STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2916, Complainant, vs. SPOKANE COUNTY FIRE DISTRICT NO. 9, Respondent.	CASE 7137-U-87-1455 DECISION 3482 - PECB CASE 7301-U-88-1507 DECISION 3021-A - PECB CASE 7605-U-88-1599 DECISION 3483 - PECB CASE 7767-U-89-1646 DECISION 3484 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Barry E. Ryan, Attorney at Law, appeared on behalf of the complainant.

Heller, Ehrman, White and McAuliffe, by Otto G. Klein, Attorney at Law, appeared on behalf of the respondent.

On November 13, 1987, International Association of Fire Fighters, Local 2916 (complainant or union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Spokane County Fire District No. 9 (respondent or fire district) had violated RCW 41.56.140(1) and (4) by "subcontracting out" bargaining unit work. (Case 7137-U-87-1455).

On March 10, 1988, the union filed a second unfair labor practice complaint with the Commission. In that case, the complainant alleged that the respondent had violated RCW 41.56.140(1) and (4), by introducing new, computer-related duties without bargaining. (Case 7301-U-88-1507). In a preliminary ruling on that complaint, the Executive Director limited the scope of the case to allegations concerning union demands for bargaining on training in computer

use, and union demands for bargaining concerning possible discipline if bargaining unit members could not use the new equipment efficiently.[1]

On September 29, 1988, the union filed a third unfair labor practice complaint with the Commission. That complaint alleged that the respondent violated RCW 41.56.140(1) and (3), by seeking to delay hearings already set on the two previous unfair labor practice complaints. (Case 7605-U-88-1599).

On January 13, 1989, the union filed a fourth unfair labor practice complaint, this time alleging that the respondent had violated RCW 41.56.140(1) and (4), by assigning bargaining unit work to a non-bargaining unit employee. (Case 7767-U-89-1646).

The cases were consolidated for further proceedings. A hearing was conducted on February 7, February 8, May 23, May 24, and June 20, 1989, in Spokane, Washington. The parties submitted post-hearing briefs on August 21, 1989.

BACKGROUND

Spokane County Fire District No. 9 provides fire prevention, fire suppression and emergency medical services in the northern portion of Spokane County, Washington. The fire district's jurisdiction covers approximately 40,000 residents in a 140 square mile area. Services are provided from seven fire stations located throughout the area served.

An elected Board of Commissioners establishes fire district policy. Holding the position since 1987, Fire Chief Robert Anderson has been responsible for daily administration of the fire district's

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[1] Spokane Fire District No. 9, Decision 3021 (PECB, 1989).

operations at all times pertinent to these unfair labor practice cases. Reporting to Fire Chief Anderson are two deputy chiefs: Deputy Chief Joe Green heads the training and operations division; Deputy Chief Skip Wells supervises the communications and fire prevention divisions.

The fire district's workforce is composed of 12 professional fire fighters and approximately 100 volunteer fire fighters.[2] In addition to fire fighting personnel, the fire district employs four dispatchers and two equipment mechanics.

The professional fire fighters are based at Station No. 1, located near the fire district's administrative offices. They work in three shifts, with a normal shift complement consisting of a captain, a paramedic and two fire fighters.[3]

The dispatchers are based at Station No. 1, while the equipment mechanics are based at a separate repair facility. They perform the types of "support" functions implied by their job titles. They are not covered by the Law Enforcement Officers and Fire Fighters (LEOFF) retirement system, and are not "uniformed personnel" within the meaning of RCW 41.56.030(7).

The stations other than Station No. 1 are covered by volunteer personnel. Volunteers receive a basic training course, and are expected to complete more advanced training in emergency medical techniques. Volunteers are "compensated" through a system under which "points" earned for participation in training classes and for performing fire suppression or emergency medical duties can be

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[2] The record indicates that the fire district was originally formed with volunteer fire fighters, and that the professional fire fighters were added at a later date.

[3] The record indicates that a majority of emergency calls involve health-related situations, and six of the twelve professional firefighters are qualified as paramedics.

cashed in twice a year for a small monetary reimbursement. In addition, volunteers receive $5.00 for each drill they attend.

International Association of Firefighters, Local 2916, represents the professional fire fighters and dispatchers employed by Spokane County Fire District No. 9. The union and the fire district have a collective bargaining relationship dating to 1986, and the record indicates that the parties negotiated a collective bargaining agreement for the January 1, 1986 through December 31, 1988 period. At all times pertinent to the instant proceedings, Rick Oliver served as local union president.

The instant unfair labor practice complaints share a common background and a number of common elements, but they arose from different specific factual settings. Accordingly, the allegations shall be examined individually.

"Skimming" of Bargaining Unit Work

The use of volunteer fire fighters has been a factor in several staffing problems for the fire district. As early as September, 1986, the employer found it necessary to modify its emergency response procedures due to uncertain volunteer participation. On November 1, 1986, the union filed a grievance protesting a "one firefighter response" to an emergency call. On November 20, 1986, then-Chief Guy Ealey responded to the grievance, stating that such a condition may occur because of the fire district's use of volunteers and its fiscal condition. The matter was not resolved, and continued through the grievance procedure. At several points in that process, the parties discussed possible alternatives to correct the situation. The record indicates that the union proposed hiring four additional professional fire fighters, to augment existing shift strengths, but that the employer opposed such a concept.

In January, 1987, the parties agreed to a temporary dispatch system to help alleviate the problem of uncertain volunteer responses, but they did not attempt to reach a final, comprehensive solution. Anderson was about to assume command of the department at that time, and the parties wanted to involve him in the discussions. They recognized that he would have to acquaint himself with the situation. Shortly after he assumed command, Anderson investigated the matter, and solicited ideas from the union and from the volunteer personnel. By April, 1987, Anderson was prepared to discuss the staffing problem with the union.

On April 1, 1987, Anderson sent a letter to the chairman of the union's grievance committee, James Panknin, expressing the belief that the fire district could not afford to hire the additional fire fighters proposed by the union. Anderson agreed that staffing levels were a concern, however, and he proposed the creation of a "stand-by system" to alleviate the problem. The proposed system was to utilize volunteers and professional fire fighters who were willing to carry a pager and to respond while off duty. Anderson noted that the subject had to be negotiated, saying:

> In so much as it will be necessary to negotiate the implementation of this system with your Local and the Volunteers at Station #1, I would hereby request you to consider this proposal for resolution to your grievance and set up a meeting with me to negotiate it's (sic) impact on your members. . . .

No specific implementation date was proposed by the employer. No immediate reply was made by the union.

On May 4, 1987, Panknin sent a letter to Anderson, asking to negotiate "a call-back system for the paid fire fighters". On the same day, Anderson sent a memorandum to the fire district's Board of Commissioners, explaining the situation and recommending that negotiations take place before a new stand-by system was created.

On May 8, 1987, Local President Oliver discussed the matter with Anderson, and a further meeting was set for May 15. The parties did not meet again, however.

On June 4, 1987, Chief Anderson issued "Special Order 87-3" entitled "Response Procedures for Three Person Manning Levels". That order addressed to professional and volunteer fire fighters assigned to Station No. 1 set forth procedures for several types of emergency calls. In the event that one professional fire fighter was left to man the station, volunteers were to be paged and requested "to stand-by at Station #1". The order also discussed response procedures if emergency calls came in before the volunteers could report to the station, but made no mention of a "stand-by" or "call-back" procedure for the professional fire fighters.

On June 14, 1987, the union presented a written proposal concerning call-back for professional fire fighters. Specifically, the union proposed that call back would be voluntary, and subject to cancellation by either party at any time. The proposal also set forth response time limits, specified that call back compensation would be set according to terms of the collective bargaining agreement, and contained a policy statement explaining that call back would be used to increase manning levels when needs arose.

The record indicates that the employer did not respond to the union's June 14 proposal until July 1, 1987, when Anderson sent Oliver a letter explaining that the Board of Fire Commissioners had reviewed the union's proposal, but rejected it because of cost problems. Anderson explained that the union's proposal would require a minimum of two hours of overtime for each call-back, and that the fire district could not afford such additional expenses. Anderson offered to meet with Oliver to discuss alternatives.

Anderson later met with Oliver to discuss the matter. Anderson testified to having explained that a one hour minimum call-back

guarantee would be more acceptable to the employer, and that the use of pagers would alleviate other concerns that the Board of Commissioners had raised about the availability of firefighters for call-back duty. Oliver acknowledged that he had such discussions with Anderson, but testified that he did not consider them to be negotiations. Oliver maintained that cost considerations were not a legitimate reason for the employer to refuse the union's approach, and he noted that union officials were never asked to address the Board of Fire Commissioners directly on the subject. The record indicates that the parties then did not have further discussions on the issue until August, 1987.

