STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 29, Complainant, vs. CITY OF SPOKANE, Respondent.	CASE 130948-U-18 DECISION 12947 - PECB PRELIMINARY RULING AND ORDER OF PARTIAL DISMISSAL

On September 14, 2018, International Association of Fire Fighters, Local 29 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC) under Chapter 391-45 WAC, naming the City of Spokane (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice was issued on October 11, 2018, indicating that it was not possible to conclude that a cause of action existed at that time for some of the allegations of the complaint. The union was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the defective allegations.

On November 1, 2018, the union filed an amended complaint. The Unfair Labor Practice Administrator dismisses the defective allegations of the amended complaint for failure to state a cause of action, and finds a cause of action for the good faith bargaining allegations and the refusal to bargain the decision to join the Spokane Integrated Communications Center Public Authority (SPOCOM)[2] allegations of the complaint. The employer must file and serve its answer to the good faith bargaining allegations and the refusal to bargain the decision to join SPOCOM within 21 days following the date of this order.

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1 At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

2 In July 2018, SPOCOM was renamed Spokane Regional Emergency Communications Public Dispatch Agency (SRECPDA). Because the change occurred after the original filing of the complaint, the complainant continued to refer to the agency as SPOCOM throughout the amended complaint.

The amended complaint alleges:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint and amended complaint were filed, by:
>
> 1) Refusing to bargain concerning the decision to join SPOCOM, which is alleged to be a mandatory subject of bargaining.
>
> 2) Breaching its good faith bargaining obligations in refusing to bargain the impacts of joining SPOCOM.
>
> 3) Unilaterally changing dispatchers' working conditions by joining SPOCOM on an unspecified date.
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> 4) Unilaterally changing firefighters' unidentified working conditions by joining SPOCOM on an unspecified date.
>
> 5) Contracting out dispatch work previously performed by bargaining unit members, without providing an opportunity for bargaining.
>
> 6) Employer official Kirstin Davis and/or Steve Reinke circumventing the union through direct dealing with employees represented by the union, in publishing and/or providing information regarding SPOCOM.

The allegations of the amended complaint concerning refusing to bargain the decision to join SPOCOM and breaching good faith bargaining obligations state a cause of action under WAC 391-45-110(2) for further case proceedings before the Commission.

The amended complaint does not state a cause of action for the two unilateral change allegations, contracting out allegation, and circumvention allegations. The two unilateral change allegations, contracting out allegation, and circumvention allegation are dismissed.

BACKGROUND

The International Association of Fire Fighters, Local 29 (union) represents uniformed employees in the fire department of the City of Spokane (employer) below the rank of Battalion Chief or equivalent including uniformed and non-uniformed civilian dispatch personnel. Through an Inter-Local Agreement (ILA) the employer provides dispatching services with the individual contracting users. The ILA sets forth the terms and conditions under which the city provides fire service communications, dispatch, and associated services to contracting users.

During 2016-2017 the employer began exploring the concept of combining all of the employer's and Spokane County emergency dispatch groups into one Integrated Emergency Communication Organization (IECO). Allegedly on or about June 21, 2017, the employer sent an e-mail to the bargaining unit members announcing that the region's public safety agencies were evaluating the IECO concept. A Governance Committee would undertake a Governance Overview Phase to define expected results and identify barriers to successful integration. Part of the Governance Overview Phase included defining the expected results and desires to be achieved by an Integrated Emergency Operations Center (IEOC) in the near- and long-term for the region. The Governance Committee first convened on June 19, 2017. On July 28, 2017, the employer allegedly sent another e-mail to bargaining unit employees informing them of the IEOC process. The bargaining unit employees allegedly informed the union about the IEOC concept, but the employer did not notify the union directly.

On March 18, 2018, the employer and union allegedly met to discuss the IEOC process. During the meeting the employer allegedly informed the union that the Spokane County Board of Commissioners (Spokane Commissioners) was moving forward with its plan to create a new public development authority tentatively called Spokane Integrated Communications Center Public

Authority (SPOCOM) to own, operate, and manage the county's 911 Dispatch system as an IEOC. The IEOC would be housed in the same building where the bargaining unit members were performing bargaining unit work. The employer also informed the union that it expected all current bargaining unit employees would be hired by SPOCOM, if they applied.

During the March 18 meeting the employer stated that the IEOC concept had been adopted by Spokane County's Board of Commissioners, a new public development authority would be created and implemented by the Spokane Commissioners, and the employer, union, and users under the contract for dispatch services under the ILA were at the mercy of the Spokane Commissioners.

According to the complaint, on March 27, 2018, the Spokane Commissioners formally passed a resolution which created the new public development authority SPOCOM.

On May 22, 2018, the union allegedly demanded the employer maintain the status quo and refrain from making any changes to the dispatchers' working conditions without first bargaining the decision and the impacts. On May 25, 2018, the employer responded to the union's request stating that the March 18 meeting was impact negotiations, and the parties planned to meet again in June 2018.

