City of Pullman, Decision 7126 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 182,	)	
Complainant,	)	CASE 14646-U-99-03671
vs.	)	DECISION 7126 - PECB
CITY OF PULLMAN,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Emmal, Skalbania & Vinnedge, by Alex J. Skalbania, represented the union.

Summit Law Group, by Rodney B. Yonker, represented the employer.

On June 16, 1999, International Association of Fire Fighters, Local 182 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Pullman (employer) as respondent. The Executive Director issued a preliminary ruling on July 26, 1999, under WAC 391-45-110, finding a cause of action to exist on allegations of:

1. A unilateral change of hiring qualifications for lateral-entry fire fighter-paramedics, affecting the safety and work assignments of bargaining unit employees, and

2. Refusal of the employer to provide information requested by the union for the purpose of bargaining concerning the unilateral change in lateral hiring practices.

The employer was directed to answer the complaint, and Examiner Jack T. Cowan was designated to conduct further proceedings in the matter. The employer filed its answer on August 16, 1999, and filed an amended answer and motion to accept the amended answer on December 6, 1999. A hearing was held before the Examiner on December 8, 1999, at which time the amended answer was accepted. The parties filed post-hearing briefs to complete the record.

The Examiner rules that the complaint was timely under RCW 41.56.160, so the employer's request that the complaint be dismissed on the basis of the statute of limitations is denied. The Examiner rules that the employer's changes in the hiring qualifications for a lateral-entry employee are not a mandatory subject of bargaining, because they have not been shown to impact the safety, health or wages of present bargaining unit members, so the unilateral change allegation is dismissed. Concerning the allegation that the employer unlawfully refused to provide information, the Examiner rules that the requested information was necessary for the union to fully represent the bargaining unit, and that the employer committed an unfair labor practice when it failed to provide some of the information requested about applicants for employment.

BACKGROUND

The employer operates and maintains a fire department, as well as other municipal services. The employer has a Civil Service Commission, established according to Chapters 41.08 and 41.12 RCW, which administers rules and procedures which impact the employer's employment conditions. Particularly relevant to this case, the Civil Service Commission establishes hiring standards and procedures for fire department employees.

The union is the exclusive bargaining representative of uniformed fire fighter employees in the employer's fire department.[1] The bargaining unit presently includes approximately 15 fire fighters and 3 captains.

Until recently, the employer did not provide emergency medical services at the full "paramedic" level. The fire department provided "basic" (EMT-B) or "intermediate" (EMT-I) services only. Some time in 1997, the city council decided to add the "paramedic" (EMT-P) level of services. In 1998, after three employees previously employed as fire fighters completed approximately 15 months of training, the paramedic service went into operation. Generally, one paramedic was assigned to each shift.[2]

During this 1997-1998 time period, the union proposed that a separate job classification be created for paramedic-trained fire fighters. The parties did not reach agreement on that issue, and the previous "status quo" remained in effect. Thus, paramedic-trained fire fighters receive premium pay in recognition of their additional training, but the EMT-P classification is not a promotion level within the department.

In the autumn of 1998, one of the paramedic-trained fire fighters resigned to take a position with another employer. The parties' collective bargaining agreement contained language calling for vacant positions to be filled as soon as possible. To satisfy that

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[1] Notice is taken of the Commission's docket records for Case 725-M-77-258, a mediation case filed in January of 1977. That case provides basis for an inference that the parties' bargaining relationship predates the existence of the Commission.

[2] One captain already had EMT-P certification. He serves as the fourth paramedic in the department, so that there are two paramedics on duty on some shifts.

requirement, the employer decided to make a "lateral hire" of a replacement employee with the requisite training and experience, rather than hiring a new employee who lacked the EMT-P training it desired. Such a lateral hire was permissible under the civil service rules in place at that time, but required that the applicant have two years of **paid** experience as a fire fighter.

The employer posted a job announcement for a lateral entry fire fighter in October of 1998, and a limited list of qualified applicants was developed by the Civil Service Commission. When the position was offered, the candidate turned down the position. The employer repeated the process with another candidate, but its offer was refused a second time.

After discussions with representatives of other employers, Fire Chief Patrick Wilkins decided to request that the Civil Service Commission modify the minimum qualifications for a lateral hire. In order to increase the size of the applicant pool, he proposed:

> ...
> 3) Lateral entry requirements for the position of fire fighter shall be as follows:
>
> a) Completed an approved fire academy or have documentation that the candidate has met NFPA Fire Fighter I criteria or hold an Associate Degree in a fire science field;
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> b) ((~~Currently employed with a fire protection agency as a paid fire fighter~~)) Currently employed as a fire fighter with a fire protection agency;
>
> c) ((~~Have two years experience as a paid fire fighter~~)) Two years full-time fire fighting experience, or four years part-time, reserve, or volunteer fire fighting experience;

d) ((~~Currently certified as an emergency medical technician in the state of residence and possess either Intermediate or Advance Life Support certification before date of appointment~~)) Possess current certification, as either an Emergency Medical Technician (EMT-B), or EMT-I, or EMT-P (employer preference at time of announcement) in state of residence, or national registry, and be able to obtain same level of certification, as recognized by the state of Washington, prior to appointment.

[Deletions shown by ((~~strikeout within double parenthesis~~)); new materials shown by underline.]

The Civil Service Commission considered the chief's proposal at its meeting held on December 8, 1998. Two union representatives, Chris Gordon (the union's president at that time) and Don Foster (a member of the union's executive committee), spoke against the proposal. Consistent with the proposal which the union had earlier advanced in collective bargaining negotiations, they argued that the employer should create a separate paramedic classification to replace the premium pay designation then in effect. The Civil Service Commission approved the changes proposed by the chief.[3] The union officials testified that they came away from that meeting with an understanding that the change was to be a one-time event.

