargaining unit has a legitimate interest in preserving the work it has historically performed. *Yakima County*, Decision 6594-C; *Spokane Fire District 9*, Decision 3482-A; *South Kitsap School District*, Decision 472 (PECB, 1978). Skimming of bargaining unit work occurs when an employer fails to honor its bargaining obligations before transferring work historically performed within the bargaining unit to its own employees outside of the bargaining unit. *Spokane Fire District 9*, Decision 3482-A; *South Kitsap*

---

[4] The possibility of a lawful unilateral change after bargaining to impasse, as described in *Pierce County*, Decision 1710 (PECB, 1983), does not exist with regard to bargaining units of "uniformed personnel."

School District, Decision 472.[5] 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 (PECB, 1985); *Newport School District*, Decision 2153 (PECB, 1985).

The harmful effect of skimming results from the prejudicial effect on the status and integrity of the bargaining unit. *City of Kennewick*, Decision 482-A (PECB, 1979). The detriment from skimming may only be felt in the future, such as when transfers of bargaining unit work eventually lead to erosion of work opportunities, loss of promotional opportunities, and adverse effects on the job security of bargaining unit employees. *City of Seattle*, Decisions 4163, 4163-B (PECB, 1995). Where an employer is dealing with two bargaining units within its workforce, it is obligated to respect the separate work jurisdictions of both bargaining units, absent a tri-partite agreement. *Kitsap County Fire District 7*, Decision 7064-A (PECB, 2001).

Establishing that the work at issue is or could be bargaining unit work is a key element of proof in a skimming case. *City of Anacortes*, Decision 6830 (PECB, 1999), *aff'd*, *City of Anacortes*, Decision 6830-A; *Spokane Fire District 9*, Decision 3482-A; *City of Anacortes*, Decision 6863-B. On numerous occasions, the Commission has considered five factors when determining whether a duty to bargain exists concerning an alleged transfer of bargaining unit work. *Spokane County Fire District 9*, Decision 3482-A; *Clover Park*

---

[5] Skimming is thus merely an in-house variant of the contracting out found to be a mandatory subject of collective bargaining in *Fibreboard Paper Products v. NLRB*, 379 US 203 (1964).

School District, Decision 2560-B (PECB, 1988), *City of Anacortes*, Decision 6863-B. Those factors include:

> (1) The employer's previously established operating practice as to the work in question, i.e., had non-bargaining unit personnel performed such work before;
>
> (2) Did [the transfer of work] involve a significant detriment to bargaining unit members (as by changing conditions of employment or significantly impairing reasonably anticipated work opportunities);
>
> (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, Decision 3482-A.

Another key inquiry in a skimming case is whether there has been an actual change. Absent a change, there is no basis to find a refusal to bargain violation. *Evergreen School District*, Decision 3954 (PECB, 1991) (citing *City of Seattle,* Decision 2935 (PECB, 1988)). If an employer merely implements or reiterates a policy that has been long-standing and established with the union's knowledge and acquiescence, then no change in employees' terms and conditions of employment will be found. *Evergreen School District*, Decision 3954. No duty to bargain arises from a change that has no material effect on wages, hours, or working conditions. *Evergreen School District*, Decision 3954; *City of Anacortes*, Decision 6863-B.

Where a waiver is claimed, the burden of establishing the existence of a waiver rests on the party asserting it. *City of Yakima*, Decision 3564-A (PECB, 1991).

Application of Standards

Bargaining Unit Work -

Throughout this proceeding, the SPOG has only contested an alleged transfer of bargaining unit work in the freshwater areas. The stipulation filed after the issuance of the original decision further narrows the scope of work alleged to have been skimmed.

The "Harbor Patrol" is the historic name for a police unit that has been in existence for several decades and at one time was responsible for all water-related rescues in both the saltwater and freshwater areas. Water-related emergency responses are divided into four categories:

- Rescue, where a person has gone under the water or is in imminent danger of doing so;
- Recovery, where a person is presumed to be deceased after being under the water for more than one hour;[6]
- Distress, where there is no immediate threat of death;
- Needs-assistance, at the lower threshold of distress calls.

Historically, only the Harbor Patrol had emergency dive teams that could fully respond to rescue and recovery calls.

Several highly publicized incidents in the late 1990's changed the situation. Responding to widespread knowledge that the fire boat operated by the Seattle Fire Department in the saltwater area could not deploy divers in response to emergencies, and had to wait for a police dive team, discussions began between the police and fire

---

[6] The term "golden hour" relates to a medical consensus that a person may survive underwater for up to one hour.

departments, as well as between the employer and the SPOG, to change the practices concerning water-related emergencies.