Chief Anderson discussed the matter with volunteers, and representatives of the volunteer group proposed a payment of $5.00 for each hour spent on stand-by, as an incentive for volunteers to participate in the new program. The record indicates that the fire district never informed the union of the volunteers' proposal.

On August 10, 1987, the fire district issued a standby procedure utilizing volunteer fire fighters. As part of that procedure, the following "compensation guidelines" were set forth:

> A maximum of two (2) volunteers will be compensated for each standby call. When there are more than two volunteers on standby, a look back at the previous standby call will be made. The first two volunteers to report for the current standby whose name does not appear on the previous list will be compensated. Any others who choose to stay, can receive points by signing the alarm sheet. The standby hours will be accumulated and paid quarterly in April, July, October and January.

The procedure went on to establish recordkeeping requirements for volunteer participation. The new procedure was almost identical to the system proposed by the volunteer group, including the use of a "look-back" procedure to equalize stand-by opportunities.

On August 16, 1987, Oliver sent a letter to Anderson, demanding bargaining on the changes in wages, hours or conditions of employment caused by the new stand-by procedure. Oliver also warned Anderson that the union would file unfair labor practice charges if the situation was not remedied.

On October 14, 1987, the union sent a letter to Anderson, detailing the status of a number of pending grievances filed against the fire district. In addition, the letter noted that the use of volunteers in the stand-by system continued, and that the union would initiate unfair labor practice proceedings because the employer had not responded to the union's request for bargaining. A similar warning was sent on November 16, 1987.[4]

On November 25, 1987, Anderson issued an order eliminating the compensation for volunteers on stand-by status. From that time on, stand-by duty by volunteers generated "points" of the type they traditionally received for performance of their volunteer fire fighter duties with the fire district.

On January 6, 1988, Anderson sent Oliver a letter, asking to discuss the issue in light of the rescission of volunteer payments. A meeting was held on January 12, 1988, but the record indicates that the employer did not advance new proposals on the subject.

In subsequent meetings, Anderson asked Oliver to delay prosecuting the unfair labor practice complaint, in order to attempt settlement of the issue. The parties met on several more occasions, but were unable to resolve their differences. Oliver testified that the meetings could not be characterized as "negotiations", because Anderson took the position that the fire district could make unilateral changes in working conditions and then negotiate only

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[4] The instant unfair labor practice complaint was filed on November 13, 1987.

the effects of such changes with the union. Anderson testified that the parties did attempt to negotiate a settlement, but were unsuccessful.

The Required Use of Computers

Among their duties, the professional fire fighters are expected to provide information for inclusion in incident reports which detail fire fighting and emergency medical activities. The reports include such information as the time of the incident, the type of alarm, the number of units responding, the nature of the fire, the source of ignition, and other related factors. Traditionally, fire dispatchers prepared fire incident reports from information given to them by fire fighting personnel. Medic reports were completed by fire fighter/paramedics after returning to the fire station at the completion of an emergency medical call. Fire and emergency medical reports were both intended to provide the type of information found in the Washington Fire Incident Report System (WAFIRS), created by the State of Washington's Office of Fire Marshall.

In the early part of 1987, Chief Anderson became concerned that reports were not being completed in a timely manner, and he explored the use of computerized reporting.[5] Anderson discussed the situation with Captain William Carl, a bargaining unit member who was familiar with computer use.

On February 26, 1987, Carl sent Anderson a memorandum outlining his recommendations for a computer system and computer software for the fire district. As part of his recommendations, Carl suggested that fire incident reporting and emergency medical reporting should be

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[5] The record indicates that the fire district had used a computer for word processing and fire hydrant records since 1986. The computer was available to bargaining unit employees for word processing, and shift captains entered data concerning fire hydrant records.

integrated to provide better information. A new computer software system was then purchased.

While the precise order of events is not clear from the record, it is clear that Anderson met with the three shift captains in the early part of March, 1987, to explain his expectations concerning the use of computers in the preparation of reports, and that he sent a memorandum to the fire district's dispatchers, shift captains and medics on March 6, 1987. At that meeting, Anderson stated that all reports dating from January 1, 1987 were to be entered onto the computer, and that the captains were to assume primary responsibility for the new reporting activities while the rest of the bargaining unit learned to use the computer system. The memorandum set forth the new computer reporting procedure, as follows:

> Effective immediately the WAFIRS reports will be completed by Shift Captains on the computer for all fire incidents in District #9 and by the Fire Medic in charge on EMS incidents. After completing the WAFIRS form on the computer you will print one (1) copy to be filed by the Dispatcher with the other incident data. The Dispatchers will complete all their routine paper work except the WAFIRS form which will be done by computer.

Credible evidence indicates that Anderson believed each report could be completed in 15 minutes using the computer.

Oliver testified that he learned of the new computer use in the early part of March, 1987, and that he contacted Anderson with his concerns about the new procedure. Specifically, Oliver wanted to determine whether bargaining unit members could be subject to discipline if the computers were not used, and whether the fire district intended to offer training in the use of computers. There is conflicting testimony about the statements made and positions taken: Oliver testified that Anderson stated that the fire

district would implement the new program, and that the union would only be allowed to bargain effects of the new computer operation. Anderson testified that he never made such comments to Oliver, and that he understood that the fire district had more extensive bargaining obligations with the union.

Anderson sent a second memorandum to the dispatchers, shift captains and medics on March 12, 1987, further explaining the new procedure. The employees were directed to start entering incident reports on the computer immediately. The project was to include all prior incident reports dating from January 1, 1987. The memorandum did not specify any penalties for failure to comply with Anderson's directions concerning computer use.

The new computer system became fully operational in April, 1987. On May 14, 1987, Anderson issued a memorandum to medics, reminding them that medical incident reports were to be completed on the computer at the end of each work shift. The memorandum also informed the medics that questions concerning the use of the computer could be addressed to Captain Carl or Firefighter Panknin.

The record is silent as to events from mid-May, 1987 through the first part of July, 1987.[6] On July 10, 1987, Oliver sent Anderson a letter demanding negotiations on a wide range of subjects, including "computer duties". The record indicates, however, that the parties did not meet to discuss the situation for several months thereafter.

On October 14, 1987, Anderson sent a letter to Panknin, requesting an "employee/management" meeting to discuss the issues outlined in

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[6] Given the continuing dispute over the use of the computers, it is inferred that bargaining unit personnel were expected to complete fire and medical incident reports by computer during that time.

Oliver's July 10 letter.[7] Oliver testified that he did not consider this to be an invitation to negotiate the issue, but only to discuss the matter in more detail.

The parties met on October 19, 1987. Oliver testified that he considered the meeting to be a "discussion" of the computer issue, rather than negotiations, basing his opinion on remarks he attributed to Anderson concerning the fire district's right to implement any kind of computer procedure it desired, without consulting the union.[8] During the course of that meeting, the union put forth several ideas concerning computer duties.[9] The fire district did not agree with the union, however, and the issue remained unresolved.

The parties did not meet again to discuss the computer issue for several months. In the intervening time, negotiations commenced for a "wage opener" in the parties' contract. At a negotiation session held on December 3, 1987, the union, through Oliver as chief spokesman, formally proposed that off-duty firefighters could enter reports using the computer. Those firefighters would receive overtime compensation for such duties. The fire district did not accept the union's position, and the issue was not settled. Neither party made any proposals concerning computer training programs or discipline for failure to complete computer duties.

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[7] The record indicates that "employee-management meetings" were established by the parties' collective bargaining agreement as a form of a "labor-management" committee used to address problems arising in the relationship.

[8] According to Oliver, Anderson believed that the fire district was obliged only to negotiate the effects that a new computer policy had on bargaining unit members.

[9] For example: (1) Oliver suggested that computer reports could be prepared by the fire district's administrative office staff; and (2) Oliver suggested that off-duty firefighters could come in and be paid overtime to complete reports on the computer.

The parties did not have further contact on the computer issue until February 4, 1988,[10] when Anderson sent Oliver a letter, asking that the computer issue be addressed in an "employee-management meeting" along with several unrelated matters pending at that time.

On February 8, 1988, Oliver responded to Anderson's offer by sending a letter detailing the union's position on each of the issues to be discussed at the proposed "employee-management" meeting. With respect to the computer issue, Oliver informed the employer that the union intended to file unfair labor practice charges and further stated:

> The Union is informing the District that regardless of any attempts made to resolve this issue, the process initiated (ULP) shall continue unaffected (sic) by these resolution attempts. The only resolution that is acceptable to the Union will be in the form of a written agreement, however, the Union shall not delay the hearing to accomplish this written agreement.