The employer posted a new job announcement and hired James Turpin on February 1, 1999. Turpin was an experienced fire fighter with EMT-P certification. Upon being hired, he began an in-house

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[3] The Civil Service Commission also adopted a recommendation that the employer reconsider its opposition to the creation of a new wage classification. The employer correctly asserts that the debate between a new classification versus continued use of premium pay has nothing to do with standards for lateral transfer, and that the recommendation by the Civil Service Commission had no authority or binding effect.

training and skills evaluation program consisting of three phases, each of which were to be satisfactorily completed before the fire fighter passed on to the next phase:

Phase One - "Rookie Training": Department policy and procedure; familiarization of geographic area and facilities; and equipment and vehicle familiarization and operation.

Phase Two - "Advanced Skills Evaluation": the fire fighter works on shift, but is not counted for purposes of minimum shift strength.

Phase Three - "Final Skills Evaluation".

The program used for Turpin was identical to the training required by the employer for all fire fighters in its fire department.

On February 2, 1999, one day following Turpin's hiring, the employer posted a job announcement for another lateral-entry EMT-P position to expand its paramedic service. This second posting alerted the union to the fact that the hiring of Turpin was not a "one time only event".

In an April 26, 1999 letter to City Manager John Sherman, the union notified the employer that it wanted to bargain the lateral-entry issue. That letter stated, in part:

> It has come to Local 1892's attention that the city is in the process of testing applicants for this lateral entry position with the intent of hiring one or more new firefighter/ EMT-Paramedics to become employees of the City's fire department, and thus, to become members of Local 1892's bargaining unit.
>
> Local 1892 is concerned that, based upon what the local knows to date about the testing and qualifications process which the City and Civil Service Commission have established for the firefighter/EMT-Paramedic position re-

> ferred to above, the low level of fire-fighting-related qualifications which candidates for that position are being allowed to possess will have a negative impact upon the safety of the members of the local [sic] ... The Local believes that the City, in its quest to find paramedics, is lowering the necessary firefighting-related qualifications of applicants for this lateral entry position to such a low level that the well being of bargaining unit members is being endangered. Since the positions in question are lateral entry positions, the City's actions in placing new hires at a particular salary level are also impacting the members of the Local 1892's bargaining unit. There are other potentially negative impacts upon the members of Local 1892's members that are associated with the City's above-referenced actions as well.
>
> ... Local 1892 also hereby requests the City to [sic] suspend the current hiring process for lateral entry firefighter/EMT-Paramedic until such time as the parties have reached a mutual agreement about how that process should be conducted. ...

On April 27, 1999, the union sent Sherman a request for information "[p]ursuant to the request to bargain". That letter asked for:

1) Job postings for the fire fighter/EMT-Paramedic position.
2) Job descriptions for the fire fighter/EMT-Paramedic.
3) Documents regarding the civil service testing process for the fire fighter/EMT-Paramedic.
4) Documents regarding the rate of pay and working conditions applicable to the fire fighter/EMT-Paramedic.
5) Documents showing the qualifications for the fire fighter/EMT-Paramedic position.
6) Documents showing the qualifications of tested and qualified applicants for the fire fighter/EMT-Paramedic position.

Sherman replied in an April 30, 1999 letter to the union. With regard to the union's demand for bargaining on the paramedic qualifications, he stated:

> The current bargaining agreement between the parties contains no feature by which the parties have agreed to bargain testing procedures or the hiring process for employment applicants. Indeed, these matters are reserved management prerogatives of the City as covered in Article 7, Management Rights. Further, I am reliably advised that the hiring process, including testing procedures and qualifications of applicants for employment from outside the city, constitute permissive, rather than mandatory subjects of bargaining. As you know, the City has no legal obligation to bargain permissive subjects under Chapter 41.56 RCW. Furthermore, some of the matters you requested bargaining on appear to be related to duties of Civil Service and are also not subject to bargaining.
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> On the basis of the above, I find that I must and do decline your request to bargain these matters. I also do not agree to suspend the hiring process for Firefighter/EMT-Paramedic. The hiring process will proceed. Concerning your reference to Paramedic pay, I need more information about your concerns. In April of 1998, the parties completed negotiations with respect to the matter of Paramedic pay, and both parties had an opportunity to raise concerns related to that matter at that time.

In a separate letter sent to the union on that same date, Sherman replied to the union's request for information, as follows:

Responding to the union's request (1) for the job posting, a copy of the document was enclosed with Sherman's letter.

Responding to the union's request (2) for a copy of the job description, Sherman stated that there was no paramedic job description currently on file in the fire department.

Responding to the union's request (3) for the testing process documents, they were enclosed with Sherman's letter.

Responding to the union's request (4) for documents concerning the rates of pay or working conditions of the lateral-entry fire fighter-paramedic, Sherman responded that there were no such documents.

Responding to the union's request (5) for "copies of any documents which show the qualifications of any applicants whom the City has rated as qualified for the lateral-entry firefighter/EMT-Paramedic position ...", Sherman replied that the only documents related to the request would be the original applications, and that those documents were excluded from disclosure by the state public records law at RCW 42.17.310(1)(t).

Responding to the union's request (6) for copies of any documents which show the "qualifications of any applicants [tested by] the City and/or the Civil Services Commission ... within the last calendar year", Sherman responded that this request also referred to original applications protected from disclosure by RCW 42.17.310(1)(f).

POSITIONS OF THE PARTIES

The union argues that the employer has "flatly" refused to bargain a mandatory subject of bargaining. It asserts that the lateral hiring of a fire fighter is a change in working conditions that has a demonstrably direct relationship to employee workload and safety. It argues that it made "... undisputedly a clear and timely demand to bargain ... which the City undisputedly refused to honor." The union contends the employer refused to provide it with requested information that would have allowed it to familiarize itself with the qualifications of the lateral-entry applicants, and enable it

to assess potential safety risks presented by the new lateral-entry hiring process. It asserts that the duty to bargain supersedes any potential exemptions from the Public Disclosure Act, Chapter 42.17 RCW.