In January 2000, officials of the fire and police departments executed an agreement regarding coordination of police and fire resources for dive and emergency scenes. That agreement provided:

> MEMORANDUM OF AGREEMENT BETWEEN THE SEATTLE FIRE DEPARTMENT AND SEATTLE POLICE DEPARTMENT REGARDING THE COORDINATION OF POLICE HARBOR PATROL DIVE RESOURCES AND FIRE DEPARTMENT WATER RESCUE RESOURCES AT FIRE AND EMERGENCY SCENES
>
> In order to provide the safest and most efficient use of Fire Department and Police Department resources at water rescue incidents, the following agreement has been made:
>
> 1. If either Seattle Fire Department or Seattle Police Department responds to, or receives a call for a Water Related Emergency, the other Department will be notified immediately.
> 2. Dive Search and Rescue will he conducted by the Seattle Police Department Dive Team members, or by other Mutual Aid agencies properly equipped and trained to conduct these operations.
> 3. Surface Water Rescue may be initiated by any Emergency Response Personnel at the scene. Seattle Fire Personnel, under extenuating circumstances, may engage in surface/free dive rescues. Seattle Fire Rescue Swimmers, if possible, will set a marker(s) for the last known location of subsurface victims.
> 4. Properly equipped Surface Water Rescue trained Fire Department resources or Mutual Aid resources so trained and equipped, will be dispatched to water related incidents. This will provide for fire fighter safety and civilian rescue activity coordination.
> 5. The Seattle Fire Depament may request Seattle Police Department Harbor Patrol to a water related incident, to assist the Fire Department in providing for fire fighter rescue and safety, should the need arise.
> 6. The Seattle Police Department Dive Team will be requested by the Seattle Fire Department to provide

dive, search and rescue capability for civilian water rescue victims.

7. This M. O. A. shall be effective immediately and shall remain in effect until rescinded by either party.

Neither of the unions representing the employees of those departments was involved in the formation of that agreement.

In a negotiated agreement signed nine months later, the SPOG and the employer agreed to a sharing of rescue diving responsibilities between the police and fire departments. That agreement dated September 22, 2000, stated as follows:

Settlement Agreement
Regarding Dive Work and Elliott Bay Patrols

The parties acknowledge that the use of SCUBA and other specialized diving equipment to perform dive work is the exclusive bargaining unit work of the Seattle Police Officers' Guild ("SPOG"). In the interest of public safety the *SPOG agrees to share only the emergency water rescue aspect of dive work* exclusively with members of the bargaining unit represented by IAFF Local 27 ("Local 27"), *in emergency circumstances under the following conditions*:

1. Following the execution of this settlement agreement, a dual notification will be made to the Police and Fire Departments in the event of a *request for emergency water rescue*. The first unit (Police or Fire) of qualified rescue divers arriving on the scene will undertake appropriate *underwater rescue operations* including SCUBA. Police Department personnel shall assume incident command (ICS) during dive operations upon arrival at the scene. *All diving work apart from that shared under the terms of this agreement, shall be performed exclusively by police divers.* The determination as to when a rescue effort becomes a recovery effort shall be defined in the protocols established for emergency water rescue response.

2. All Police Department personnel regularly assigned or subject to call out to perform dive work shall be paid the premium pay applicable to dive work. In its efforts to enhance overall public safety, the City will ensure there are at least as many authorized divers in the Police Department as in the Fire Department. All divers shall be fully equipped by the City to perform their work. Upon ratification of the successor to the collective bargaining agreement between the City and Local 27 that expires on December 31, 2000, the SPOG may at their sole option reopen negotiations explicitly and exclusively with respect to the issue of premium pay for dive work performed by members of their bargaining unit. The City acknowledges that the express purpose of this reopener is to address equity regarding premium pay specific to dive work in the City.

3. The Police Department shall have the primary responsibility for all subsurface water rescue work in the City and the Police Department shall have final authority and responsibility to establish training programs, operational protocols, future deployment levels and uniform equipment standards, including compatible communications systems, for all such work. The parties recognize that the Police Department, while retaining final authority, will necessarily consult with Fire Department management in administering the diving program.

4. Nothing in the budgeting or operation of the City's diving program will result in the loss of positions by the SPOG bargaining unit, including dive positions as a result of the execution of this settlement agreement. Additionally, nothing in the settlement agreement will allow Local 27 bargaining unit members to perform law enforcement duties in conjunction with emergency dive rescue efforts or prohibit either Local 27 or SPOG bargaining unit members from performing surface rescue efforts.

5. SPOG bargaining unit members shall continue to operate a Harbor Patrol boat to patrol Elliot Bay. The authorized staffing levels for the Harbor patrol unit will include staffing for the Elliot Bay patrol boat. Staffing above the minimum levels necessary to accomplish public safety needs and appropriate equipment purchases shall be at the discretion of the Police Department as budgeted by

the City. The attached protocols for fire responses shall apply on Elliot Bay. Current non-law enforcement patrols on Elliot Bay by the Fire Department shall continue.

