Spokane International Airport, Decision 7889 (PECB, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE INTERNATIONAL AIRPORT, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1789, Respondent.	)	CASE 16122-U-01-4115 DECISION 7889 - PECB CASE 16123-U-01-4116 DECISION 7890 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On November 29, 2001, the Spokane International Airport (employer) filed two unfair labor practice complaints with the Commission under Chapter 391-45 WAC, naming International Association of Fire Fighters, Local 1789 (union) as the respondent. Both complaints arise out of the parties' negotiations for a successor contract to replace an expired collective bargaining agreement, where interest arbitration had been initiated under RCW 41.56.430 through .490.

On December 11, 2001, the union filed a motion for summary judgment on both complaints, alleging they were untimely.

On December 13, the Executive Director denied the union's motion for summary judgment, issued preliminary rulings under WAC 391-45-110, and suspended interest arbitration proceedings pending the outcome of the unfair labor practices complaints. In Case 16122-U-

01-4115, the Executive Director found a cause of action to exist on allegations summarized as follows:

> Union refusal to bargain in violation of RCW 41.56.150(4), [and derivative "interference" in violation of RCW 41.56.150(1)], by advancing proposals to interest arbitration on: 1) new article - communcations; 2) Article XX - Training and Safety; 3) Article XXIII - Department Rules and Regulations; and 4) Memorandum of Understanding - 12/2/99 Supplemental Agreement, which are alleged to be non-mandatory subjects of bargaining.

In Case 16123-U-01-4116, the Executive Director found a cause of action to exist on allegations summarized as follows:

> Union refusal to bargain in violation of RCW 41.56.150(4), [and derivative "interference" in violation of RCW 41.56.150(1)], by advancing proposals to interest arbitration on: 1) Article XXI - Staffing; and 2) Memorandum of Understanding - Staffing, which are alleged to be non-mandatory subjects of bargaining.

The union filed separate answers to those complaints on December 27, 2001.

On February 13, 2002, the union filed a motion for partial summary judgment, asserting that the employer had not objected to the "training and safety," "rules and regulations," and "supplemental agreement" during bilateral negotiations or in mediation, and urging that the employer should not be permitted to do so through an unfair labor practice complaint blocking interest arbitration. The employer submitted an opposition brief on February 26, 2002.[1]

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[1] A ruling on the union's motion for partial summary judgment was not made prior to or at the hearing. That subject is incorporated into this decision.

The matters were consolidated for a hearing held on May 13, 2002, before Examiner J. Martin Smith. The parties filed briefs.

Based on the evidence in the record and the arguments advanced by the parties, the Examiner rules: (1) The union's motion for partial summary judgment is DENIED; (2) the union's proposals on "communications," "training and safety," and the "supplemental agreement" are found to be permissive subjects of bargaining, so that the union was not entitled to pursue them to interest arbitration; and (3) the employer did not produce sufficient evidence to establish that the union's proposals on "rules and regulations" and "staffing" are permissive subjects of bargaining, so that the union was and remains entitled to pursue those proposals through the statutory interest arbitration process. The complaints are dismissed or sustained, accordingly.

BACKGROUND

This employer has been operating a commercial airport facility since 1962, under an agreement between Spokane County and the City of Spokane.[2] Chapter 14.08 RCW provides statutory authority for airport operations.

The Airport Fire Department

Chapter 14.08 RCW authorizes, but does not direct, airports to maintain fire departments. Federal Aviation Regulation (FAR) 139 sets forth the Federal Aviation Administration (FAA) requirements for airport fire fighting procedures. The FAR 139 standard for

[2] An amendment of that agreement in 1990 has no bearing on this case.

"Index C" airports such as the facility operated by this employer requires that the employer have two fire trucks respond to the center of the airfield runway (one within three minutes and the other within four minutes) in the event of an airliner crash.

The Washington National Guard provided fire control services at the Spokane airport into the 1970's. This employer thereafter established its own fire department, with a primary mission of responding to aircraft emergencies on the airport runways and ensuring the Airport maintains its FAR 139 certification. The employer has mutual aid agreements with the City of Spokane, the United States Air Force, and Spokane County Fire District 10. The employer believes that Fire District 10 is responsible for emergencies within the airport boundaries, other than for calls involving aircraft emergencies on the runways.

There has never been a commercial airliner disaster at the Spokane airport. There have been several general aviation crashes, although the most recent one on airport property occurred in 1992. Operations at the airport decreased between 1992 and 2002. There were no fire incidents involving aircraft between 1997 and 2001. Fire incidents at the airport averaged approximately one per month between 1997 and 2001.

The parties have fundamentally different views of the scope of responsibility of the airport fire department. Although the employer acknowledges that its fire fighters would respond to a structure fire at the airport, it believes that its personnel should withdraw once Fire District 10 and the other mutual aid forces arrive and set up a unified command. The union avers that, in addition to preparing for and responding to aircraft emergencies on the runways, airport fire fighters have responded to aircraft emergencies outside runway areas and even outside the airport

boundaries, that the airport fire fighters have significant responsibilities for fighting structural fires on the airport property, and that the airport fire fighters perform emergency medical services at the airport.

