STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEATTLE KING COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL, LABORERS LOCAL 242, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 23564-U-10-6006 DECISION 11161-A - PECB DECISION OF COMMISSION

Robblee Detwiler & Black, P.L.L.P, by *Dan Hutzenbiler*, Attorney at Law, for the union.

Seattle School District Office of the General Counsel, by *Kevin F. O'Neil*, Senior Assistant General Counsel, for the employer.

On October 8, 2010, the Seattle King County Building and Construction Trades Council, Laborers Local 242 (council) filed an unfair labor practice complaint against the Seattle School District (employer).[1] The council alleged that the employer unlawfully skimmed bargaining unit work when it assigned zone crew leader work to a member of Pacific Northwest Regional Council of Carpenters, Local 131 (the carpenters). Examiner Karyl Elinski held a hearing, found no violation and dismissed the complaint. The council now appeals that decision.[2]

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1 All dates are 2010 unless otherwise noted.

2 A notice of appeal shall identify the specific rulings, findings, and conclusions a party wishes to challenge. WAC 391-45-350(3). A party must put the Commission and opposing party(s) on notice of the argument(s) it desires to advance. *Clover Park School District*, 7073-A (EDUC, 2001). Where the notice of appeal does not supply sufficient information on which to determine a specific basis for an appeal, the Commission need not reach the substantive issues of the case. *Clover Park School District*, Decision 7073-A. However, the Commission has authority to waive its rules when a party is not prejudiced. WAC 391-08-003. In the present case, we waive strict application of our rules because it is clear from the parties' appellate briefs that the employer was not prejudiced by the council's insufficient notice.

ISSUES

1. Did the Examiner have the authority to analyze contracts when ruling on the skimming unfair labor practice?
2. Did the employer commit an unfair labor practice by skimming bargaining unit work?
3. Should the Examiner have allocated the at-issue work to a specific unit?

We hold that under our deferral to arbitration rules and unfair labor practice statutes, the Examiner had the authority to consider the parties' contractual agreements when ruling on the at-issue unfair labor practice. WAC 391-45-110; RCW 41.56.140(4). We affirm the Examiner's findings and conclusion. The employer did not violate RCW 41.56.140(4) and (1) by refusing to bargain or interfering with employee rights, or commit a derivative interference violation when it appointed a carpenter as a zone crew leader. The Examiner correctly did not rule on a unit placement issue in the context of an unfair labor practice.

ANALYSIS

To address the council's arguments we incorporate the Examiner's applicable legal standards, analysis and conclusions here as we see no reason to restate them. Although we are not persuaded by the union on appeal, we would like to address some relevant arguments.

Deferral to Arbitration

On appeal, the council argues that the Examiner "improperly elected to act as an arbitrator, and reviewed the parties' contracts to decide whether the [employer's] actions violated those agreements." In this case, the preliminary ruling asked the employer to specify whether deferral was requested. Deferral to arbitration is an employer option under WAC 391-45-110(3), where the sole cause of action is for a unilateral change. In response, the employer did not request deferral and asserted the affirmative defense of waiver by contract to the unfair labor practice. One purpose of deferral is to resolve a dispute with a single adjudicative action. *City of Wenatchee*, Decision 6517-A (PECB, 1999). Private arbitrators have no authority to rule on

unfair labor practices.[3] On the other hand, an examiner has statutory authority to determine whether a contract waiver defense precludes finding a violation for a unilateral change without. RCW 41.56.140(4). Thus, here the Examiner had the authority to consider the parties' collective bargaining agreements, the parties' 1999 settlement agreement, and the 2010 memorandum when ruling on the instant unfair labor practice, and she was acting as an examiner when doing so.

Skimming

Next, the council argues that "[t]he Examiner wholly failed to apply the proper skimming analysis. . . ." As the Examiner wrote regarding the applicable law, skimming bargaining unit work occurs when an employer fails to give notice to or bargain with the union before transferring bargaining unit work historically performed within the bargaining unit to employees outside of the bargaining unit. *Spokane County Fire District 9*, Decision 3482-A (PECB, 1991). The union, as the complaining party, has the burden to prove any alleged skimming has taken place. WAC 391-45-270. A complaint alleging a "unilateral change," such as a skimming violation, must establish both: (1) the existence of a relevant status quo; and (2) a change of employee wages, hours, or working conditions. *City of Kalama*, Decision 6773-A (PECB, 2000). If there is no change in the status quo, then there has not been skimming. *City of Anacortes*, Decision 6863-B (PECB, 2001).