At the conclusion of that letter, Oliver distinguished "negotiations" from "discussions" about the issues to be addressed by the "employee-management" committee, stating:

> The Union has received your request to meet to discuss several topics. The Union will agree to meet with the District at a reasonable time to be mutually agreed and in a separate letter we will propose a date.
>
> However, we wish to inform the District that we consider these issues negotiable and the Union intends to differentiate between a discussion and a negotiation session. As the

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[10] During the intervening period, Oliver had several discussions with members of the Board of Fire Commissioners about the use of computers, but neither party changed its respective position concerning the computer duties.

> District is aware Public Employment Relation (sic) Commission has ruled that discussing a negotiable issue does not satisfy the obligation of an employer to negotiate issues that affect wages, hours, and conditions of employment of bargaining unit employees.
>
> Please be aware that the Union will not agree to an offer to discuss a negotiable issue rather than negotiate the issue. If the District desires to resolve a negotiable issue then it is the District's obligation to negotiate not discuss. . . .

During his testimony at hearing in these cases, Oliver sought to further explain his distinction between "discussions" and "negotiations", by characterizing "discussions" as an exchange of information without resolving the underlying problem, while characterizing "negotiations" as a "give and take" with the final goal of a written document expressing the parties' understanding on an issue.

The unfair labor practice complaint on this subject was filed on March 10, 1988. Negotiations for the wage opener continued. In a letter to the union explaining the fire district's settlement offer, the employer's negotiator, Duane Wilson, stated that it was the employer's belief that the union would have bargaining unit employees continue to enter data on the computer if the fire district increased its wage offer. Disagreements over the use of the computer continued through the summer.

On August 3, 1988, Anderson issued a memorandum to Captain Mike VanHeel concerning tardiness on a number of computer reports. Anderson warned VanHeel that discipline would be imposed if the reports were not brought up to date. Other bargaining unit employees received copies of the memorandum sent to VanHeel.

On August 10, 1988, Oliver sent a letter to Anderson, advising him that bargaining unit members would no longer use the computer for the completion of incident reports:

> Due to the fact that you are now threatening disciplinary action against the members of the Union concerning the Unfair Labor Practice, the Union is taking the following action for the protection of the Union members.
>
> Upon advice of legal counsel the Union is directing all Union members to complete all reports in the manner in which they have always been done prior to he Unfair Labor Practice which was committed by Chief Robert Anderson. . . .
>
> The Union shall direct all members to comply with the normal practice and procedures that have always been in effect concerning record keeping. The Union shall also direct all members not to engage in an Unfair Labor Practice by participating in it. . . .

On the same date, Oliver sent a "directive" to all bargaining unit members concerning the use of the fire district's computer system for the preparation of fire and medical incident reports, stating:

> Effective immediately all report writing shall be accomplished in the manner in which they have always been done prior to the unfair labor practice that was committed by Chief Robert Anderson.
>
> Upon advice of legal counsel the Union is informing the members that the unilateral decision by Chief Robert Anderson in regard to computer duties was and continues to be an unfair labor practice.
>
> The Union is also advising the members that as an unfair labor practice has been duly and legally filed with the Public Employment Relations Commission the Union is directing all bargaining unit members to complete all reports as they had always been done before the unfair labor practice occurred.
>
> This directive involves all aspects of computer duties due to the fact that no computer duties have been successfully negotiated with the Union.

> If any member has any questions concerning the proper procedure for record keeping, contact the Executive Board for directions.

According to Oliver's analysis, Anderson's order had created a "Hobson's Choice" for bargaining unit members: Employees were being required to participate in illegal activity,[11] or risk discipline by refusing to use the computer as ordered by the fire chief. The matter was presented to the bargaining unit, which voted unanimously to refuse to follow Anderson's orders concerning computer use.

On August 11, 1988, Anderson sent a letter to Oliver, expressing concern over the union's approach to the computer issue. Among other points raised, Anderson stated:

> Since March of 1987, every employee in the bargaining unit has been required to work on computers. Since that time, employees have been working on the computers. As the Chief, it is up to me, and not you, to issue directives to employees. If you or any of the membership does not like that order, you of course have the right to grieve it. In the interim, however, all employees are required to perform as directed by me. Failure to do so is insubordination, and will be dealt with accordingly.

Copies apparently were not sent to other employees.

On August 11, 1988, the fire district's attorney, Otto Klein, sent a letter to the union's attorney, Barry Ryan, questioning Ryan's advice about computer duties, and re-affirming Anderson's statements relating to the possibility of discipline if reports were not completed on the computer.

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[11] This conclusion was based on the union's contention that the fire district did not have the right to initiate computer duties without bargaining.

On August 18, 1988, Anderson sent a memorandum to bargaining unit member Kevin VonSteuben concerning VonSteuben's difficulties in completing reports in a timely manner. Anderson warned VonSteuben that continued problems would lead to a three shift suspension. The record indicates that several other bargaining unit employees received similar warnings from Anderson at approximately the same time, and that employees VonSteuben and Carl actually received three shift suspensions for failure to comply with Anderson's orders concerning incident reporting.

On September 27, 1988, Anderson sent another memorandum to Carl, warning that continued refusal to complete incident reports by computer could lead to termination of employment. Anderson reiterated his contention that bargaining unit members should follow a "work now, grieve later" policy, rather than refusing to follow orders about the use of the computer.

Difficulties about the use of the computer continued for some time, with the parties remaining deadlocked on the issue. The parties continued discussion of the matter, however, and were finally able to resolve some of their differences.

On October 3, 1988, Anderson sent a memorandum to all bargaining unit employees, stating that the union and fire district had agreed to enter into "informal discussions" concerning a number of unresolved issues, including computer duties. Anderson went on to state that any bargaining unit employee attempting to use the computer in a good faith effort to complete reports in a timely fashion would not be subject to disciplinary action while the discussions continued. Shortly thereafter, Oliver sent a "notice" to bargaining unit employees, urging them to use the computer in the preparation of incident reports dating back to August 10, 1988. The record indicates that the employees continued to use the computer for incident reporting as of the date of the instant unfair labor practice hearing.

Delay in the Unfair Labor Practice Litigation

The union believed that the fire district had committed several unfair labor practices during the course of events detailed above. Apart from the cases involved here, examination of the Commission's docket records discloses that the union filed at least three other unfair labor practice complaints against the employer.

At an unspecified time in the spring of 1988, fire district attorney Klein contacted union attorney Ryan, asking that the unfair labor practice complaints filed up to that time be held in abeyance while settlement efforts were pursued. Ryan contacted Oliver, who agreed that settlement attempts could be beneficial. The parties held approximately five meetings during spring and summer of 1988 on the issues filed as unfair labor practice complaints.

As with other issues, there is a substantial divergence of testimony on what transpired during the settlement discussions: Oliver testified that the employer continued to display a negative attitude toward negotiations with the union, and that Chief Anderson stated an intention to make changes in working conditions as he saw fit, while only negotiating the effects of such changes with the union. Anderson testified that he never made such broad assertions to the union, but did remind the union that certain matters were not subjects for negotiations.

While discussions for resolving the unfair labor practice complaints were in progress, the parties continued to experience other difficulties in their relationship. Among those were Chief Anderson's August 3, 1988 memorandum enforcing use of the computerized reporting system by threat of discipline, and Oliver's August 10, 1988 directive to bargaining unit members to refrain from using the computer while unfair labor practice litigation was pending. After the threat of discipline and the union's reaction occurred,

the parties suspended discussions about settling the various unfair labor practices.

The record indicates that meetings were resumed later, and then continued into autumn of 1988. Oliver testified that, at some unspecified point during those resumed meetings, Anderson stated that it was the employer's intention to delay matters, so that the union would lose interest and eventually withdraw from the litigation. Anderson testified that he never made such statements to Oliver or to any other union official, although he acknowledged telling Oliver that litigation was a long, time-consuming process and that the final outcome of litigation was not certain.

On September 29, 1988, the union filed the unfair labor practice complaint docketed as Case 7605-U-88-1599, alleging that the fire district was attempting to delay unfair labor practice litigation by asking for negotiations and then refusing to bargain about the issues to be litigated.

The parties met to address the unfair labor practice issues on several more occasions, but progress was not forthcoming. The record indicates that they were not able to resolve any of the issues that were to be presented in the unfair labor practice forum. The parties eventually decided that further meetings were unnecessary, and the unfair labor practice litigation went forward.

Mechanics Doing Bargaining Unit Work

The mechanics employed by the fire district work in a separate repair facility located near the fire district's administrative offices, and are responsible for the maintenance and repair of the fire district's vehicles. A storage yard at the maintenance facility is used for reserve firefighting equipment. The record indicates that a four-wheel-drive unit, often referred to as "the brush truck", is stationed at the repair facility.

