STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 3524, Complainant,	)	CASE 12472-U-96-2956
vs.	)	DECISION 6008-A - PECB
SNOHOMISH COUNTY FIRE DISTRICT 1, Respondent.	)	DECISION OF COMMISSION

Webster, Mrak and Blumberg, by Christine M. Mrak, Attorney at Law, appeared on behalf of International Association of Fire Fighters, Local 3524.

Ogden, Murphy and Wallace, by Douglas Albright, Attorney at Law, appeared on behalf of Snohomish County Fire Protection District 1.

This case comes before the Commission on a petition for review filed by International Association of Fire Fighters, Local 3524, seeking to overturn a decision issued by Examiner William A. Lang.[1]

BACKGROUND

The facts are fully outlined in the Examiner's decision. They are incorporated by reference here, and will be repeated here only briefly.

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[1] Snohomish County Fire District 1, Decision 6008 (PECB, 1997).

International Association of Fire Fighters, Local 3524 is the exclusive bargaining representative of paramedics employed by Medic 7, an "Advanced Life Support" division of the Southwest Snohomish County Public Safety Communications Agency (SNOCOM). Medic 7 was created by an interlocal agreement made pursuant to Chapter 39.34 RCW. Snohomish County Fire District 1 (District 1), the cities of Brier, Edmonds, Lynnwood and Mountlake Terrace, and the town of Woodway were members of Medic 7. A collective bargaining agreement between Local 3524 and Medic 7 was in effect for the period from January 1, 1994 through December 31, 1996.

On February 26, 1996, District 1 and Snohomish County Fire Protection District 11 agreed to consolidate fire protection and emergency medical services operations. At that time, District 1 recognized International Association of Fire Fighters, Local 1997, as the exclusive bargaining representative of its own employees.

By letter of February 29, 1996, Local 3524 asked Fire District 1 to bargain any decision concerning withdrawal from Medic 7, and the effects of that decision. Fire District 1 took the position it did not have an obligation to bargain such matters. Local 3524 renewed its demand to bargain by letter of March 25, 1996, based on an assertion that Fire District 1 was a joint employer of the Medic 7 paramedics. Fire District 1 again responded that it did not have an obligation to bargain.

On April 29, 1996, Local 3524 filed a complaint charging unfair labor practices, claiming that District 1 interfered with employee rights in violation of RCW 41.56.140(1) and refused to bargain in violation of RCW 41.56.140(4). After a preliminary ruling letter identified deficiencies in the complaint, Local 3524 amended its complaint on June 28, 1996, to allege that District 1 and six other public entities are joint employers of the Medic 7 employees.

Local 3524 alleged it learned on or about February 29, 1996 that District 1 was considering transferring work out of the Medic 7 bargaining unit, that Local 3524 timely requested bargaining, and that District 1 refused to bargain. Remedies requested included restoration of the status quo, reimbursement of lost earnings, that District 1 be required to bargain, and that District 1 pay attorney fees and litigation costs.

Examiner William A. Lang held a hearing on March 6 and 7, 1997, and issued his decision on August 19, 1997. The Examiner found that the Medic 7 Board was the employer of the paramedics represented by Local 3524, and that District 1 was neither an employer nor a joint employer of those employees, so that District 1 was under no obligation to bargain with Local 3524 concerning its decision to consolidate operations with Fire District 11, its decision to withdraw from the Medic 7 program, or the effects of those decisions. The Examiner dismissed the unfair labor practice complaint.

Local 3524 petitioned for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

Local 3524 argues that Fire District 1's decision to withdraw from Medic 7 resulted in the transfer of bargaining unit work and is a mandatory subject of bargaining. Local 3524 contends that District 1 controlled the decision to withdraw from Medic 7 and was an employer of Medic 7 paramedics for the purpose of bargaining collectively over the withdrawal from Medic 7. Local 3524 contends that District 1 is a joint employer of Medic 7 paramedics along with the other public agencies that comprise Medic 7, and a joint

employer as a subdivision of Medic 7. Local 3524 requests the Commission to reverse the Examiner's order, to restore the status quo ante, and to order District 1 to bargain in good faith the decision and effects of the withdrawal. It requests that adversely affected employees be made whole.

