STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1983	)	CASE 9526-E-91-1580
	)	DECISION 4199-B - PECB
Involving certain employees of:	)	
	)	
CITY OF MOUNT VERNON	)	DIRECTION OF ELECTION
	)	

James L. Hill, International Vice-President, appeared on behalf of the petitioner.

Mark Knowles, Finance Director, Linford C. Smith, City Attorney, and Heller, Ehrman, White & McAuliffe, by Bruce L. Schroeder, Attorney at Law, appeared on behalf of the employer.

Aitchison, Hoag, Vick & Tarantino, by James M. Cline, Attorney at Law, appeared on behalf of the intervenor, Mount Vernon Police Services Guild.

On December 5, 1991, International Association of Fire Fighters, Local 1983 (IAFF), filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of "dispatchers" employed by the City of Mount Vernon (employer). The Mount Vernon Police Services Guild (PSG) was granted intervention in the proceedings, based on its status as the incumbent exclusive bargaining representative of some of the employees involved. A pre-hearing conference was conducted at Mount Vernon, Washington, on February 18, 1992. A statement of results of the pre-hearing conference was issued on February 21, 1992. Pursuant to arrangements stipulated to by the parties, a hearing was held at Mount Vernon, Washington, on March 31, 1992, before Hearing Officer Walter M. Stuteville. The processing of this representation case was thereafter "blocked" under WAC 391-25-

370, on the basis of unfair labor practice charges filed by the PSG. The employer requested reconsideration of the decision to invoke the "blocking charge" rule, resulting in a further exchange of correspondence. A Direction of Election issued on October 26, 1992,[1] was subsequently withdrawn for reconsideration,[2] and the parties were given until December 7, 1992 to file additional written arguments. The question before the Executive Director at this time is the proper processing of this representation case.[3]

BACKGROUND

The City of Mount Vernon is the largest municipality in Skagit County, and is the county seat. Historically, the employer maintained a separate "dispatch" operation for its Fire Department, under the direction of its fire chief, and it maintained a separate "dispatch" operation for its Police Department, under the direction of its police chief.

IAFF Local 1983 has historically had a collective bargaining relationship with the City of Mount Vernon, covering a bargaining unit of approximately seven "dispatchers" working in the Mount Vernon Fire Department. The IAFF and the employer had a collective bargaining agreement in effect for the period from January 1, 1989 through December 31, 1991.

The PSG has historically had a collective bargaining relationship with the City of Mount Vernon, covering a bargaining unit which has included approximately five or six "dispatchers" working in the

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1 City of Mount Vernon, Decision 4199 (PECB, 1992).

2 City of Mount Vernon, Decision 4199-A (PECB, 1992).

3 The PSG's unfair labor practice charges have not been resolved, and they remain the subject of separate proceedings before the Commission under Chapter 391-45 WAC.

Mount Vernon Police Department.[4] The work station for the police dispatchers was behind a window at the front entrance of the Police Department offices, and they also served as receptionist for the department. When backup was needed, police records clerks performed dispatching functions. The PSG and the employer have a collective bargaining agreement in effect for the period from January 1, 1991 through December 31, 1993.

In December of 1989, the City of Mount Vernon entered into an agreement with the "Skagit, Stanwood, Camano EMS Council", calling for the City of Mount Vernon to provide emergency dispatch services for advanced life support (Medic 1) services in areas of Skagit County outside of the municipal boundaries of Mount Vernon. That responsibility was assigned to the dispatch operation then within the employer's Fire Department.

In September of 1990, voters in Skagit County considered a ballot proposition imposing a telephone line surcharge:

> ... for the purpose of creating a uniform county-wide capability for 911 dialing, and improving certain aspects of emergency services dispatching within the county.

The ballot measure was approved by 82.4% of those voting, and steps were taken by public officials of various jurisdictions to implement that ballot measure. In particular, a "Skagit County Emergency Communications Committee" was created.

In May of 1991, officials of participating jurisdictions signed a document titled "Interlocal Cooperative Agreement - Countywide 911 Implementation". That agreement provided for a "central dispatch" system operated by the City of Mount Vernon to take responsibility

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[4] It appears that one or more of those "dispatcher" positions was vacant at the time the petition in this case was filed.

for receiving nearly all emergency service calls in Skagit County, using equipment owned and provided by Skagit County.[5]

In July and August of 1991, officials of the City of Mount Vernon and of Skagit County signed a "Memorandum of Agreement" concerning "911 Services", setting forth their respective obligations for the operation of a "central dispatch" function by the City of Mount Vernon, using equipment provided by Skagit County. A copy of the previously described "Interlocal Cooperative Agreement" was attached. The scope of the dispatch function was described as follows:

> Central Dispatch shall be utilized for the receipt of emergency **fire, police and medical services access calls".**

[Emphasis by **bold** supplied.]