At all times pertinent to these unfair labor practice complaints, Vance Smith worked as the "district mechanic" and Doug Strong worked as the "assistant mechanic". The record indicates that Strong also served as a volunteer fire fighter with the fire district.

Oliver testified that, on approximately six different occasions between June, 1988 and November, 1988,[12] Chief Anderson ordered the mechanics to respond to fire alarms. Anderson denied that he made regular use of the mechanics to respond to fire calls, but he acknowledged that the mechanics were used as fire fighters in several emergency situations. Without giving specific dates, Anderson stated that mechanics responded to at least one traffic accident and to a structure fire.

Smith testified that he had responded in emergency situations on many occasions prior to Anderson's tenure as fire chief. Smith did not believe that Anderson had changed fire district policy by his use of mechanics as "auxiliary" fire fighters.

The record indicates that a brush fire started on July 18, 1988, in a heavily wooded, rural and remote sector of the fire district that is accessible only by four-wheel-drive vehicles. After an initial alarm had been entered, it became apparent that more firefighting personnel were needed at the scene. An alarm was turned in at a nearby fire station manned by volunteer firefighters, but it soon became clear that the volunteers were not available, and that assistance would not be forthcoming from that station. Anderson remembered that the fire district's four wheel drive unit was being serviced at the maintenance facility, and he ordered Smith and Strong to bring that unit to the fire scene. Once at the fire

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[12] The complaint charging unfair labor practices filed on January 13, 1989, and docketed as Case 7767-U-89-1646 refers only to incidents involving the use of mechanics from July, 1988 forward.

scene, the mechanics took part in firefighting activities. While Anderson testified that he did not give specific orders for Smith and Strong to work on the fire line, he later testified that they only took an active firefighting role for approximately 15 minutes. Anderson further testified that Smith and Strong made repairs to a Department of Natural Resources (DNR) vehicle which had broken down after being used by DNR personnel to respond to the fire.

A similar incident took place on an unspecified date, when another brush fire threatened several nearby structures.[13] The four-wheel-drive unit was again in the district's maintenance facility for repairs, but Anderson checked and learned that the vehicle was ready for service. The mechanics were then ordered to bring the brush truck to the fire scene. While the fire fighters at the scene directed their attention to saving the threatened structure, the officer in command at the scene directed the mechanics to attack the brush fire itself, to prevent its further spread in an adjacent field where a second structure was threatened. The mechanics fought the fire for an unspecified period of time.

DISCUSSION

Although filed as four separate complaints, these cases arise out of one, on-going bargaining relationship. There are certain elements in common among the cases. From the testimony and evidence presented, it is apparent that the parties have had a most difficult bargaining relationship. The record contains numerous references to personal animosities that transcend the collective bargaining process. To the extent that these unfair labor practices arose from a personality clash, the Examiner cannot fashion any meaningful remedies to correct those feelings. The

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[13] It is inferred that this incident occurred after the July 18, 1988 incident.

atmosphere in which the complaints arose does have effect, however, because it helps to explain how events were perceived and how misunderstandings could arise.

Just as the factual background for each unfair labor practice complaint was detailed individually, the positions of the parties and legal analysis for each case is set forth separately, under the headings that follow.

"Skimming" of Bargaining Unit Work

The Position of the Union -
The union argues that the employer transferred bargaining unit work to non-unit employees, in violation of RCW 41.56.140(1) and (4), by assigning volunteer personnel to paid "stand-by" duty. Noting that such work could have been given to bargaining unit members, the union maintains that it requested negotiations in a timely manner after it learned of the employer's intentions, and that the employer refused to negotiate in good faith concerning the matter. The union contends that the employer cannot justify its actions by claiming that the union's bargaining proposals on the "standby" issue were too costly to be considered, and that the employer's subsequent withdrawal of compensation to the volunteers performing "standby" duty does not excuse the employer's earlier refusal to bargain with the union in good faith. As a remedy, the union asks for a cease and desist order, along with an order directing the fire district to reimburse the union for lost wages and benefits for affected bargaining unit employees. In addition, the union seeks its costs and attorneys' fees.

The Position of the Employer -
The employer denies that it committed an unfair labor practice when it temporarily assigned volunteers to "standby" duty at Fire Station No. 1. The employer contends that volunteers have performed such duties for a considerable period of time, and that the

offer of a token payment for "standby" does not alter the nature of the work performed. The employer notes that the use of volunteer "standby" in this situation arose from the employer's desire to improve firefighting and emergency medical coverage within the fire district. Even with this goal in mind, the fire chief recognized that the proposed plan caused concerns for the union, and it was discontinued. In addition, the employer argues that the fire chief discussed the matter with the union in good faith, and consistently reminded the union of his intentions to involve volunteer fire fighters in any "standby" procedure. The employer also maintains that the union never responded to the chief's requests for less costly proposals, and it appeared that the union had dropped the issue as a point of contention. Finally, the employer contends the complaint must be dismissed because the union cannot demonstrate that the work at issue was, in fact, bargaining unit work.

The Applicable Legal Standards -

It is well settled that an employer has a mandatory duty to give notice to the exclusive bargaining representative of its employees prior to any transfer of bargaining unit work to employees outside of the bargaining unit. The employer is then obligated to bargain such matters, upon request. A transfer or removal of bargaining unit work could arise from a "contracting out" arrangement, where an employer intends to enter into a contractual arrangement to have the work performed by employees of a third party, as discussed in City of Vancouver, Decision 808 (PECB, 1980), or could arise from a "skimming" arrangement, where an employer intends to have the work performed by its own employees who are either unrepresented or members of a different bargaining unit, as in South Kitsap School District, Decision 472 (PECB, 1978). Under either type of arrangement, the Commission has followed the analysis of Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), in numerous cases holding that a duty to bargain exists concerning the decision to transfer bargaining unit work outside of the unit.

The union, as moving party, must sustain its burden of proof in bringing the unfair labor practice charges. See: Yelm School District, Decision 2543 (PECB, 1986). In determining whether that burden of proof has been met, several factors must be established. As explained in Clover Park School District, Decision 3007 (PECB, 1988), the factors to be considered include:

> (1) The employer's previously established operating practice as to the work in question i.e., had nonbargaining unit personnel performed such work before);
>
> (2) Did it involve a significant detriment to bargaining unit members (as by changing conditions of employment or significantly impairing job tenure or reasonably anticipated work opportunities);
>
> (3) Was the employer's motivation solely economic;
>
> (4) Had there been an opportunity to bargain generally about the changes in existing practices; and
>
> (5) Was the work fundamentally different from regular bargaining unit work in terms of the nature of the duties, skills, or working conditions.

Clover Park, Decision 2560-B at page 7.

See, also, City of Bellevue, Decision 3007 (PECB, 1988), where it was held that the union, as the complaining party, has the burden of proof in cases where alleged "skimming" has taken place.

In City of Kennewick, Decision 482-B (PECB, 1980) the Commission found that the employer committed a violation where it attempted to contract out custodian work which was traditionally done, or could have been done, by bargaining unit employees. A similar result was reached in City of Vancouver, supra, where the employer contracted with a private company to take over sewage treatment operations theretofore done by the city's own waste treatment plant employees.

In both Kennewick and Vancouver, the Commission determined that the employers failed to give the incumbent bargaining representative appropriate notice of the contracting out proposal before the decision was already in place. In both of those cases, the Commission ordered the employer to rescind the contract and bargain with the exclusive bargaining representative of its employees prior to any such action.

The employer's continued responsibility for the function is an important consideration. In City of Kelso, Decision 2120-A (PECB, 1985), the Commission rejected the employer's argument that it had completely abandoned its firefighting operation, determining instead that the employer had actually attempted to contract out its firefighting function to a third party, without fulfilling its bargaining obligation.

Having a mixed practice of work assignment may only cloud the situation. In Community Transit, Decision 3069 (PECB, 1988), the employer attempted to expand an existing subcontracting arrangement, by giving new work that could have provided opportunities for existing employees to the contractor, without allowing the exclusive bargaining representative an opportunity to negotiate about the matter. The Commission determined that the employer's actions could have the effect of diverting work away from the employer's workforce, and ordered bargaining on the issue.

Application of the Law to the Facts on "Unit Work" -
These particular unfair labor practice allegations must also be placed in the context of events leading to the filing of the charges. In the instant case, the employer argues that the union's complaint must fail, because the union did not prove that the work at issue was, in fact, bargaining unit work in the first place. Moreover, the employer contends that the Clover Park factors clearly indicate that the employer acted properly by offering standby pay to volunteer firefighters.