The Disputed Negotiations

The matters at issue in this unfair labor practice proceeding were discussed during the recent collective bargaining negotiations between the parties:

- The union sought to continue existing contract language concerning minimum staffing, and asserted that maintaining a level of five to seven fire fighters per shift is directly related to safety;
- The union proposed that the employer join (and pay the costs for services provided by) the Spokane Consolidated Communication Center (SCCC), which provides dispatching services for other emergency services providers in Spokane County;
- The union proposed that the employer make certain additional concessions regarding communications coverage and equipment;
- The union proposed changes in training and safety provisions of the parties' contract, and the inclusion of structure fires in the training regimen;
- The union proposed to strengthen limitations on changes of rules and regulations during the term of the contract, and resisted employer-proposed changes of the contract language on that subject; and
- The union demanded that the parties' successor contract include a supplemental agreement dated December 2, 1999, in which the parties had addressed concerns about "joint or

supplemental performance of bargaining unit work" by other fire departments.

Following a period of negotiations, the parties participated in mediation under the auspices of a member of the Commission staff. Acting on the recommendation of the assigned mediator, the Executive Director of the Commission initiated interest arbitration by a letter issued on May 29, 2001.

DISCUSSION

The Duty to Bargain

The ultimate issues in these cases concern whether the union committed unfair labor practices by bargaining to impasse on non-mandatory subjects or, conversely, whether the employer had a duty to bargain the topics at issue. As parties to a collective bargaining relationship regulated by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, these parties have a duty to bargain with regard to employee wages, hours, and working conditions. RCW 41.56.030(4).

The determination as to whether and when a duty to bargain exists is a question of law and fact for the Commission to decide. WAC 391-45-550. *See also City of Centralia,* Decision 5282-A (PECB, 1996); *City of Spokane,* Decision 4746 (PECB, 1994); *Spokane County Fire District 9,* Decision 3661-A (PECB, 1991).

The Supreme Court of the State of Washington ruled on the duty to bargain in *Fire Fighters Local 1052 v. PERC,* 113 Wn.2d 197 (1989), where a union representing fire fighters demanded that the City of Richland negotiate over minimum staffing levels for equipment

responding to emergency calls, citing safety concerns as the motivating factor for the proposal. In holding that union had a right (and that employer had a duty) to bargain the minimum staffing of equipment, the Court discussed the duty to bargain in general, as well as specific issues related to staffing:

> The scope of mandatory bargaining is . . . limited to matters of direct concern to employees. Managerial decisions that only remotely affect 'personnel matters', are classified as nonmandatory subjects.
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> *Local 1052, supra* (citations omitted).

The Court ratified the Commission's practice of making case-by-case determinations on scope of bargaining issues, applying the facts of the particular case.

> PERC's policy of case-by-case adjudication of scope-of-bargaining issues permits application of the balancing approach most courts and labor boards generally apply to such issues. On one side of the balance is the relationship the subject bears to 'wages, hours and working conditions'. On the other side is the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates.
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> *Local 1052, supra* (citations omitted).

The Court noted that workload and safety are conditions of employment, and thus mandatory subjects of bargaining. *Local 1052, supra*.

The focus of these parties on the scope of bargaining stems from a decision of our Supreme Court which limited the statutory

interest arbitration process to the so-called "mandatory subjects" of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338 (1986).

The Motion for Partial Summary Judgment

The union's motion for partial summary judgment concerns only the "training and safety," "rules and regulations," and "supplemental agreement" issues framed by the preliminary rulings in these cases. The standard for summary judgment in Commission proceedings is set forth in WAC 10-08-135, as follows:

> A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In this case, the "law" underlying the union's motion is rooted in both Commission precedent and the Commission's rules.

The Requirement to Communicate -

A party claiming that a proposal advanced in collective bargaining is not a mandatory subject of bargaining must communicate its concerns to the other party during bilateral negotiations and/or during mediation. WAC 391-55-265(1)(a). The Commission will dismiss unfair labor practice charges alleging unlawful pursuit of permissive subjects in interest arbitration unless the complaint alleges that the charging party called the claimed "scope" defect to the attention of the proponent in negotiations and/or mediation. *King County Fire District 39,* Decision 2328 (PECB, 1985).

The union contends, and the employer agrees, that the parties' negotiation notes do not clearly indicate that the employer put the

union on notice it considered the issues in question as non-mandatory subjects.[3] That is not dispositive, however.

The employer asserts that it made it "abundantly clear" to the mediator that it considered the topics at issue in these cases to be non-mandatory subjects of bargaining. The union contends that it heard no such message from the mediator, and that it remained unaware throughout mediation that the employer considered the "training and safety," "rules and regulations," and "supplemental agreement" issues to be non-mandatory subjects. Thus, the question is whether the employer, in opposing summary judgment, has raised an issue of material fact in asserting that it presented its protests to the mediator. The union must prevail on its motion unless there is a credible allegation that the employer raised its objections about the three issues to the mediator.