District 1 urges that the threshold issue is whether it is an "employer" of the employees represented by Local 3524. It argues it is not an employer of Medic 7's paramedic employees, and that the other issues identified by Local 3524 are irrelevant. The respondent contends that Local 3524 seeks inappropriate remedies, and that the complaint should be dismissed as a matter of policy and for failure to name necessary parties.

DISCUSSION

The Statutory Framework

The statute contemplates coverage of multiple public employers. Under RCW 41.56.020, the chapter applies to:

> [A]ny county or municipal corporation, or any political subdivision of the state of Washington, including district courts and superior courts, except as otherwise provided by RCW 54.04.170, 54.04.180, and chapters 41.59, 47.64, and 53.18 RCW. ...

"Public employer" is defined in RCW 41.56.030 as:

> [A]ny officer, board, commission, council, or other person or body acting on behalf of **any public body** governed by this chapter, **or any subdivision of such public body**. ...

[Emphasis by **bold** supplied.]

The duty to bargain can exist, however, only between the exclusive bargaining representative of and the particular employer of the employees in an appropriate bargaining unit. RCW 41.56.030(4) defines that obligation as:

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

[Emphasis by **bold** supplied.]

RCW 41.56.140 enumerates potential unfair labor practices for a public employer:

> It shall be an unfair labor practice for a public employer to:
>
> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights** guaranteed by this chapter;
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> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) **To refuse to engage in collective bargaining.**

[Emphasis by **bold** supplied.]

No duty to bargain can arise in this case unless it is determined that District 1 is an employer of the employees involved for the purposes of the collective bargaining statute. Issues about whether District 1 had a duty to bargain its withdrawal from the Medic 7 program, and/or the effects of that withdrawal need only be addressed if District 1 had a bargaining relationship with International Association of Fire Fighters, Local 3524.

The Employer

For the reasons outlined below, we agree with the Examiner that Snohomish County Fire District 1 is not an appropriate employer for bargaining with Local 3524 in this case.

The "Right of Control" Test -

The traditional indicator of an employer-employee relationship in Washington is the existence of a right of control. Zylstra v. Piva, 85 Wn.2d 743 (1975). In determining whether an entity is to be considered an employer, the Commission examines the amount and extent of control the entity exerts over the final position on subjects of bargaining. The determination of "control" involves factual questions. North Mason School District, Decision 2428-A (PECB, 1986). The Commission stated in Tacoma School District, Decision 3314-A (PECB, 1990):

> [I]t is **only such retained control** as would be equal to a veto power, or **a final say**, that would trigger sufficient control to ... target the public entity as the true employer.

[Emphasis by **bold** supplied.]

The "right of control" test should not be applied in a way that allows employers to evade a bargaining obligation, but the entity

must have "the final say" over core subjects of bargaining to be considered an employer.

A thorough review of the record in this case persuades us that District 1 did not, and does not, exert the amount of control over core subjects of bargaining that is required to be considered an employer of the employees in the pertinent bargaining unit.

No Final Say -
District 1 had historically exerted little control over the core subjects of bargaining and it is clear that it did not have the final say over collective bargaining matters:

- No labor agreement was negotiated specifically or separately for Fire District 1.

- The record supports the Examiner's finding that Medic 7 was treated as a separate employer when the Medic 7 paramedics selected an exclusive bargaining representative. The collective bargaining agreement dated December 16, 1993, covering the 1994-1996 period, lists the employer as "Southwest Snohomish County Public Safety Communications Agency Medic Seven" in Article I, and was signed by the "Medic 7 Board Chairman". Thus, it was Medic 7 that was the original party/employer to the bargaining relationship with Local 3524.

- The Medic 7 Board set parameters for collective bargaining negotiations, selected and hired legal counsel, authorized its labor consultant to take action, ratified tentative agreements, and took formal action to authorize the chairman to sign the resulting collective bargaining agreement on behalf of the board. The agreement was the ultimate final authority over wages, hours and working conditions of Medic 7 personnel.

