City of Everett, Decision 11241-A (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 46, Complainant, vs. CITY OF EVERETT, Respondent.	CASE 23744-U-11-6055 DECISION 11241-A - PECB DECISION OF COMMISSION

Emmal, Skalbania and Vinnedge, by *Alex Skalbania*, Attorney at Law, for the union.

Perkins Coie, by *Lawrence B. Hannah*, Attorney at Law, for the employer.

On January 18, 2011, the International Association of Fire Fighters, Local 46 (union) filed a complaint charging unfair labor practices against the City of Everett (employer). The Unfair Labor Practice Manager reviewed the complaint and issued a deficiency notice on January 26, 2011. The union filed an amended complaint on February 15, 2011, and the Unfair Labor Practice Manager found a cause of action existed for unilateral changes, contracting out, circumvention, and failing or refusing to meet and negotiate with the union.

Examiner Katrina I. Boedecker held a hearing and issued a decision[1] finding that the employer unilaterally reduced overtime opportunities, unilaterally reduced equipment staffing, and skimmed when it allowed bargaining unit work to be performed by employees from other jurisdictions. The Examiner found that the employer did not transfer bargaining unit work to private ambulance companies or circumvent the union. The employer appealed.

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[1] *City of Everett*, Decision 11241 (PECB, 2011).

ISSUES

1. Did the employer unilaterally reduce overtime opportunities when the employer reduced staffing on Aid car 6 and unilaterally redeployed personnel on Aid car 2, Aid car 6, and Engine 3?

2. Did the employer unilaterally change the mutual aid policy?

3. Did the employer contract out bargaining unit work when it added agencies to the automated response list?

4. Did the Examiner err when she concluded that the employer did not circumvent the union?

5. Did the Examiner err when she concluded that the employer did not refuse to bargain by passing an ordinance to allow the employer to contract ambulance services?

6. Did the employer refuse to bargain by failing or refusing to meet and negotiate with the union over the employer's decisions and the effects of those decisions?

We reverse the Examiner's ruling that the employer unilaterally reduced overtime opportunities and refused to meet and negotiate with the union. The employer made changes to overtime opportunities in conformity with the collective bargaining agreement. The union waived, by contract, its right to bargain the changes to overtime opportunities. The employer made changes to the station orders for automated mutual aid. The employer did not contract out bargaining unit work. We affirm the Examiner's ruling that the employer did not circumvent the union and the employer did not contract out ambulance services.

BACKGROUND

Reductions to Overtime

The employer operates a fire department with five fire stations. Murray Gordon (Gordon) was the fire chief. Each of the five fire stations was assigned certain equipment. Three pieces of equipment are at issue in this case: Aid car 2, Aid car 6, and Engine 3. Aid cars were staffed with two firefighter/emergency medical technicians (EMTs). Engines were staffed with a captain, a driver, and a firefighter.

If sufficient staff were on duty, Aid car 2, Aid car 6, and Engine 3 were staffed twenty-four hours a day. If an insufficient number of staff were on duty to staff Aid car 2 and Engine 3, the employer would call in employees on overtime to staff Aid car 2 and Engine 3. Aid car 6 was staffed 24 hours a day, if sufficient staff was available on duty, otherwise it was staffed through overtime from 8 a.m. to 8 p.m.

The union represents a bargaining unit of firefighters; firefighter/EMTs; firefighter driver/engineers; firefighter/paramedics; Fire Captains; Fire Inspector; Medical Services Officer; Fire Battalion Chiefs; Assistant Fire Marshall; and Fire Division Chiefs. Paul Gagnon (Gagnon) was the union president. Article 27 of the collective bargaining agreement established a minimum staffing of 25 firefighters on duty. Article 27 requires three firefighters on each fire suppression company and two firefighters on each aid car.