The employer begins its defense by asserting that the complaint filed on June 16, 1999, was untimely as to the change of minimum qualifications adopted by the Civil Service Commission meeting on December 8, 1998, and as to the implementation of the changed requirements on December 10, 1998, so that the union's "unilateral change" allegations should be dismissed. The employer continues its defense by arguing that the qualifications for hiring employees are a fundamental prerogative of management, and a permissive subject of bargaining. It asserts that prospective employees are not members of the bargaining unit represented by the union, and are not within the union's "mandate" of authority. Citing that lateral-entry employees must complete a comprehensive training and skill review program, the employer contends the union has failed to demonstrate any safety effects of its decision that require bargaining. Similarly, the employer alleges the union failed to demonstrate any impact of the changed hiring criteria on the wages or wage structure of bargaining unit members. Even if hiring criteria were a mandatory subject of bargaining, the employer asserts that the union waived its right to demand bargaining by agreeing to the "Management Rights" section of the parties' collective bargaining agreement and/or by its inaction for over six months after the union had knowledge of the decision to hire a lateral-entry fire fighter/paramedic. Finally, the employer responds to the allegation that it unlawfully refused to provide requested information by asserting that it provided all information that was needed by the opposite party for the proper performance of its duties in the collective bargaining process. It contends the only documents withheld related to persons who were not yet members

of the bargaining unit represented by the union, and that the withheld documents contained personal information about the applicants not relevant to the issue at hand.

DISCUSSION

Statute of Limitations

The Examiner is not persuaded by the employer's argument that the complaint filed on June 16, 1999, was untimely.[4]

Like Section 10(b) of the National Labor Relations Act, RCW 41.56.160 imposes a six-month limitation on the filing of unfair labor practice charges:

> RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS AND CEASE AND DESIST ORDERS. (1) 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.
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> [Emphasis by **bold** supplied.]

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[4] The June 11, 1999, postmark date cited by the employer is not controlling. A complaint charging unfair labor practices is only considered to be "filed" when it is actually received by the Commission. WAC 391-08-120(1).

The timeliness of a complaint is thus a "jurisdictional" question in any unfair labor practice case. North Franklin School District, Decision 3844 (PECB, 1991).

Complaints which appear to be untimely on their face are usually dismissed in the preliminary ruling process conducted under WAC 391-45-110. In this case, the employer argues that the union was notified and aware of the alleged unilateral change in hiring standards as early as December 8, 1998. On its face, a failure to file a complaint within six months following notice of a unilateral change could be a basis for finding the complaint is untimely. However, the focus of the union's statement of facts and the documents accompanying the complaint in this case was on the February 2, 1999, hiring of the first lateral-entry employee.[5]

The existence of a statute of limitations problem can be revisited when a respondent files its answer under WAC 391-45-110(2) and 391-45-190. In this case, there was no mention of a statute of limitations problem in the employer's answer. It was not until the employer filed its amended answer, on December 6, 1999, that the employer added an affirmative defense asserting that the complaint was untimely because the union knew of the employer's intentions more than six months before the complaint was filed.

The decision in City of Seattle, Decision 5930 (PECB, 1997) includes an extensive discussion of the statute of limitations in the Public Employees' Collective Bargaining Act and pertinent information from that case is summarized here. The period of limitations begins to run when the potential unfair labor practice complainant knew or should have known of the violation of its

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[5] The union also alleges that the December 8, 1998, action of the employer's Civil Service Commission was not to be permanently effective.

rights. Mukilteo School District, Decision 3964 (PECB, 1992). In City of Kent, Decision 5417 (PECB, 1996), a complaint was dismissed where the union was aware of a holiday scheduling change more than six months prior to the filing of the complaint. See, also, City of Spokane, Decision 4937 (PECB, 1985); City of Tacoma, Decision 5408 (PECB, 1995); City of Kirkland, Decision 5318 (PECB, 1995). Exceptions to strict enforcement of the six-month limitation have occurred, however, in cases where a complainant shows it had no actual or constructive knowledge of the acts or events which are the basis of the charges. See: City of Pasco, Decision 4197-A (PECB, 1994) [employer's direct dealing with bargaining unit employee and existence of a separate agreement on reimbursement of training expenses were concealed from union]; North Franklin School District, Decision 3980-A (PECB, 1992)[scope of work contracted out concealed from union]. No such facts are present in this case, where it is clear that the union was present at the meeting of the Civil Service Commission in December of 1998 when the change in hiring standards was discussed and approved.

Even where parties expressly agree to waive the six-month period of limitations on a particular unfair labor practice claim, such an agreement will **not** be honored by the Commission unless it is set forth in writing prior to the expiration of the original six-month period during which a timely complaint charging unfair labor practices should have been filed. City of Seattle, Decision 4057-A (PECB, 1993). No such facts are present in this case.

Where announcement of a change and its actual implementation are separated in time, the Commission has accepted a complaint filed within six months following the delayed implementation date. Washington Public Power Supply System, Decision 6058-A (PECB, 1998). In this case, the actions of the fire chief in proposing a change of the civil service rules and the actions of the Civil

Service Commission to change the minimum qualifications for lateral-entry fire fighter/paramedics might have been challenged by the union, but such a challenge would have been premature if the employer did not actually hire any lateral-entry employees under the changed rule. Similarly, the union might have filed a complaint when the employer posted a job announcement with the new qualifications on December 10, 1998, but such a challenge would also have been premature if the employer had not been able to actually hire anybody under the changed qualifications. In the same light, the employer only actually implemented the previously-discussed change with the hiring of Turpin on February 1, 1999, which was within the six months prior to the filing of the complaint.

