STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRKLAND POLICE OFFICERS' GUILD, Complainant, vs. CITY OF KIRKLAND, Respondent.	CASE 22415-U-09-5718 DECISION 10883-A - PECB DECISION OF COMMISSION

Cline & Associates, by *Christopher J. Casillas,* Attorney at Law, for the union.

Summit Law Group PLLC, by *Bruce L. Schroeder,* Attorney at Law, and *Sofia D. Mabee,* Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal by the Kirkland Police Officers' Guild (union) seeking to overturn certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Kenneth J. Latsch.[1]

ISSUES

1. Did the Examiner err when he found that the City of Kirkland (employer) went out of the dispatch business?
2. Did the Examiner err by failing to make findings of fact or conclusions of law concerning the employer's unilateral decision to lay off employees?
3. Did the union waive by inaction its right to bargain the employer's decision to close its dispatch service?

[1] *City of Kirkland,* Decision 10883 (PECB, 2010)

The Examiner properly found that the employer went out of the dispatch business. The employer's decision was an entrepreneurial decision to stop providing dispatch services. The layoff of bargaining unit employees was a result of the decision to close its operations. The Examiner's analysis of the union's waiver by inaction was unnecessary in light of the determination that the employer's decision was an entrepreneurial decision to go out of the dispatch business rather than contracting out bargaining unit work.

RELEVANT FACTS

The employer operated a communications center that provided police dispatch services. The City of Medina, the City of Mercer Island, and the Town of Hunts Point contracted with the employer for police dispatch services. The employer contracted with the City of Bellevue for fire and emergency medical dispatch services. If a fire or medical call was taken in the employer's communications center, the dispatcher transferred the call to the City of Bellevue communications center.

The union represented a bargaining unit of non-commissioned personnel, including dispatchers, in the employer's police department.

In 2004, the employer, in cooperation with Bellevue, Mercer Island, Clyde Hill, Medina, and Woodinville Fire and Life Safety, contracted with a consultant to study the feasibility of creating a consolidated regional emergency dispatch center. In 2005, the employer, Bellevue, Bothell, Clyde Hill, Issaquah, Medina, Mercer Island, Redmond, Eastside Fire and Rescue, King County Fire District 27, King and Kittitas Counties Fire District 51, Northshore Fire District, Shoreline Fire District, and Woodinville Fire and Life Safety hired consultants to complete a second study and develop a draft governance and business services plan for a regional dispatch agency to be called NORCOM.

The employer began informing employees about NORCOM in 2005. The employer created a website and gave informational packets to employees.

The employer raised its interest in joining NORCOM at the beginning of the 2006 negotiations for a successor collective bargaining agreement. During the first bargaining session, the employer made a PowerPoint presentation about NORCOM. The PowerPoint contained a slide stating that the final decision to join NORCOM would occur in 2007.

During bargaining, issues related to NORCOM arose. The employer wanted to negotiate the impacts of the decision to join NORCOM and made proposals about the impacts. The union wanted more information and resisted including these matters in the successor negotiations. Guy Priszner, a member of the union's bargaining team, testified that the union did not believe NORCOM would come into existence. During the course of negotiations, the union did not raise the issue of bargaining the decision to close the employer's dispatch center.

On August 7, 2007, the employer's city council authorized a resolution to execute the Interlocal Agreement (ILA) forming NORCOM. On August 10, 2007, City Manager David Ramsay sent an e-mail to police department employees informing them that the city council approved the resolution. Ramsay informed employees that NORCOM would make its own employment and labor decisions. Ramsay provided information about when the transition was expected to occur.

On November 1, 2007, NORCOM incorporated as a Washington not-for-profit corporation. All but two of the entities that participated in the study executed the ILA. Beginning in November 2007, NORCOM began e-mailing dispatchers a newsletter called NORCOM Dispatch. In May 2008, NORCOM began distributing a newsletter called NORCOM News to all of the City of Kirkland's dispatchers.

On January 19, 2008, the City of Kirkland and the union signed a tentative agreement for a collective bargaining agreement effective from January 1, 2007 through December 31, 2009. The collective bargaining agreement did not address any of the effects of the NORCOM transfer.

Union President Jack Keesee testified that on July 30, 2008, he sent a letter by interoffice mail to Bill Kenny, the employer's human resources director, demanding to bargain the decision and the effects of the decision to transfer bargaining unit work to NORCOM. Kenny did not recall

receiving the letter. At Kenny's request, Keesee and Kenny met on August 20, 2008, to discuss the impacts.

The union filed this unfair labor practice complaint on April 23, 2009. The union provided the employer with its first proposal on the impacts of the employer closing its dispatch center after the union filed its complaint. On July 1, 2009, NORCOM began operations. The parties concluded negotiations on the impacts in April 2010.