- Management of the paramedics was controlled by a pyramid structure reporting to the director of SNOCOM/Medic 7. The Medic 7 Board was kept apprised of productivity of the employees. The paramedic manager who oversaw the paramedics owed no special allegiance to District 1. Any grievance processing would have involved the paramedic manager, then the SNOCOM/Medic 7 director, and the Medic 7 Board with the final say. The manager had the authority to require an employee to attend training. The director of SNOCOM/Medic 7 would handle any disciplinary action.

- Personnel files of SNOCOM and Medic 7 were commingled, while the member jurisdictions did not maintain any personnel files on the employees involved.

- District 1 and other participating agencies were not involved in the evaluation of the paramedics and could not impose discipline on those employees.

- Medic 7 paid the medical and dental insurance, and employer's share of retirement contributions for the paramedics. Employees' checks were issued by Snohomish County. Employees did not receive pay from any of the member jurisdictions.

- The Medic 7 Board decided the number of hours in employee work shifts and the number of hours a car would be in service. At monthly meetings of the Medic 7 Board, reports were made on such matters as scheduling problems, sick leave, overtime used, and the like. Fire District 1 did not perform those functions.

- Fire District 1's influence was limited: The Medic 7 Board is made up of one representative from each jurisdiction.

> Committees function as typical committees and make recommendations to the board. Fire District 1 had representatives on Medic 7 standing committees, such as the personnel committee and budget committees. There was testimony that representatives of the major financial contributors, such as Mountlake Terrace, Edmonds, Lynnwood, and Fire District 1 may have had more "clout", but the record fails to show that District 1 or any other participating jurisdiction as a separate entity, had any legal right to influence collective bargaining issues.

Local 3524 argues that Fire District 1 contributed a large percentage of Medic 7's budget.[2] When determining who is the employer, however, the source of funds does not equate with the right to control. See, Kent School District, Decision 2215 (PECB, 1985).

In Tacoma School District, supra, the Commission concluded a private transit company, rather than the public employer, was the employer because it had the final say over wages and benefits, over most of the non-economic bargainable subjects, and over decisions concerning discipline and discharge. In that case, even an ability to set minimum wage and benefit levels and a right to require an employee's dismissal were found to be insufficient indicia of "control" to warrant Commission jurisdiction over the public employer. On the record made here, District 1 exercised less control over the Medic 7 paramedics than was exercised by the Tacoma School District over its contractor's bus drivers.

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[2] The budget of Medic 7 is made up of contributions by the participating jurisdictions. The record shows that approximately 40% of Medic 7's budget was paid by District 1.

Not Joint Employer -

Local 3524 argues that Fire District 1 is a joint employer of the Medic 7 paramedics. When two or more entities exert control over subjects of bargaining, they may be considered joint employers for purposes of collective bargaining. In Zylstra v. Piva, supra, the Supreme Court of the State of Washington concluded that the persons at issue there were employees of a county for purposes of negotiating matters relating to wages and related benefits, but were employees of the state judicial system for purposes of hiring, firing, working conditions and other matters.

Commission precedent also requires that "joint" employers each exercise a substantial degree of control over the basic core of subjects for collective bargaining, so that collective bargaining cannot take place without the presence of both employers:

- In City of Lacey, Decision 396 (PECB, 1978), both the city and a joint animal control commission played significant roles in determining wages, hours and working conditions of animal control employees. The joint commission was the ultimate authority on matters of budget, the size of the workforce, hiring, layoffs, discharge, facilities and basic policy, so it was determined to be a necessary participant in any collective bargaining. Salaries and fringe benefits were set by the City of Lacey, and the animal control budget was incorporated into the City of Lacey budget, so the city was also a necessary participant in bargaining. The case at hand is distinguishable, however. Fire District 1 never had a similar degree of authority over subjects of collective bargaining.