6. Upon execution of this settlement agreement, the 12-hour shift pilot program for Harbor Patrol personnel shall become the regular shift for Harbor Patrol personnel. The SPOG acknowledges that there are impacts of the 12-hour shift that will be resolved through labor-management discussions.

7. The City will budget to fully accomplish the terms of this MOA and to ensure no loss in public safety response capabilities by either department.

8. This Memorandum of Agreement shall be signed by SPOG, the City and Local 27 and will resolve all outstanding issues with respect to jurisdiction over dive work and Elliot Bay patrols.

9. The terms of this agreement shall be subject to enforcement through the grievance procedure of the parties' extant collective bargaining agreement although this agreement shall survive the expiration of any particular collective bargaining agreement for so long as firefighters perform subsurface water rescue work. If this provision is determined to be unenforceable as to duration the parties agree to immediately insert this agreement within the terms of the extant collective bargaining agreements.

(emphasis added). Under the terms of the stipulation filed on January 9, 2004, the intent of that memorandum was that the SPOG agreed to share "only the emergency water rescue aspect of dive work" with the fire department.

The controversy now before the Examiner arose on April 9, 2001, when the commander of the police communication section issued a memorandum titled "Procedure for Water Related Emergencies," which purported to be based upon the agreement made between the police and fire departments in January 2000. The disputed memorandum was as follows:

> Procedure For Water Related Emergencies
>
> REVIEW AT ROLL CALLS
>
> READ AND INITIAL
>
> If either the Seattle Fire Department or the Seattle Police Department responds to, or receives a call regarding a *Water Related Emergency**, the other Department *WILL* be notified immediately. The term "Water related" also includes areas "adjacent to the shoreline".
>
> (See attached Memorandum of Agreement between the Seattle Fire Department and the Seattle Police Department.)
>
> **Some* examples of water related emergencies are:
>
> > *Any incident involving a person in the water.*
> > (This includes drownings, suicide attempt, rescue, fall, distress, needs assistance)
> >
> > *Any incident involving a fire or smoke situation.*
> > (Includes pier, boat, plane, house boat, or area adjacent to the shoreline)
> >
> > *Any incident involving a distressed vehicle or rescue.*
> > (Includes boat or house boat taking on water, over turned water crafts, planes in the water, cars in the water, searches for people or vehicles lost in the water, requests for assistance.[sic]
> >
> > *Any medical emergency on the water.*
> >
> > *Any large spill.*
> > (Includes gas, diesel, oil, or toxic material.)
> >
> > *All the above, in an area adjacent to the shoreline.*

On April 23, 2001, the SPOG requested bargaining over the memorandum dated April 9, 2001. Its letter to the employer included:

> Recently, the Seattle Police Department (SPD), in concert with the Seattle Fire Department (SFD), negotiated and agreed to a "Procedure For Water Related Emergencies." On April 9, 2001 the SPD issued an internal department memorandum informing Department personnel of the new "procedure." It is the position of the Seattle Police Officers' Guild that this "procedure" constitutes an intentional erosion of our bargaining unit work.

> Additionally, the SPD memorandum identifies an attached "Memorandum of Agreement between the Seattle Fire Department and the Seattle Police Department" in the text of the April 9, 2001 memorandum. That MOA was previously negotiated solely between the agencies without bargaining unit knowledge or approval. It was signed by then Assistant Chief Ed Joiner for the SPD and Assistant Chief Roger Ramsey for the SFD in January of 2000.
>
> You may recall that this MOA was the subject of a separate action by the SPOG. In response to the argument voiced by the SPOG, the City of Seattle (City) agreed to rescind that MOA. We view this recent action by the SPD and the SFD as a major step backwards and a violation of a prior agreement between the City and the SPOG.
>
> It is the position of the SPOG that this "procedure" is a mandatory subject of bargaining. We demand the City immediately rescind the April 9, 2001 "Procedure For Water Related Emergencies," in its entirety, and adhere to the September 22, 2000 MOA between the SPOG and the City. The City should view this letter as a formal demand to bargain on this matter.

The employer received that letter, and there was a discussion between the SPOG and the employer on April 24, 2001, concerning this subject matter.

In a memorandum dated April 29, 2001, the author of the disputed memorandum explained his reasons for issuing that document, as follows:

> The original procedure for processing so-called "Water-related emergencies" was issued by me to my dispatch personnel on 1/20/00. (See attached Memo)
>
> The "Water-related emergencies" procedure noted in the SPOG letter refers to a more recent procedural memo from me, which was an update to the memo noted above. Its purpose was to further clarify and define "Water-related emergencies", dated 4/09/01. On 4/26/09[sic], I issued an additional memo to all Communications Staff outlining a specific procedure to be followed by dispatchers to insure that time delays in relaying information and/or callers to the Fire Department does not occur.