The record shows that the fire district had once used volunteers in a standby capacity. The record does not indicate, however, that such a practice was consistent or long-established. The work at issue (being available to respond and actually responding to fire and medical emergency calls) was clearly of a type that bargaining unit employees were capable of and accustomed to performing.

In addition, the record indicates that the employer had never before paid volunteers specifically for standby duty. While volunteers regularly received a small remittance for attending drills, the record clearly indicates that Chief Anderson initiated something new when he ordered payments for volunteers on standby duty shortly after the issue was raised by the union in the context of bargaining a proposed standby policy using the fire district's professional firefighters. By offering volunteers additional compensation for performing work sought by the union, the employer failed to fulfill its statutory bargaining obligation.

In many respects, the instant case is similar to the facts presented in Community Transit, supra. In both cases, the same kind of work was performed by bargaining unit employees and a non-unit group. In both cases, the employer expanded the scope of work performed by the non-unit group, without offering the increased work opportunity to the bargaining unit employees. In both cases, the bargaining representative was not given sufficient notice of the employer's intentions before the new work was initiated. Rather, the change in practice arose only after the union attempted to negotiate a call-back and standby system whereby bargaining unit employees would receive overtime pay for such time worked. The timing of these events leads to the conclusion that the employer created the standby system solely as a result of the union's initial request to negotiate about the subject.

The employer's arguments concerning the cost of the union's proposal are not persuasive. While a deterrent to accepting the

union's position, the cost of the proposal cannot stand as a legitimate reason to cut off negotiations with the union and turn to the volunteer work force for work which could be performed by the bargaining unit. If the bargaining unit involved consists of "uniformed personnel", as it does here, and the subject matter is a mandatory subject of bargaining, as it is here, then the merits of "cost" arguments are to be decided in interest arbitration under City of Seattle, Decision 1667-A (PECB, 1984), not by unilateral action of the employer.

Fashioning an appropriate remedy requires acknowledgment that the employer has discontinued the payments made to the volunteers. The employer has not, however, removed the standby duty from the volunteer personnel. To remedy the situation, the employer shall be ordered to discontinue the use of volunteers in standby duty and, upon request, bargain with the union concerning a standby policy. In the event that the parties are unable to reach agreement on such a policy, the issue shall be submitted to interest arbitration according to the terms of RCW 41.56.400, et seq.

The Required Use of Computers

Position of the Union -
The union maintains that the employer committed unfair labor practices within the meaning of RCW 41.56.140(1) and (4), by refusing to bargain in good faith concerning the use of computers in the fire district. In particular, the union now contends that the employer should have negotiated about the availability of training in computer use, and about the possibility of discipline if computer reports were not completed in a timely manner. The union argues that the employer must negotiate the effects of proposed changes in operations, and, in the instant matter, refused to bargain in good faith. The union maintains that it did not waive its right to bargain concerning the use of computers in the fire district, and that it made repeated attempts to negotiate with

the employer. As a remedy, the union asks that the employees suspended for failure to use the computer be awarded back pay for the time they were suspended, and that their personnel files be purged of any references to the suspension. In addition, the union asks for a cease and desist order, as well as an order directing the employer to bargain concerning computer training and possible discipline. Finally, the union seeks costs and attorney's fees.

The Position of the Employer -

The employer denies that it committed an unfair labor practice by initiating the use of computerized reporting in the fire district. The employer argues that many of the union's allegations are barred by the six month statute of limitations found in RCW 41.56.160, and must be dismissed. The employer further maintains that the union effectively waived its right to bargain over training and discipline matters arising from the use of computers, noting: (1) The parties' collective bargaining agreement contains language allowing the fire chief to implement rules and regulations for the "efficient operation of the District Fire Department", and the Chief created such a regulation when he decided that incident reports should be completed on the computer; (2) the union waived its right to bargain through inaction, since several members of the bargaining unit assisted Chief Anderson in the implementation of the computer system, and the union had full knowledge of the proposed computer system long before the instant unfair labor practice was filed; and (3) the union never made any proposals concerning training or discipline effects of the computer system throughout the time period detailed in the complaint, insisting instead that the employer could not make the decision to use computers without bargaining. The employer further contends that it did not suspend employees for their exercise of collective bargaining rights, but rather took such action to punish simple insubordination after it became clear that the affected employees would not follow orders concerning the use of the computer.

The Applicable Legal Standards -

At the outset of discussion of this issue, it must be noted that the scope of inquiry in the unfair labor practice concerning the use of computers has been narrowed significantly. Originally, the union complained of the employer's underlying decision to initiate computer duties in the fire district. On October 4, 1988, the Executive Director dismissed several allegations of this complaint in Spokane Fire District No. 9, Decision 3021 (PECB, 1988), and limited further proceedings to allegations concerning demands to bargain training and the imposition of discipline concerning computer use.

A union has the right to demand collective bargaining under Chapter 41.56 RCW only as to matters that are "wages, hours and working conditions". RCW 41.56.030(4). Other decisions are left to the employer's discretion. For example, the decision to merge with another entity, as in City of Kelso, Decision 2633-A (PECB, 1988),[14] the set of services to be provided, as in Federal Way School District, Decision 232-A (EDUC, 1977) and Kent School District, Decision 595-A (EDUC, 1979),[15] and the level or quality of service to be provided, as in City of Yakima, Decision 1130 (PECB, 1981) and Pierce County, Decision 1710 (PECB, 1983),[16] have all been held to be non-mandatory subjects of collective bargaining. Where the decision itself is outside of the scope of mandatory collective bargaining, the employer will nevertheless be obligated to bargain the effects of that decision on its employees. City of Kelso, (two cases) supra; Federal Way School District,

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[14] This second Kelso case involved a merger of public employers after an earlier "contracting out" scheme was held to violate the city's duty to bargain.

[15] Federal Way and Kent involved decisions concerning school district curriculum and textbook selection.

[16] City of Yakima and Pierce County involved "minimum manning" of law enforcement services.

supra; Seattle School District, Decision 2079-B (PECB, 1984).[17] The preliminary ruling issued in this case limited inquiry to allegations concerning the "effects" of the decision to computerize. The union did not appeal that preliminary ruling, and it is controlling here.

In simplest terms, the employer raises alternative defenses to the complaint of "timeliness", "waiver by contract" and "waiver by inaction". Those defenses are addressed at the same time that the union's allegations are discussed.

Timeliness -

RCW 41.56.160 provides:

> The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That 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. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law. (Emphasis supplied).

In the instant case, the computer system was operational by April of 1987. The unfair labor practice complaint was filed in March of 1988, but it does not appear that discipline was seriously threatened or imposed until August of 1988, when a union leader ordered a work stoppage.

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[17] In Seattle, the school district implemented a computerized monitoring system for school building boilers. The Examiner decided that the implementation of such a system was within the employer's discretion, and was not a mandatory subject of bargaining, but went on to rule that the employer owed a duty to bargain the effects of that new computerized system on bargaining unit employees.

The parties had discussions concerning the implementation of computer-related duties as early as 1987, but the record does not indicate that the parties conducted negotiations over the effects of the new system. While the employer contends that the union-represented employees had input when the computer system was developed for the fire district, the record does not support a conclusion that the unfair labor practice occurred more than six months before the complaint was filed. Given the nature of the charges made and the long period of time in which the course of events took place, it must be concluded that dismissal on the basis of timeliness is not appropriate. Those events occurring within six months before the complaint was filed shall be analyzed.

Waiver by Contract -

Bargaining rights may be waived contractually, if the waiver is explicit and the affected party fully understands the waiver's impact on the duty to bargain. See City of Kennewick, Decision 482-B (PECB, 1980), where the employer relied on broad language found in "management's rights" and "entire agreement" clauses to give it the authority to subcontract bargaining unit work without prior notice and negotiations. The Commission ruled that the two clauses did not contain specific reference to subcontracting, and the incumbent union was not on notice that its right to bargain subcontracting was supposedly waived because of the existing contractual terms. See also: City of Clarkston, Decision 3286 (PECB, 1989), wherein an Examiner ruled that a general management's rights clause, allowing the employer to make future changes in the employment relationship, is not a sufficient waiver under Commission precedent.[18]

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[18] Similar results were reached in City of Wenatchee, Decision 2216 (PECB, 1985) and City of Pasco, Decision 2603 (PECB, 1987), the latter holding that general management's rights and "scope of agreement" clauses do not constitute a waiver of bargaining rights as to events occurring during contract hiatus.

The employer has not established that it had clear and unmistakable language in a contract that was in effect during 1987 and 1988 which waived the union's right to bargain the effects of a decision to install a computerized reporting system unlike anything used in the fire district up to that time. The "waiver by contract" defense is without merit in this case.