- In Thurston County Fire Protection District 9, Decision 461 (PECB, 1978), the Executive Director found that a fire district was a joint employer of certain personnel. The fire

district and The Evergreen State College had agreed that the district would provide fire protection services for the college, and the fire district would employ 10 students from the college who would work primarily on calls on the college campus. Although the college was not an employer subject to the jurisdiction of the Commission under Chapter 41.56 RCW, the student firefighters were considered a unit appropriate for collective bargaining within the fire district on the matters it controlled.[3] Local 3524 cites this case as support for its argument that the Commission or its Executive Director have consistently found that an interlocal agreement creates a joint employer relationship, but the fire district and the college were specifically joint employers of the students under the terms of that interlocal agreement. Other facts distinguishing that case from the case at hand are that the fire district clearly controlled selection, training and supervision and related activities of the fire fighters.[4] The key in that case was not the existence of an interlocal agreement, but the terms of that agreement, and the degree of control the fire district had over the student fire fighters.

- Sno-Isle Vocational Skills Center, Decision 841 (EDUC, 1980), which Local 3524 cites as supporting its position, in fact supports a view that District 1 is not a joint employer. The issue there was whether a skills center jointly created by several school districts was a separate entity and the employer of its employees. The Mukilteo School District acted

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[3] An employee organization formed by the student fire fighters petitioned to represent them as a separate unit.

[4] The college provided office, living and equipment storage space for district operations on the college campus, as well as tools and clothing.

as host district and provided the site for the center, but the center was governed by a council composed of representatives from each of nine participating districts. The council set policy and the budget, determined the programs to be offered, set staffing levels, and hired the director who selected the center's personnel. Contrary to an argument here that each constituent district was a joint employer,[5] the conclusions reached in that case were that: (1) The skills center was an employer entity onto itself, separate and distinct from the participating districts; and (2) Mukilteo School District was not the sole employer of the petitioned-for employees. The Mukilteo School District was not in a position to independently engage in meaningful collective bargaining, either as one of nine equal participants in the council of the skills center, or as a functionary providing administrative services for compensation to the skills center.

▸ In Kitsap Peninsula Skills Center, Decision 838-A (EDUC, 1981), the Executive Director found a skills center to be a joint employer with the Bremerton School District. An agreement between various school districts specifically gave each participating district equal standing in resolving disputes, and an administrative council for the skills center made effective recommendations regarding wages, hours or working conditions. Staffing, budgeting and operation of the skills center was subject to the center's administrative council as well as the board of directors of the Bremerton

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[5] A finding that an entity is a "joint employer" does not necessarily or automatically mean that all associated entities are employers for the purposes of collective bargaining. On the contrary, a finding that an entity is a joint employer can only indicate that specific entity is to be considered as such.

School District. In the case at hand, however, District 1 did not exert a control in relation to Medic 7 that equates with the authority exercised over the skills center by Bremerton School District. In particular, District 1 had no standing to resolve disputes, or to make effective recommendations regarding wages, hours, or working conditions.

- Local 3524 did not address Kennewick School District, Decision 2008 (PECB, 1988), which directly applies to the case at hand. There, a vocational facility was operated under a joint agreement of participating school districts, but the joint council could only make recommendations on personnel matters. The Kennewick School District was responsible for the personnel functions associated with the center, had authority to hire, discipline, evaluate and discharge vocational instructors, and processed their grievances. The Executive Director found that the specific reservation of final personnel authority to a single school district distinguished that situation from Sno-Isle and Kitsap, and that the vocational facility was not a separate employer. In the case at hand, no similar authority is vested in Fire District 1 as a participating jurisdiction of Medic 7.

- In North Mason School District, supra, a private transit company had a supervisory and administrative function, but did not play any meaningful role with respect to the basic core of subjects for collective bargaining. The contracting school district retained the final say on wages, benefits, hours and all significant aspects of the employees' working conditions, and there was no evidence that the school district required the transit company's concurrence in such matters. Here, by contrast, there was no evidence that Medic 7 required the concurrence of District 1 on collective bargaining issues.

- The case at hand equates more with Tacoma School District, supra, where a private transit company was found to be the employer, because it had the final say over wages, benefits, most non-economic subjects of bargaining, discipline and discharge. The contracting school district did not retain sufficient control to be labeled as a joint employer.