During the summer of 2010,[2] the employer and the union discussed the employer's budget during labor management meetings. During the June meeting, the employer expressed a desire to reduce overtime staffing. The employer proposed to reduce staffing of Aid car 6 from twelve hours a day to eight hours a day. At the July 16 labor management meeting, the employer and union further discussed reducing the number of hours Aid car 6 would be staffed. At some point in time, the union provided input that the shift should be from 8:00 a.m. until 4:00 p.m. The employer adopted the shift proposed by the union.

On July 22, Gordon e-mailed staff a budget update. Gordon announced that beginning August 1, Aid car 6 would continue to be staffed 24 hours if sufficient staff were on duty. If overtime were necessary to staff Aid car 6, then Aid car 6 would be staffed from 8:00 a.m. until 4:00 p.m. Gordon testified that he made the decision, the decision was purely economic, and he did not offer to bargain the change.

In October 2010, the employer made further reductions to staffing when it eliminated overtime staffing of Aid car 6. On October 6, Assistant Chief Bob Downey (Downey) sent an e-mail to the Battalion Chiefs informing them that beginning October 9, Aid car 6 would no longer be

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[2] All dates are in 2010 unless otherwise noted.

staffed with overtime. On October 7, Gordon told Gagnon that the employer would no longer staff Aid car 2, Aid car 6, and Engine 3 with overtime because the overtime budget was nearly depleted.

If necessary, overtime was used to staff Aid car 2 and Engine 3 24 hours a day. On October 14, Downey sent an e-mail to the battalion chiefs and acting battalion chiefs concerning redeploying staff. The e-mail stated:

> Effective Saturday, October 16th, 2010, if absentees create openings in suppression apparatus crews, first redeploy extra personnel from any unit with more than the minimum unit staffing, then from Aid 2, and then from Engine 3 to make up crews. Overtime is not authorized unless it means redeploying personnel from another unit in addition to those listed above.

The union characterized the employer's actions as "browning out" the units. The employer characterized its actions as redeployment.

On October 14, Gagnon, union Vice President John Gage, and other union officers met with Chief Administrative Officer/Chief Financial Officer Debra Bryant and Labor Relations/Human Resources Director Sharon DeHaan. The union requested the meeting to discuss the overtime changes that the employer had implemented. Overtime and sick leave were discussed. Bryant told the union that the decision had been made, the employer was attempting to balance the budget, and the fire department would not receive additional overtime money. DeHaan testified that the union did not specifically request bargaining.

On November 2, Gagnon and Gage met with the mayor, Bryant, DeHaan, and Downey. Overtime and redeployments were discussed. The union asked to be part of the decision making. The mayor said the decisions were his and he would take the union's ideas under consideration.

Mutual Aid

The employer has been a party to mutual aid agreements since the 1970s. The employer's mutual aid agreements have, since at least the 1990s, included Snohomish County Fire District 1,

Marysville Fire District, and the City of Mukilteo. Mutual aid has historically been dispatched, upon request, into the city to assist in responding to fire calls.

SNOPAC dispatches 911 calls for police and fire agencies, including the employer's fire department. SNOPAC uses computer aided dispatch (CAD) software to identify available service areas and dispatch emergency calls. Station order is used to find the closest available, appropriate apparatus to respond to a call. SNOPAC dispatches the apparatuses in accordance with the employer's tactical standard operating procedures. The employer's tactical standard operating procedures identify which units are dispatched to which type of calls. The employer's participation in SNOPAC dates to SNOPAC's creation in 1974.

If CAD identified that all of the employer's medic aid units were out on calls, the dispatcher had to manually search for the closest available medic unit to be sent. The responding unit might have been from another agency. Historically, Medic 25 from Mukilteo was dispatched into the employer's jurisdiction when the employer did not have units available to respond to medic calls.[3]

The employer's list of agencies that could be dispatched into the employer's jurisdiction was small. SNOPAC requested that the employer add stations that could provide mutual aid if the employer's units were unavailable and allow SNOPAC to use automated dispatching for both medical and fire calls. Downey worked with SNOPAC to identify additional stations of other employers that could be dispatched if the employer had no equipment, or not the appropriate type of equipment, available to respond to an emergency call.