Waiver by Inaction -

Just as a union can waive its bargaining rights by agreeing to specific waiver language in a contract, bargaining rights can be waived by actions taken or omitted in the collective bargaining process. A union is not expected to address every possible eventuality that could arise in making a contract proposal. Once notified of a potential change of wages, hours or working conditions, however, it must make an affirmative effort to bargain if it hopes to avoid a waiver of its statutory rights. See: City of Kelso, Decision 2120 (PECB, 1984); affirmed, Decision 2120-A (PECB, 1985). Typically, such a waiver occurs when a union fails to make a timely response to an employer's offer to negotiate on a mandatory subject of bargaining. See: City of Pasco, Decision 2603 (PECB, 1987), where an Examiner determined that the union effectively waived its right to bargain subcontracting by failing to request bargaining after a timely notification by the employer. A waiver can also be found if a union initially raises a subject for bargaining and then fails to respond to an employer's requests to discuss the issue in depth. See: Spokane County, Decision 2377 (PECB, 1986).

While the instant unfair labor practice was not dismissed as "untimely" under RCW 41.56.160, the record clearly shows that the union was well aware during the six months preceding the filing of the complaint that the employer intended to initiate computer reporting duties. Union officials had a continuing dialogue with the fire chief concerning the components of that system. In addition, the record clearly shows that the employer was prepared

to negotiate the effects of the new system. In response to the employer's offer to discuss the matter, the union refused to participate, claiming that "discussions" were not "negotiations" within the meaning of the statute. The union's interpretation of "negotiations" is not an issue for decision, but it is indicative of the union's approach to this entire matter. It appears that the union would only consider "negotiations" to take place if the employer conceded to the union's position. If the employer desired to make a change where the union did not agree, the union would characterized the meeting as "discussions". RCW 41.56.030 defines "collective bargaining" in the following terms:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.... (Emphasis supplied).

By its very nature, the collective bargaining process is designed to allow the parties to have a wide range of latitude in raising issues that concern wages, hours and working conditions. In that process, neither party is required to make agreements or concessions that would be injurious to its bargaining position. If the union's view of bargaining was generally applied, that balance would be destroyed. It is far more important for parties to communicate in an effort to resolve differences than it is to characterize the nature of the meeting.

The demands which were put forth by the union were advanced in terms of the decision to computerize, not just the effects of that

decision. There is indication that the union never made any effort to negotiate the "effects" of the computerization decision until after the Executive Director's preliminary ruling. A union which makes an undifferentiated demand for more than it is entitled to bargain does so at its own peril. Renton School District, Decision 706 (EDUC, 1979); Pierce County, Decision 1845 (PECB, 1984).

The union in this case was given ample opportunity to discuss the computer issue. It is impossible to determine how events would have unfolded if the union had taken full advantage of those opportunities, however. The union's actions effectively precluded any possibility of resolving the issue short of the litigation now before this Examiner. The complaint must be dismissed.

Delay in the Unfair Labor Practice Litigation

The Position of the Union -
The union contends that the employer purposely delayed negotiations aimed at resolving several unfair labor practice cases, in violation of RCW 41.56.140(1) and (3). The union argues that the employer engaged in retaliatory conduct against several bargaining unit employees while it delayed the unfair labor practice procedure, that the alleged retaliatory actions occurred only after the union requested that the unfair labor practice cases be set for hearing, and that the employer's conduct is indicative of its disregard for its statutory bargaining obligations. As a remedy, the union requests a cease and desist order, an order requiring the employer to rescind its disciplinary action and expunge references to the discipline from the affected employees' personnel files, back pay for the period that the employees were suspended, and payment of the union's costs and attorney's fees.

The Position of the Employer -
The employer contends that it did not commit an unfair labor practice, and maintains that it requested delay of the unfair labor

practice litigation in a good faith effort to resolve the underlying issues before a hearing was necessary. The employer contends that efforts to resolve those differences were thwarted by the union's refusal to address several crucial matters. The employer contends, further, that the discipline at issue was unrelated to the collective bargaining process then under way, and related only to insubordination arising from the employees' decision not to follow orders concerning computer reporting. The employer maintains that the employer did not otherwise threaten or coerce employees as alleged by the union.

The Delay of the Litigation -

As the union properly notes in its closing brief, a public employer is expected to conduct collective bargaining negotiations at reasonable times and places. RCW 41.56.030(4). Negotiations concerning settlement of substantive issues raised in an unfair labor practice complaint are an extension of the collective bargaining process, and must be given the same statutory protections offered to other collective bargaining negotiations.[19]

In the instant case, the employer did ask for a delay in the unfair labor practice proceedings while attempts to reach settlement were undertaken. While the union contends that the employer purposely delayed any meaningful negotiations on the unresolved issues, the record does not support such a conclusion.

As in the case of the computer duties, it appears that the union did not want to characterize its discussions with the employer as "negotiations". The record indicates that the employer made itself available for meetings intended to resolve the issues underlying

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[19] Similar results were reached in cases concerning attempts to settle grievances filed under terms of grievance procedures found in collective bargaining agreements. See: City of Mercer Island, Decision 1580 (PECB, 1983), and King County, Decision 1698 (PECB, 1983).

the unfair labor practice litigation. The record further indicates that the parties did attempt to reach some understanding on those issues. The union did not agree with the employer's approach, and filed the instant complaint. Given the totality of circumstances, the union has not proven that the employer committed an unfair labor practice through its attempts to resolve the other unfair labor practice complaints short of litigation.

The Disciplinary Suspensions -

During the same time period that the parties were attempting to resolve the earlier unfair labor practice complaints, the employer disciplined several bargaining unit employees. The discipline was stated to be in response to the failure or refusal of those employees to use the computer in the manner directed by the employer. The union argues, however, that the employer's action was designed to intimidate the employees in the exercise of their statutory bargaining rights and was a form of retaliation for earlier union efforts. To prevail in an unfair labor practice complaint alleging discrimination, the union must sustain a burden of proof consisting of three elements: (1) That the employee was engaged in protected activity; (2) that the employer was aware of the employee's protected activity; and (3) that the employer intended to discriminate against the employee. See: King County, Decision 2955 (PECB, 1988). Given the nature of such a complaint, open admissions of discriminatory or retaliatory intent are rare. Discriminatory motives can be inferred, however, from circumstances surrounding the allegedly discriminatory act. For example, discriminatory intent can be found if an employer has expressed hostility against the incumbent union. See: Grand Rapids Die Casting Corporation v. NLRB, 126 LRRM 2747 (1987). Similarly, the proximity of the protected activity to the discipline could lead to a finding of discriminatory intent. See: NLRB v. Sure-Tan, Inc., 109 LRRM 2995 (1982). Where a "mixed motive" is claimed, a two-step analysis is used under City of Olympia, Decision 1208-A (PECB, 1982) and Clallam County, Decision 1405-A (PECB, 1984), affirmed __

Wn.App. ___ (Division II, 1986), following the precedent of Wright Line, 251 NLRB 150 (1980).

In the instant case, the union is unable to prove that the affected employees were, in fact, engaged in a protected activity when they failed or refused to perform the computer reporting assignment given to them by the employer. Further, the record clearly demonstrates that the union then ordered all of its members to cease compliance with the employer's orders concerning computer use.[20] The discipline in the instant case arose directly from the employees' refusal to follow orders.

As explained above, the employer was prepared to meet its statutory bargaining obligation, but the union's interpretation of the term "negotiations" caused it to waive its bargaining rights. While the affected employees were put in an awkward position because of the stand taken by the union on the bargaining process, the union's misunderstanding of the law does not excuse the insubordination.[21]

Conclusions on "delay" and "discrimination" -
The union has not established elements essential to its burden of proof. The complaint must be dismissed.

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[20] The union apparently believed (mistakenly) that the employer owed it a duty to bargain all aspects of the computer issue. In essence, the union made a determination based on that belief that it had the right to direct its members to ignore the employer's orders. No unfair labor practice complaint has been filed against the union, and the conduct is not before the Examiner for decision.

[21] Were this a grievance arbitration situation, ample precedent suggests that the "work now, grieve later" doctrine cited by the employer would be applied to the instant case. There is no evidence that the use of the computer system posed any danger to the health or safety of any bargaining unit employee or other person. While that doctrine should have been followed here, analysis of the unfair labor practice complaint is limited to the statutory obligations placed on both parties.