The City of Mount Vernon was to be the employer of the personnel used to perform the dispatch function. The document made reference to a "Communication Director" position.

A job announcement was issued for the "Emergency Communications Center Director" position at Mount Vernon, with a June 30, 1991 deadline for applications. The position was offered to John R. Church on August 6, 1991. Church accepted the position, and commenced working in it on September 9, 1991.

The implementation of the "central dispatch" system began in October of 1991, with the hiring of five additional dispatchers. They were joined by the dispatchers theretofore assigned to the employer's Fire Department. The employer also began taking steps to consolidate its police and fire dispatch operations in a single facility different from the space previously occupied by either

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[5] The one exception, involving calls originating within the City of Anacortes, is not relevant here.

group. As law enforcement and fire/emergency services use different radio frequencies, it was never the intent to merge dispatching of those services at the same consoles. The physical consolidation was intended, however, to achieve improved utilization of personnel and other economies of scale. The employer intended to cross-train its employees on both types of dispatching, and to provide backup for the police dispatching function from within the dispatcher group. The move of the police dispatchers to the new facility necessarily had the side effect of terminating their role as receptionist for visitors to the Police Department. The police records clerks would no longer perform in the role of backup dispatcher, but apparently were to assume the "receptionist" function in the Police Department.

The record indicates that Church immediately began taking an active role in the operation of the dispatch function. Some joint meetings of the fire and police dispatchers were held, although there is also indication that the Police Department dispatchers continued to have some separate meetings. Some cross-training of staff commenced, although it appears to have consisted primarily of assigning employees from the fire side of the operation to observe the dispatching activity on the police side of the operation.

On December 2, 1991, the mayor of Mount Vernon approved and signed the employer's budget for 1992. Appropriations were made for emergency communications under a separate line item. The budget documents indicate that no funding was provided in the budgets of the Fire Department or Police Department for dispatching services.

The IAFF's petition filed on December 5, 1991, described the proposed bargaining unit in the following manner:

> All dispatchers of the City of Mount Vernon 911 Emergency Communications Center, excluding supervisory and confidential employees.

The petition contained an explanatory note indicating that, effective January 1, 1992, the employer's police and fire dispatch centers were being merged into one dispatch agency, to be known as the City of Mount Vernon 911 Emergency Communications Center.

A job announcement and detailed job description for an "Emergency Communication Specialist" classification were issued under date of December 9, 1991. Those documents were published on City of Mount Vernon letterhead which lists John R. Church as "director" of the "9-1-1 Emergency Communications Center". Any difference between "police dispatch" and "fire dispatch" functions was obliterated or disregarded in those documents.

Although John Church had already been working as Emergency Communications Center Director for some time, two memos issued in December of 1991 formalized the transfer of the police and fire dispatchers to his supervision. A December 9, 1991 memo from Church and another employer official addressed to "Records/ Communications Personnel" described the transition that was to occur in the Police Department. A December 19, 1991 memo from the fire chief to "dispatch personnel" mentioned Church by name, and indicated that the employees would be transferred to his supervision as of January 1, 1992. Progress on the new facility was slow, however, and it became evident at some point that the physical consolidation of the dispatching operations would not take place on January 1, 1992, as earlier announced.

The PSG filed a motion for dismissal on December 19, 1991, claiming that the petition was untimely and that the employer had not yet consolidated its dispatch operations.[6] The PSG also noted that it had a collective bargaining agreement with the employer through December 31, 1993.

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[6] The PSG did acknowledge that the employer was contemplating establishment of the new emergency communications center in the winter of 1991 [sic], or spring of 1992.

The IAFF's representation petition was assigned to Hearing Officer Stuteville for further proceedings, and representatives of the employer, the IAFF and the PSG participated in the pre-hearing conference held on February 18, 1992. The parties stipulated that the Commission has jurisdiction in this proceeding, stipulated that the IAFF and PSG are both qualified to act as exclusive bargaining representatives, and stipulated to an eligibility list which set forth 11 employee names and "one vacancy" under a heading of "Central Dispatch", together with four employee names and "one temporary" under a heading of "Police Dispatch".[7] Several matters remained in dispute at the close of the pre-hearing conference:

(1) Whether the petition had been timely filed;

(2) whether the petitioned-for bargaining unit was an appropriate unit for the purposes of collective bargaining; and

(3) (based on the previous two items) whether a question concerning representation exists.