On a first alarm call, certain units were dispatched. For example, for a commercial fire, four engine companies, two ladder companies, an aid car, a medic unit, and the command car were dispatched. In the past, if the incident commander determined that the employer needed additional resources, the incident commander asked SNOPAC to dispatch the appropriate units, including mutual aid, if necessary. If only one of the employer's ladders was available to respond and two were necessary, the incident commander had to ask SNOPAC to dispatch a

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[3] In the past, Medic 25 was co-staffed with bargaining unit employees and Mukilteo employees.

ladder truck from the mutual aid list. After the change, SNOPAC's computer system identified which of the employer's units were available to be dispatched. For example, if a commercial fire response was needed, SNOPAC first dispatches the appropriate employer apparatuses, if available. If only one of the employer's ladder trucks was available to respond, SNOPAC then dispatched the closest available mutual aid ladder truck.

Bargaining unit employees were not called back to respond on first alarm fires when the employer did not have the appropriate units available to respond to fire calls. On a second alarm, bargaining unit employees were called back on overtime. The incident commander determines when a second alarm is necessary. If a second alarm is called, all of the employer's units were dispatched to the scene of the alarm and the employer's stations are staffed through mutual aid in order to respond to other calls. The employer did not make any changes to second alarm situations.

At the August 10 division chief staff meeting, Downey announced that the fire response list was adjusted. As a result, when all resources were out of service, a mutual aid medic unit would be dispatched.

On August 12, Gagnon sent Gordon a letter and demanded to negotiate automatic mutual aid.[4] On August 20, Gordon responded by e-mail that he did not think the decision to use automated mutual aid was a mandatory subject of bargaining and was willing to discuss how the union believed the automated dispatch system impacted the bargaining unit. Gordon requested that Gagnon provide a time when he would like to discuss the matter. No bargaining date was established.

On September 2, Downey issued an information bulletin announcing the changes to mutual aid. On September 27, the union requested information about automated mutual aid.

ISSUE 1: Did the employer unilaterally reduce overtime opportunities when the employer reduced staffing on Aid car 6 and unilaterally redeployed personnel on Aid car 2, Aid car 6, and Engine 3?

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[4] The parties disagree about whether the term is automatic mutual aid or automated mutual aid.

LEGAL PRINCIPLES

Standard of Review

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran,* Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College,* Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-Tran,* Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County,* Decision 7210-A (PECB, 2001).

Subjects of Bargaining

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland,* Decision 2448-B (PECB, 1987), *remanded,* 113 Wn.2d 197 (1989); *Federal Way School District,* Decision 232-A (EDUC), *citing NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958). Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate. *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which managerial action is deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC,* 113 Wn.2d 197, 200 (1989) (*City of Richland*). The inquiry focuses on which characteristic predominates. *City of Richland,* 113 Wn.2d at 200. The Supreme Court in *City of*

Richland held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects." *City of Richland,* 113 Wn.2d at 200.

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University,* Decision 10413-A (PSRA, 2011), *citing Skagit County,* Decision 6348 (PECB, 1998); *City of Kelso (Kelso I),* Decision 2120-A (PECB, 1985) (the decision to contract out bargaining unit work and the effects of the decision on the employees are mandatory subjects of bargaining); *City of Kelso (Kelso II),* Decision 2633-A (PECB, 1988)(the decision to merge operations with another employer is an entrepreneurial decision that is a non-mandatory subject of bargaining, and only the effects of that decision on employee wages, hours, and working conditions are mandatory subjects of bargaining). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decisions could constitute mandatory subjects of bargaining. *See Wenatchee School District,* Decision 3240-A (PECB, 1990).