Around 4/1/01, Asst. Chief John Diaz and Deputy Fire Chief A.D. Vickery met to discuss a number of issues, including the relay of calls and/or information between the Police and Fire Departments regarding "Water-related emergencies". They also discussed other issues concerning training and equipment(?). For the portion of the meeting that was about "Water-related emergencies", they invited Lt. Ayco, Communications Section and Lt. Schweitzer, Harbor Unit into the discussion.

As a result of the above meeting, on 4/4/01, I arranged to meet with Bat. Chief John Pritchard, Fire Alarm/ Dispatch Center and Deputy Chief Ramos in my office to discuss the need to clarify the procedure for relaying calls and/or other information to each other regarding "Water-related emergencies". From that meeting, I issued the 4/09/01 memo. Later this month, I had a phone conversation with Chief Pritchard and I decided there was a need to further clarify for dispatchers the specific procedures for sharing and processing "Water-related emergency" calls and/or information, which I did with the memo dated 4/26/01. (See attached memos)

In the 911 center, our goal is to insure that notification, call/information sharing and dispatch of the necessary and appropriate public safety resources for "Water-related emergencies" occurs in a timely fashion. To accomplish this goal, there must be clear, simple and bright-line definitions and procedures for processing such calls in an expeditious manner. They cannot be subject to interpreting and analyzing the intent of labor contracts or MOA's. I do not see the clarifying definitional and/or procedural memo's dated 4/09/01 or 4/26/01 as a negotiation or attempt to violate any agreements between SPD, SFD and/or SPOG, including the MOA's on this subject dated, 1/13/00 and 10/5/00. (See attached)

It was not my intent to erode or encroach on any SPOG body of work by issuing the original, 1/20/00 memo on "Water-related emergencies. Additionally, the memos dated 4/09/01 and 4/26/01 were simply an effort to clarify the definitions of "Water-related emergencies" and the procedures for the timely and most expeditious manner for relaying calls and/or information between the Police and Fire Dispatch Centers. My purpose, as in handling other emergency calls, was to insure a specific procedure is in place that will enable us to dispatch police units (Harbor) in the quickest manner possible and to immediately provide that information to the Fire Alarm Center. In turn, the Fire Alarm Center will reciprocate with any calls or information they receive regarding

> "Water-related emergencies", so we can dispatch our resources in an expeditious manner.

The employer did not rescind the April 2001 memorandum, and it refused to bargain with the SPOG on the matter. In its written response to the SPOG dated April 30, 2001, the employer conceded that the January 2000 memorandum had been rescinded.[7]

> At our meeting on April 24, and in your letter of April 23, you have raised concerns regarding an internal Police Department memo, dated April 9, 2001, specifying that both the Police and Fire Departments will be notified of water related emergencies. We acknowledged at the meeting that the Memorandum of Agreement between the Police and Fire Departments attached to the memo had been rescinded. However, we do not believe that the direction provided to Communications personnel by the internal memo constitutes an erosion of Seattle Police Officers' Guild bargaining unit work or a violation of the settlement agreement, dated September 22, 2000, between SPOG and the City.
>
> At the April 24 meeting, we agreed to move the grievance regarding alleged violations of the settlement agreement to step 3 of the grievance process, and a step 3 meeting is being scheduled. That meeting should provide an opportunity for further discussion of any remaining questions or concerns regarding the dispatch of water related emergency calls.

The parties agreed at the hearing that the SPOG historically had exclusive jurisdiction for water-related emergency work in the freshwater areas. The SPOG now acknowledges that it had modified its claim to exclusive jurisdiction over dive/rescue work, but still asserts that the reference to *all water-related emergency*

---

[7] At hearing in this matter, the employer admitted that the January 2000 memorandum had not been negotiated with the unions representing the employees of the police and fire departments, and that it had been rescinded once that became apparent.

work within the city of Seattle in the April 2001 memorandum goes beyond that specific alteration of its historic work jurisdiction.