The Impediment of Mediator Confidentiality -
The most obvious solution to the problem presented in this case is not available to either party. The Washington Administrative Code makes this clear:

> WAC 391-08-810 AGENCY RECORDS - CONFIDENTIALITY.
>
> . . . .
>
> (2) In order to respect the confidential nature of mediation, the agency shall not permit the disclosure of notes and memoranda made by any member of the commission or its staff as a recording of communications made or received while acting in the capacity of a mediator between the parties to a labor dispute.
>
> . . . .

[3] Both sides took extensive notes during negotiations. The union tape-recorded the proceedings; the employer had a note taker. The parties transcribed their notes and traded them.

> WAC 391-55-090 CONFIDENTIAL NATURE OF MEDIATION. Mediation meetings shall not be open to the public. Confidential information acquired by a mediator shall not be disclosed to others outside the mediation process for any purpose, and a mediator shall not give testimony about the mediation in any legal or administrative procedure.

In the same vein, WAC 391-08-310(2) precludes parties from using the power of subpoena to call a mediator as a witness.

The cited protection of confidentiality is in harmony with statutes regulating the mediation process outside of the collective bargaining setting. As noted in *City of Lynnwood*, Decision 7637 (PECB, 2002), RCW 5.60.070 protects the confidentiality of mediation:

> If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then the communications made or the materials submitted in, or in connection with the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding.

Responding to timely objections during the hearing in that case, the Examiner in *City of Lynnwood* excluded testimony about conversations between a mediator and employer representatives when the union was not present. That Examiner then rejected a request that he retract that ruling, stating in his decision:

> [T]he employer has not shown any basis for it to have believed it could rely on its ex parte conversation with the mediator. Just as RCW 5.60.030 prevents testimony about conversations with somebody that cannot be called as a

> witness, it is appropriate to exclude testimony concerning statements made by or to a mediator who cannot be called as a witness. The union interposed a timely objection each and every time the employer attempted to introduce testimony about the private conversations between the mediator and the employer's representative. That testimony was properly excluded from the record in this proceeding.

City of Lynnwood, supra.

In the present case, the record already includes testimony about the ex parte communications between the employer and the mediator. Concerning the employer's view of the non-mandatory nature of the contract articles in question, that testimony was:

> Q. [By Mr. Hollingsworth] Did you communicate at any point in the arbitration - in the negotiations or mediation the view that these articles were non mandatory?
>
> A. [By Mr. Jucht] Yes, we made it abundantly clear to the mediator what our position was on all of the articles.
>
> Q. Do you know whether the mediator passed that on or not?
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> A. I don't know exactly what he told the other parties.

Transcript 67-68.

Beyond failing to assert a timely objection, the union proceeded to cross-examine the employer's witness:

> Q. [By Mr. Skalbania] Let me ask you - maybe I can break it down. Sounds like your contention is that you notified the PERC mediator during the mediation process about a couple - wouldn't you agree that to the extent there was any notification by the airport of concerns about the permissive nature of a couple of these issues that that notification was

> only made through the mediator during the PERC mediation proceedings, is that correct?
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> A. [By Mr. Jucht] Right. There were several things that we felt were implied in the minutes. And after going through these it was not abundantly clear on I believe the last four issues as far as whether they're mandatory so that's why we made it abundantly clear to the mediator.
>
> Q. And you're not contending that anyone from Local 1789 was present at the time you were doing that, are you?
>
> A. That's correct.

Transcript 70-71.

Applying the principles applied in *City of Lynnwood*, the testimony of the employer official is part of the evidentiary record in this case in the absence of either a timely objection or motion to strike the testimony. That testimony raised a material question of fact about whether the employer reasonably relied upon its ex parte communications with the mediator, so that the union's motion for partial summary judgment must fail.

Application of Standards

At the hearing in these proceedings, there was no significant testimony concerning the union's reason for proposing the amendments to the contract language concerning "training and safety," for opposing the employer's proposed change concerning the "rules and regulations" language, or for including the "supplemental agreement" in the new contract. Thus, analysis and conclusions must be based on the exhibits which were admitted in evidence.

The "Scope of Operation" Debate -

Prior to applying the precedents on "scope of bargaining" to the specific proposals at issue in this case, it is appropriate to

comment upon the parties' differing views of the mission of the airport fire department. The record makes it clear that the employer and union have different views concerning that matter:

- The employer has a narrow view of the mission, based on the narrow focus of FAR 139 on commercial airliner crashes, and it notes that the FAA only requires it to provide a fire suppression force sufficient to respond to the center of the runways with a minimum amount of equipment within a specific amount of time. In the context that the employer need not maintain its own fire department (but has the option of doing so), the employer sees a role for its department that does not encompass general fire suppression or emergency duties at the airport, and it sees Fire District 10 as being the primary responder for general fires and emergencies.

- The union envisions a significantly broader mission for the airport fire department. It sees the bargaining unit employees as the primary fire fighting force for the airport, with Fire District 10 and other agencies as no more than supplementary forces at the airport (and even as competitors in fire suppression aircraft emergencies on property adjacent to the airport).