The parties agreed at the pre-hearing conference to resolve those issues by filing a stipulated statement of facts with the Hearing Officer by March 17, 1992, and to submit any briefs on legal issues by March 31, 1992. A hearing was scheduled for March 31, 1992, to cover the eventuality that a stipulation of facts could not be arranged within the time specified. A "statement of results" was issued soon thereafter.[8] The Hearing Officer issued a notice of hearing to confirm the hearing arrangements stipulated to by the parties at the pre-hearing conference.

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[7] The parties also stipulated at the pre-hearing conference that no unfair labor practice charges then existed that would block further proceedings in the matter. That circumstance changed subsequently, when the PSG filed an unfair labor practice complaint with the Commission.

[8] The "Statement of Results" indicated that its contents would become part of the case record as binding stipulations between the parties, unless objections were filed in writing within 10 days with the Hearing Officer. No such objections were filed by any of the parties.

On March 13, 1992, the PSG filed a complaint charging unfair labor practices with the Commission, alleging that the employer had violated its bargaining obligations under RCW 41.56.140(4), by failing to negotiate the decision to consolidate its police and fire dispatching operations.[9] The PSG alleged that the proposed consolidation was scheduled to be implemented during the spring of 1992, and that it involved "skimming" bargaining unit work away from police dispatchers (i.e., fire department dispatchers would thereafter handle some of the calls historically handled exclusively by police department dispatchers). The PSG reiterated its objections to the IAFF's representation petition, arguing that the proposed consolidation had not yet occurred, and that the employer had not discharged its bargaining obligations concerning the consolidation decision.

The parties did not file the stipulation of facts which had been contemplated at the pre-hearing conference in this representation case. The Hearing Officer conducted a hearing in this matter at Mount Vernon on March 31, 1992, with appearances and participation by the employer and both unions. A total of 35 exhibits were marked for identification, of which 34 were admitted in evidence.[10]

The PSG's unfair labor practice complaint came before the Executive Director for processing under WAC 391-45-110, and a preliminary ruling was issued in that matter on May 12, 1992. Making the customary assumption that all of the facts alleged in the unfair labor practice complaint were true and provable, it was concluded that a violation could be found. Additionally, the "blocking charge" rule, WAC 391-25-370, was invoked to suspend the processing

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[9] Case 9693-U-92-2192.

[10] Exhibit 22, which was admitted in evidence at the hearing, is a March 22, 1992 letter from one of the former police dispatchers to Church, in which the employee bemoans "the lack of any input into a combined dispatch facility **of which we are a part**".

of this representation proceeding. On May 22, 1992, Examiner Mark S. Downing of the Commission's staff was assigned to conduct further proceedings on the PSG's unfair labor practice complaint, under Chapter 391-45 WAC.

On June 1, 1992, the PSG filed an "Amended Statement of Facts" in its unfair labor practice case. The new allegations concerned the employer's hiring of two new dispatchers in May of 1992, and its assignment of them to handle police calls while paying them at the wage rate specified in the contract between the employer and the IAFF,[11] and refusing to follow other provisions of the PSG agreement. Although the PSG reiterated in the amendatory material that nothing in its 1991-93 labor agreement with the employer addressed the subject of consolidation, it appeared that the disposition of the new allegations might take a course different from that of the previously filed complaint. Thus, the new allegations were docketed as a separate case,[12] and a routine "deferral" inquiry was sent to the employer and PSG under date of June 4, 1992.

On June 4, 1992, Examiner Downing issued a notice of hearing, establishing July 7, 1992 as the hearing date for the PSG's original unfair labor practice complaint.

On June 19, 1992, the employer filed an answer to the unfair labor practice complaints. It admitted that a new department had been formed, and that employees in the new department were handling both police and fire dispatch calls, as well as performing 911 call answering for other agencies located throughout Skagit County. As an affirmative defense, the employer asserted that the decision to establish a new emergency communications department and consolidate existing dispatch operations was not a mandatory subject of

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[11] The IAFF contract provided a rate of pay lower than that provided in the PSG agreement.