The Examiner is not persuaded by the employer's contention that the April 2001 memorandum does not alter the terms of the agreement signed by these parties on September 22, 2000. The intentions of the September 2000 and April 2001 memoranda are quite different: The memorandum dated September 22, 2000, specifically limits the transfer of work; the memorandum dated April 9, 2001, does not. Additionally, the origin of the terms and definitions contained in the April 2001 document is not clear from this record; even the memorandum from January 2000 (upon which the April 2001 document purports to have been based) does not enumerate those specific examples of water emergencies. The April 2001 document arguably expands the definition and scope of water-related emergency work beyond the dive/rescue work addressed in the September 2000 agreement. While it is true that the April 2001 document only calls for simultaneous dispatch of police and fire units, and does not expressly authorize any transfer of bargaining unit work, simple logic dictates that the only purpose of having fire units respond to a scene would be for fire department personnel to perform all water-related emergency work, including the full range of rescue, recovery, distress and needs-assistance categories.

The April 2001 document was inherently defective because of its reliance upon the defunct document from January 2000. Having itself rescinded the January 2000 agreement because it was not negotiated with the unions representing the employees of the respective departments, the employer has not produced any convincing basis to validate its persistent reliance on the April 2001 document expressly based upon the January 2000 document. The logic is inescapable: If the January 2000 memorandum was poisoned by a lack of bargaining, its April 2001 progeny was similarly tainted;

if the employer saw the need to bargain one, it must bargain the other.

The April 2001 document was also flawed because it did not address or implement the more recent (and controlling) agreement negotiated by the employer with the SPOG in September 2000. The author of the April 2001 document provided insight into its formation in his memorandum of April 29, 2001, stating:

> In the 911 center, our goal is to insure that notification, call/information sharing and dispatch of the necessary and appropriate public safety resources for "Water-related emergencies" occurs in a timely fashion. To accomplish this goal, *there must be clear, simple and bright-line definitions and procedures* for processing such calls in an expeditious manner. *They cannot be subject to interpreting and analyzing the intent of labor contracts or MOA's.*

(emphasis added). Thus, this case comes down to the employer defending the actions of a subordinate official who appears to have come up with his own definitions and examples and instituted a protocol for emergency responses that is outside of (and in conflict with) the agreement reached by the employer and the SPOG through the collective bargaining process. Chapter 41.56 RCW imposes a duty to bargain on the employer as a whole, and all of its officials and agents must observe and act within the obligations of the collective bargaining process. When challenged by the SPOG, the employer has inexplicitly placed the defense of its errant agent ahead of its statutory obligations toward (and even its own agreement with) the SPOG.

<u>There Was No Waiver By The Union</u> -

The Examiner is not persuaded by the employer's defense that the SPOG waived its right to protest the April 2001 memorandum because

of the settlement agreement dated September 22, 2000. Even as modified by the stipulation filed on January 9, 2004, the parties' agreement in September 2000 was limited to dive/rescue work. The April 2001 document calls for dispatch of the fire department for all water-related emergencies anywhere in Seattle. The SPOG immediately protested the April 2001 document, and pointed out the fallacy of its purported reliance on the rescinded memorandum from January 2000. The employer had the burden to prove the alleged waiver, and it failed to do so.

Fundamental Differences in Work and Detrimental Effect -
The employer offered a "de minimis" defense, pointing out that the Harbor Patrol responds to hundreds of water-related emergencies each year, ranging from rescues to needs-assistance calls. The SPOG presented evidence of four examples of alleged skimming between April 2001 and the date of the hearing.

- The most recent example, dating from June 2002, began with a joint training exercise for police and fire divers in the freshwater area (in this instance, Lake Union). Just prior to the training, the police bargaining unit member in charge of the exercise became aware of a recovery effort in the lake, and shifted the exercise to address that situation. The SPOG now alleges that the participation of fire department divers in a recovery effort in the freshwater area constituted skimming, but the Examiner concludes the employer cannot be faulted for this incident. The joint dive was not initiated by the employer, and did not occur because of the April 2001 memorandum. Instead, it was the result of a judgment call by a member of the bargaining unit represented by the SPOG.

- A second example, dating from March 2002, occurred when both police and fire units responded to a call reporting a body in the water off Harbor Island (in the saltwater area). The fire

department arrived first and had removed the body from the water by the time a Harbor Patrol unit arrived, but the Examiner concludes the employer cannot be faulted for this incident. Although the *recovery* of a dead body remains SPOG work under the September 2000 agreement, the SPOG acknowledged at the hearing in this proceeding that there is often a gray area when deciding when a person floating in the water is beyond rescue. Thus, although the distinction between rescue and recovery is noted, it would be unproductive at best (and bizarre at worst), to second-guess the emergency response in question into a labor dispute.