Decisions about the mission and scope of the airport fire department are clearly a management prerogative. Even if it could provide a broader range of work opportunities to the employees it represents, the union is not in a position to enlist the Commission or an interest arbitrator as allies in its desire to broaden the work jurisdiction of the airport fire fighters.

The "Training and Safety" Proposals -

This debate in bargaining flows directly from the mission of the department. The parties' contract contained Article XX, titled "Training and Safety." The union proposed the following addition:

> All buildings set for demolition on Airport property shall be released to the Airport Fire Department for training purposes. If structures are deemed stable for live burn evolution's, [sic] the Airport Fire Department will lead agency [sic] in conducting live fire drills in accordance with NFPA 1403 standards.

The union's intent was to use surplus buildings for training the airport fire fighters on how to extinguish structure fires.

On October 6, 2000, the union proposed to retain the previous contract language with the following addition:

> [A]dditional language stating that prior to any future training taking place with other fire departments, SOP's will be developed by the SIA Fire Dept. clarifying that, should bargaining unit members choose to participate in such training, they will do so under the direction of their own supervisors and they will have at least as much input into the training evolutions that are performed as the other departments who are participating in the training. Any such SOP that is developed will be subject to the collective bargaining process.

The union has apparently abandoned its proposal that the employer turn over any airport buildings scheduled for demolition.
Any decision by the employer to dispose of (or to not dispose of) a capital asset such as buildings on its property is clearly within management's prerogative. The union presented no evidence detailing any connection between its demand concerning surplus buildings and the wages, hours, and working conditions of bargaining unit employees. The same analysis applies to the language proposed in paragraph 10 of the union's October 6, 2000, package. Without any evidence to challenge that management prerogative, it is impossible to apply the balancing test referred to by the Supreme Court in *Local 1052*. Thus, the Examiner's conclusion must

be that the union's training and safety proposals involve a permissive subject of bargaining, and hence cannot be pursued to impasse under RCW 41.56.450.

The "Communications" Proposals -

The union's proposals on communications also appear to flow from wishful thinking about the mission and scope of the airport fire fighting workforce. Its initial proposals in the recent negotiations included the following:

> SPOKANE COUNTY COMBINED COMMUNICATIONS CENTER
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> The Employer will become a full member of the Spokane County Combined Communications Center (the SCCC Center) within two weeks after the execution date of this Agreement and will continue to maintain its full membership in the Center thereafter. Once the Employer has become a member of the SCCC Center, the Airport Dispatch Center will utilize the services of the SCCC Center on each occasion when it is dispatching bargaining unit members to calls. The parties hereby agree that utilization of the services of the SCCC Center is essential in ensuring that a safe working environment is maintained for bargaining unit members.

Even if the use of SCCC dispatching might be apt for a fire fighting force providing responses to the full range of calls envisioned by the union, the need for SCCC dispatching to FAR 139 emergencies is not evident. The employer argues that the union committed an unfair labor practice by insisting upon a continuing obligation of the employer to become a participant in the SCCC, to the exclusion of all other communication systems. The union concedes that the employer raised the issue of communications not being a mandatory subject of collective bargaining.

The package proposal submitted by the union on October 6, 2000, included the following:

> 14. Memorandum of Understanding to be incorporated into the parties' CBA in which the Airport agrees that: 1) within 60 days of ratification, it will identify all dead spots and seek approval on South Frequency; and 2)if communications problems continue to exist beyond 6 months after having a ratified CBA, the employer shall begin evaluating different and intrinsically safe radios for purchase. 3) That the Airport Fire department shall have an in station SCCC paging system to notify fire fighters about all responses in the same manner as other fire departments using the SCCC.

The union provided testimony explaining that it modified its original demand regarding joining the SCCC, submitting only paragraph 14 in its final package of October 6, 2000. The union witnesses further testified that the employer installed a repeater and an in-station paging system, and had made a good faith effort to address some of the union's concerns over communications. On cross-examination, however, the union witnesses stated ongoing concern regarding lack of membership in the SCCC, and stated a belief that SCCC dispatchers will not treat the airport fire department as a primary responder for the purposes of upgrades in fire fighting equipment, preferring to deal with its members on those issues. Based on this, the union contends the department is not seen as a "legitimate" fire department, and the communications issue continued to simmer notwithstanding the union's concession that its initial proposal was not a mandatory subject of bargaining.

The union's concerns about "legitimacy" emanated from the experience of a union witness. There was no independent evidence that his concerns reflected any SCCC policy. The union presented some testimony indicating a belief that the communications issue is related to the safety and efficiency of the department, but even

that assessment by employees is weakened by the union's acknowledgment that the employer has addressed the union's more serious concerns about communications. There was no testimony regarding the necessity of new radios or the six month review, or the connection of those items to employee working conditions.