Mitigating Circumstances -

The union asserts that it did not have actual knowledge that the employer intended to change **only** the qualifications for a lateral transfer, because it believed that the employer would create a separate paramedic job classification based upon the recommendation of the Civil Service Commission. The union thus believed that the change in lateral-entry standards would only affect the first paramedic position being filled. Although the evidence supports the employer's argument that nothing in the presentations before the Civil Service Commission or in the job announcement indicated that the change was on a one-time only or temporary basis, that does not justify disregarding the effects of the Civil Service Commission recommendation concerning creation of a new classification. That recommendation was referenced in the minutes of the Civil Service Commission meeting, and was throughly discussed in a March 15, 1999, memorandum from the fire chief to the Civil Service Commission:

> At Decembers [sic] Civil Service Commission meeting, I gave the commissioners an update on the recruitment process and the limitations we were having with the process and the need to expand the recruitment pool as was being done with other jurisdictions. To accomplish my request, I asked the commission to authorize amending Civil Service Rule VIII Section 3 to read: Currently employed as a firefighter with a fire protection agency and have two years full time experience or four years part-time or volunteer experience. The commissioners approved my request. Also during the discussion of recruitment, I advised the commissioners that the candidate selected would be compensated at mid-range.
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> Two members of the Pullman Fire Department Chris Gorton and Don Foster were in attendance at the December meeting. **Chris Gorton spoke to the commission about the need to establish a classification of paramedic within the department.** His justification was that this would be utilized during the time new Firefighter/EMT-P positions were authorized by the City Council and entry level recruitment would occur. **The commissioners gave direction to Paul Eichenberg to make this request to the City Council and report back by June of 1999.**

[Emphasis by **bold** supplied.]

Therefore, the union's actions could easily have been affected by conflicting information originating with employer officials (i.e., from the fire chief and the Civil Service Commission). Thus, the failure of the union to file an unfair labor practice complaint on the basis of the December job announcement is consistent with its understanding that the change in lateral-entry qualifications was a temporary "fix" until the employer acted on the classification recommendation. The union clearly demanded to bargain on April 27, 1999, and filed its complaint within six months after February 2, 1999 (when it became apparent that the change of lateral-entry requirements was not going to be limited to a one-time use), and March 15, 1999 (when the chief's memo made it clear that the

employer was not going to add a new paramedic job classification in the short-term).

Mandatory/Permissive Subject of Bargaining

The scope of mandatory collective bargaining is as set forth in RCW 41.56.030(4), as follows: "[P]ersonnel matters, including wages, hours and working conditions ..." See, City of Bellevue, Decision 2788 (PECB, 1987).[6] In determining whether a particular proposal is a mandatory subject of bargaining, the Commission initially determines whether it directly impacts the wages, hours or working conditions of bargaining unit employees. Lower Snoqualmie Valley School District, Decision 1602 (EDUC, 1983). That determination is a question of law and fact.

When a subject does not directly affect wages, hours or working conditions, the Commission utilizes a balancing test, analyzing the employer's need for entrepreneurial freedom against the employees' interest in their terms and conditions of employment. Federal Way School District, Decision 232-A (EDUC, 1977). Such a balancing test was applied in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), where the Supreme Court of the United States held that an employer is required to bargain concerning a decision to contract out work historically performed by bargaining unit employees. In a concurring opinion, Justice Stewart described the employer side of the balancing test as follows:

> Decisions concerning the volume and kind of advertising expenditures, product design, the

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[6] Although this case involves actions by a civil service commission, the statutory exclusion from collective bargaining set forth in the proviso to RCW 41.56.100 does not apply. See, City of Yakima, Decision 3503-A (PECB, 1990), affirmed 117 Wn.2d 655 (1991).

> manner of financing, and of sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.
>
> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment . . .
>
> ... those managerial decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

Rules on safety and health, however, are mandatory subjects of bargaining. Gulf Power Company, 156 NLRB 622 (1966), enforced 384 F.2d 822 (5th Cir., 1967); Boland Marine & Mfg. Co., 225 NLRB 824 (1976), enforced 562 F.2d 1259 (5th Cir., 1977); Hanes Corporation, 260 NLRB 557 (1982); Oil, Chemical & Atomic Workers v. NLRB, 711 F.2d 348 (D.C. Cir., 1983); NLRB v. Holyoke Water Power Co., 778 F.2d 49 (1st Cir., 1985); City of Richland, Decision 2448-A, 2448-B (PECB, 1987).

Pre-Hire Conditions of Employment -

Minimum qualifications and hiring of new employees are among the decisions that are generally considered to be core entrepreneurial prerogatives, and **not** mandatory subjects of collective bargaining. As the employer argues here, such standards do not affect the members of the bargaining unit because they are used to screen applicants for vacant positions. In Kitsap County Fire District 7, Decision 2872-A (PECB, 1988), the Commission wrote:

> The Examiner properly concluded that the employer had no obligation to bargain with the union concerning its decision to hire non-smokers and its decision to hire applicants having residences in close proximity to the employer's place of business. **Such individuals were not "employees" of this employer at that point in time, and so were not represented by the union.**

[Emphasis by **bold** supplied.]

If the analysis could end there, prompt dismissal of the union's "unilateral change" allegations would be warranted.

Effect on Safety -

However, the union argues that the pre-hire conditions in this situation have an impact on employee working conditions; specifically: safety, health, and wage effects. Therefore, it asserts that the employer committed an unfair labor practice when it refused to bargain lateral-entry qualifications. Minimum qualifications have been held to become mandatory subjects of bargaining **if** they have an impact on employee working conditions:

> While pre-hire minimum qualifications would normally be outside of the scope of mandatory collective bargaining, it appears that a violation could be found if application of the new requirement to existing employees adversely affected their discipline, tenure of employment or other working conditions.