Mechanics Doing Bargaining Unit Work

The Position of the Union -

The union argues that the employer committed unfair labor practices within the meaning of RCW 41.56.140(1) and (4), by assigning fire fighter work to mechanics. The union contends that the employer unilaterally transferred fire fighting duties to non-bargaining unit employees without notice or the offer to negotiate the issue. The union maintains that the employer's concern about response time for emergency situations did not relieve the employer of its collective bargaining obligations. The union further maintains that it did not waive its bargaining rights concerning the transfer of unit work, and that it took appropriate actions considering the lack of prior notice from the employer. As a remedy, the union requests a cease and desist order, an order directing the employer to negotiate the issue in good faith, payment of lost wages for unit members who should have performed the work at issue, and payment of the union's costs and attorney's fees.

The Position of the Employer -

The employer denies that it committed an unfair labor practice on the basis of the facts presented. The employer argues that the mechanics have traditionally assisted fire fighters in fire suppression operations in emergency situations, and that it did not change policy or otherwise make an intrusion into bargaining unit work by continuing that long-standing practice. The employer notes that the union has not presented a clear indication of what it considers to be improper action.[22]

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[22] Indeed, at some points in testimony, the union indicated that the mechanics should not be allowed to do any work associated with fire fighting, such as delivering equipment to a fire scene. At other points, it appears that the union objected only to the mechanics' active participation as fire fighting personnel at the fire scene.

The Applicable Legal Standard -

As noted, above, in the discussion concerning the use of volunteers to perform "standby" duty, the union has the burden of proof. Yelm School District, supra. Applying the standards set forth in Clover Park School District, supra, the union must show that the work now under scrutiny was traditionally performed by the bargaining unit, that there was a transfer of bargaining unit work to persons outside of the bargaining unit; and that this resulted from a recent change of practice (as opposed to a long-standing practice of using non-bargaining unit personnel).

Application of the Law to the Facts

There is no question that driving fire trucks to fire scenes and engaging in fire suppression activities are both within the scope of bargaining unit work here. Moreover, there is also no question that the fire district's mechanics have, on occasion, performed firefighting duties. The record indicates that the mechanics undertook such work at the direction of fire district officials, and that such duties went beyond simple delivery of firefighting apparatus to a fire scene, so as to involve actual fire suppression work.

While most of the union's case revolved around two fires occurring in remote areas within the fire district, the employer presented credible evidence that mechanics have assisted fire fighters in fire suppression duties for a number of years. The record does not indicate that the two incidents complained of in the instant matter were substantially different from the existing practice concerning the use of mechanics in emergency firefighting activities. Given these factors, it is difficult to find that "skimming" of bargaining unit work has taken place. The union was on notice of the employer's policy concerning the use of mechanics, and mechanics do not perform bargaining unit work on a consistent basis. The union could propose a change in contract negotiations, but evidently has not done so in the past. The complaint must be dismissed.

CONSOLIDATED FINDINGS OF FACT

1. Spokane County Fire Protection District No. 9 provides fire suppression and emergency medical services to residents in the northern portion of Spokane County, Washington, and is a "public employer" within the meaning of RCW 41.56.030(1). General policy for the fire district is set by an elected Board of Fire Commissioners. Fire Chief Robert Anderson is responsible for daily supervision of fire district activities. Two deputy chiefs assist Anderson in his duties. The fire district operates seven fire stations in addition to its headquarters building, a repair shop, and a storage yard where surplus and specialized equipment are kept.

2. International Association of Fire Fighters, Local 2916, a "bargaining representative" within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of a bargaining unit of 12 fire fighters employed by Spokane County Fire Protection District No. 9 who are "uniformed personnel" within the meaning of RCW 41.56.030(7). At all times pertinent to these proceedings, Rick Oliver served as local union president.

3. The fire district's "uniformed personnel" work out of Fire Station No. 1.

4. The fire district employs dispatchers, who work in its Fire Station No. 1. The dispatchers are not covered by the Law Enforcement Officers and Fire Fighters (LEOFF) retirement system, Chapter 41.26 RCW, and are not considered to be "uniformed personnel" within the meaning of RCW 41.56.030(7).

5. The fire district employs mechanics, who work in the repair facility. The mechanics are not covered by the Law Enforce-

ment Officers and Fire Fighters (LEOFF) retirement system, Chapter 41.26 RCW, and are not considered to be "uniformed personnel" within the meaning of RCW 41.56.030(7). While primarily responsible for maintenance of the fire district's firefighting equipment, the mechanics have been assigned from time to time over a number of years to perform firefighting duties. Such assignments have been made only in emergency situations, when sufficient staffing has not been available.

6. The fire district's fire stations other than Station No. 1 are covered by approximately 100 volunteers trained in fire suppression and emergency medical techniques. The volunteers earn "points" for participating in fire suppression and emergency medical calls. The "points" can be redeemed semi-annually for a small monetary reimbursement. In addition, the volunteers receive five dollars for each training drill they attend. At least one of the fire district's mechanics has also served as a member of the volunteer force.

7. In September, 1986, the fire district modified response procedures because of uncertain volunteer participation. During the processing of a grievance concerning "one person" emergency responses, the fire district and the union discussed possible alternatives for insufficient staffing. The union proposed hiring additional personnel, but the employer opposed such an approach.

8. In January, 1987, the fire district initiated a temporary dispatching system to alleviate the emergency response problem. Chief Anderson took command of the department at approximately the same time, and he took steps to investigate the situation, including solicitation of ideas from the union.

9. Shortly after he took command of the department, Anderson discovered that routine fire incident and emergency medical

incident reports were not being kept up to date. To remedy the situation, Anderson explored the use of a computerized reporting system. Anderson discussed the situation with Captain William Carl, a bargaining unit member familiar with computer operations.

10. On February 26, 1987, Carl sent a letter to Anderson, recommending certain features for a computerized reporting system. After receiving Carl's recommendations, the fire district purchased new computer software for a reporting system.

11. In the early part of March, 1987, Oliver learned of the fire district's intentions concerning computerized reporting. He contacted Anderson to ask whether bargaining unit members could be subject to discipline if they failed to use the computer system in a timely manner. In addition, Oliver wanted to know if the fire district intended to offer training on the new computer system.

12. On March 6, 1987, Anderson issued a memorandum to fire dispatchers, shift captains, and medics, setting forth the district's new computer reporting procedure. A second memorandum was issued to the same employees on March 12, 1987, in which Anderson directed those employees to immediately start entering incident reports, and to also start entering incident reports dating back to January 1, 1987.

13. The new computerized incident reporting system became fully operational in April, 1987.

14. On April 1, 1987, Anderson sent a letter to James Panknin, chairman of the union's grievance committee, reiterating the employer's opposition to hiring additional firefighters to resolve the problem of insufficient staffing on emergency responses. Anderson proposed the creation of a "stand-by

system" utilizing volunteers and professional firefighters who would be willing to carry a pager while off duty, and he acknowledged that the issue would have to be negotiated.

15. On May 4, 1987, Panknin sent a letter to Anderson, proposing negotiations over a "call-back system for paid fire fighters". On the same date, Anderson sent a letter to the Board of Fire Commissioners, recommending that negotiations begin on the stand-by issue.

16. The parties discussed the stand-by issue on May 8, 1987, but did not resolve the matter.

17. On May 14, 1987, Anderson issued a memorandum to the fire district's medics, reminding them that they were to use the computerized reporting system for emergency medical incident reports.

18. On June 4, 1987, Anderson issued "Special Order 87-3", implementing a system whereby volunteers would be required to "stand-by" at Fire Station No. 1 in certain emergency situations.

19. On June 14, 1987, the union presented a proposal calling for call-back of bargaining unit members. The proposal specified that call-back was voluntary, and that the plan could be canceled by either party at any time.

20. On July 10, 1987, Oliver sent Anderson a letter, demanding negotiations over a variety of subjects, including the use of computers for incident reporting. The parties did not meet to discuss the matter for several months.

21. On July 17, 1987, Anderson sent Oliver a letter, stating that the Board of Fire Commissioners had reviewed the union's

proposal concerning call-back, but rejected it because of its cost. The parties discussed the stand-by / call-back issue in a subsequent meeting, but the matter was not resolved.

22. Fire Chief Anderson approached the fire district's volunteer fire fighters about the possibility of creating a stand-by system. Representatives of the volunteer group suggested that the fire district provide compensation to volunteers, as an incentive to accept such duty. The volunteers suggested compensation at the rate of $5.00 per hour for time spent on stand-by. The union was not informed of the volunteers' proposal.

23. On August 10, 1987, the fire district issued a new stand-by procedure calling for the use of volunteer personnel who were to be compensated for time spent on stand-by duty. That procedure was essentially identical to that proposed by the volunteer group.

24. On August 16, 1987, Oliver sent a letter to Anderson, demanding bargaining on changes in wages, hours, and conditions of employment caused by the new procedure calling for compensated stand-by by volunteers.