ISSUE 1

LEGAL STANDARD

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires a public employer to bargain collectively with a union representing its employees. A public employer has a duty to bargain, in good faith, "personnel matters, including wages, hours and working conditions." The determination as to when the duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer commits an unfair labor practice when it refuses to engage in collective bargaining. RCW 41.56.140.

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, and 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 level or types of services to be offered by an employer is generally accepted as a management prerogative and, as such, a permissive subject of bargaining. *See Federal Way School District,* Decision 232-A (PECB, 1977). This Commission recognizes that public employers have the right to "entrepreneurial" control over non-mandatory subjects of bargaining. *Snohomish County Fire District 1,* Decision 6008-A (1998); *Wenatchee School District,* Decision 3240-A (PECB, 1990).

The bargaining obligation applies to a decision on a mandatory subject of bargaining and the effects of that decision, but only 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 be mandatory subjects of bargaining. *See Wenatchee School District,* Decision 3240-A (PECB, 1990).

When distinguishing between the decision to go out of business and the decision to contract out work, the Commission has applied United States Supreme Court precedent interpreting the National Labor Relations Act because it is similar to Chapter 41.56 RCW.[2] *City of Anacortes,* Decision 6830-A (PECB, 2000), *citing Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

In *Fibreboard,* the union asked to schedule bargaining on a successor collective bargaining agreement. *Fibreboard,* 379 U.S. at 205-206. The employer informed the union that it determined substantial savings could be achieved by contracting out work the union had

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[2] Decisions construing the National Labor Relations Act (NLRA) are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Power Supply System,* 101 Wn.2d 24 (1984).

performed upon expiration of the collective bargaining agreement. *Fibreboard*, 379 U.S. at 206. The employer terminated the collective bargaining agreement and contracted out the work. *Fibreboard*, 379 U.S. at 206-207. The employer continued to supervise employees; assigned work to the contractor; furnished tools, supplies, and equipment to the contractor; and purchased its own tools, supplies, and equipment. *Fibreboard*, 379 U.S. at 207, 219. The maintenance work still had to be performed in the plant. The employer replaced the existing employees with those of a contractor, who performed the same work under similar conditions of employment. *See Fibreboard*, 379 U.S. at 213. In determining whether contracting out gave rise to a duty to bargain, the Court in *Fibreboard* found the following factors significant:

1. What was the employer's level of control and interaction with the new workforce?
2. What was the employer's reason for the decision to contract out the work?
3. What was the fee arrangement?
4. What is the effect on the basic operation of the company?
5. What effect would bargaining have on the employer's ability to manage the company?

The Court found the motivation to reduce labor costs to be significant. *See Fibreboard*, 379 U.S. at 213-14. The Court found it significant that the employer paid the contractor the cost of operation plus a fixed fee. *See Fibreboard*, 379 U.S. at 207, 219. The Court found that bargaining about the matter would not significantly abridge the employer's freedom to manage the business. *Fibreboard*, 379 U.S. at 213. Applying those factors, the Court held that the employer had contracted out work, and that contracting out work previously performed by members of an existing bargaining unit was a subject within the phrase "terms and conditions of employment," so that bargaining on the decision to contract out was required. *Fibreboard*, 379 U.S. at 209-210.

In contrast, in *First National Maintenance Corp.*, 452 U.S. 666 (1981), the Court found the decision to shut down part of a business for economic reasons not to be a mandatory subject of bargaining. The employer provided housekeeping and maintenance services to commercial customers. *First National Maintenance Corp.*, 452 U.S at 668. One of the employer's customers terminated the service agreement. *First National Maintenance Corp.*, 452 U.S at 669.

The employer terminated its employees that worked for the customer. *First National Maintenance Corp.*, 452 U.S at 669-70. The Court found several factors significant:

1. Would bargaining over this sort of decision advance the process of resolving conflicts between labor and management? For example, in the case of a partial plant closure, the union's practical purpose in bargaining would be to seek to delay or halt the closing. *First National Maintenance Corp.*, 452 U.S. at 2711. However, management's interest in whether it should discuss a decision of this kind is much more complex and varies with the particular circumstances. *First National Maintenance Corp.*, 452 U.S at 2711. "Management may . . . face significant tax . . . consequences that hinge on . . . reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage of the business." *First National Maintenance Corp.*, at 2711.
2. What was the reason for the decision? For example, labor costs were not a factor in an economic-based partial termination. *First National Maintenance Corp.*, 452 U.S. at 2706, 2712-13.
3. What control does the union have over the cause of the decision? In *First National Maintenance Corp.*, the union had no control over the amount a third party was willing to pay the employer for its services. *First National Maintenance Corp.*, 452 U.S. at 2706, 2712-13.
4. Lastly, the Court did not believe that the absence of significant investment or withdrawal of capital was crucial. The employer decided to halt work at a specific location, representing a significant change in operations. *First National Maintenance Corp.*, 452 U.S. at 2706, 2712-13.

An employer may have to bargain over the decision to contract out, but does not have to bargain when it decides to shut down part of its business for entrepreneurial reasons. *City of Anacortes,* Decision 6830-A.