Prior to applying the balancing test, it is necessary to examine the facts presented to determine whether the union established a connection between the communications issue and working conditions as they relate to worker safety. The positions of the parties on this issue are unclear. The union did not present or proffer specific evidence relating its communications proposals to employee safety; the employer based its complaint on the fact that the union's demand concerning joining the SCCC was included in the union's final package proposal of October 6, 2000, as well as a letter of understanding regarding installing a repeater and the possible replacement of radios (paragraph 14 of the package proposal). Yet, the union's package proposal refers only to the memorandum of understanding, and does not reference the demand to join the SCCC. Nothing is shown that the union has withdrawn this demand. The employer could reasonably have concluded that the union's earlier proposals were withdrawn, and that a new proposal on radio communications had been substituted. In the absence of an explicit withdrawal or amendment of the union's original demand,[4] when considering the communications issue the employer could reasonably have believed that paragraph 14 was *in addition to* the demand to join the SCCC. Any continued pursuit by the union of the proposals on communications would also conflict with the testimony of its witnesses that its concerns have been addressed.

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[4] Important for purposes of this analysis is that the package proposal specifically agreed to "current language" for rules and regulations (paragraph 3), staffing (paragraph 4), and training and safety (paragraph 10).

The union's main contention was that lack of membership by the employer in the SCCC could result in the SCCC being unwilling to grant upgrades in fire suppression response directly to the department, and this potentially leaves the department in the position of not having the equipment and personnel necessary to deal with a major emergency. There was no evidence that this is the policy of the SCCC. The union cited one incident where an upgrade had been denied the department by the SCCC based upon the employer's non-member status, but further testimony revealed the upgrade had come through the response of Fire District 10. This testimony would be relevant if the union continued to demand that the employer join the SCCC, but it apparently no longer does. This position came as a surprise to the employer, which came to the hearing prepared to defend against the demand to join. If the union retains all or part of its demand regarding paragraph 14 of its package proposal of October 6, 2000, it has refuted its position by its own testimony and failed to make its case, specifically by its admissions that the employer has addressed its main issues, as well as its failure to provide evidence concerning the need for a review and purchase of radios as a working condition. Therefore, the communications issue is a permissive subject of bargaining.

The "Minimum Staffing" Issue -
The staffing level maintained by the employer since at least 1985 has been between five and seven fire fighters on duty. Since 1997, the parties' collective bargaining agreement has contained the following provision in Article XXI:

> Department Staffing
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> A minimum of five fire fighting personnel shall be maintained on duty each shift, and ordinarily a minimum of seven shall be scheduled on each shift. If sufficient fire fight-

> ing personnel are not available to meet minimum staffing requirements, employees will be recalled on overtime or held over. The parties agree that the minimum staffing levels provided for in this Article shall be maintained for the term of this Agreement, unless a reduction in the Airport's index requires a reduction in staffing. In that event, the parties agree that staffing will not be reduced until the parties have bargained pursuant to RCW 41.56 concerning any effects.

The fact that these parties have negotiated about minimum staffing in the past does not convert that subject into a mandatory subject of collective bargaining. WAC 391-45-550.

The employer proposed elimination of Article XXI from the parties' contract. The union proposed to change the first sentence to read, "A minimum of five fire fighting personnel shall be maintained on duty on each shift, and a minimum of seven fire fighters shall be scheduled on each shift." The union later offered to retain the current contract language on this article.[5]

In *Local 1052* the court discussed staffing as related to the scope of bargaining:

> When staffing levels have a demonstratedly direct relationship to employee workload and safety, however, we believe that, under appropriate circumstances, requiring an employer to bargain over them will achieve the balance of public, employer and union interests that best furthers the purposes of the public employment collective bargaining laws. . . . "[T]he size of the crew might well affect the safety of the employees and would therefore constitute a

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[5] It is clear that the employer told the union during negotiations that it considered shift staffing to be a non-mandatory subject of bargaining.

> working condition, within the meaning of RCW 41.56.030(4) defining collective bargaining."

Local 1052, supra (quoting *Everett v. Fire Fighters, Local 350,* 87 Wn.2d 572 (1976))(other citations omitted).

The court distinguished between "departmental and shift staffing levels on the one hand, and equipment staffing levels on the other." The Court acknowledged that "general staffing levels are fundamental prerogatives of management" but that "equipment staffing is not so importantly reserved to the prerogative of management." The Court cited with approval the Commission's decision in *City of Yakima,* Decision 1130 (PECB, 1981), "Whether a community will have a large police force, a small one, or none at all, is a very basic managerial decision which ultimately must be determined by the voting public through its elected representatives." *Local 1052 supra*, (quoting *Yakima, supra*). The Court also applied the distinction between shift and equipment staffing to *Yakima,* stating it was a shift staffing case and did not reach conclusions on equipment staffing. *Local 1052, supra*.