[12] Case 9822-U-92-2236.

bargaining. The employer stated, however, that the subject of consolidation had been discussed by the parties during their contract negotiations commenced in early 1990. The employer admitted that it had hired two emergency communications specialists for the new department. All other allegations of the complaints were denied.

The PSG's second complaint was reviewed by the Executive Director under WAC 391-45-110. A preliminary ruling letter issued on June 23, 1992, advised the parties that those allegations appeared to be solely concerned with a contract violation, and would need to be remedied through the grievance machinery of the parties' collective bargaining agreement. The PSG was given 14 days in which to file an amended complaint which stated a cause of action.

On June 30, 1992, the employer filed a written request with the Examiner, for a continuance of the hearing scheduled for July 7, 1992. The employer indicated that the continuance was necessary to facilitate the parties' attempts to settle the matter through a three-way meeting between representatives of the employer, the IAFF, and the PSG. Representatives of the IAFF and PSG concurred, and the requested continuance was granted.

On July 1, 1992, the PSG filed an amended complaint in the second of its unfair labor practice cases. The PSG alleged there that the employer's refusal to treat the two new dispatchers as members of the PSG's bargaining unit was a unilateral "skimming of unit work", in violation of RCW 41.56.140(4). A preliminary ruling concerning that amended complaint was issued on July 13, 1992. Assuming all of the facts alleged in the amended complaint to be true and provable, it was concluded that an unfair labor practice violation could be found. Examiner Downing was designated to conduct further proceedings in the matter. Nothing was ventured as to whether that complaint would be regarded as a "blocking charge".

The physical move of all dispatch personnel and operations to the new facility was completed in July of 1992.

On August 7, 1992, the employer filed a letter with the Commission, requesting that the suspension of this case under the "blocking charge" rule be canceled, so that an election could be held to resolve the pending question concerning representation in the new emergency communications department. While the employer acknowledged that it has a bargaining obligation concerning the "effects" of its decision to consolidate police and fire dispatch operations, it continued to resist any requirement to bargain the "decision" to establish the new department. In explaining the history of the employer's consolidation efforts, that letter stated that the IAFF had represented approximately 12 fire dispatchers, while the PSG had represented only 5 police dispatchers. Further, the employer indicated that it had met with the PSG on July 17, 1992,[13] that the issues raised by the PSG at that time concerned only the "effects" of the consolidation, and that the PSG did not indicate that it wanted to bargain anything about the consolidation "decision". The employer thus contended that the PSG was no longer interested in bargaining over the decision to consolidate dispatch services, so that the unfair labor practice complaint concerning that decision should no longer be deemed a "blocking charge".

On August 11, 1992, the PSG filed a letter with the Commission, responding to the employer's request to remove the blocking charge. While arguing that the employer's characterization of the PSG's position at the July 17 meeting was inaccurate, the PSG asserted somewhat contradictory positions about the merits: First, it

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[13] The employer asserted that the meeting was held in light of WAC 391-45-550, which sets forth the Commission's policy that a party does not confer the status of a mandatory subject on any issue by engaging in collective bargaining. The employer stated that it had thus been open to discussion of its decision, as well as the effects of its decision.

argued that the 1991-93 collective bargaining agreement between the PSG and the employer contained a "zipper" clause which eliminated any obligation of the PSG to bargain the consolidation decision with the employer; second, the PSG reiterated its earlier claim that the employer had an obligation to bargain the decision to consolidate dispatch services.

On August 14, 1992, the employer filed a letter arguing that the issue was not one of "contracting out" or "skimming" of bargaining unit work, but rather a situation where two represented bargaining units were consolidated into one unit.

The Executive Director attempted to arrange a telephonic conference with the representatives of all parties, but was unable to do so. A telephone conference held with the attorneys for the employer and PSG on August 25, 1992 failed to resolve the matter. One of the matters at issue during that telephone conference was the degree of integration of police and fire dispatch functions.[14]

POSITIONS OF THE PARTIES

The IAFF has petitioned for a representation election in a "horizontal" or "occupational" bargaining unit consisting of all emergency services dispatchers employed by the City of Mount Vernon. Although it was the incumbent exclusive bargaining representative in a "vertical" or "departmental" unit of dispatchers within that employer's Fire Department, it has not claimed that it should automatically be given status as successor exclusive

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[14] The employer's attorney evidently reported the subject matter of the telephone conference back to his client, and John Church sent a letter received by the Commission on September 14, 1992. Church therein described the current operation at the dispatch center as involving "employees working in the Center's one large room".

bargaining representative of the employees in the new "911 Emergency Communications Center".

The PSG argues that the merger of police and fire dispatch operations was merely "contemplated" at the time the IAFF's petition was filed, so that the petition was premature. The PSG also asserts that its existing collective bargaining agreement with the employer constitutes a "contract bar" preventing any election which involves the employees it has historically represented. The PSG asserts a desire to produce evidence on certain factual issues at an administrative hearing in this matter.[15] The PSG has continuously asserted that the police and fire dispatchers function separately, even after any administrative change, although an affidavit filed with the Commission acknowledges that the physical consolidation of the two functions was accomplished in July of 1992. The PSG cites precedent supporting the claims it will advance in its unfair labor practice case, and it urges that any election be delayed until its charges have been fully resolved.

The employer urges the Commission to go forward with the determination of the question concerning representation, saying that it is in a "no win" situation with two competing unions on its premises. The employer points out that anything it does consistent with one union's contract is subject to challenge by the other union. The employer points out that a hearing was held in this matter, and that the PSG had full opportunity to present evidence on issues relevant to this representation case. Responding to the "premature petition" and "contract bar" arguments advanced by the PSG, the employer asserts that its dispatch operations have been consolidated, and it points to National Labor Relations Board (NLRB) decisions which hold that a question concerning representation exists in this kind of situation.

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[15] The PSG incorrectly asserts that no hearing has been held in this matter.

DISCUSSION

It is the purpose of representation proceedings before the Public Employment Relations Commission to implement the right of public employees, under RCW 41.56.040, to select representatives of their own choosing for the purposes of collective bargaining. Such proceedings are regarded as "investigative" in nature, and are not "adversary" proceedings in the traditional sense. WAC 391-25-350 limits the scope of representation case hearings:

> ... to matters concerning the determination of the existence of a question concerning representation, the appropriate bargaining unit and questions of eligibility.

This is not a proper forum for determining the unfair labor practice charges which have been advanced by the PSG under Chapter 391-45 WAC. Nevertheless, some of the testimony adduced at the hearing in this case, and much of the argument advanced by the employer and PSG, relates to the duty of the employer to bargain concerning the decision to merge the police and fire dispatch operations and/or the effects of such a merger. Those matters are beyond the scope of this representation proceeding.

The "Premature Petition" Claim

The events giving rise to the consolidation of dispatching functions in Skagit County date back to at least the vote of the people in 1990, and arguably date back even farther to the agreement for "Medic 1" dispatching in 1989. By the time that the IAFF filed its representation petition on December 5, 1991, significant events made that consolidation a reality:

* Formal contracts had been signed to implement a county-wide dispatch system operated by the City of Mount Vernon;

* John Church had been hired as the new director of that system, and was already performing in that capacity;

* New job descriptions were being developed for positions which made no distinction between police and fire dispatch functions;

* Five new dispatchers had been added to the employer's workforce, to perform the work created by the consolidation;[16]

* The employer's budget for 1992 had funded the new emergency communications department separately, and had deleted funding of "dispatching" from the police and fire department budgets; and

* Steps were being taken towards physical consolidation of the two historically separate dispatch operations in a common facility different from either of the previous facilities.

The IAFF's petition may have anticipated the formal transfer of supervision by something less than a month, but it came after all of the decisions essential to implementation of the new department had been finalized on the employer's side of the equation. The only events which remained were ministerial in nature,[17] and the actual construction of the new facility. Moreover, the petition was filed after the employer had hired new employees in contemplation of the consolidation, bringing the new department close to its full intended workforce.[18] Rather than asserting a "successorship" or "accretion" claim in this situation, the IAFF chose to file a

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[16] If the inquiry is confined to the fire side alone, this constituted a 71.4% increase of staffing. Even if looked at in relation to the entire dispatch function, this constituted a 41.67% increase in staffing. Either number is far more than the 30% "showing of interest" needed to raise a question concerning representation.

[17] A nominal retention of supervisory authority by the fire chief and police chief through December 31, 1991 would be consistent with having the dispatchers on their budgets through that date. The alternative would seem to have required some amendment of fiscal, budgetary and accounting records for a year that was almost concluded.

[18] This is to be distinguished from an "expanding unit" situation, under which the National Labor Relations Board (NLRB) would likely withhold action until the full anticipated workforce had been hired. The only vacancies remaining to be filled were created by normal turnover.

representation petition in the new department. By way of comparison, there can be no doubt that the hiring of employees for a new emergency communications department could have provided a basis for an organizing drive initiated by the IAFF or some other labor organization, had Skagit County been named as the employer. The petition was timely filed.