In *City of Anacortes*, the employer provided emergency dispatch services to local jurisdictions. The City of Anacortes was one of nine entities that signed an interlocal agreement to form a regional emergency dispatch organization (SECOM). SECOM was an independent agency,

whose governing board was comprised of representatives from the nine participating agencies. SECOM controlled the employees' wages, hours, and working conditions. The employer retained no control over these matters. SECOM assumed responsibility for answering and dispatching emergency services and was liable for those services. SECOM had responsibility for determining the financial responsibility and costs of participating agencies, approving the budget, appointing and terminating the SECOM director, and maintaining insurance. The Commission determined that the employer got out of the business of providing 911 services and did not need to bargain over the decision. *City of Anacortes,* Decision 6830-A.

ANALYSIS

Here, the Examiner concluded that the employer decided to go out of the dispatch business. As a result, the employer did not have a duty to bargain the decision to go out of the business and did not commit an unfair labor practice by failing to do so. The union argues that the employer did not go out of business, but rather contracted out bargaining unit work, creating an obligation to bargain the decision. We disagree and affirm the Examiner.

We must first determine whether the employer closed a portion of its operation or contracted out bargaining unit work. In order to make that determination, we examine the factors analyzed in *City of Anacortes*, *Fibreboard*, and *First National Maintenance Corp.* Second, we apply the balancing test to determine whether the employer had an obligation to bargain.

First, the employer did not retain control over NORCOM's workforce. The employer has no control over the wages, hours, and working conditions of NORCOM employees. Second, the record contains sufficient evidence to convince us that the decision to join NORCOM was not motivated by a desire to reduce labor costs, but the employer sought to improve the services provided to the citizens. Third, NORCOM, not the employer, determines the cost of dispatch services it provides to principals and subscribers. Fourth, the employer no longer provides dispatch services. The employer does not employ workers to dispatch calls. NORCOM dispatches all police, fire, and emergency medical calls. The employer sold its dispatch equipment to NORCOM.

Fourteen principals and subscribers share decision making authority and governance of NORCOM. The employer is a member of the NORCOM governing board. As such, the employer has a vote in NORCOM's decision making, but is not the sole decision maker. An employer does not "maintain control" over a cooperative agency merely by having a representative on the agency's board. *City of Anacortes,* Decision 6830-A, *citing Snohomish County Fire District 1,* Decision 6008-A (PECB, 1998).

Similar to the *City of Anacortes*, the employer pays a share of the costs of NORCOM's operations. NORCOM determines the costs of its services to principals and subscribers. The employer approves its portion of NORCOM's operating budget, but does not approve the overall budget.

The employer no longer operates a communications center dispatching emergency calls. In *Fibreboard*, the employer contracted out bargaining unit work. The work continued to need to be performed at that employer's facility. In this case, the dispatching of emergency response calls is performed entirely by NORCOM. The employer did not retain a need to have dispatching services provided at its facility.

The union argues that the ILA prescribes certain circumstances under which the employer could withdraw from or be terminated from NORCOM. We disagree. The possibility that the employer could withdraw from NORCOM is an insufficient reason to determine that the employer has not gone out of the dispatch business.

The employer went out of the dispatch business; it did not contract out bargaining unit work. Having determined that the employer closed its dispatch operations, we next determine whether the decision to close a portion of its operations is a mandatory subject of bargaining.

It is generally accepted that the level or type of services an employer provides is a management prerogative. *Federal Way School District,* Decision 232-A. The decision to cease providing a service is an entrepreneurial decision. When the employer decided to close its communications center, it made a decision to reduce the types of services it provided. The decision to close a portion of its operation did impact employee wages, hours, and working conditions. That impact

is not sufficient to outweigh the employer's ability to determine the level of services it provides. Thus, the employer did not have a duty to bargain its decision to close its dispatch operations.

CONCLUSION

The employer closed its dispatch operations, thereby going out of the dispatch business. The employer's decision to go out of business is an essential management prerogative that is a permissive subject of bargaining. Thus, the employer did not have a duty to bargain the decision to close its operations. Laying off employees was a result of the decision to close its operations, not a separate decision.

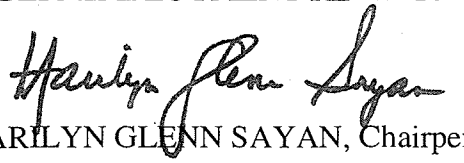
NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Kenneth J. Latsch are AFFIRMED and ADOPTED as the Findings of Fact, Conclusions of Law, and Order of the Commission except that Conclusion of Law 2 is VACATED.

ISSUED at Olympia, Washington, this 13th day of April, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	22415-U-09-05718	FILED:	04/23/2009	FILED BY:	PARTY 2
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BAR UNIT:	DISPATCHERS				
DETAILS:	-				
COMMENTS:					

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