Wages, including overtime compensation, and hours of work are mandatory subjects of bargaining. *City of Pasco*, Decision 9181-A (PECB, 2008); *City of Kalama*, Decision 6773-A (PECB, 2000). Actions reducing compensation to bargaining unit employees are generally mandatory subjects of bargaining. *City of Centralia*, Decision 5282-A (PECB, 1996).

The number of staff on duty (shift staffing) has been found to be a management prerogative. *City of Richland,* 113 Wn.2d at 205.

Unilateral Change

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake Washington Technical College*, Decision 4712-A (PECB, 1995). To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable

opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of formal notice, it must shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A.

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A. If the employer's action has already occurred when the employer notifies the union (*a fait accompli)*, the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College,* Decision 4712-A.

If the bargaining unit employees are eligible for interest arbitration, an employer may not unilaterally implement its desired change to a mandatory subject of bargaining without bargaining to impasse and obtaining an award through interest arbitration. *Snohomish County*, Decision 9770-A (PECB, 2008). Interest arbitration is applicable when an employer desires to make a mid-term contract change to a mandatory subject of bargaining. *City of Yakima*, Decision 9062-A (PECB, 2006).

Therefore, an employer violates RCW 41.56.140(1) and (4) if it implements a unilateral change on a mandatory subject of bargaining without having fulfilled its bargaining obligation.

Waiver

When given notice of a contemplated change affecting a mandatory subject of bargaining, a union desiring to influence the employer's decision must make a timely request for bargaining or it waives its right to bargain by its inaction. *Washington Public Power Supply System*, Decision 6058-A. Waiver is an affirmative defense. *Lakewood School District,* Decision 755-A (PECB,

1980). A key ingredient to finding a waiver by inaction is a finding that the employer gave adequate notice to the union. *Washington Public Power Supply System*, Decision 6058-A. An employer asserting that a union waived by inaction its bargaining rights bears a heavy burden of proof. The employer must prove that the union's conduct is such that the only reasonable inference is that the union has abandoned its right to negotiate. *Clover Park Technical College,* Decision 8534-A (PECB, 2004).

A party may also waive its right to bargain through the language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). We have long held that typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

ANALYSIS

On appeal, the employer argues that this case is about shift staffing and that the apparatuses continue to be staffed in accordance with the minimums established by the collective bargaining agreement. Only if there were not enough staff on shift to operate the apparatus are personnel redeployed. The employer argues that the union waived by contract its right to bargain.

The union argues this is a case about reducing bargaining unit employees' available opportunities for overtime. The union argues that substantial evidence supports the Examiner's conclusions. The union argues that the employer presented its decision as a *fait accompli.*

Faced with budget constraints, Bryant instructed Gordon to live within his budget. Gordon decided to reduce overtime costs in an effort to stay within the 2010 budget. The employer

determined overtime costs could be contained if it did not use overtime to staff three apparatuses. By reducing overtime staffing, the employer eliminated overtime opportunities for bargaining unit employees. Overtime compensation is a mandatory subject of bargaining. The amount of overtime available directly impacts employees' wages and hours.

The employer does not deny that it made the changes. Rather, the employer argues that the union waived its right to bargain. The employer argues that the management rights clause acts as a waiver of the union's right to bargain.

> ARTICLE 7 – MANAGEMENT RIGHTS
>
> The management of the City and the direction of the work force are vested exclusively in the City unless otherwise expressly provided by the terms of this Agreement. The City has the right to manage and operate the Fire Department in its discretion, and to adopt rules for the operation of the Department and the conduct of its employees, provided such management, operation and rules are not controlled by the terms of this Agreement or by applicable law. Examples of such rights include the right:
>
> . . .
>
> D. to assign work and determine the location and the number of personnel to be assigned duty at any time. It is understood by the parties that every incidental duty connected with fire service oriented operations enumerated in job descriptions is not always specifically described. The City agrees that work assignments shall be limited to Fire Department Duties.
> E. to control the department budget, including its allocation for equipment and supplies.
>
> ARTICLE 8 – PREVAILING RIGHTS
>
> All rights and privileges for employees, at the present time in the form of salaries, overtime, insurance, other monetary payments by the City, hours, and shifts shall remain in full force, unchanged and unaffected in any manner by this Agreement except as expressly provided elsewhere in this Agreement or changes by mutual consent, provided that this Article shall have no application to a situation where a third party unilaterally alters or terminates a health care plan, in which case the parties will bargain collectively as required by law.