25. On October 14, 1987, Oliver sent a letter to Anderson in which several unresolved grievances were discussed. The letter also mentioned the district's continued use of volunteers in paid stand-by duty status.

26. On October 14, 1987, Anderson sent a letter to Panknin, requesting a meeting to discuss the issues raised in Oliver's July 10, 1987 letter.

27. The parties exchanged ideas on the computer issue at a meeting held on October 19, 1987, and the union advanced several

different approaches for resolving the matter. The employer declined to accept the union's proposals, and the computer issue remained unresolved.

28. On November 13, 1987, the union filed the complaint charging unfair labor practices in Case 7137-U-87-1455, challenging the use of volunteer personnel on a compensated basis for stand-by duty.

29. On November 25, 1987, Anderson issued an order rescinding the compensation for the volunteers on stand-by duty. Volunteers were thereafter awarded "points" for stand-by duty in the same manner that service points were earned for other duties.

30. The parties met on several subsequent occasions but were unable to resolve their differences concerning the stand-by issue.

31. On December 3, 1987, the union and the fire district met in collective bargaining negotiations on a re-opener provision of their collective bargaining agreement. During the course of that meeting, the union proposed calling in off-duty personnel on an overtime basis to enter reports on the computer. The employer rejected the proposal, citing its cost.

32. On February 4, 1988, Chief Anderson sent a letter to Oliver, asking that a meeting be set to address several issues, including use of computers.

33. On February 8, 1988, Oliver sent a letter to Anderson, detailing the union's position on the unresolved issues. In particular, Oliver informed the fire district that the union anticipated filing an unfair labor practice complaint concerning the assignment of computer duties. The same letter went on to draw a distinction between "negotiation" and "discus-

sion", and indicated that the union would not "discuss" the computer issue with the fire district.

34. Disagreements over the use of the computer continued. On March 10, 1988, the union filed the complaint charging unfair labor practices in Case 7301-U-88-1507, challenging the imposition of computerized reporting duties.

35. At an unspecified time in the spring of 1988, Otto Klein, the attorney for the fire district, contacted Barry Ryan, the attorney for the union, asking that the unfair labor practice complaints be held in abeyance while settlement efforts were undertaken. The parties agreed that settlement attempts would be beneficial.

36. The parties met approximately five times during the spring and summer of 1988, in an effort to resolve the unfair labor practices filed to that point. Their efforts were unsuccessful.

37. On July 18, 1988, a brush fire started in a remote, rural area of the fire district. After unsuccessfully attempting to call volunteer personnel, Anderson decided to have the district's mechanics drive a four-wheel-drive firefighting vehicle from the repair facility to the fire scene. Once at the fire scene, the mechanics were assigned fire fighting duties.

38. On an unspecified date which is inferred to have been after July 18, 1988, the mechanics were ordered to drive the fire district's four-wheel-drive firefighting unit to another fire scene. Once at that fire scene, the mechanics helped to contain a brush fire while firefighting personnel concentrated their efforts on preventing the fire from burning nearby structures.

39. On August 3, 1988, Anderson sent a memorandum to Captain Mike VanHeel, a member of the "uniformed personnel" bargaining unit, warning VanHeel that his tardiness in completing computer reports could lead to disciplinary action. Other bargaining unit employees were also warned about their computer usage at the same time.

40. On August 10, 1988, Oliver sent a "directive" to all bargaining unit members, ordering them to refrain from using the computer reporting system.

41. On August 10, 1988, Oliver sent a letter to Anderson, advising that bargaining unit members would no longer use the computer to complete fire incident and medical emergency reports.

42. On August 11, 1988, Anderson sent a letter to Oliver, stating that the union's proposed actions could lead to disciplinary action against bargaining unit employees for insubordination.

43. On August 18, 1988, Anderson sent a memorandum to "uniformed personnel" bargaining unit member Kevin VonSteuben, warning that VonSteuben's tardiness in completing computer reports could lead to a three shift suspension. Other bargaining unit employees were also warned about their computer usage at the same time.

44. On September 27, 1988, Anderson sent a memorandum to Captain Carl, warning that continued refusal to use the computer could lead to termination.

45. On September 29, 1988, the union filed the complaint charging unfair labor practices in Case 7605-U-88-1599, alleging that the fire district had attempted to delay the unfair labor practice litigation and had retaliated against bargaining unit employees because of their union activities.

46. After several meetings were held, the parties resolved some of their differences concerning the use of the computers. On October 3, 1988, Anderson sent a memorandum to all bargaining unit members, stating that the fire district and union had entered into "informal discussions" concerning the computer issue, and that while those discussions were in progress, bargaining unit employees trying to use the computer in good faith would not be disciplined if reports were late.

47. Shortly after October 3, 1988, Oliver sent a letter to bargaining unit employees, urging them to use the computer for reports dating to August 10, 1988.

48. On January 13, 1989, the union filed the complaint charging unfair labor practices in Case 7767-U-89-1646, alleging that the fire district improperly removed bargaining unit work by assigning fire fighting duties to the mechanics.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By events described in paragraphs 21 and 22 of the foregoing findings of fact, Spokane County Fire Protection District No. 9 engaged in "skimming" of bargaining unit work without giving notice to or bargaining with International Association of Fire Fighters, Local 2916, and therefore committed an unfair labor practice within the meaning of RCW 41.56.140(4) and (1).

3. By the other events described in the foregoing findings of fact, Spokane County Fire Protection District No. 9 has not committed, and is not committing, any unfair labor practices within the meaning of RCW 41.56.140(1), (3) or (4), with

respect to the assignment of members of the "uniformed personnel" bargaining unit to use a computer for incident reporting.

4. By the other events described in the foregoing findings of fact, Spokane County Fire Protection District No. 9 has not committed, and is not committing, any unfair labor practices within the meaning of RCW 41.56.140(1) or (3), by imposing discipline on its employees for their failure or refusal to use the employer's computerized reporting system.

5. By the other events described in the foregoing findings of fact, Spokane County Fire Protection District No. 9 has not committed, and is not committing, any unfair labor practices within the meaning of RCW 41.56.140(1) and (4), by continuing an established practice of temporarily assigning mechanics to drive a firefighting apparatus and to engage in fire suppression duties in emergency situations.

ORDER

1. Case 7137-U-87-1455. Pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that Spokane County Fire Protection District No. 9, its officers and agents shall immediately:
   a. Cease and desist from:
      (1) Failing to give notice to International Association of Fire Fighters, Local 2916, prior to making changes of wages, hours or working conditions of employees in the "uniformed personnel" bargaining unit represented by that organization.
      (2) Refusing to negotiate in good faith, upon request, with International Association of Fire Fighters, Local 2916, concerning the use of compensated

volunteer personnel to perform traditional bargaining unit work.

b. Take the following affirmative actions to remedy the unfair labor practice and effectuate the purposes of Chapter 41.56 RCW:

(1) Give notice to International Association of Fire Fighters, Local 2916, prior to any change of practice which results in the transfer of work that has been traditionally performed by members of the "uniformed personnel" bargaining unit to persons outside of that bargaining unit.

(2) Upon request, bargain in good faith with International Association of Fire Fighters, Local 2916, concerning any proposed use of compensated volunteers to perform work traditionally performed by members of the "uniformed personnel" bargaining unit.

(3) Post, in conspicuous places on the employer's premises where notices to employees are customarily posted, copies of the notice attached hereto. Such notice shall, after being duly signed by an authorized representative of Spokane County Fire Protection District No. 9, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the respondent to ensure that said notices are not removed, altered, defaced, or covered by other material.

(4) Notify the complainant, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by this Order.

(5) Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this Order,

as to what steps have been taken to comply herewith, and at the same time, provide the Executive Director with a signed copy of the notice required by this Order.

2. Case 7301-U-88-1507. The complaint charging unfair labor practices filed in the above-captioned matter is hereby DISMISSED.

3. Case 7605-U-88-1599. The complaint charging unfair labor practices filed in the above-captioned matter is hereby DISMISSED.

4. Case 7767-U-89-1646. The complaint charging unfair labor practices filed in the above-captioned matter is hereby DISMISSED.

DATED at Olympia, Washington, this 1st day of May, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kenneth J. Latsch

KENNETH J. LATSCH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT transfer traditional bargaining unit work to volunteer personnel without first offering International Association of Fire Fighters, Local 2916, the opportunity to negotiate about the matter.

WE WILL, upon request, negotiate in good faith with International Association of Fire Fighters, Local 2916, concerning any stand-by system that is created by the fire district using compensated volunteers.

SPOKANE COUNTY FIRE PROTECTION DISTRICT NO. 9

By:_____
Authorized Representative

Dated:_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.