On July 16, 2018, the City Council allegedly passed an emergency ordinance aimed at stopping the employer from making unilateral changes to dispatch services. The emergency ordinance instructed the employer to continue its operation and management of dispatch services unless or until the City Council approves by resolution a different method of providing emergency dispatch services.

Steve Reinke was hired as the Executive Director of SPOCOM in July 2018.

Following public inquiry, the employer allegedly published and provided a number of documents to bargaining unit members. The documents included a "frequently asked questions" document.

The frequently asked questions document included information regarding seniority, level of benefits, and compensation and other information related to the future integration with SPOCOM. On August 8, 2018, an employer representative, Kirstin Davis, allegedly sent an e-mail to bargaining unit employees providing information on the next steps of the SPOCOM integration. On an unidentified date bargaining unit employees asked whether pay and benefits would be reduced during the integration of SPOCOM. On August 16, 2018, Davis e-mailed the bargaining unit employees and responded to their questions. On September 15, 2018, Davis again wrote to bargaining unit members informing them of the career progression changes that would occur under the new SPOCOM integration.

SPOCOM allegedly published an advertisement for new 911 positions on October 12, 2018.

On October 6, 2018, Davis sent an update from Reinke to bargaining unit employees. The update allegedly explained what would be discussed after the "go-live" of the SPOCOM integration. The discussion allegedly would include mandatory subjects of bargaining. On October 13, 2018, Reinke allegedly e-mailed bargaining unit members reiterating the October 6 update and promised that terms and conditions of employment once the SPOCOM integration occurred would be "as good or better" than the existing conditions.

The amended complaint also alleges that the employer's implemented changes and announced future changes jeopardize firefighters' safety because dispatchers have unique skills that would not translate to a combined system. Fire dispatch requires intensive familiarity with procedures and protocols which may not result in a regionalized system, and dispatch times may increase due to the call volume.

ANALYSIS

Timeliness

There is a six-month statute of limitations for unfair labor practice complaints. "[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the

filing of the complaint with the commission." RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007), citing *City of Bremerton*, Decision 7739-A (PECB, 2003). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice of" the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

The complaint was filed on September 14, 2018. For the complaint to be timely filed, the facts alleged must have occurred on or after March 14, 2018. Those facts alleged that occurred on or after March 14, 2018, are timely filed. The facts alleged that occurred during 2016 and 2017 are untimely and will be considered for background information only.

Unilateral Change

Applicable Legal Standard

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or to a good faith impasse concerning any mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). A complaint alleging a unilateral change must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment.

Kitsap County, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may reasonably be considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Kitsap County*, Decision 8893-A *citing Whatcom County*, Decision 7288-A, *citing City of Pasco*, Decision 4197-A (PECB, 1994).

For a "past practice" to exist, two basic elements are required: (1) a prior course of conduct; and (2) an understanding by the parties that such conduct is the proper response to the circumstances. *See Whatcom County*, Decision 7288-A (no unilateral change violation found where employer lacked knowledge of past practice). It must also be shown that the conduct was known and mutually accepted by the parties. To constitute an unfair labor practice, a change in the status quo must be meaningful. *City of Kalama*, Decision 6773-A.

Application of Standard

a. Unilateral Change to Dispatchers' Working Conditions

The amended complaint fails to provide alleged facts that a change to dispatchers' working conditions has actually occurred. The amended complaint alleges that the union represents the dispatchers. It also alleges that the employer had a practice of providing dispatch services through the ILA. On March 27, 2018, a formal resolution was passed to create SPOCOM. The employer allegedly intended to move its dispatch services to SPOCOM. The union alleges the decision to integrate to SPOCOM and the impacts of the integration are mandatory subjects of bargaining. On July 16, 2018, the employer allegedly passed an emergency ordinance aimed at stopping the employer from making unilateral changes to dispatch services.

On an unspecified date in July 2018, Reinke was appointed as executive director of SPOCOM. Reinke and Davis then allegedly sent out communications to bargaining unit employees regarding a future integration into SPOCOM. While SPOCOM was allegedly created, and the complaint alleges future changes could occur, the amended complaint lacks facts that the dispatchers' working conditions actually changed. A complainant's prophecy of future events at the preliminary ruling stage of proceedings is insufficient to state a cause of action for a unilateral change. *Kitsap County*, Decision 11610-A (PECB, 2013). In order for a cause of action for a unilateral change to exist, there must have been a change. *Kitsap County*, Decision 11610-A. Because the amended complaint lacks facts alleging whether the change actually occurred, the unilateral change to dispatchers' working conditions violation is dismissed.

b. Unilateral Change to Firefighter Working Conditions

The amended complaint fails to provide alleged facts related to an established firefighter practice or a change that actually occurred related to the firefighters. The amended complaint alleges a change in firefighter working conditions which could affect firefighter safety. It points to paragraphs 4.13 to 4.29 and 4.32 to 4.34 identifying the unilateral change. The facts alleged in paragraphs 4.13 to 4.23 are all untimely. The facts in 4.24 to 4.29 and 4.32 to 4.34, lack facts related to an established practice for the firefighters and lack facts related to an actual change that occurred for the firefighters. Because the complaint lacks facts alleging what change occurred for firefighters and whether the change actually occurred, the unilateral change to firefighters' working conditions violation is dismissed.