Management rights clauses can contain a list of clear and unmistakable waivers, can contain a list of unclear and confusing non-waivers, or can contain a mix of both. *City of Wenatchee*, Decision 8802-A (PECB, 2006). Article 7 contains a mix of specific waivers and a more general

waiver. The language demonstrates that the parties intended to allow the employer to change, without bargaining, those subjects specifically listed. Under Article 7, the employer has the express right to "determine the location and number of personnel to be assigned duty at any time."

When the employer decided to eliminate overtime staffing of Aid car 2, Aid car 6, and Engine 3, it was acting within its right to determine the number of personnel assigned to duty at any time. That decision was subject only to the other terms of the collective bargaining agreement.

The collective bargaining agreement addressed the minimum number of firefighters required to be on duty at any time. The language in the parties' collective bargaining agreement resulted from a 1976 interest arbitration award.[5]

> ARTICLE 27 – HEALTH AND SAFETY
>
> The parties recognize that manning (crew size, on duty shift force) vitally affects the efficient and economic operation of the Department in providing the best possible service to the community and, further, that changes from the present minimum level agreed to in prior contracts do affect the safety and job security of the members of the Union, and therefore agree as follows:
>
> The City agrees to maintain a firefighting force of at least twenty-five (25) firefighters on duty at all times. The City further agrees to maintain at least three (3) firefighters on each fire suppression company, one of whom shall be a captain; to maintain two (2) firefighters on each aid car and to maintain a battalion chief who shall be on duty with each fire suppression platoon.
>
> The City further agrees to use the attrition method in reaching the twenty-five (25) firefighter minimum crew level. Attrition is defined as voluntary quit, dismissal for just and sufficient cause, permanent disability, retirement or death.
>
> Provided, however, that notwithstanding the foregoing, the City may, during the course of the contract year, seek to effect a change in the minimum manning provided by paragraph one above. If the City desires to effect such change, it shall propose to the Union a written proposal as to the reduction sought including the reason for the change, prior to the date of the change. At least 90 days prior to

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[5] In *City of Everett v. Fire Fighters, Local 350, Int'l Ass'n of Fire Fighters*, 87 Wn.2d 572 (1976), the Washington Supreme Court deferred to arbitration the question of whether a minimum shift staffing proposal was a mandatory subject of bargaining. The arbitrator found that minimum staffing was a mandatory subject of bargaining and modified the language in the collective bargaining agreement.

> the proposed effective date of the change, the City shall meet with representatives of the Union at reasonable times and places for the purpose of exploring the advisability of the change and agreement to the change. If the parties fail to agree to the change within 60 days of the first formal conference, the parties shall submit the proposal to arbitration as provided for by Article 6, Step 4. The Arbitrator shall resolve the issue based upon a finding that the proposal of the City will improve efficiency of service and that it does not reasonably impair the safety of the firefighting force.

The collective bargaining agreement established a minimum of 25 firefighters on duty at all times. The employer's decision to eliminate overtime opportunities on Aid car 2, Aid car 6, and Engine 3 did not cause the minimum shift staffing to fall below 25.

CONCLUSION

Overtime, including the opportunity for overtime, is a mandatory subject of bargaining because it affects employee wages and hours. The management rights clause of the parties' collective bargaining agreement reserved to the employer the right to determine the number of personnel on duty, provided that the number of personnel on duty did not fall below the minimum established in Article 27 of the collective bargaining agreement. The union waived, by contract, its right to bargain changes to overtime staffing of Aid car 2, Aid car 6, and Engine 3. The employer did not violate its collective bargaining obligation when it changed overtime staffing of Aid car 2, Aid car 6, and Engine 3.