King County Fire District 11, Decision 4538 (PECB, 1993).

The union cites IAFF, Local 1052 v. PERC (City of Richland), 113 Wn.2nd 197 (1989), where the Supreme Court of the State of Washington held that, when a change in working conditions has a

> ... demonstrably direct relationship to employee workload and safety ... we believe

> that, under appropriate circumstances, requiring an employer to bargain over ... [such a change] ... will achieve the balance of public, employer and union interests that best furthers the purposes of the public employment collective bargaining laws.

And the union's brief contains multiple citations of City of Centralia, Decision 5282-A (PECB, 1996), for the proposition that employers must bargain attempts "to undermine the safety of employees."

The union provided testimony that the range of volunteer fire fighter experience can vary enormously from one fire department to another. Local union President Llewellyn testified that he received no training whatsoever while he was a volunteer fire fighter in a small, rural fire district in Yakima County. He contrasted that with his experience when being hired as a reserve fire fighter for Washington State University, which carefully tested out his credentials and training before he was counted as a fully functioning fire fighter. He also testified that, even with appropriate training, some volunteer fire fighters may be involved in only a limited number of fires each year and therefore do not have consistent experience with the equipment and vehicles.

The employer rebutted the union's "safety" concerns, by comparing the changed qualifications for lateral-entry with the qualifications for an entry-level applicant. Thus:

A **lateral**-entry hire must:	An **entry**-level hire must:
• have completed an approved fire academy;	• have a high school diploma or a G.E.D; and
• have EMT-P certification;	• have EMT-B certification.

• have met the criteria of the National Fire Prevention Academy for a Fire Fighter I or hold an associate degree in fire science; and	(no requirement)
• have experience, either two years experience as paid fire fighter or four years as a part-time reserve volunteer fire fighter.	(no requirement)

Although the employer has created a difference in experience requirements between the entry-level and lateral-entry paramedic, the evidence establishes that the employer treats all new employees the same for purposes of testing, training and orientation. The employer provided documentation that the lateral-entry employee was checked out on equipment in the same manner as an entry-level new hire, and was not counted as a part of a functional fire crew until the individual passed the appropriate screening for fire fighter skills, abilities, and familiarity with procedures and equipment.

Just stating a "safety" concern is not enough for the union to prevail. The employer has successfully rebutted the union's arguments concerning safety. Having made an undoubtedly entrepreneurial decision to launch a "paramedic" service,[7] the employer has taken closely-associated steps to assure that it has the personnel needed to provide that service. The union's concerns about safety might have some validity if lateral-entry employees were being utilized in regular operations without proper training, but the evidence in this case shows that the lateral-entry fire fighter/paramedic (who comes to the department with more training

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[7] In King County Fire District 16, Decision 3714 (PECB, 1991), a decision to upgrade the level of paramedic service provided by a fire department was found to be a non-mandatory subject of bargaining.

than an entry-level employee) gets the same in-house training as an entry-level employee. The employer did not violate the statute when it hired lateral-entry fire fighter/paramedics under the revised standards adopted by its Civil Service Commission.

Effect on Wages -

The union expressed concern about "potential pay inequities" that might arise within the bargaining unit if the employer hires employees under the revised lateral-entry requirements, but it did not fully develop the argument. It merely stated that fire fighters with very little training or expertise would be hired at a rate of pay equal to or higher than the rate of pay that was received by more experienced members of its bargaining unit. Such a possibility does not constitute a change of the status quo, however. The civil service regulation immediately following the lateral-entry requirements specifically deals with salary placement, and that regulation was not modified:

> 4) Persons selected for the lateral entry position shall enter at a pay classification to be determined by the Civil Service Commission but **in no event at a pay step higher than the middle step** for police officer or firefighter, whichever is most applicable. ... For fire, the employee will be eligible for EMT pay upon completion of the appropriate certification requirements.
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> [Emphasis by **bold** supplied.]

Thus, the employer had a right to hire lateral-entry employees before this dispute arose, and the union's expressed concern is not a result of the changes made in the lateral-entry hiring criteria in 1998-1999. The union's argument on the effect of the lateral hire requirements on current employee wages is not persuasive.

Additional Employer Defenses on Unilateral Change -
Having concluded that the employer did not violate the statute because, in this situation, the lateral-entry qualifications are not a mandatory subject of bargaining, two additional defenses asserted by the employer are not controlling. They are discussed only briefly:

Waiver by contract is succinctly discussed in Yakima County, Decision 6594-C (PECB, 1999). The principal outcome of the collective bargaining process under Chapter 41.56 RCW is for an employer and the exclusive bargaining representative of its employees to sign a written collective bargaining agreement controlling wages, hours and working conditions of bargaining unit employees for a period of up to three years. RCW 41.56.030(4); 41.56.070. The Supreme Court has required that agreements reached in collective bargaining be put in writing. State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970). Such contracts are enforceable according to their terms, including by means of arbitration. RCW 41.56.122(2); 41.58.020(4). Thus, there is no duty to bargain for the life of the contract on the matters set forth in a collective bargaining agreement, and an employer action in conformity with that contract will not be an unlawful unilateral change. City of Yakima, supra. Waiver by contract is an affirmative defense, and the employer has the burden of proof. Lakewood School District, Decision 755-A (PECB, 1980). In this case, the employer asserts that the Management Rights clause in the parties' collective bargaining agreement precludes the bargaining of hiring criteria. It specifically cited two specific clauses contained in ARTICLE 7 - MANAGEMENT RIGHTS of the parties collective bargaining agreement:

> All powers, authorities, functions and rights not specifically and expressly restricted by this agreement are retained by the Employer and shall continue to be subject to exclusive

> management control. Without limitation, but by way of illustration, the exclusive prerogatives, functions, and rights of the Employer shall include the following:
>
> ...
> 3. The right to direct members of the Fire Department, including **the right to hire,** promote, transfer, discipline, or discharge employees.
>
> ...
> 6. The determination of **policy affecting selection or training** of Fire personnel
>
> [Emphasis by **bold** supplied.]