For many years, dating back at least to the 1990s, the council has represented a number of trade union affiliates for the purposes of collective bargaining with the employer. The carpenters union was one of the council's affiliates. There is no dispute that the parties' 2007-2010 collective bargaining agreement, as well as previous agreements between the parties, covered the carpenters and the appointment of zone crew leader work. However, the collective bargaining agreements between and among the employer, council and carpenters do not specify the trades from which the employer may select employees to fill the zone crew leader positions.

Nevertheless, two agreements provide guidance. In September 1999, the employer and council negotiated a settlement agreement that states:

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[3] The deferral process allows an arbitrator to assist the unfair labor practices process by validating or clearing away contract waiver defenses, but deferral is a discretionary action by the Commission and an option of the employer.

4. The parties agree that the Zone Crew Leader . . . positions are part of the bargaining unit represented by the [council]. Any new person selected for these positions will have 31 days after starting in their new position to satisfy the union security obligations contained in the collective bargaining agreement covering that unit.

5. The parties agree that the [employer] may interview and hire any [employer] employee in the Maintenance Department whether they are represented by the [council], by other unions, or not represented, for any Zone Crew Leader . . . positions.

In March of 2010, the parties entered into a memorandum of understanding that included:

5. The parties agree that the terms and conditions in the 2007-2010 CBA shall apply to both [the council] and Carpenters until a successor CBA [collective bargaining agreement] is negotiated for each respective unit or until Washington state law provides that a CBA expires, whichever is sooner.

In 1999, the carpenters were an affiliate union of the council and covered by the parties' 1999-2002 collective bargaining agreement. In March 2010, the carpenters entered into the agreement mentioned above to disaffiliate from the council. Thus, until the carpenters negotiated a new agreement effective November 15, the carpenters were covered under the parties' existing 2007-2010 collective bargaining agreement that governed zone crew leader work. On October 1, when Brian Zadorozny (Zadorozny), a carpenter, was awarded the zone crew leader position he was covered by the existing contract. He had also held the position of zone crew leader in the past when he was covered by previous contracts between the parties.

To summarize, this case arose in the following circumstances:

1. The collective bargaining agreements and agreements between the employer, council and carpenters are silent regarding from which trades the employer my select employees to fill the zone crew leader positions;
2. Council members from various trades including at least one carpenter (Zadorozny) have held the zone crew leader position in the past;
3. In 1999, the parties agreed to an appointment process where current council employees and others could fill zone crew leader appointments;

4. The 1999 settlement agreement continued to apply at the time the at-issue dispute arose;
5. Under the 2010 memorandum, carpenters were covered by the parties' existing collective bargaining agreement at the time of Zadorozny's 2010 appointment.

Analyzing the relevant status quo, we agree with the Examiner that the employer did not make a unilateral change at the time it appointed Zadorozny to the zone crew leader position and before the carpenters entered into a successor agreement with the employer. Thus, there was no transfer of bargaining unit work and no skimming violation.

Allocation

Finally, the council argues that the zone crew leader work should be allocated to its unit. We agree with the Examiner that at the time the parties made their 1999 settlement agreement on the placement of the zone crew leader position within the council, the agreement did not anticipate the carpenter's disaffiliation from the council. In essence, the council now requests through the instant unfair labor practice complaint that the Commission rule that the zone crew leader work belongs to the council. An unfair labor practice complaint is not the appropriate method to determine the proper unit placement of a position; the unit clarification procedures are.

CONCLUSION

We have reviewed the entire record and fully considered the arguments of the parties. The Examiner correctly stated the legal standards. We find that substantial evidence supports the Examiner's findings of fact, and that the findings of fact support the conclusions of law. We hold that under our deferral to arbitration rules and unfair labor practice statutes, the Examiner had the authority to consider the parties' contractual agreements when ruling on the at-issue unfair labor practices. WAC 391-45-110; RCW 41.56.140(4). We affirm the Examiner's findings and conclusion. Given the facts and agreements between the employer, council and carpenters, the employer did not violate RCW 41.56.140(4) and (1) by refusing to bargain or interfering with employee rights, or commit a derivative interference violation, when it appointed

a carpenter as a zone crew leader. The Examiner correctly did not rule on a unit placement issue in the context of an unfair labor practice. We affirm the Examiner's decision in its entirety.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Karyl Elinski are AFFIRMED and ADOPTED as the Findings of Fact, Conclusions of Law, and Order of the Commission. The complaint charging unfair labor practices in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 15th day of January, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

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BY: /S/ MAJEL C. BOUDIA

CASE NUMBER:	23564-U-10-06006	FILED:	10/07/2010	FILED BY:	PARTY 2
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BAR UNIT:	OPER/MAINT				
DETAILS:	-				
COMMENTS:					

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