ISSUE 2: Did the employer unilaterally change the mutual aid policy?

ANALYSIS

The preliminary ruling frames the issues for hearing. *King County*, Decision 9075-A (PECB, 2007. The preliminary ruling established a cause of action for "unilateral changes to bargaining unit members' workload, overtime opportunities, and safety, through: . . . (ii) changing the Mutual Aid policy to an Automatic Aid policy."

The employer admits that it expanded the station orders for automated mutual aid. The employer argues that this decision involves a permissive subject of bargaining concerning the level of service the employer delivers. The employer argues that it did not enter a new mutual aid agreement, rather, it enhanced the pre-existing station orders.

Having established that the employer made the change to the station orders, the question remains whether expanding the station orders was a mandatory subject of bargaining. The level of service an employer provides is a managerial prerogative; thus, it is a permissive subject of bargaining. *See Federal Way School District*, Decision 232-A (PECB, 1977). Public employers have the right to "entrepreneurial" control over non-mandatory subjects of bargaining. *Wenatchee School District*, Decision 3240-A (PECB, 1990). In this case that managerial prerogative must be balanced against the employees' interest.

The union asserted that the expansion of the station orders increased the safety risks to employees and reduced overtime opportunities.

The union presented testimony that the employer does not conduct training exercises with the jurisdictions that respond to mutual aid calls. The employer presented testimony that it participates in some training with other jurisdictions, including Snohomish County Fire District 1.

The union offered evidence that the mutual aid responders use a different radio frequency for communication than the employer. According to the union, this causes confusion and a safety issue. Employer witnesses testified that once SNOPAC dispatches mutual aid, the mutual aid responding uses the same radio frequency as the employer.

The union failed to establish that bargaining unit personnel would be called back on overtime to respond to a first alarm call.

Expanding the station order for dispatching mutual aid is a managerial prerogative impacting the level of service. The employer's interest in controlling the level of service it offers outweighs

the employees' interests. The union did not meet its burden of proving change in the station order impacted hours or wages.

The employer did not have a duty to notify the union and offer to bargain prior to expanding the automated station orders. The employer did have a duty to notify the union and offer to bargain the effects of its decision to expand the automated station orders.

On August 12, Gagnon requested to bargain the changes to "automatic mutual aid." On August 20, Gordon responded that he did not think the decision was a mandatory subject of bargaining and the employer was willing to discuss how the union believed the change impacted bargaining unit members. Gordon invited Gagnon to offer dates for bargaining. There is no evidence that Gagnon offered dates for bargaining. The union made information requests. On September 2, 2010, the employer notified the union that the fire response list was changed. The employer did not notify the union until after the change had been made. The union waived by inaction its right to bargain the effects of the change when it failed to offer dates to bargain the effects of the change to mutual aid.

CONCLUSION

The employer made changes to the station orders for automated mutual aid. The employer's interest in establishing the level of service it provides outweighs the concerns raised by the union. The employer did not have a duty to bargain the decision to expand station orders. The employer had a duty to bargain the effects of its decision. The union waived its right to bargain the effects when it failed to respond with dates to discuss the effects.

ISSUE 3: Did the employer contract out bargaining unit work when it added agencies to the automated response list?

LEGAL PRINCIPLES

Longstanding Commission precedent establishes that any decision to transfer or "skim" bargaining unit work from the bargaining unit that traditionally performed that work to a

different bargaining unit or unrepresented employees is a mandatory subject of bargaining. *South Kitsap School District*, Decision 472 (PECB, 1978); *City of Snoqualmie*, Decision 9892-A (PECB, 2009). Exclusive bargaining representatives have a legitimate interest in preserving work that their bargaining units historically perform, at least when an employer has not cut back services and personnel. *City of Snoqualmie*, Decision 9892-A. An employer has a duty to give notice to the exclusive bargaining representative of its employees and provide an opportunity for bargaining prior to making a decision to contract out bargaining unit work. *Clover Park School District*, Decision 2560-B (PECB, 1988).

The Commission has long applied the same test to determine whether an employer has skimmed bargaining unit work to questions of whether an employer contracted out bargaining unit work. Contracting out occurs when bargaining unit work is contracted to be performed by employees of another employer. Skimming occurs when an employer removes work from the bargaining unit and gives the work to other employees, either represented or non-represented, of the employer.

When determining whether an employer has violated its collective bargaining obligation by contracting out bargaining unit work, a two step analysis is applied. First, it must be determined whether the work in question is bargaining unit work. *City of Snoqualmie*, Decision 9892-A. Bargaining unit work is work that bargaining unit employees have historically performed.

If the work is determined to be bargaining unit work, the Commission considers five factors to determine whether the employer had a duty to notify the union of the intended transfer of work and provide an opportunity for bargaining:

1. The previously established operating practice as to the work in question (i.e., had non-bargaining unit personnel performed the work before?);
2. Whether the transfer of work involved significant detriment to the bargaining unit members (i.e., by changing conditions of employment or significantly impairing reasonably anticipated work opportunities.);
3. Whether the employer's motivation was solely economic;

4. Whether there had been an opportunity to bargain generally about the changes in existing practices; and
5. Whether the work was fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

No one factor is determinative in the analysis. *Skagit County*, Decision 8746-A (PECB, 2006).

ANALYSIS

First, we must determine if the work being performed by other jurisdictions is bargaining unit work. Bargaining unit members respond to fire and medic calls within the employer's jurisdiction. The work at issue is responding to fire and medic calls within the employer's jurisdiction when the employer does not have the appropriate equipment available to respond to the call. The work at issue is bargaining unit work.

Next, we analyze whether the employer had a duty to notify the union of the intended transfer of work and provide an opportunity to bargain.

In the past, non-bargaining unit personnel have responded to fire and medic calls when the employer did not have sufficient units available to respond. Medic 25, from another jurisdiction, responded if all of the employer's medic units were unavailable. For a period of time, Medic 25 was staffed with bargaining unit employees. After that practice ceased, Medic 25 continued to respond to medic calls if all of the employer's medic units were unavailable. Snohomish County Fire District 1 has responded to fire calls. Those responses occurred as a result of a request by the incident commander. This factor weighs heavily in favor of not requiring the employer to bargain the decision.

Having mutual aid dispatched into the city on a first alarm fire did cause a significant detriment to the bargaining unit. A union has an interest in preserving bargaining unit work. Allowing non-bargaining unit personnel to perform bargaining unit work harms the bargaining unit. However, the union did not prove that employees lost wages or hours as a result of the employer

expanding the station order for automated mutual aid. The union did not prove that the employer called employees back to duty on a first alarm fire if the employer had insufficient units in service to respond to the call. This factor weighs heavily in favor of not requiring the employer to bargain the decision.

There is no evidence that the employer's motivation to expand the station orders for automated mutual aid was economic. The evidence indicates that the employer's decision was based on a conversation with SNOPAC to aid SNOPAC in providing dispatching services. The change allowed SNOPAC to more efficiently dispatch medic units when all of the employer's units were unavailable. This factor weighs heavily in favor of not requiring the employer to bargain the decision.

The employer did not provide the union an opportunity to bargain the expansion of the station order for automated mutual aid. During the August 10, 2010 division chief meeting, Downey informed the division chiefs that the fire response list was being expanded. The notes from the August 10 division chief staff meeting state: "The fire response list has been adjusted." However, as discussed above, the decision to expand the station order was not a mandatory subject of bargaining.

The work being performed is not fundamentally different than bargaining unit work.