The facts of the case in *Local 1052* involved a union proposal that the City of Richland ensure minimum staffing for each of four pieces of fire fighting equipment, which the union asserted were minimums directly related to safety. The Court held that, when balancing management prerogatives against worker safety, the balance tips in favor of safety regarding equipment staffing, making it a working condition and thus a mandatory subject of bargaining. Subsequent Commission decisions have continued to apply the balancing test and to reflect the "shift" versus "equipment" distinction:

- In *City of Spokane*, the union believed it had an agreement with the fire chief that would maintain a general staffing level of 69 fire suppression personnel. When that employer

proposed a level below 69, the union filed an unfair labor practice complaint alleging that the staffing issue was related to worker safety. The Examiner in that case found the record did not show the union had consistently raised safety concerns regarding the employer's staffing decisions, and that the evidence instead supported that employer's contention that it was allocating scarce resources and the union's actual concern was over the wisdom of the employer's decision. The dismissal of the unfair labor practice complaint in *City of Spokane* thus illustrates the principle that general staffing levels are within management prerogatives and ultimately a matter for the voters to decide, not for a union or the Commission to control.

- In *City of Centralia*, the employer instituted a contingency plan for reducing some shifts from three fire fighters to two. This was seen as a labor-saving move, and that employer entered into agreements with neighboring jurisdictions to supply help as needed. The union in that case asserted that the two-fire fighter shifts constituted a unilateral change in the status quo, as well as a safety issue, and requested bargaining. The Examiner in that case ruled in favor of the employer, but the Commission wrote:

> [That] the employer's reduction of its staffing level to save labor costs affected both equipment staffing and shift staffing, that the staffing levels have a direct relationship to employee workload and safety and that the union's interest in employee safety, workload and pay is stronger than the employer's prerogative in establishing the staffing level of its fire department, so that the employer's staffing decision is a mandatory subject of bargaining under RCW 41.56.030(4).

City of Centralia, Decision 5282-A (PECB, 1996).

The Commission thus reversed the Examiner decision in that case and ruled that the employer committed an unfair labor practice.

Thus, the question presented in this case involving two airport crash/rescue trucks that must arrive at the center of the runway within a minute of one another concerns "shift staffing" under *Local 1052* or presents a "safety" issue justifying expansion of the "one truck operation" circumstances noted in *Centralia*.

The airport fire fighters use specialized vehicles designed for fighting aircraft fires, and do not utilize the type of apparatus (pumper trucks) generally used for fire fighting in residential and commercial areas.[6] The airport fire fighters must undergo Aircraft Rescue and Fire Fighting (ARFF) training. There was testimony that FAA regulations make air crews responsible for evacuations, and do not require ARFF fire fighters to enter burning airplanes. Among the relatively few occasions when they have occurred, aircraft emergencies have mostly come with advance warning. The vast majority of calls responded to by the airport fire fighters are for emergency medical services. While those general facts conform to the employer's narrow view of the mission of the airport fire department, the analysis cannot end there.

The role of Fire District 10 in relation to the airport was the subject of substantial testimony provided by the parties. The employer provided testimony that the response time for District 10 to get to the airport is six minutes, while the union provided testimony that the response time was closer to eight or nine

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[6] In fact, a pumper truck formerly owned and used by the airport fire department is now over at District 10.

minutes.[7] Employer witnesses stated that the employer relies on District 10 as the primary responder to airport fires other than aircraft incidents, even if the airport fire fighters are the first to arrive at the scene. The evidence indicates that District 10 only has full-time fire fighters at one station, and is otherwise staffed by volunteers. Many of the volunteers live outside the district. Different from the ARFF training, fire fighting in residential and commercial structures may require entry into burning buildings to rescue occupants. The record does not establish how many District 10 fire fighters (if any) have ARFF training, but it is clear that the airport fire fighters and District 10 fire fighters have not trained together. Although these facts tend to confirm that the airport fire fighters are out of their element in dealing with structure fires, they generally support a conclusion that the airport fire fighters are largely on their own when it comes to the aircraft emergencies under FAR 139.

The potential for a major disaster was the subject of extensive discussion during parties' recent negotiations. The union presented scenarios theorizing a crash of a Boeing 737 passenger aircraft. It was the union's contention that those scenarios demonstrated the current staffing level was the minimum necessary to ensure fire fighter safety. At the hearing in this matter, the union also provided testimony that the Airline Pilots Association and the International Civil Aviation Organization recommend a minimum of seven fire fighters responding to an airliner crash. The union provided testimony that eight fire fighters responding is

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[7] The response time for other mutual aid providers is clearly greater than the response time for District 10. The closest City of Spokane fire station is over eight minutes from the airport. The response time from Fairchild Air Force Base may be as long as 25 to 30 minutes.

the preferred number for safety, that seven is acceptable, that five is marginal (because there would be no back-up team), and that the lives would be endangered if only four fire fighters respond.[8] Citing concern for the safety of its members, the union states that the issue is not how many emergency incidents there might have been at the airport, but whether the airport fire department would be prepared if an emergency within its announced "mission" were to occur. The union thus urges that its insistence upon retaining the status quo with regard to staffing is directly related to that contingency. At the hearing in this matter, the employer acknowledged that the union's intent in proposing the scenarios was based on safety issues. Transcript 76. The employer did not agree that the scenarios presented actual safety concerns.