Even if the IAFF's petition were aptly criticized as "premature" when filed, subsequent events have provided ample basis for the amendment of that petition or the filing of a new petition. Within weeks after the IAFF's petition was filed, the employees were told of their transfer to the new department as of January 1, 1992, and the new director was exercising some authority over them. The transfer of supervisory authority was implemented on January 1, 1992, well in advance of the pre-hearing conference and hearing held in this case. Further, both the employer's answer to the PSG's unfair labor practice complaint and PSG's latest brief on this representation case admit that the physical consolidation of the dispatching functions has been accomplished. This is not a case in which a "certification bar" year created by RCW 41.56.070 has been foreshortened by the filing of the petition, or even a case in which a "contract bar" window period created by RCW 41.56.070 has been missed.[19] The IAFF could have filed new paper any time after January 1, 1992, and could still do so at this time. Thus, even under the circumstances most favorable to the PSG, dismissal of the IAFF's petition as "premature" would exalt form over substance, and would only delay resolution of this dispute until the IAFF filed a new representation petition. Assuming, arguendo, that the "premature petition" argument were not subject to rejection on the other grounds stated above, it would be rejected on this basis.

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[19] As noted below, the validity of the PSG's "contract bar" claim rises and falls on the consolidation itself, rather than on the date on which the petition was filed.

Existence of a "Contract Bar"

RCW 41.56.070 generally precludes raising a question concerning representation while a collective bargaining agreement is in effect, except during the "window" period not more than 90 days nor less than 60 days prior to the expiration of that contract. In this case, the PSG and the employer have a contract in effect, and the IAFF's petition was not filed within the statutory "window".

The so-called "contract bar" is not absolute. The definition of "collective bargaining" found in RCW 41.56.030(4) makes reference to "an appropriate bargaining unit". Under RCW 41.56.080, an exclusive bargaining representative operates only in the context of an "appropriate bargaining unit". The duty to bargain exists, and any collective bargaining agreement can be deemed "valid", only where the bargaining relationship covers an "appropriate" bargaining unit.[20] The Legislature delegated authority to the Commission to determine "appropriate" bargaining units. RCW 41.56.060.

The PSG has no basis to complain about any attempt to raise a question concerning representation among the dispatchers formerly employed in the employer's Fire Department. They were not covered by the PSG's contract with the employer on December 5, 1991.

Similarly, the PSG has no basis to complain, and in fact has not complained, about the employer's expansion of its operations to provide dispatching for other emergency service providers. This includes the expansion in 1989 to provide dispatching for Medic 1 services outside of Mount Vernon, as well as the expansion in 1991 to provide dispatching for all but one municipality in the county.

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[20] See, South Kitsap School District, Decision 1541 (PECB, 1983). A decision there that two bargaining units which purported to divide the employer's clerical workforce were both inappropriate led to the existence of a question concerning representation for the entire group.

It even includes expansion to provide dispatching for police calls other than for the Mount Vernon Police Department. Thus, there is no occasion to invoke the "contract bar" in opposition to the IAFF's petition affecting the employees added in October, 1991.

As to the effect of the IAFF's petition on the dispatchers formerly employed in its Police Department, the employer has aptly cited decisions of the National Labor Relations Board (NLRB) in support of the proposition that the "contract bar" rule will not operate in certain merger situations.

In Boston Gas Co., 221 NLRB 628 (1978), the employer had acquired two other companies in December of 1973. For a time, it had continued to recognize contracts with two separate labor organizations covering the employees of the formerly separate companies. Those agreements expired in March and June of 1975. On January 24, 1975, the employer filed a representation petition that appears to have been timely as to the contract which was to expire in March, but would normally have been untimely under the "contract bar" rule as to the agreement which was due to expire in June. The NLRB held that, since the employees worked side-by-side in similar job classifications and performed like functions under common supervision, the employer had formed a new operation. A question concerning representation was thus found to exist, and the labor agreements were held to not constitute a bar to an election.

In Massachusetts Electric Co., 248 NLRB 155 (1980), the employer had consolidated service and distribution facilities it formerly operated in three towns, so that only one of those facilities remained. The employer had existing collective bargaining agreements with different unions representing similar groups of employees. The NLRB held that the employer's newly-integrated operation was an appropriate bargaining unit. The existing contracts were not considered to constitute a bar to the holding of an election.