CONCLUSION

The employer did not contract out bargaining unit work to employees of another employer. The employer's involvement in mutual aid agreements pre-dates the expansion of the SNOPAC dispatch response list. The work performed when mutual aid is dispatched into the city is bargaining unit work. However, the work has previously been performed by non-bargaining unit personnel and the union failed to establish that the employees suffered a significant detriment as a result of mutual aid being dispatched into the city on a first alarm fire. The employer was not required to provide notice and opportunity to bargain the decision to expand the station order for automated mutual aid.

ISSUES 4 and 5: Did the Examiner err when she concluded that the employer did not circumvent the union? Did the Examiner err when she concluded that the employer did not refuse to bargain when the employer passed an ordinance to allow the employer to contract ambulance services?

CONCLUSION

We have reviewed the record and considered the parties' arguments. The Examiner correctly stated the relevant legal standards. Substantial evidence supports the Examiner's findings of fact. The Examiner properly applied the law to the facts presented. Substantial evidence supports the Examiner's conclusions of law. We affirm the Examiner.

ISSUE 6: Did the employer refuse to bargain by failing or refusing to meet and negotiate with the union over the employer's decisions and the effects of those decisions?

CONCLUSION

We reverse the Examiner's ruling that the employer failed or refused to meet when it unilaterally reduced staffing for Aid car 6 and imposed redeployments for Aid car 2, Aid car 6, and Engine 3. As discussed above, the union waived by contract its right to bargain those decisions. Therefore, the employer did not fail or refuse to meet with the union.

We reverse the Examiner's ruling that the employer failed or refused to meet when it unilaterally expanded the station orders for mutual aid. The employer did not contract out bargaining unit work. The employer had an obligation to notify the union and bargain the effects of the change. The union waived by inaction its right to bargain the effects of the change.

NOW, THEREFORE, it is

ORDERED

I. The Findings of Fact issued by Examiner Katrina I. Boedecker are AFFIRMED and the following Findings of Fact are added:

13. The parties' collective bargaining agreement reserved to the employer the right to determine the number of personnel on duty at any time, provided the number did not fall below 25.

14. Bargaining unit work includes responding to fire and medic calls.

15. Prior to the employer expanding the station orders, Medic 25 responded to medic calls within the employer's jurisdiction and Snohomish County Fire District 1 responded to fire calls.

16. Prior to the employer making changes to automated dispatch station orders, the incident commander had to request that SNOPAC dispatch mutual aid. After the change, SNOPAC dispatched mutual aid when the computer identified that none of the employer's apparatuses required for the response were available.

17. In a first alarm, the employer did not call employees back on overtime to staff the additional apparatuses necessary to respond to the call.

18. The employer did not make changes to the second alarm response.

II. Conclusions of Law 1, 6, and 7 are AFFIRMED and Conclusions of Law 6 and 7 are renumbered as 5 and 6. Conclusions of Law 2, 3, 4, and 5 are vacated. The following Conclusions of Law are substituted:

2. By its actions in Findings of Fact 4 and 7, the employer changed overtime opportunities. Through the language in the collective bargaining agreement, as

identified in Finding of Fact 13, the union waived its right to bargain. The employer did not violate RCW 41.56.030(4) and (1).

3. By its actions in Findings of Fact 7 and 9, the employer changed staffing. Through the language in the collective bargaining agreement, Finding of Fact 13, the union waived its right to bargain. The employer did not violate RCW 41.56.030(4) and (1).

4. By its actions in Findings of Fact 5 and 6, the employer did not contract out bargaining unit work and did not violate RCW 41.56.030(4) and (1).

III. The Order is VACATED. The union's complaint alleging unfair labor practices is dismissed.

ISSUED at Olympia, Washington, this 20th day of March, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23744-U-11-06055	FILED:	01/18/2011	FILED BY:	PARTY 2
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BAR UNIT:	FIREFIGHTERS				
DETAILS:	-				
COMMENTS:					

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