In Chelan County, Decision 5469-A (PECB, 1996), the Commission discussed the standard for assessing the validity of a waiver by contract defense:

> If a union waives its bargaining rights by contract language, an action may not be an unlawful "unilateral change". City of Yakima, Decision 3564-A (PECB, 1991). Waiver by contract is an affirmative defense, and the employer has the burden of proof. Lakewood School District, Decision 755-A (PECB, 1980). It relies on City of Yakima, supra, where the Commission said:
>
> > In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer.
>
> In Yakima, the Commission found no waiver on certain issues because contract provisions were either ambiguous or added no substance to the matter at issue. Here, the contract provisions are not ambiguous. When the contract terms themselves evidence a meeting of the minds, we need go no further to determine what was intended.

In this instance, sections 3 and 6 of the parties' management rights clause are not ambiguous, but they may not cover the specific safety issue raised by the union. The Examiner declines to make a contract interpretation normally reserved to an arbitrator, where such a ruling is not necessary to the disposition of this case.

Waiver by inaction is asserted by the employer in an apparent attempt to cover all possibilities. The employer argues that the union waived its right to demand to bargain lateral-entry hiring qualifications because the union knew in early December of 1998 that the employer was planning on recruiting lateral-entry fire fighter/paramedics under its revised minimum qualifications yet no demand to bargain was made until April of 1999. In Seattle School District, Decision 5755-A (PECB, 1998), the Commission described the conditions under which a waiver by inaction defense must be considered:

> When presented with notice of an opportunity for bargaining on either a decision or its effects, a party must make a timely request to bargain if it desires to assert its rights under the statute. See, King County, Decision 4893-A (PECB, 1995). The Commission does not find waivers by inaction easily, but if a union fails to request bargaining in a timely manner once notified of a contemplated change, or fails to advance proposals in a timely manner for the employer to consider, /7 a "waiver by inaction" defense asserted by the employer will likely be sustained. See, Mukilteo School District, Decision 3795-A (PECB, 1992); North Franklin School District, Decision 3980-A (PECB, 1993); and Lake Washington Technical College, Decision 4721-A (PECB, 1995). A specific and timely request that the employer bargain a matter generally will support a finding that the union has not waived bargaining by inaction, while silence will support finding a waiver by inaction.

> The burden of proof is with the party claiming waiver. City of Wenatchee, Decision 2194 (PECB, 1985) and City of Yakima, Decision 3564-A (PECB, 1991).
>
> [Footnotes omitted.]

In this case, the employer's "waiver by inaction" argument does not set forth any facts beyond those already outlined in the "statute of limitations" discussion set forth above. Because of the conflicting information provided by employer officials, it was not until February of 1999 (when the employer began the process to hire a second lateral-entry fire fighter paramedic), that the union is clearly chargeable with knowledge that the employer had no intention of creating the new classification that had been discussed in collective bargaining and in the civil service proceedings. While the Examiner declines to resolve the debate about what the union knew or should have known in the December 8 to February 3 period, the absence of a ruling should not be taken as an acceptance of the "waiver by inaction" defense.

Duty to Provide Information

The precedent on the duty to provide information in collective bargaining is summarized in State of Washington, Decision 4710 (PECB, 1994). Pertinent segments of that decision are:

> The Commission has held numerous times that both public employers and exclusive bargaining representatives are obliged to promptly supply relevant information, when the other makes a clear request. City of Bellevue, Decision 4324-A (PECB, 1994); City of Seattle, Decision 3329-B (PECB, 1990); King County, Decision 3030 (PECB, 1988); Pullman School District, Decision 2632 (PECB, 1987); Toutle Lake School District, Decision 2474 (PECB, 1986); City of Yakima, Decision 1124 (PECB, 1981) (other conclusions of law reversed, Decision 1124-A

> (PECB, 1981)). Those decisions are consistent with National Labor Relations Act precedent. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Industrial Co., 385 U.S. 432 (1967).
>
> The requested information must be relevant to fulfillment of the statutory duties to negotiate or enforce collective bargaining agreements. For example: Toutle Lake School District, supra, involved a request for names of newly hired employees; Pullman School District, supra, arose out of a union's request for personnel files of all employees disciplined within the prior five years; King County, supra, involved access to the home addresses of bargaining unit members. The Commission has found that a refusal to provide relevant information is a "refusal to bargain" unfair labor practice under RCW 41.56.140(4).
>
> ...
> The Commission expects that parties will negotiate solutions to any difficulties they encounter in connection with information requests. This is consistent with viewing the duty to provide information as part of the obligation to bargain. Although an employer may initially reply to an information request by claiming that compliance is difficult or not warranted, it must also explain its concerns to the union and make a good faith effort to reach a resolution that will satisfy its concerns and yet provide maximum information to the union. City of Bellevue, supra; Pullman School District, supra.

As recounted above, the union made an information request on April 27, 1999, and the employer only partially complied. In particular, the employer did not furnish the union with requested documents showing the qualifications of applicants applying for, and found by the employer to be qualified for, the lateral-entry position advertised by the employer.

Obligations Under the Public Records Act -

The employer's initial and ongoing defense is that the requested information is exempted from public disclosure by the specific language of the Public Records Act, Chapter 42.17 RCW. That statute was adopted by the citizens of the State of Washington, through the initiative process. The goal of the public records portion of that chapter is:

> That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.
>
> RCW 42.17.010(11).