Contracting-out Dispatch Work to SPOCOM

Applicable Legal Standard

Historically, the Commission has applied the same standard to cases involving the duty to bargain a decision to contract out bargaining unit work or a decision to assign bargaining unit work to nonbargaining unit employees (skimming). Therefore, discussion of Commission precedent involves both contracting out and skimming cases. Contracting out involves an employer contracting with another entity and having the contractor's employees perform the work.

Skimming involves other, nonbargaining unit employees of the employer performing bargaining unit work.

The Commission clarified the standard for these types of cases in *Central Washington University*, Decision 12305-A (PSRA, 2016). As the Commission explained, the threshold question is whether the work that was contracted out is bargaining unit work. If the work is not bargaining unit work, then the analysis would stop and the employer would not have had an obligation to bargain its decision to contract out work. If the work was bargaining unit work, then the *City of Richland* balancing test should be applied to determine whether the decision to contract out bargaining unit work is a mandatory subject of bargaining.

There must be an actual unilateral change for a cause of action for skimming to exist. *State – Office of the Governor*, Decision 10948-A (PSRA, 2011). Skimming does not occur until work has actually been assigned to employees outside of the bargaining unit. Therefore, in a skimming case the statute of limitations does not begin to run until bargaining unit work is assigned to nonbargaining unit employees. *Lake Washington School District*, Decision 11913-A (PECB, 2014).

A complainant's prophecy of future events at the preliminary ruling stage of proceedings is insufficient to state a cause of action for a unilateral change. *Kitsap County*, Decision 11610-A. In order for a cause of action for a unilateral change to exist, there must have been a change. *Id.*

Application of Standard

The amended complaint fails to provide alleged facts related to what bargaining work was actually transferred. The amended complaint states the bargaining unit members historically performed the fire call dispatch work for the employer. It also alleges that a resolution was passed on March 27, 2018, which created SPOCOM. Finally, SPOCOM allegedly published an advertisement for new 911 positions on October 12, 2018. The amended complaint lacks facts alleging that any bargaining unit work was actually transferred from the bargaining unit to SPOCOM and if so, when that occurred. A change must have actually occurred for a contracting

out violation to be found. Because the complaint lacks facts alleging bargaining unit work was actually contracted-out, the contracting out violation is dismissed.

Circumvention

Applicable Legal Standard

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *University of Washington*, Decision 11600-A (PSRA, 2013); *Royal School District*, Decision 1419-A (PECB, 1982). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning a mandatory subject of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

Sharing information or listening to employee concerns does not rise to the level of circumvention. *See Kitsap Transit*, Decision 11098-A (PECB, 2012), *aff'd on other grounds*, Decision 11098-B (PECB, 2013) (employer memorandum to employees announcing a unilateral change was not circumvention); *Vancouver School District*, Decision 10561 (EDUC, 2009), *aff'd*, Decision 10561-A (EDUC, 2011) (employer communication of the employer's bargaining proposal to bargaining unit employees was not circumvention or direct dealing); *University of Washington*, Decision 10490-C (employer did not circumvent the union when it met with bargaining unit employees and listened to their concerns).

Application of Standard

The amended complaint fails to provide facts showing the employer engaged in direct negotiations with one or more employees concerning a mandatory subject of bargaining. The amended complaint alleges that Davis and Reinke communicated with bargaining unit employees on more than one occasion through published documents or by e-mail. The amended complaint also alleges Davis and Reinke heard bargaining unit employees concerns and shared information based on those concerns. Because the amended complaint lacks facts alleging Davis and Reinke were negotiating with bargaining unit members, the circumvention violation is dismissed.

ORDER

1. Assuming all of the facts alleged to be true and provable, the refusal to bargain and good faith bargaining allegations of the amended complaint state a cause of action, summarized as follows:

> Employer refusal to bargain in violation of RCW 41.56.140(4) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by:
>
> (a) Refusing to bargain concerning the decision to join SPOCOM, which is alleged to be a mandatory subject of bargaining.
>
> (b) Breaching its good faith bargaining obligations in refusing to bargain the impacts of joining SPOCOM.

The refusal to bargain and good faith bargaining allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. The City of Spokane shall:

> File and serve their answers to the allegations listed in paragraph 1 of this order, within 21 days following the date of this order.

An answer shall:

a. Specifically admit, deny, or explain each fact alleged in the amended complaint, as set forth in paragraph 1 of this order, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

3. The allegations of the amended complaint in concerning unilateral change, contracting out, and circumvention in violation of RCW 41.56.140(4), are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 30th day of November, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Unfair Labor Practice Administrator

Paragraph 3 of this order will be
the final order of the agency on
any defective allegations, unless
a notice of appeal is filed with
the Commission under WAC 391-45-350.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 11/30/2018

DECISION 12947 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 130948-U-18

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