In Martin Marietta Chemicals, 270 NLRB 821 (1984), the employer had historically operated a facility known as the "north plant". Another employer operated an immediately adjacent facility known as the "south plant". Two different labor organizations had historically represented the production and maintenance employees at the different facilities, and both of them evidently wanted to continue representing those units. Collective bargaining agreements for both units were effective through May 31, 1983. On January 29, 1982, Martin Marietta acquired the south plant, hiring the employees of the former operator of that facility. The employer then decided to operate both plants under one central administration. The NLRB held that a new operation had been created, consolidating the two previously separate bargaining units, and that the changed circumstances had "obliterated" the previous separate units. The Board's policy in such situations places greater emphasis on the right of employees to select their representative than on historical considerations or the vested interests of the labor organizations involved. Thus, the NLRB stated at page 822:

> When an employer merges two groups of employees who have been historically represented by different unions, **a question concerning representation arises**, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation. Boston Gas Co., 221 NLRB 628 (1978). [Emphasis by **bold** supplied.]

Citing Massachusetts Electric, supra, the Board went on to state that, even if either of the collective bargaining agreements remained in effect, it would not bar an election. See, also, Pergament United Sales, 296 NLRB 333 (1989).

The record in the instant case amply supports a conclusion that the petitioned-for unit is an "appropriate bargaining unit":

* Although there are differences in the radio frequencies used, the nature of the radio traffic, and some procedural details, all of the dispatchers working in the new department have **duties, skills and working conditions** in common with one another, and are within the same generic occupational type. Their jobs do not require extensive educational background, licensure or "professional" status. All of the employees involved are now under common supervision.

* The petitioned-for bargaining unit encompasses all of the employer's emergency services dispatchers, thus avoiding any "fragmentation" concerns that might be raised in connection with the **extent of organization** aspect of the statutory unit determination criteria.

* The **history of bargaining** in two separate units must be disregarded in the face of changed circumstances. The evidence stipulated at the pre-hearing conference and admitted at the hearing, together with the admissions of the employer and PSG that the physical consolidation of operations has become an accomplished fact, indicate that a new operation has been created. The expanded responsibilities of the new operation, and its expanded staff, distinguish it from either of the predecessor operations. Situations involving overlaps between bargaining units have been rejected in the past as abhorrent to peaceful labor relations. See, South Kitsap School District, supra, and City of Seattle, Decision 781 (PECB, 1979). The employer reasonably voices concern that perpetuating both of the historical bargaining units would leave it with a legacy of work jurisdiction disputes within the "central dispatch" department.

* There is no occasion to conduct a unit determination election to ascertain the **desires of employees** where one of the proposed choices would be an inappropriate unit. Clark County, Decision 290-A (PECB, 1977). In this case, preservation of two separate units within the emergency communications department would not be supportable under RCW 41.56.060 and Commission precedent.

Applying the principles set forth in the cited NLRB decisions, the "contract bar" claim advanced by the PSG must be rejected. The IAFF cannot be deemed as a successor exclusive bargaining representative in the consolidated operation.[21] A question concerning representation currently exists.

The "Blocking Charge" Rule

The Commission has endorsed the early determination of questions concerning representation. The rules set forth in Chapter 391-25 WAC encourage the use of election or cross-check agreements, and preclude the filing of interlocutory "appeals" from the decisions and actions of the Commission staff, until a tally has been issued following an election or cross-check. Summary judgments are authorized in WAC 391-08-230, and the Commission has admonished the Executive Director to go forward with determining questions concerning representation whenever possible, while reserving disputes about limited numbers of employees for post-election determinations. City of Redmond, Decision 1367-A (PECB, 1982).

The so-called "blocking charge rule", WAC 391-25-370 does provide for the suspension of processing of representation cases under certain limited circumstances:

> (1) Where representation proceedings have been commenced under this chapter **and:**
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> (a) A complaint charging unfair labor practices is filed under the provisions of chapter 391-45 WAC; **and**
>
> (b) It appears that the facts as alleged may constitute an unfair labor practice; **and**

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[21] Indeed, since the historical units were relatively equal in size, any "successorship" or "accretion" claim which might have been advanced by the IAFF would have to have been questioned on the basis of the substantial increase in the size of the overall workforce when the five dispatchers were added in October of 1991.

> (c) Such unfair labor practice could improperly affect the outcome of a representation election;
>
> **the executive director may suspend the representation proceedings** under this chapter pending the resolution of the unfair labor practice case.
>
> [Emphasis by **bold** supplied.]