Documents deemed to be public records must be released to a person requesting them, **unless disclosure is statutorily exempted.** The party opposing disclosure bears the burden of proving that the documents fall within a particular exemption. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 794 (1990). In this case, the employer asserts it is excused from releasing the requested information under RCW 42.17.310(1)(t), which provides:

> (1) The following are exempt from public inspection and copying:
>
> ...
>
> (t) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant.

Because the act favors disclosure, the statutory exemptions are construed narrowly. Dawson v. Daly, 120 Wn.2d 782, 789 (1993).

The employer's argument ignores, however, that this request was made under statutory authority separate and apart from Chapter 42.17 RCW. Even if the requested materials would be exempt from disclosure under Chapter 42.17 RCW,[8] Commission precedents including State of Washington, supra, and dating back to at least King County, Decision 3030 (PECB, 1988) have rejected reliance on the language of Chapter 42.17 RCW as limiting the duty to provide information which grows out of a collective bargaining relationship. Additionally, the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, supersedes any other statute, ordinance, or regulation with which it conflicts. RCW 41.56.905; Rose v. Erickson, 106 Wn.2d 420 (1986). Thus the employer's arguments based on Chapter 42.17 RCW are not persuasive.

Information Requested Exceeds Unit Parameters -

The remaining question here is whether the employer had an obligation to disclose the requested materials as a part of its collective bargaining obligations. The employer equates this situation with Pasco School District, Decision 5384-A (PECB, 1996), which states that there is no disclosure requirement unless there is a showing of "actual relevance". The employer then defends its decision on the basis that the requested information concerned persons who were not yet (and might never be) employees in the bargaining unit represented by the union, and on the basis that the request concerned a non-mandatory subject of bargaining.[9] The Examiner is not persuaded by either of these arguments.

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[8] The Examiner does not decide that question.

[9] Upon reaching a conclusion favorable to its view of the situation, the employer would treat the union's request as it would any request for public records made by somebody other than an exclusive bargaining representative, and would apply the public records statute. Again, the Examiner need not and does not decide the employer's obligations under Chapter 42.17 RCW.

The subject matter of the request is not found to be a mandatory subject of collective bargaining in this case, but the qualifications of the applicants for employment could have been a subject for bargaining if the union had sustained its burden of proof as to the existence of a safety concern. Thus, if the employer had **not** intended to treat lateral-entry paramedics as new hires for purposes of training, orientation and evaluation, then the hiring qualifications could have had greater safety ramifications for existing employees.

Similarly, the fact that the applicants for employment were not in the bargaining unit represented by the union at the time does not eradicate the possibility of the union having a legitimate interest in obtaining information about their qualifications. The Commission has responded to the employer's argument in Pasco School District, Decision 5384-A (PECB, 1996), as follows:

> Information pertaining to employees in the pertinent bargaining unit has been held to be presumptively relevant. In cases where the requested information pertains to employees outside of the bargaining unit, however, the NLRB has required the requesting party to bear the burden of establishing that the information is relevant to its bargaining responsibilities.
>
> Applying the federal precedents to this case, the union has the burden to show both: (1) the relevancy of the requested information regarding a person outside of the pertinent bargaining unit; and (2) that the union adequately informed the employer of the basis for its request.

Because the subject matter could have been a mandatory subject of collective bargaining, the union had a right to sufficient

information to evaluate the situation, even if it never pursued a request for bargaining.[10]

Conclusions on Duty to Provide Information -

In this case the union's request for information was for: "[D]ocuments which show the qualifications of any applicants ...." Although the union seemingly stated its request too broadly or aimed at the wrong target, the employer should have responded at least partially, perhaps with a list of the qualifications of the various applicants, listed anonymously. Such a response would have conformed to the purpose of the collective bargaining process, which is for the parties to resolve disputes between themselves:

> The requested information could certainly have been helpful to the union to potentially "sift out unmeritorious claims" before a grievance was filed, or to otherwise work with the employer on related issues to attempt to resolve any disputes. The employer prevented the union from effectively carrying out its function of representing employees in the bargaining unit.

Seattle School District, Decision 5542-C (PECB, 1997).

Instead of seeking clarification, or negotiating with the union concerning the specifics of its information request, the employer chose to completely deny the union the requested information. In

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[10] In this particular situation, where the conclusion on the "scope" issue is largely driven by the training provided to lateral-entry employees after their hiring, the information sought was not the information that was really needed. Apart from providing a basis for the union's complaint in this case, the employer's refusal to provide the requested information likely distracted the union from shifting its focus beyond the qualifications of the applicants. The union's request imposed a duty to provide information upon the employer, even if it would not have led the union to the correct answer.

so doing, it hampered the union's ability to adequately evaluate the effect of the changes in hiring qualifications on safety, wages or conditions of work, and prevented the union from adequately representing its bargaining unit. Because this amounts to a "technical" violation, the customary order to read the compliance notice in public has been omitted.

FINDINGS OF FACT

1. The City of Pullman, a municipal corporation of the State of Washington within the meaning of RCW 41.56.020, is a public employer within the meaning of RCW 41.56.030(1). During the time pertinent to this case, the city manager of Pullman was John Sherman and the chief of the employer's fire department was Patrick Wilkins.

2. International Association of Fire Fighters, Local 1892, a bargaining representative within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of a bargaining unit of uniformed fire fighters employed by the City of Pullman. During the time pertinent to this case, Chris Gordon and subsequently, Richard B. Llewellyn have been the presidents of the union.

3. The employer and union have had a collective bargaining relationship for many years, and were parties to a collective bargaining agreement during the time pertinent to this case. That contract includes acknowledgment, among "powers, authorities, functions and rights" at Article 7 - Management Rights, the right of the employer to "hire" employees.

4. The employer has a Civil Service Commission organized under Chapters 41.08 and 41.12 RCW, which promulgates rules and regulations. Among other things, the civil service rules establish the criteria for the hiring of fire fighters, including lateral-entry fire fighters.

5. Sometime before 1997, the employer added emergency medical services at the paramedic level (EMT-P) to the services historically provided by its fire department, upgrading the level of service provided from the basic (EMT-B) or intermediate (EMT-I) service levels.

6. By 1998, the bargaining unit represented by the union included four employees (three at the fire fighter rank and one at the captain rank) who were qualified to provide EMT-P services. Those employees were paid a premium for their certification, but their positions were not a separate classification or promotional level.

7. In the autumn of 1998, one of the EMT-P fire fighters left the employ of the Pullman Fire Department. In order to promptly replace that person, the employer sought to hire a lateral-entry employee under the civil service rules then in effect. The employer's offers of employment were rejected by two different candidates selected under those civil service rules.

8. In December of 1998, the employer's Civil Service Commission considered an employer request for a change of the experience requirement for lateral-entry from two years of paid fire fighter experience to two years of paid or volunteer fire fighter experience. Union officials appeared at the meeting of the Civil Service Commission and opposed the employer's request. The Civil Service Commission adopted the change

proposed by the employer. Responding to the arguments of the union officials, the Civil Service Commission also adopted a recommendation that the employer create a separate paramedic job classification.

9. Shortly after the Civil Service Commission action described in paragraph 8 of these Findings of Fact, the employer commenced a recruitment for a lateral-entry fire fighter. On February 1, 1999, a new employee with EMT-P certification began employment as a lateral-entry fire fighter. The new employee was placed in the middle of the fire fighter salary schedule, as provided for in civil service rules which were not changed by the actions described in paragraph 8 of these Findings of Fact. The new employee was required to complete the same program of training and skills evaluation, and was hired subject to the same one-year probationary period, as are applicable to employees hired without fire fighting experience.

10. Shortly after the hiring described in paragraph 9 of these Findings of Fact, the employer commenced another recruitment process to hire a second EMT-P certified fire fighter under the revised lateral-entry qualifications.

11. When the employer began the recruitment described in paragraph 10 of these Findings of Fact, the union became aware that the employer was not going to implement the separate fire fighter/ paramedic wage classification recommended by the Civil Service Commission. At that point, union officials were concerned that the revised lateral-entry hiring qualifications could result in safety and wage effects on the bargaining unit represented by the union.

12. On April 27, 1999, the union sent a written request to the employer for bargaining on "... the testing and hiring process that the City is contemplating using for the purpose of developing a civil service list for the lateral entry position within the City's fire department ...."

13. On April 27, 1999, the union sent a written request to the employer for six specific categories of information related to the posting, testing, pay and working conditions of the lateral-entry position(s), as well as the qualifications of all applicants for lateral-entry hiring and the qualifications of all lateral-entry applicants determined by the employer to be qualified for the position.

14. On April 30, 1999, the employer sent a written reply to the union, refusing to bargain the issue(s) raised by the union on the grounds that hiring standards and procedures are not a mandatory subject of bargaining, and responding to four of the union's information requests by stating that the requested document does not exist, and refusing to provide information about the qualifications of individual applicants for the lateral-entry positions.

15. In light of the training program uniformly applied to newly hired employees without regard to whether they are hired by lateral-entry, the union has failed to establish any actual basis for its expressed concerns about either the change of the civil service rules or its implementation having any effect upon the bargaining unit it represents.

CONCLUSIONS OF LAW

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

2. The complaint filed in this matter on June 16, 1999, was timely under RCW 41.56.160, in relation to the actual implementation in February of 1999 of the change of civil service rules announced in December of 1998.

3. The decision of the City of Pullman to change its experience requirements for the hiring of fire fighter/paramedics by lateral-entry is a permissive subject of bargaining under RCW 41.56.030(4), so the employer did not commit an unfair labor practice under RCW 41.56.140(4) when it refused to bargain the matter with the union in response to the union's demand for bargaining on the issue.

4. By refusing to provide specific information requested by the union concerning the experience of candidates for a lateral-entry, which information was reasonably necessary to the union's evaluation of the effect of the change in lateral-entry qualifications on the safety of current bargaining unit members, the employer committed an unfair labor practice in violation of RCW 41.56.130(4) and (1).

ORDER

1. The allegation that the employer unlawfully refused to bargain concerning changes in its qualifications for lateral-entry hiring are DISMISSED.

2. The City of Pullman, its officers and agents shall immediately take the following actions to remedy its unfair labor practice.

A. CEASE AND DESIST from:

1. Refusing to bargain by refusing to provide information lawfully requested by the exclusive representative of its employees and reasonably related to the effects of a change in the status quo which could have resulted in a bargaining obligation.

2. In any other manner refusing to bargain with its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

1. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

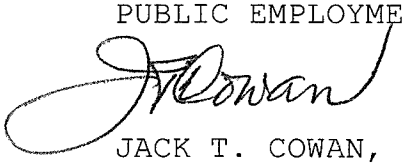
2. Notify International Association of Fire Fighters, Local 182, in writing, within 20 days following the date of this order, as to what steps have been

taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

3. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

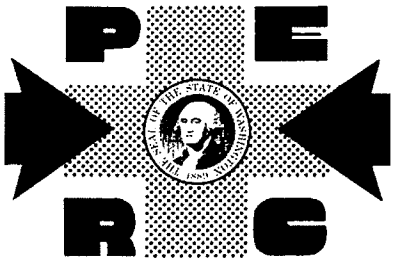
Issued at Olympia, Washington, this 3rd day of August, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JACK T. COWAN, Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE WILL NOT refuse to provide information requested by the certified bargaining representative of our employees, when that information relates to effects on wages, hours or working conditions of those employees.

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

DATED: _____

CITY OF PULLMAN

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone (360) 753-3444.