- The third and fourth examples, dating from October and November 2001, took place in the freshwater area (on Lake Washington) and offer more definitive examples of the SPOG's concerns, as well as being probable consequences of the April 2001 document. The police incident reports of both incidents were admitted as evidence at the hearing in this proceeding, and are repeated verbatim here with some bracketed insertions to enhance understanding:

> 10-31-01, 0706 Hrs. [Police personnel] were notified via telephone and pager of a car in the water at the Magnuson Park boat ramp [in the freshwater area]. Divers Allers and Beard [members of the SPOG bargaining unit] responded in the Dive van, along with officers Carpenter, Bailey, and Enright. Officer Johnson responded in Patrol #8. When we arrived at 0715 with Allers and Beard suited up and ready to dive, SFD [fire department] engine 40 and Ladder 9 were at the boat ramp along with 2 SPD [police department] patrol vehicles (1U01, officer Gardena, and 1U5, officer Stolt). Two firefighters had already gone into the water, one in his uniform and one in his underwear, and they advised us there was nobody in the vehicle. Ladder 9 had a towline attached from the front of the ladder truck to the rear of the vehicle and was attempting to tow the vehicle out of the water. In addition, a climbing

> rope was attached to the vehicle and approximately 4 firefighters were pulling on it from the south as the ladder truck backed up, trying to prevent the vehicle from hitting the north dock. Numerous other SFD [fire department] units were staged in the boat ramp approach lanes, including the Technical Rescue truck. Allers and Beard influenced SFD [fire department] personnel to stop using the ladder truck to tow the vehicle out of the water. Lt. Schweitzer was notified and responded from the Harbor station as SFD [fire department] divers were entering the water. Patrol officers discovered the vehicle was not reported stolen and sent officers to the owner's address in the 9500 blk of 44 Av NE. At 0735 we requested a Lincoln [a private towing firm] for a tow. We discovered the SFD [fire department] personnel from E40 had entered through the driver's window, broken out the back window, and removed items from the rear passenger compartment prior to our arrival. They had also removed the keys from the ignition and attempted to open the trunk. When unable to open the trunk they pried it open with an axe and threw the keys inside. Lt. Schweitzer arrived at 0745. At 0746 [a police department] patrol officer reported that they had made contact with the owner at his residence and discovered that he had accidentally driven the vehicle into the water at around midnight, then climbed out and drove home. At 0755 the tow truck arrived. At 0800 Allers and Beard, in dive gear, attached the tow truck's winch cable to the vehicle, untied the ropes SFD [the fire department] had tied to the car, and then searched the area underwater. The dive began at 0805 and they were out of the water at 0815. The vehicle was then winched the vehicle out of the water and we cleared the scene.

Then:

> On 11-30-01 at 12:22 a caller to 911 described a jet ski that wouldn't start 300-400 yds E. [east] of Stan Sayres Piers [in the freshwater area]. Caller described a person in wetsuit, not in distress, just a jet ski that wouldn't start. 911 dispatch informed [the] Fire [department]. Fire dispatched the following units: L7, B5, A14, R14,

> E4, AU28, L12, B2, A25, M10, SAFT2, STAF10, DEP1. Fire also had the Chief Seattle to look through [pass through the locks separating the saltwater and freshwater areas]. Fire was informed Patrol 8 [a police department boat] was responding from Husky Stadium. Fire was informed Patrol 8 was at the I-90 Bridge and still launched Park Dept. boat [borrowed or commandeered from another of the employer's departments] in order to tow the jet ski in. Officers Price and Martin responded, took over the tow – the individual involved, . . . was not in any distress and was shocked at the overwhelming Fire response. He wanted to swim his jet ski in.

While the testimony at the hearing suggested that fire department personnel did not engage in any water-related emergency responses on Lake Washington previous to April 9, 2001, they clearly did so after the issuance of the document at issue in this case. The two Lake Washington incidents, coming within one month of each other, demonstrate extensive and enthusiastic involvement by fire department personnel in situations that certainly appear to fall outside of the dive/rescue work ceded by the SPOG in the September 2000 agreement. The employer is responsible for the actions of its dispatchers and for the actions of its fire department personnel, and has produced nothing that shows the SPOG agreed to such an erosion of its work jurisdiction.

The employer would disregard any encroachments on the work jurisdiction of the SPOG as hardly making a dent in the hundreds of water-related emergency calls that the Harbor Patrol responds to each year. Without suggesting that a "de minimis" defense is ever persuasive, the fire department responses to the incidents in October and November of 2001 cannot be considered serendipitous. The employer produced no evidence of responses by the fire department to water-related emergencies in the freshwater area prior to the April 2001 memorandum challenged in this proceeding. The massive responses in October and November of 2001 support an

inference that, by that time, fire units located near the freshwater areas believed that they had equal jurisdiction with the Harbor Patrol for all water-related emergencies. Such a belief was a foreseeable consequence of the April 9, 2001, memorandum.

Even if the employer did not actively "assign" the work of the SPOG's bargaining unit to the fire department, the employer should have reasonably foreseen the uncertainty that resulted from the non-bargained "procedures" detailed in the April 2001 document: In contrast to the September 22, 2000, agreement, the April 2001 memorandum does not provide for an incident-command structure, training, or the impact on bargaining unit work. The employer wrapped itself and its two public safety departments and the unions into a confused web with its memorandum, then refused to untangle it through negotiations. The employer cannot create a situation where one bargaining unit encroaches upon the work of another, refuse to deal with the resulting conflicts, and claim that it is absolved of its collective bargaining responsibilities because it did not actively assign work to another bargaining unit, but only looked the other way when it occurred, or that it never intended the foreseeable results of its actions.

The primary negative effect on the SPOG is anticipatory. The SPOG has reasonable grounds for concern about a threat to the integrity of the bargaining unit it represents as a result of the April 2001 memorandum: That if the memorandum is left unchallenged, the fire department and employer could, in the not too distant future, claim that the fire department had been responding to all freshwater-related emergencies for years, and that the SPOG had waived (by inaction) its right to sole jurisdiction over the work.

The employer as a whole bears the burden for this state of affairs. At the hearing, the employer implied its frustration in dealing

with the strained relations between the unions representing its police and fire personnel, but the employer clearly added to any problem by creating an environment in and through the April 2001 document, by which the fire department is dispatched to freshwater emergencies that historically have been the sole jurisdiction of the police department. Beyond demonstrating the friction that existed between the police and fire personnel responding, the reports concerning the incidents in October and November of 2001 should alert the employer that strained relations between police and fire unions will not disappear through the employer taking the position that the April 2001 memorandum has not added fuel to any controversy that has existed in the past.

The Employer's Motivation and the Opportunity for Bargaining - The employer maintains that it need not bargain the April 2001 memorandum. Starting with the author's explanation of April 29, 2001, employer officials have been stating that it was not their intent to negate the collective bargaining process, and that the main intent of the April 2001 document was to disseminate information in support of the goal of the safety of the public they serve.

Accepting that the employer's agents may have acted out of good intentions, they have nevertheless violated the employer's obligations under the collective bargaining process. Nothing in the arena of mandatory subjects of bargaining is sacrosanct or immune from the duty to bargain. If, hypothetically, the employer were to contemplate a transfer of responsibility for all water-related emergency work to one or the other of the departments involved in this controversy, the collective bargaining statute would not preclude the employer from eventually getting to such a result. The employer would, however, need to satisfy its collective bargaining obligations. At a minimum, that would require the employer to give notice (prior to making a decision) to all unions

that represent bargaining units that would be affected by a transfer of bargaining unit work. The employer would then need to bargain in good faith (prior to making a decision) with each union that requested bargaining. Because its commissioned law enforcement officers and its fire fighters are "uniformed personnel" under the statute, the employer would need to take any unresolved issues to mediation under RCW 41.56.440 and to interest arbitration under RCW 41.56.450. *City of Seattle*, Decision 1667-A. In the absence of agreement by all parties, the ultimate decision would thus be made through the rational process of interest arbitration, rather than by the economic and power struggles associated with either the unilateral changes prohibited by the legislature in RCW 41.56.470, or with the strikes abhorred by the legislature in RCW 41.56.430 and expressly prohibited by the legislature in RCW 41.56.490.

REMEDY

The complaint filed by the SPOG was directed at the issuance of the April 2001 document. At the time the complaint was filed, none of the four examples of alleged skimming introduced at the hearing had occurred. The SPOG did not move to amend its pleadings to conform to the evidence, however, and the employer objected to the use of evidence concerning those incidents by the SPOG to prove its case after the fact. The employer's objection is apt, insofar as it goes to the remedy in this case.

The union was entitled to pursue its original complaint alleging potential harm to the integrity of the bargaining unit it represents, and would be entitled to a remedial order compelling the employer to withdraw the April 2001 document even if there had been no actual incidents of "skimming" up to the time of the hearing.

The incidents involving responses by the fire department to water-related emergencies on Lake Washington in October and November 2001 are used here only as illustrative examples of the type of confusion and controversy that was likely to result from the April 2001 document challenged in the unfair labor practice complaint. In the absence of an amended complaint putting the employer on notice that it needed to defend itself concerning the four alleged examples of "skimming" that occurred after the filing of the complaint, the union is not entitled to a remedial order based on those incidents. The remedial order in this case is thus confined to the original complaint, and the Examiner intentionally omits any order to make employees in the bargaining unit represented by the SPOG whole for any lost opportunities for work or premium pay.

MODIFIED FINDINGS OF FACT

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

2. The Seattle Police Officers' Guild (SPOG), a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory law enforcement officers employed by the City of Seattle.

3. The non-supervisory employees of the fire department operated by the employer are represented for the purposes of collective bargaining in a bargaining unit separate and apart from the bargaining unit represented by the SPOG.