Neither does federal precedent persuade us that a change of focus is warranted at this time. Res-Care, Inc., 280 NLRB 670 (1986) stood for the proposition that an employer must have "the final say on the entire package of employee compensation i.e. wages and fringe benefits," for meaningful bargaining to take place. Local 3524 argues that the National Labor Relations Board (NLRB) recently rejected the "control test" in Management Training Corporation, 317 NLRB 1355 (1995), but a careful reading of that decision indicates that Local 3524 misinterprets its applicability to the case at hand:

- First, Management Training only applied to the question of assertion of jurisdiction over a private employer with close ties to an exempt government entity.

- Second, the NLRB's stated concern was that Res-Care placed too much emphasis on control of economic terms and conditions, and did not address non-economic issues. The Commission's control test has historically been of broader scope.

- Third, the NLRB still maintained that the "employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act." Thus, even if Management Training was a binding precedent, District 1 had literally no indicia of an employer.

We see no reason to abandon the control test as set forth in our precedent, particularly when Local 3524 has not cited any Washington state case which has overruled Zylstra v. Piva, supra.

Policy Arguments Unavailing -

Local 3524 argues that each partner of the joint venture called Medic 7 should bear an individual responsibility to bargain its own decision to replace the employees of the joint venture within its jurisdiction, that a co-venturer should not be able to tiptoe away from the joint venture and saddle its abandoned partners with the sole obligation to bargain the effects of its conduct, and that the first to leave cannot enjoy immunities from the operation of law which the last to leave does not. As District 1 asserts, however, Local 3524's contentions ignore the fact that collective bargaining law pertains to public "employers", not necessarily to public entities that may be participants in joint ventures. As the Examiner noted,[6] there is an inherent weakness in being an employee of (or a union representing the employees of) a secondary supplier, where the primary producer can change suppliers at will or at contract termination.

Local 3524 argues that if District 1 can withdraw without bargaining, then all the rest of Medic 7's joint venturers could do so, leaving no employer with an obligation to bargain decisions or effects. Local 3524 urges that City of Centralia, Decision 5282-A (PECB, 1996) could give rise to a duty to bargain a decision based in part on an employer's desire to reduce labor costs, under considerations outlined by the Supreme Court of the United States in First National Maintenance v. NLRB, 452 U.S. 666 (1981). In City of Centralia, however, there was no question of who was the employer. The conclusions there as to the existence of a duty to

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[6] Decision, page 21, footnote 17.

bargain an employer decision to reduce shift staffing to save labor costs rested on several other matters, as well.

Conflict of Laws -

Local 3524 argues that the vehicle of an interlocal agreement is no shield to the District's obligations under the collective bargaining statutes, as RCW 39.34.030(5) provides that no public agency may escape its obligations through an interlocal agreement. Chapter 39.34 RCW authorizes cooperative and joint action between public agencies. RCW 39.34.030(5) states as follows:

> No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, the performance may be offered in satisfaction of the obligation or responsibility.

Local 3524 also reminds the Commission that RCW 41.56.905 expressly controls in conflicts with other statutes, and that Chapter 41.56 RCW is to be construed liberally.

In this case, the interlocal agreement specifically allowed any party to withdraw from Medic 7 "after giving written notice to all other parties on or before July 1 in any year of its intention to terminate ... on December 31 of the same year ...". Citing Zylstra, supra, Local 3524 reasons that District 1 had an obligation to bargain with it over the area exclusively controlled by District 1, because District 1 was the only political subdivision of the state with any control over its decision to withdraw from Medic 7. Local 3524 misapplies the right of control test here. When Medic 7 and the bargaining unit at Medic 7 were formed,

District 1 was never an employer for purposes of collective bargaining, and it never had any obligation or responsibility imposed upon it by collective bargaining statutes. Had any other unfair labor practice been filed against District 1 concerning employees of Medic 7, it would have been properly dismissed. District 1 cannot now be held to have had a duty to bargain wages, hours and working conditions or other personnel matters.

For the reasons outlined above, we conclude that Snohomish County Fire District 1 was not, and is not, an employer of the employees represented by this union, and had no duty to bargain its decision to withdraw from Medic 7 or the effects of such withdrawal under Chapter 41.56 RCW.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law and Order issued by Examiner William A. Lang in the above captioned matter on August 19, 1997, are AFFIRMED and adopted as the findings of fact, conclusions of law and order of the Commission.

Issued at Olympia, Washington, on the 20th day of January, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner