City of Everett, Decision 11241 (PECB, 2011)

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 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

The International Association of Fire Fighters, Local 46, (union), filed a complaint charging unfair labor practices against the City of Everett (employer) on January 18, 2011, and an amended complaint on February 15, 2011. The preliminary ruling, issued February 23, 2011, found the amended complaint to state causes of action for employer refusal to bargain, and potential derivative interference acts, by: 1) Making unilateral changes to bargaining unit members' workload and overtime opportunities, and by unilaterally imposing "brownouts" thus impacting employees' safety; 2) contracting out fire fighting work that had been performed by bargaining unit members; 3) contracting out ambulance work previously performed by bargaining unit members; 4) circumventing the union though direct dealing with employees represented by the union; and 5) failing or refusing to meet and negotiate with the union over the decisions and effects of the employer's actions.

Examiner Katrina I. Boedecker held a hearing on the amended complaint on June 13, 14, 15, and 16, 2011, in Everett, Washington. The parties filed post-hearing briefs by November 16, 2011.

ISSUES

1. Did the employer refuse to bargain, and therefore commit a derivative interference violation, by unilaterally reducing overtime staffing on the second aid car (Aid car-6), and imposing "brownouts" for the Aid car-2, Aid car-6, and Engine-3 units?

2. Did the employer refuse to bargain, and therefore commit a derivative interference violation, by allowing bargaining unit work to be performed by employees from Snohomish Fire District 1 and the Marysville Fire Department?

3. Did the employer refuse to bargain, and therefore commit a derivative interference violation, by contracting out bargaining unit work to the private ambulance companies Rural Metro and AMR?

4. Did the employer refuse to bargain, and therefore commit a derivative interference violation, by circumventing the union when it sent an e-mail to bargaining unit members on August 1, 2010, concerning reduced overtime staffing and by sending an Information Bulletin to bargaining unit members on September 2, 2010, concerning increasing the numbers of Mutual Aid entities that could be dispatched into the City of Everett by the dispatching center's automated dispatch program?

5. Did the employer refuse to bargain, and therefore commit a derivative interference violation, by failing or refusing to meet and negotiate with the union over the employer's decisions and the effects of those decisions?

After examining the testimony of the witnesses, the documents admitted into evidence, the parties' legal arguments and the record as a whole, I find that the employer did refuse to bargain about reducing overtime opportunities, reducing equipment staffing levels, and allowing fire fighter bargaining unit work to be performed by employees from other jurisdictions. I also find that the employer failed to negotiate in a meaningful way before unilaterally making those changes. However, the union did not establish that the employer transferred bargaining unit work to private ambulance companies or that the employer illegally circumvented the exclusive bargaining representative.

ISSUE 1: Did the employer refuse to bargain, and therefore commit a derivative interference violation, by unilaterally reducing overtime staffing on the second aid car (Aid car-6), and imposing "brownouts" for the Aid car-2, Aid car-6 and Engine-3 units?

OVERTIME AND BROWNOUTS

APPLICABLE LEGAL STANDARDS

Collective bargaining is defined as "the mutual obligations of the public employer and the exclusive bargaining representative" to meet and negotiate in good faith. RCW 41.56.030(4). "The law requires that a party who would change existing wages, hours or working conditions give notice to the opposite party and provide an opportunity for collective bargaining prior to implementing the change." *METRO (Amalgamated Transit Union, Local 587)*, Decision 2746-B, and 3151-A (PECB, 1990). [Appeal as to remedy only. *METRO*, Decision 2746-C, and 3151-B (PECB, 1990)]. The Commission's general rule is "that an employer commits an unfair labor practice by unilaterally changing the terms and conditions of employment of union-represented employees." *Lewis County PUD*, Decision 7277-A (PECB, 2002), citing *NLRB v. Katz*, 369 U.S. 736 (1962).

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, defines that it is an unfair labor practice for a public employer to refuse to engage in collective bargaining with the certified exclusive bargaining representative of its employees concerning mandatory subjects of bargaining. RCW 41.56.140(4). A mandatory subject of bargaining is one that affects employees' wages, hours or working conditions more than it affects the employer's scope of entrepreneurial control. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197 (1989).

To engage in meaningful bargaining, the employer must give the union sufficient notice to allow bargaining to occur prior to any change. "Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties." *Lake Washington Technical College*, Decision 4721-A (PECB, 1995), quoting *Clover Park School District*, Decision 3266 (PECB, 1989).

If the employer's attitude is that the change is a "done deal," that is indicative of a "fait accompli." A union does not have to request bargaining if the employer presents the change as a fait accompli. *Val Vue Sewer District*, Decision 8963 (PECB, 2005), cited in *City of Tukwila*, Decision 10536-A (PECB, 2010).

The complainant bears the burden of proof in establishing a unilateral change to a mandatory subject of bargaining. WAC 391-45-270(1)(a).

ANALYSIS

Background

The union is the exclusive bargaining representative of approximately 175 employees. At all material times, the union president is Paul Gagnon. Murray Gordon is the chief of the fire department. There are four assistant chiefs, one being the fire marshal. The chief and assistant chiefs are the only classifications that are outside of the bargaining unit. The bargaining unit includes: Fire fighter; fire fighter/EMT; fire fighter driver/engineer; fire fighter/Paramedic; Fire Captain; Fire Inspector; Medical Services Officer; Fire Battalion Chief; Assistant Fire Marshall; and Fire Division Chief. The employer has five fire stations.

Due to the massive downturn in the economy, during summer 2010, Chief Administrative Officer/Chief Financial Officer (CAO/CFO) Debra Bryant directed Chief Gordon that he had to live within his budgeted line items. Bryant told Gordon that he did not have the authority to overspend any part of his department's budget, including the line item for overtime. Bryant specified that Gordon would not be given access to any more money for overtime.

At labor/management meetings throughout the summer of 2010, the parties discussed the employer's budget problems. The chief asked the union to bring forth any money saving ideas that its members could generate. President Gagnon testified that the union had been trying to help the employer with the economic crisis. The employer had not hired any fire fighters in two years and it had not filled a vacant Assistant Fire Marshal position. Consequently, the union believed that the department was understaffed. The union thought it was helping the employer

monetarily since it was not pushing to fill vacancies. However, the employer took actions in the summer and fall of 2010 that the union believed it could no longer tolerate or ignore.

Reducing overtime staffing on the second aid car

For several years, Aid car 6 (A-6) had been staffed twelve hours a day (8:00 A.M. to 8:00 P.M.). Pursuant to the collective bargaining agreement, employees assigned to Aid cars get an additional dollar an hour in wages. Aid cars are staffed with two fire fighter/emergency medical technicians (EMTs). Medic units are staffed with two fire fighter paramedics. EMT aid units do basic life support (BLS); EMTs have 130–150 hours of training. Paramedic units perform advanced life support (ALS); paramedics have about 3,000 hours of training. Bargaining unit members would be called in on an overtime basis, if necessary, to staff A-6.

During the summer labor/management meetings, the parties discussed the staffing of A-6. The employer wanted to reduce the staffing of the unit from a 12-hour shift to an eight-hour shift. It proposed that the unit should operate from 10:00 A.M. to 6:00 P.M. The union wanted to maintain the 12-hour shift. It submitted, however, that the unit should be staffed earlier in the day. The employer later accepted the union's input that the unit should run from 8:00 A.M. to 4:00 P.M., but it would not change the four hour reduction to the shift. On or about August 1, 2010, the employer reduced the staffing of A-6 to eight hours a day (8:00 A.M. to 4:00 P.M.) if staffing the 12-hour shift caused overtime.

During or about late summer, the employer determined that the department's overtime budget was nearly depleted for the year. On October 6, 2010, Assistant Chief Bob Downey sent an e-mail to all four Battalion Chiefs that stated in total: "Starting on October 9th we will no longer be staffing AID 6 with Overtime. If you have the manning you may staff it with on-duty personnel but Overtime is [no] longer feasible." As a result of the mandate not to use any overtime to staff A-6, that unit was only staffed about 13% of the shifts from October 15, 2010, through April 30, 2011.

On October 7th, Chief Gordon met with Union President Gagnon. Gordon told Gagnon that the overtime budget was nearly depleted. He related that for economic reasons A-6 would no longer be staffed with any overtime, even at the eight-hour shift duration.

Brownouts

Assistant Chief Downey sent another memo to the Battalion Chiefs and Acting Battalion Chiefs on October 14th : "Effective Saturday, October 16th, 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."

Prior to October 16th, Aid car 2 (A-2) and Engine 3 (E-3) were staffed 24/7 using overtime if needed. After Downey's memo, E-3 would be put out of service if there were less than three people available to staff the apparatus. The union characterizes the employer's treatment of A-6 (above), A-2, and E-3 as "browning out" the three units.

After mid-October, it became apparent to the employer that the model of redeploying personnel to put A-2 out of service first, and then putting E-3 out of service did not work in every circumstance. This pattern was not workable because there were times that no individuals assigned to A-2 would be qualified to serve in either the position of captain or driver to fill a vacancy on E-3, but there could have been EMTs available to staff Aid-2. Thus at times, the employer altered its announced staffing patterns.

The Chief testified that this new staffing pattern was made for economic reasons, since the employer's CAO/CFO had directed him to live within his budget. The Chief also testified that as a result of this staffing pattern, "a lot of overtime" was saved.

On October 14, 2010, the union leadership met with CAO/CFO Bryant. The meeting centered on the cutbacks to A-6, A-2, and E-3. Bryant informed the union that the employer had decided not to give the fire department any additional money for overtime.

The union next tried to meet directly with Mayor Stephanson. The Mayor agreed to meet with the leadership on November 2, 2010. When the union officers got to the meeting, they were surprised to see that Chief Gordon and Assistant Chief Downey were present. The employer's Labor Relations/Human Resources Director Sharon DeHaan was also in attendance. The "brown

outs" of the three units were discussed. The Mayor was emphatic that he makes all budget and staffing decisions. He was adamant that the staffing decisions would stand. The Mayor asked the union to submit any cost savings ideas to him. The union talked about approaching the city council. The Mayor stated that staffing was not a city council issue, it was his decision.

Legal Analysis

In both of the above areas, the employer's behavior is inconsistent with a willingness to bargain. The employer presented each change as a done deal. In the face of the "fait accompli," the union did not have to request bargaining. The present facts stand opposite the ones the Commission found in *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998), where it wrote: "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 should not be found." Although the employer agues that the union either did not request bargaining or did not follow up on its bargaining requests, the record does not support that contention. The manner in which the employer announced each change did not invite bargaining.

The employer was emphatic that it would only look at the staffing approach that it had predetermined to use. The attitude of the Mayor and the CAO/CFO clearly demonstrated to the union that bargaining was futile. The employer's labor relations director did nothing to alter that perception.

Overtime for A-6

Overtime is a mandatory subject of bargaining since it involves both wages and hours. The union cites *Valley Communications Center*, Decision 6097 (PECB, 1997) where the Examiner found: "It is clear that compensation for overtime work is a mandatory subject of bargaining, affecting both the general terms 'wages' and 'hours' as found in the statute. . . ." [*Valley Communications Center*, Decision 6097-A (PECB, 1997) dismissed petition for review as untimely.]

An employer may not unilaterally change the manner in which overtime has historically been handled so that it would reduce overtime opportunities for the bargaining unit. If the employer desires such changes, it must bargain about them in good faith. The union cites *City of Centralia*, Decision 5282-A (PECB, 1996), where "The Commission has found a duty to bargain exists when a change results in loss of work opportunities or pay to bargaining unit employees. See, *City of Mercer Island*, Decision 1026-A (PECB, 1981), "where a duty to bargain arose because the creation of promotional positions resulted in loss of unit work for the bargaining unit."

The employer frankly states that the change in the staffing of A-6 was an economic decision in order to save on overtime. The employer confirmed that the change, in fact, saved "a lot" of overtime. The employer sent two communications to the Battalion Chiefs about changes in staffing of A-6, each presenting a fait accompli. The August 1st memo reduced the shift to eight hours, if the 12-hour shift would incur overtime. This impacts bargaining unit members' wages since they could have received overtime before the unilateral change. The fact that the employer accepted the union's input on which of the eight out of 12 hours should be staffed does not prove that the employer was bargaining with the union. The record shows that the employer was determined to reduce its overtime costs. As to that goal, it was not taking any proposals from the union. Rather it forged ahead with its predetermined course of action. The same is true for the October 6th memo that announced if staffing even the eight-hour shift for A-6 resulted in overtime, then the aid car would not be staffed at all. The data shows that this resulted in A-6 being staffed for only about 13% of the shifts in a relevant six-month period. The economic benefits that the employer reaped caused economic hardships to the employees. The employer should have proposed its preferred changes and allowed the union to offer alternatives so that both parties might have had a chance to end with a result that each party desired.

Brownouts

The number of fire fighters assigned to equipment that can be deployed to an incident can directly impact fire fighter safety. *City of Richland,* 113 Wn.2d 197 (1989). In that case, the Washington State Supreme Court addressed the issue of minimum staffing of equipment. In *City of Richland,* the union advanced safety concerns as the basis for wanting to bargain about the number of personnel assigned to apparatus that would respond to a call out. The Court accepted

that the size of the crew assigned to equipment could affect the safety of the employees. "Since staffing levels had a demonstratedly direct relationship to employee workload and safety," the Court believed that, "under appropriate circumstances, requiring an employer to bargain over them will achieve the balance of public, employer and union interests that best furthers the purposes of the public employment collective bargaining laws." *Local 1052*, 113 Wn.2d at 205. Also cited in *Spokane International Airport*, Decision 7889-A (PECB, 2003).

CONCLUSION

The employer had a duty to bargain with the union about the number of employees assigned to the A-6, A-2 and E-3 units. It failed to meet its duty.

ISSUE 2: Did the employer refuse to bargain, and therefore commit a derivative interference violation, by allowing bargaining unit work to be performed by employees from Snohomish Fire District 1 and the Marysville Fire Department?

INCREASING AUTOMATED AID LIST

APPLICABLE LEGAL STANDARDS

See discussion of legal standards for allegations of unilateral changes, above.

In *Skagit County*, Decision 8746-A (PECB, 2006), the Commission developed five questions to be answered to see if the employer had a duty to bargain before transferring bargaining unit work:

1. What were the prior operating practices as to the work in question (*i.e.* had non-bargaining unit personnel performed such work before)?;

2. Whether the transfer of the work involved a significant detriment to bargaining unit members, including 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?

See also *City of Snoqualmie*, Decision 9892-A (PECB, 2009).

ANALYSIS

Background

Public entities can enter into mutual aid agreements to help one another by supplying personnel or equipment as needed. Automated mutual aid ignores geographical boundaries, so that the closest crew and apparatus are dispatched to an incident whether or not the incident is happening in a specific employer's city limits. SNOPAC dispatches for the City of Everett's fire department. It uses computer aided dispatch (CAD) software to automatically identify available service units within specified areas, generally the city limits of each SNOPAC member. In total, SNOPAC dispatches for 24 fire departments and 12 police departments.

If the CAD indentifies that all of the medical aid units for a certain city are out on calls, then a dispatcher would have to manually search for the closest available medical unit to be sent. The medical unit that the dispatcher found might come from outside of the city limits where the call originated. The employer agreed to a request from SNOPAC to change the protocol list used for dispatching apparatus. It agreed to expand the list of the geographically closest appropriate apparatus that could be dispatched to a call. Thus, a call coming from inside the City of Everett, might be responded to by a crew and equipment from outside of the city.

The director of SNOPAC worked with Assistant Chief Downey to expand the list of stations that the CAD system would automatically search to find available equipment for a call coming from Everett. They added stations from Snohomish Fire District 1, City of Marysville, Snohomish Fire District 7, City of Mukilteo, and City of Lake Stevens to the list that would be searched automatically.

On August 12, 2010, Union President Gagnon sent a memo to Chief Gordon. The memo was titled "Request to Negotiate, Automatic [e.g. Automated] Mutual Aid." Gagnon wrote, "we

have recently been made award of changes that have been made to the Everett Fire Department fire responses, specifically Automatic Mutual Aid. It appears this may include changes in our wages, hours and/or working conditions." Gagnon requested that the changes be rescinded "until we have had an opportunity to review this new policy and the City and Local 46 have reached an agreement as to the changes." The Chief replied that the changes to the automatic mutual aid system were not a mandatory subject of bargaining, but he did invite Gagnon to identify changes that related to wages, hours or working conditions. He also asked Gagnon for times when they could "get together to discuss this more."

On September 2nd, Assistant Chief Downey announced the expanded automated list to certain bargaining unit members. Again on September 27th the union requested information about automated mutual aid "in order to properly prepare for negotiations" on the matter. Gagnon e-mailed Gordon October 11th that "As long as we work together - I'm positive we can get through these tough times."

Legal Analysis

SNOPAC and the employer's actions to increase the number of units that could automatically be dispatched to an incident based on geographic closeness, not city boundaries, could be viewed as a good manner for providing service. It also definitely has an impact on the bargaining unit. There is no explanation as to why the employer could not include the union in developing this change. This scenario is similar to the one where an employer was found guilty of an unfair labor practice when it increased its volunteer forces in a manner that decreased the call back of the uniformed personnel. *Spokane County Fire District 9*, Decision 3482-A (PECB, 1991).

In *City of Centralia*, Decision 5282-A (PECB, 1996) the Commission found that the reason the employer there could reduce the size of its fire fighter crew was because of its mutual aid agreements with surrounding jurisdictions. These agreements called for its neighbors to send over fire fighters in an emergency. The Commission held:

> The employer solicited assistance from other sources to perform work previously performed by bargaining unit members, and decreased its total number of paid personnel. Even though the assistance solicited was unpaid, the employer's action

> resulted in the same effect to employees in the bargaining unit as "subcontracting" or "skimming" would, that is, loss of work for the bargaining unit, and further supports an unfair labor practice charge.

In *Port of Seattle*, Decision 7271-B (PECB, 2003), the Commission applied the *Skagit County* five part test to determine whether the transfer of bargaining unit work was subject to negotiations. Commission found that four of the tests were met exactly: 1) Non-bargaining unit employees had not done the work before; 2) the transfer was solely economically motivated; 3) the employer could have bargained the changes; and 4) the transferred work was the same as bargaining unit work. The Commission held as to the fifth test, did the transfer of the work significantly lessen anticipated work opportunities, that the transfer did constitute a "significant detriment" even though the overall workload of the bargaining unit had increased. The parties are similarly situated in the instant complaint.

Additionally, where the Commission found that no bargaining unit members lost any scheduled work hours or even a decline in call-back work when an employer increased the amount it paid its volunteer fire fighters, the Commission did find that the change in compensation paid to the volunteers created a "significant detriment" to bargaining unit members. The Commission held, "we find a significant detriment because increasing the monetary incentive for volunteers to respond for standby duty reduced the *likelihood* that uniformed personnel would need to be called back." *Spokane County Fire District 9*, Decision 3482-A. (Emphasis added.) "Once the union proves that a change in practice occurred that can reasonably be inferred to have reduced bargaining unit work, we view the obligation as shifting to the employer to demonstrate that the change did not have a significant impact. In this case, the employer's evidence fell short." *Spokane County Fire District 9.*

The employer's evidence fell short in the instant case, also. Increasing the SNOPAC automated list of geographically close and available equipment reduced the work opportunities for bargaining unit members. This is compounded by the employer's decision to reduce staffing. Union witnesses testified that with less staffing on A-6, A-2, and E-3 there is an increase in inbound mutual aid responses. Although the employer argues that the change was de minimis and remote to the bargaining unit, and did not bear on wages, hours or working conditions in any fundamental way, its own data predicts that there would be an approximate 19% increase in

inbound aid units responding to calls in Everett from outside of the city. (Comparing "Aid in" calls in 2009 to projected annualized calls for 2011.) The union also established that the employer factors in outside aid responses to pick up for out of service Everett fire department units.

Employer defense – waiver by contract

The employer claims that its actions are lawful given the language of the parties' collective bargaining agreement. The union and employer are parties to a collective bargaining agreement dated January 1, 2009, through December 31, 2011. To support its waiver by contract defense, the employer cites *Southwest Snohomish County Public Safety Communications Agency*, Decision 11149 (PECB, 2011), [remanded as to remedy only *Southwest Snohomish County Public Safety Communications Agency*, Decision 11149-A (PECB, 2011)]: "[T]here is no duty to bargain for the life of the contract on the matters set forth in a collective bargaining agreement, and an employer action in conformity with that contract will not be an unlawful unilateral change." Quoting *Yakima County*, Decision 6594-C (PECB, 1999); citing *City of Yakima*, Decision 3564-A (PECB, 1991). The employer also cites a National Labor Relations Board case that held when evaluating an unilateral change complaint, if the employer shows "a substantial claim of contractual privilege" a complaint will not be issued. *NCR Corp.*, 271 NLRB 1212, (1984). The employer does acknowledge, however, that *NCR Corp* provided that a contract waiver defense is not available if a lack of good faith bargaining is found.

The employer points to language in Article 7 Management Rights of the bargaining agreement: "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." The employer acknowledges that the article does subject itself to other terms of the agreement. That subjection clause causes the employer to look to Article 27 Health and Safety, which in fact contains minimum staffing requirements. The requirements boil down to: 25 fire fighters on duty per shift; three per suppression company, with one being a captain; two per aid car; and one battalion chief. The employer submitted a grievance arbitration award where the union had grieved that the operational staffing level was actually 28, *City of Everett* (Beck, 1985). The arbitrator denied the union's grievance writing, in part, that the management rights article "gives the Employer the right to assign work and determine the number of personnel to be assigned duty at any time,

provided in exercising this right the Employer is not in conflict with the Agreement or with applicable law."

In response to the employer's waiver by contract theory, the union offered Article 8 Prevailing Rights that calls for the parties to maintain certain "rights and privileges" including overtime. The union also claims that Article 37 Duration requires the parties to bargain under Chapter 41.56 RCW regarding any contracting out through mutual aid pacts.

The union's contentions are correct. The employer's arguments ignore applicable articles of the collective bargaining agreement. The Management Rights Article, itself, acknowledges that it must be read in conjunction with the other articles of the collective bargaining agreement. The general language of the Management Rights Article is subject to more specific language in other articles. The union is right that the Prevailing Rights language applies to overtime. The union did not waive its right – through language in the contract – to bargain about the areas where the employer made unilateral changes.

CONCLUSION

The employer's unilateral changes deprived bargaining unit members of overtime opportunities, increased the work load, and caused work to be done by non-bargaining unit members. The employer had the duty to bargain its decisions, and the effects of those decisions, about A-6 that first reduced, then eliminated overtime opportunities; browning out certain units; and increasing the number of units outside of the city to be automatically called to respond to calls inside the city. These decisions all involved mandatory subjects of bargaining. The employer presented each decision as a fait accompli, thus relieving the union of having to request bargaining.

ISSUE 3: Did the employer refuse to bargain, and therefore commit a derivative interference violation, by contracting out bargaining unit work to the private ambulance companies Rural Metro and AMR?

USE OF PRIVATE AMBULANCES

APPLICABLE LEGAL STANDARDS

Generally, the transfer of bargaining unit work outside of the bargaining unit is a mandatory subject of bargaining. *City of Kennewick*, Decision 482-B (PECB, 1980), *aff'd*, 99 Wn.2d 832 (1983). The

Commission denied the employer's motion to dismiss the unfair labor practice compliant in *Kennewick* when the employer contracted out custodial work to a private firm.

The Commission likened an employer's insistence to be able to contract out bargaining unit work to "a sword of Damocles poised over the heads of the bargaining unit employees and their union." *City of Snohomish*, Decision 1661-A (PECB, 1984).

ANALYSIS

Background

Prior to summer 2010, private ambulances primarily would do BLS transports and occasionally an ALS transport, if requested to take a patient to a hospital outside of Everett, or if no paramedic unit was available. More than three-quarters of the department's total calls are related to emergency medical services. The employer tracks the call volume as increasing. One way that it tried to contain the increase was to develop a program it titled Make the Right Call. The program was aimed at health care facility workers to encourage them to call a private ambulance company rather than calling 911 for a BLS transport.

Currently, an incident commander, generally a member of the bargaining unit, at the scene of a car accident or fire will evaluate a patient to determine if the patient should be transported. If the incident commander decides that an ambulance is needed, the commander will ask SNOPAC to dispatch one. SNOPAC rotates dispatches between Rural Metro and AMR, both private ambulance companies. Although Chief Gordon testified that private ambulances provide most of the BSL transports in the city, the Emergency Medical Services Division Chief wrote in an Information Bulletin July 19, 2010, to the entire fire department that the department's own ambulances should be used to transport all patients. He did not want the department relying on private ambulances. This could increase revenues for the employer since non-residents are billed for services if transported by an ambulance from the employer.

At the October 14th union membership meeting, which the Chief attended by invitation, the Chief talked about the possibility of simultaneous dispatch of a private ambulance and a fire

department ambulance. He was addressing the Make the Right Call situation when a health care worker would call to 911 causing SNOPAC to dispatch a department ambulance for a non-emergent transport, when the transport should be done by a private ambulance.

Due to Chief Gordon's remarks about potential simultaneous dispatch of an Everett ambulance and a private ambulance, Union President Gagnon wrote the Chief on October 19th for information about any contract or ordinance for sole-source ambulances "to make sure that if there were any impacts or effects that we would be able to figure those out." In the letter, Gagnon also requested that the employer refrain from entering into any contract or ordinance until the union could analyze it. Several e-mails were exchanged between Gordon and Gagnon about the contract and/or ordinance. The final e-mail was from the Chief wherein he took the position that any ordinance or contract with a single ambulance company would not take any work away from the bargaining unit, nor would it change any working condition or affect safety. On December 22, 2010, the Everett City Council passed an ordinance to allow the Mayor to enter into a contract with a sole-source ambulance company.

Legal Analysis

Maintaining bargaining unit work is of vital interest to employees, since without the work, employees would have no jobs. Any unilateral transfer of bargaining unit work affects employees' wages, hours and working conditions, and is thus prohibited. The union correctly argues that the Commission recognizes that work preservation is a fundamental interest to employees. The union claims that the employer was going to use Rural Metro or AMR to do transports that had previously been handled by the A-6 or A-2 units.

The employer argues that the ordinance authorizes a sole-source contract, but no contract in fact exists. It contends that the union is complaining about potential, future changes. The employer also argues that the union never requested or pursued bargaining about the use of private ambulances.

Gagnon's October 19th letter to the Chief is a clear request to bargain, so that part of the employer's defense fails. However, the union has failed to show any actual changes. Since an

employer's decision to take work out of the bargaining unit is bargainable, it follows that the effects of that decision must also be bargained. The Commission does not excuse an employer from its duty to bargain over developmental or experimental changes. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). The Commission held in *Spokane* that the timing of "effects" bargaining depends on the facts of a particular case. The bargaining obligation can arise where the effects are foreseeable before an implementation, but there is no duty to bargain if the effects are speculative.

CONCLUSION

This is a close case, but I find that the passing of the sole-source ordinance is not enough to trigger a duty to bargain. However, if the employer takes one step to act on the sole-source ordinance that would impact wages, hours or working conditions, the trigger would be pulled. The employer would be well advised to include the union in its decision, rather than exclude the union, before it shoots itself in the foot.

ISSUE 4: Did the employer refuse to bargain, and therefore commit a derivative interference violation, by circumventing the union by sending an e-mail to bargaining unit members on August 1, 2010, concerning reduced overtime staffing and by sending an Information Bulletin to bargaining unit members on September 2, 2010, concerning increasing the numbers of Mutual Aid entities that could be dispatched into the City of Everett by the dispatching center's automated dispatch program?

DIRECT DEALING

APPLICABLE LEGAL STANDARDS

Once employees have chosen an exclusive bargaining representative to speak for them during negotiations and the duration of the collective bargaining agreement, the employer must not evade the representative by dealing directly with employees about mandatory bargaining subjects. *City of Seattle*, Decision 3566-A (PECB, 1991).

An employer is not allowed to engage in direct negotiations with one or more bargaining unit employees concerning one or more mandatory subjects of bargaining. *City of Wenatchee*, Decision 2216 (PECB, 1985). In *Wenatchee*, there were only three candidates signed up to take

a promotional exam. Each of the three were already on the civil service list for the promotion; a civil service list remains good for one year. The employer talked with the three about cancelling the costly examination procedure and just interviewing all three of them. One applicant objected; he wanted to take the test to potentially improve his position among the three. The other two agreed to the cancellation. The employer did cancel the exam. The employer was found to have unlawfully negotiated directly with the three bargaining unit members.

ANALYSIS

Background

The union asserted only two incidences of the employer's direct dealing with bargaining unit members:

- The August 1, 2010 e-mail to the Battalion Chiefs about the reduced overtime staffing on the second aid car (A-6); and
- The September 2, 2010 Information Bulletin to the Battalion Chiefs and Acting Battalion Chiefs about the Mutual Aid dispatch being changed by adding to the number of stations in the automated aid system.

Those were the only two incidents that were advanced to hearing in the preliminary ruling. Even through the record may arguably show other incidents, they cannot be analyzed since they are outside the scope of the preliminary ruling. The union did not ask to expand the preliminary ruling, nor did it seek to conform the pleadings with the proof at the conclusion of the evidentiary hearing.

Legal Analysis

It is evident that the employer did not alert the union to either of the communiqués before they were issued to bargaining unit members.

The employer argues that it did not deal directly with employees about bargaining unit matters. It characterizes the September 2nd communiqué as merely a "tweaking" of the computerized

dispatch system. The Information Bulletin from Downey details changes in dispatching to allow an automated process for apparatus from other departments outside of the city to be dispatched into the City of Everett under situations where they had not been in the past.

I agree with the employer's contention that these writings were not direct dealings with employees. The employer did not solicit any concessions or changes to working conditions from any individual employees. There was no back and forth between the employer and employees about the A-6 overtime situation or the expansion of the automated aid process.

Ironically, finding that the employer was not bargaining with the employees about working conditions further solidifies that the communiqués are unilateral announcements of changes in working conditions. It is true that the employer was not bargaining with employees; but it was informing them of what was going to happen to their working conditions. The communiqués are not an attempt to bypass the union negotiating team, but they are evidence of a fait accompli.

ISSUE 5: Did the employer refuse to bargain, and therefore commit a derivative interference violation, by failing or refusing to meet and negotiate with the union over the employer's decisions and the effects of those decisions?

DERIVATIVE INTERFERENCE VIOLATIONS

APPLICABLE LEGAL STANDARDS

When an employer refuses to bargain in violation of RCW 41.56.140(4), the action inherently interferes with the ability of public employees to exercise their rights under the statute. When an employer commits a refusal to bargain violation by making a unilateral change, the Commission finds that the action has "an intimidating and coercive effect" on employees. *Battle Ground School District*, Decision 2449-A (PECB, 1986). Thus, if an employer implements a unilateral change to a mandatory subject of bargaining, it violates RCW 41.56.160(1) as well as (4).

ANALYSIS

The preliminary ruling issued in this matter listed a potential derivative interference act for each of the refusal to bargain allegations.

The union has proven that the employer failed or refused to meet and negotiate with the exclusive bargaining representative over the decisions detailed above and the effects of those decisions.

Since I found that the employer did refuse to bargain when it unilaterally reduced the overtime staffing on A-6 and imposed the brownouts for A-2, A-6, and E-3, the derivative interference for that claim stands.

Since I found that the employer did refuse to bargain when it unilaterally changed the automated dispatch list to allow bargaining unit work to be performed by employees from Snohomish Fire District 1 and the Marysville Fire Department, the derivative interference for that claim stands.

In both instances, bargaining unit members could reasonably perceive that the employer was ignoring their bargaining rights.

FINDINGS OF FACT

1. The City of Everett is a public employer within the meaning of RCW 41.56.030(12).

2. The International Association of Fire Fighters, Local 46, is a bargaining representative within the meaning of RCW 41.56.030(2). It is the exclusive bargaining representative for a bargaining unit of: Fire fighter; fire fighter/EMT; fire fighter driver/engineer; fire fighter/Paramedic; Fire Captain; Fire Inspector; Medical Services Officer; Fire Battalion Chief; Assistant Fire Marshall; and Fire Division Chief.

3. The union and employer are parties to a collective bargaining agreement dated January 1, 2009, through December 31, 2011. The agreement contains articles about management rights; health and safety; prevailing rights; and duration.

4. On or about August 1, 2010, the employer reduced the staffing of A-6 to eight hours a day (8:00 A.M. to 4:00 P.M.) if staffing the 12-hour shift caused overtime.

5. The employer, working with its dispatch agent SNOPAC, expanded the list of stations that the dispatch CAD system would automatically search to find the geographically closest available equipment for a call coming from the City of Everett. This allowed bargaining unit work to be done by non-bargaining unit employees.

6. On September 2, 2010, Assistant Chief Downey announced the expanded automated list to certain bargaining unit members.

7. On October 6, 2010, the employer announced to bargaining unit members that it was eliminating the staffing of Aid Car 6 altogether if staffing at eight hours would incur overtime.

8. At a union meeting on October 14, 2010, Chief Gordon, who attended by invitation, discussed the possibility of simultaneous dispatch of a private ambulance and a fire department ambulance in certain instances. The union later, in writing, requested information about any potential contract or ordinance that would allow for simultaneous dispatching.

9. On October 14, 2010, the employer announced to bargaining unit members that it was instituting a new method of filling vacancies by redeploying staff from Aid Car 2, then Engine 3, effectively browning out those units. This new redeployment caused Aid Car 2 and Engine 3 to be staffed only 13% of the shifts over an approximate six-month time period.

10. On October 14, 2010, the union leadership met with the employer's Chief Administrative Officer/Chief Financial Officer Debra Bryant about cutbacks to Aid Car 6, Aid Car 2, and Engine 3. Bryant informed the union that the employer had decided not to give the fire department any additional money for overtime.

11. On November 2, 2010, the union leadership met directly with Mayor Stephanson. Besides the Mayor, also present were Chief Gordon and Assistant Chief Downey and the

employer's Labor Relations/Human Resources Director Sharon DeHaan. The "brown outs" of the three units were discussed. The Mayor was adament that the staffing decisions would stand.

12. On December 22, 2010, the Everett City Council passed an ordinance to allow the Mayor to enter into a contract with a sole-source ambulance company.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By unilaterally changing overtime opportunities when it changed the staffing of Aid Car 6, as described in Findings of Fact 4 and 7, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

3. By unilaterally changing overtime opportunities when it instituted a new manner of redeploying staff assigned to Aid Car 6, Aid Car 2 and Engine 3, as described in Findings of Fact 7 and 9, and refusing to bargain about the changes as described in Findings of Fact 10 and 11, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

4. By allowing bargaining unit work to be done by non-bargaining unit employees, when it expanded the list of stations that the dispatch CAD system would automatically search to find the geographically closest available equipment for a call coming from the City of Everett, as described in Finding of Fact 5, the employer contracted out bargaining unit work, and thus refused to bargain and violated RCW 41.56.140(4) and (1).

5. The union did not waive its bargaining rights over overtime or staffing in the language of its collective bargaining agreement, so the employer was not relieved of its duty to bargain under RCW 41.56.030(4).

6. Since the employer has only passed an ordinance to allow it to contract with a sole-source provider for ambulance service, but has not evidenced that it has decided to do so, the employer did not refuse to bargain, or violate RCW 41.56.140(4) or (1).

7. Since the August 1, 2010, e-mail concerning reduced overtime staffing, and the September 2, 2010, Information Bulletin that were sent to bargaining unit members, announced decisions already made affecting wages, hours and working conditions, the employer did not circumvent the union by dealing directly with bargaining unit members. Neither communiqué invited individual employees to bargain about the changes, so the employer did not refuse to bargain, or violate RCW 41.56.140(4) or (1).

ORDER

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

1. CEASE AND DESIST from:

   a. Unilaterally changing overtime opportunities concerning staffing of Aid Car 6.

   b. Unilaterally changing overtime opportunities by redeploying staff assigned to Aid Car 6, Aid Car 2, and Engine 3.

   c. Allowing bargaining unit work to be done by non-bargaining unit employees, by expanding the list of stations that the dispatch CAD system automatically searches to find the geographically closest available equipment for a call coming from the City of Everett.

   d. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

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

a. Restore the *status quo ante* by reinstating the overtime opportunities and staffing levels of Aid Car 6, Aid Car 2, and Engine 3 as they existed prior to the unilateral changes that are found unlawful in this order.

b. Restore the *status quo ante* by working with SNOPAC to reinstate the list of stations that the dispatch CAD system would automatically search to find the geographically closest equipment.

c. Work with the union to calculate the amount of lost overtime, if any, due to the unlawful unilateral changes and contracting out of bargaining unit work found unlawful in this order.

d. Pay to the union, for its determination of distribution, the amount of lost overtime the parties calculated was due, if any, within 20 days of the date of this order. Interest must be applied.

e. Give notice to and, upon request, negotiate in good faith to agreement or receipt of an interest arbitration award with the International Association of Fire Fighters, Local 46, before making changes in wages, hours and working conditions for bargaining unit employees.

f. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

g. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Everett, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

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

i. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 2nd day of December, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, Examiner

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

CASE 23744-U-11-6055
DECISION 11241 - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *CITY OF EVERETT* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY changed overtime opportunities for employees represented by the International Association of Fire Fighters, Local 46.

WE UNLAWFULLY changed equipment staffing levels for employees represented by the International Association of Fire Fighters, Local 46.

WE UNLAWFULLY allowed employees of other entities to do the bargaining unit work of employees of the City of Everett represented by the International Association of Fire Fighters, Local 46.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL reinstate the overtime opportunities and staffing levels of Aid Car 6, Aid Car 2 and Engine 3.

WE WILL work with SNOPAC to reinstate the list of stations that the dispatch CAD system would automatically search.

WE WILL work with the International Association of Fire Fighters, Local 46, to calculate the amount of lost overtime , if any, and pay to Local 46, for its determination of distribution, the amount of lost overtime pay, with interest.

WE WILL give notice to and, upon request, negotiate in good faith to agreement or receipt of an interest arbitration award with the International Association of Fire Fighters, Local 46, before making changes in wages, hours and working conditions for bargaining unit employees.

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

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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MARILYN GLENN SAYAN, CHAIRPERSON
PAMELA G. BRADBURN, COMMISSIONER
THOMAS W. McLANE, COMMISSIONER
CATHLEEN CALLAHAN, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 12/02/2011

The attached document identified as: DECISION 11241 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DURFIELD

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

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