A major defect with the union's approach is that its evidence centered on the fact that crews from Fire District 10, the City of Spokane Fire Department, and Fairchild Air Force Base could not respond within the three to four minutes called for by FAR 139 regulations in the event of a commercial airliner crash. In addition, the union emphasized the special training required for fighting such fires, training only the department can bring to bear within the allotted time. The union also gave evidence of scenarios of commercial airliner crashes it presented to the employer detailing the need for at least the five to seven fire fighters for the two required pieces of equipment, and cited Labor and Industry safety standards for fire fighters, explaining that

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[8] The union cited Chapter 296-305 WAC, as requiring that fire fighters work in crews of two at a minimum, with a minimum of two crews responding (referred to as the "two-in, two-out" rule). The relevance of Chapter 296-305 is not clear, in light of: 1) the conclusion that the employer can establish a mission which does not include fighting structure fires; and 2) the fact that ARFF personnel are not required to enter burning aircraft.

the "two-in, two-out" rule, plus need for an incident commander, demonstrates that a five fire fighter response is the minimum, that seven or eight is preferred, and that four would be disastrous. Thus, the union's argument centered on its unique ability to respond to airliner crashes.

The employer clearly can determine how many fire fighters it employs, or whether it will maintain its own department at all. If the union's argument was that the five to seven minimum per shift is necessary to be able to respond to possible commercial airliner crashes *as well as* general fire emergencies at the airport, then it would be encroaching on the prerogative of management to define the department's role. The employer can, if it chooses, limit the department's mission solely to the response to the center of the airfield required by the FAA.

The issue then becomes, is it within the employer's prerogative to set the minimum number of fire fighters on each shift who would respond to the center of the airfield? Here the discussion turns to the relationship between shift staffing and equipment staffing. That is, would a shift level of less than five impact the safety of a crew responding to a crash, because the two pieces of equipment necessary would not be adequately staffed? Curiously, the employer did not respond to the union's scenarios with its own expert testimony, saying only that it disagreed with them. While the employer provided abundant testimony concerning its inter-local agreements with other departments to respond to fires at the airport, in doing so it effectively demonstrated that only its department can respond with the required equipment in the required time to the employer's primary fire suppression mission — a commercial airliner crash, since the employer's testimony was that District 10's quickest response time is six minutes, or between twice and one-third again the response required by the FAA.

The only testimony the employer provided to refute the union's claim that minimum equipment staffing is related to safety was that there has never been a commercial airplane crash in the forty years the airport has operated. This argument begs the question. The FAA requires two pieces of equipment ready to respond within three to four minutes to an airliner crash, *regardless of whether an airport has ever had such an incident*. The decisive inquiry must be the appropriate level of staffing for those two pieces of equipment. The union had an experienced fire fighter, who also teaches fire science, testify that the minimum number is five, making the telling point that the issue is not the number of incidents that is important, but whether the department is prepared to respond to an airliner disaster if one occurs. The union presented evidence that five to seven fire fighters are necessary to safely staff the equipment responding to the center of the runway. The employer presented no persuasive argument to the contrary. The record shows that the union's concern with minimum staffing is over equipment staffing as it relates to worker safety, a mandatory subject of bargaining. In balancing the arguments, the employer's desire to calculate the odds that an airliner crash will not happen while a shift is arguably understaffed is outweighed by the union's concerns over the safety of those fire fighters on duty when and if disaster strikes. In other words, the employer may indulge in risk management analysis at its pleasure, but must bargain the effects of that analysis when it comes to equipment staffing levels that arguably impact worker safety.

<u>The "Rules and Regulations" Proposal</u> -

The union proposed adding language to existing Article XXIII, Department Rules and Regulations, as follows:

> No new Rules and Regulations shall be implemented after posting until the affects [sic] have been bargained in accordance with the

> Collective Bargaining laws of the State of Washington. Rules and Regulations inconsistent with the law or deemed unlawful shall be dismissed and are unenforceable.

The employer proposed elimination of the following stand-alone sentence: "Working conditions not specifically addressed in this Agreement shall remain unchanged or affected unless changed by mutual consent."[9] In its package proposal of October 6, 2000, paragraph 3, the union offered to retain current contract language, stating it did not believe the sentence had ever referred to mandatory subjects, but that as part of its package it would stipulate that it did not. There was no testimony offered by either party on this issue.

The employer apparently believes it need not agree to bargain non-mandatory subjects. Of course, the employer, should it decline to negotiate issues it considers permissive subjects of bargaining, would do so at its peril. The union could file unfair labor practices charges, and a review could demonstrate the subjects to be mandatory. Thus, it seems unnecessary to state the obvious in the contract and object to impasse the employer's intent to eliminate the sentence. On the other hand, the employer could reasonably fear that by leaving the sentence in it is agreeing to bargain all subjects, whether mandatory or permissive. Yet, the sentence does refer to "working conditions." Working conditions are subject to mandatory bargaining. The union could reasonably fear that the removal of the sentence could be considered a waiver

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[9] Such a clause is often referred to as a "maintenance of standards" or "prevailing rights" clause. It is commonly raised as an issue by a labor organization who is replacing a predecessor union and seeks to retain whatever benefits had been allowed in prior agreements. That of course is not the case here.

of its right to bargain those working conditions not enumerated in the contract.