That rule clearly provides the Executive Director some range of discretion, and the Commission endorsed exercise of that discretion in Southwest Snohomish County Public Safety Communications Agency, Decision 3309 (PECB, 1989), to avoid abuse of the representation case process.

In this case, no more than 5 positions out of a total workforce of 17 employees are affected by the unfair labor practice charges. At least the remaining 12 employees find themselves without collective bargaining rights or representation, so long as the Commission withholds determination of the question concerning representation raised by the IAFF's petition.

In the pending unfair labor practice case, the "worst case scenario" for the employer, as well as the "best case scenario" for the PSG, would be a ruling that the employer committed a "refusal to bargain" violation by transferring police dispatch work from employees represented by the PSG to employees of the new emergency communications department. The traditional remedy for "skimming" or "subcontracting" violations is an order compelling the employer to reinstate the work to the original bargaining unit, and to give notice and fulfill its bargaining obligations prior to future transfers of bargaining unit work. Thus, work now performed in the central dispatch operation **might** be transferred back to the non-commissioned police support bargaining unit for some period in the

future,[22] and some employees now working under the supervision of John Church **might** be transferred to other supervision. It is not at all clear that the physical arrangements would have to be restored to their previous conditions, even if an unfair labor practice violation were found. Thus, the employer **could**, at least in theory, find itself with two different unions representing its dispatchers, but there is no apparent possibility under which the "central dispatch" bargaining unit would entirely disappear.

The invoking of the blocking charge rule because **some** of the petitioned-for employees **might** eventually be removed from the bargaining unit imposes a substantial prejudice on the rights of the employees who are not in dispute. Returning to the hypothetical comparison used earlier, there can be no doubt that the determination of a question concerning representation should and would go forward had Skagit County been named as the employer of "central dispatch" employees, notwithstanding a potential liability on the part of the City of Mount Vernon to re-create its own police dispatch function and staff if a "subcontracting" violation were to be found. The situation is also parallel to that described in City of Redmond, supra, where the bargaining rights of the undisputed employees would have been implemented by an early determination of the question concerning representation, notwithstanding that the disputed employees were unable to implement their bargaining rights until a ruling was made on their status.

Continued application of the "blocking charge" rule is inappropriate in this case. An election must be directed.

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[22] Even the finding of an unfair labor practice violation would not preclude a future consolidation of dispatching functions in the new department. The nature of the "skimming" violation is a failure to conform to process requirements imposed by the collective bargaining law. If the employer once found guilty of a violation gives appropriate notice and bargains in good faith in future dealings with the union, it may be able to win agreement on or lawfully implement the change it desires to effect.

Election Procedure

The dispatchers formerly employed in the Mount Vernon Police Department are currently employed in the 911 Emergency Communications Department, and they are deemed to be eligible voters in the election directed herein. While there is a possibility, as noted above, that their former jobs within the police support bargaining unit could be re-created as the result of the PSG's unfair labor practice charges, that is not a basis to exclude them from eligibility to vote on the current question concerning representation.

The PSG has been granted intervention in this proceeding on the basis of its incumbency in the historical police dispatcher bargaining unit, without being required to tender authorization cards as a "showing of interest". Although the unit historically represented by the PSG is no longer appropriate, and its contract does not bar an election in the consolidated operation, the fact remains that the group historically represented by the PSG constitutes more than 10% of the bargaining unit sought by the IAFF. The PSG will thus be listed as a choice on the initial representation election ballot in this proceeding. Whether the PSG survives to a "run-off" election or is certified as exclusive bargaining representative of the entire dispatch unit will be up to the vote of the employees.

DIRECTION OF ELECTION

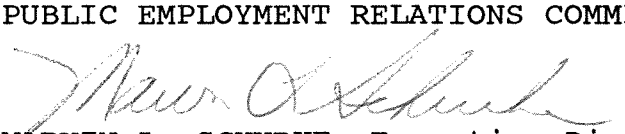
A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described as:

> All employees of the City of Mount Vernon performing emergency services dispatching functions, excluding supervisors, confidential employees, and all other employees

to determine whether a majority of those employees desire to be represented for the purposes of collective bargaining by International Association of Fire Fighters, Local 1983, or by Mount Vernon Police Services Guild, or by no representative.

ENTERED at Olympia, Washington, this 18th day of December, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing timely objections with the Commission pursuant to WAC 391-25-590.