4. The employees in the bargaining units described in paragraphs 2 and 3 of these findings of fact are "uniformed personnel" within the meaning of RCW 41.56.030(7).

5. The Seattle Police Department has historically operated a Harbor Patrol unit staffed by 29 members of the bargaining unit represented by the SPOG and one additional employee. That unit historically had exclusive responsibility for all water-related emergencies within the city limits of Seattle.

6. Responding to criticism following highly-publicized situations that occurred when the employer's fire department was unequipped to deploy divers in the 1990's, officials of the police and fire departments executed an agreement in January 2000 establishing a procedure for responses by both departments to water-related emergencies.

7. The memorandum dating from January 2000 was later rescinded by the employer, on the basis that it had not been negotiated with the unions representing the employees of either of the departments involved.

8. Following collective bargaining negotiations, the employer and the SPOG signed an agreement on September 22, 2000, by which the SPOG agreed to a limited sharing of work jurisdiction with the fire department in regard to dive/rescue situations.

9. On April 9, 2001, an employer official issued a procedure for its emergency communications personnel, requiring simultaneous notification of fire department and police department units for all water-related emergencies. That document cited the previously-rescinded memorandum described in paragraph 6 of these findings of fact as the source of its authority, and included terms and definitions that were not contained in the agreement signed by the employer and the SPOG on September 22, 2000, or in any other agreement between the employer and the SPOG.

10. The SPOG gave the employer timely notice that the SPOG considered the April 2001 document to be a violation of the agreement signed by the parties on September 22, 2000, and as a transfer of bargaining unit work. The SPOG demanded bargaining over the issue.

11. The employer refused to bargain in response to the demand for bargaining described in paragraph 10 of these findings of fact, and asserted that the April 2001 document was merely a clarification of the agreement signed by the parties on September 22, 2000.

12. The union reasonably believed that the employer had contravened the parties' agreement of September 2000 by its issuance and defense of the document described in paragraph 9 of these findings of fact, and that the document issued in April 2001 would lead, immediately or in the future, to a loss of work jurisdiction that would harm the integrity of the bargaining unit represented by the SPOG.

13. Although the employer has stated that it had issued the April 2001 document out of concern for public safety, the employer has not demonstrated that any legitimate concerns about public safety preclude it from fulfilling its collective bargaining obligations under Chapter 41.56 RCW.

MODIFIED 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. On the basis of the foregoing findings of fact, the bargaining unit represented by the Seattle Police Officers' Guild has and

retains exclusive work jurisdiction concerning all water-related emergency work in the freshwater areas of Seattle, other than dive/rescue work.

3. On the basis of paragraphs 9 through 13 of the foregoing findings of fact, the City of Seattle has made an unlawful unilateral transfer of water-related emergency work other than dive/rescue work in the freshwater areas of Seattle to its employees outside of the bargaining unit represented by the Seattle Police Officers' Guild, without having first fulfilled its collective bargaining obligations under Chapter 41.56 RCW, and so has committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

MODIFIED ORDER

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

1. CEASE AND DESIST from:

   a. Unilaterally transferring water-related emergency work in the freshwater areas of Seattle other than dive/rescue work from the bargaining unit represented by the Seattle Police Officers' Guild to its employees outside of that bargaining unit.

   b. In any other manner, interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

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

a. Rescind, and cease giving effect to any directions concerning water-related emergency work in the freshwater areas of Seattle contained in the document titled "Procedure for Water-Related Emergencies" issued on April 9, 2001. The employer shall be entitled to substitute a document limited to dive/rescue work that is consistent with the agreement signed by the employer and the Seattle Police Officers Guild in September 2000.

b. Give notice to and, upon request, negotiate in good faith with the Seattle Police Officers' Guild concerning any change of procedures involving the dispatch of personnel for water-related emergencies in Seattle.

c. 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.

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

e. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

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

Issued at Olympia, Washington, on the 12th day of January, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL rescind and cease giving effect to any directions concerning water-related emergency work in the freshwater areas of Seattle contained in the document titled "Procedures for Water-Related Emergencies" issued on April 9, 2001, and any new procedures will be consistent with the agreement signed by the City of Seattle and the Seattle Police Officers Guild in September 2000.

WE WILL give notice to, and upon request, negotiate in good faith with the Seattle Police Officers' Guild concerning any change of procedures involving the dispatch of personnel for water-related emergencies in Seattle.

WE WILL NOT unilaterally transfer water-related emergency work in Seattle from the bargaining unit represented by the Seattle Police Officers' Guild to city employees outside of that bargaining unit.

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

DATED: _____

CITY OF SEATTLE

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 711 Capitol Way, Suite 603, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300.