The real issue here might be an eventual argument over whether the particular "working conditions not specifically addressed in this Agreement" are working conditions or something else. It is impossible to arrive at a conclusion based on such an abstraction combined with no testimony and little supporting evidence. On balance, the employer has not demonstrated why the "working conditions" referred to in the sentence at hand are not mandatory subjects and why the union should not legitimately seek to negotiate this, even to impasse.

The "Supplemental Agreement" Proposal -
The parties had entered into a supplemental agreement on December 2, 1999, which provided in pertinent part:

> The Department agrees to provide notice to the Union at least sixty (60) days prior to implementing an agreement with any other fire department or fire district which provides for joint or supplemental performance of bargaining unit work. The notice shall include a copy of the agreement, and the effective date of the agreement. The Union will review the agreement and determine whether there are any effects on the wages, hours and working conditions of the Union members. If the Union so requests within thirty (30) days of receiving notice of the agreement from the department, the Department will commence bargaining concerning any effects of that agreement on Union members' wages, hours and working conditions (to the extent recognized under RCW 41.56) within ten (10) working days of the Union's request, except the ten (10) working day period may be shortened upon declaration of an emergency by the Spokane Airport Board. The 60-day notice period may be shortened in the event of an emergency, declared by the Spokane Airport Board, making it not reasonably possi-

> ble under the circumstances to provide such notice, in which case the period to commence bargaining at the request of the Union shall be shortened to five (5) working days.

In paragraph 15 of the package proposal it advanced on October 6, the union demanded inclusion of that supplemental agreement in the parties' collective bargaining agreement.

The record is bereft of any evidence establishing a relationship between the supplemental agreement and wages, hours, and working conditions. The contest here seems to be over the requirement of a 60 day notice, rather than the employer's duty to bargain the effects of any inter-local agreements between it and other government agencies. As with the rules and regulations issue, should the employer unilaterally enter into such agreements with arguable effects upon mandatory subjects of bargaining, the union has recourse through unfair labor practices complaints. Yet, again, it is impossible to analyze this topic or apply a balancing test without any evidence. The union has not established this topic to be a mandatory subject.

FINDINGS OF FACT

1. The Spokane International Airport is a public employer within the meaning of RCW 41.56.030(1).

2. The International Association of Fire Fighters, Local 1789, a bargaining representative within the meaning of RCW 41.56.030(1), is the exclusive bargaining representative of non-supervisory fire fighters employed by Spokane International Airport.

3. In order to be certified by the Federal Aviation Administration, the employer must ensure it has two fire trucks ready to respond to the center of the airfield runways within three to four minutes in the event of a commercial airliner crash.

4. Washington law authorizes, but does not require, the employer to operate its own fire department for this purpose; the employer has chosen to maintain its own department.

5. The employer defines the mission of its fire department as primarily the response to the center of the airfield required by the FAA.

6. The parties have a long history of bargaining, and in the fall of 2000 were negotiating a successor to an existing agreement.

7. The union proposed amendments to an existing article on training and safety, providing in pertinent parts that the employer release buildings scheduled for demolition to the union for training purposes, and that the employer bargain certain aspects of any training scheduled between the Airport Fire Department and outside fire departments.

8. The union withdrew its proposal that the employer release buildings for training, but retains its proposal relative to training with other departments.

9. The union bargained this issue to impasse and insists on its inclusion in matters scheduled for interest arbitration.

10. The union provided no evidence connecting its demands with wages, hours, or working conditions.

11. The employer proposed an amendment to an existing article on rules and regulations, demanding in pertinent part the elimination of a sentence requiring negotiations over changes in working conditions not addressed in the contract.

12. The union objected, bargained this issue to impasse, and insists on its inclusion in matters scheduled for interest arbitration.

13. The employer provided no evidence as to why "working conditions" in this context would not be a mandatory subject of bargaining.

14. The union proposed including in the successor contract a supplemental agreement between the parties signed on December 2, 1999, providing in pertinent part for the employer to give the union 60 days notice prior to entering into inter-local fire suppression agreements.

15. The union bargained this issue to impasse and insists on its inclusion in matters scheduled for interest arbitration.

16. The union provided no evidence connecting this demand with wages, hours, or working conditions.

17. The union demanded that the employer join the Spokane County Combined Communications Center; the union provided evidence it has modified its proposal to include only those items set forth in paragraph 14 of its package proposal of October 6, 2000. The notice of modification was made for the first time at the hearing.

18. The union gave evidence that the employer has made a good faith effort to address its communications concerns, but has

not formally withdrawn either its demand that the employer join the SCCC, or paragraph 14 of the package proposal, either in its entirety or in part.

19. The employer reasonably concluded that the union had not withdrawn its demand that the employer join the SCCC.

20. The union did not provide evidence sufficient to connect its communications demands to wages, hours, or working conditions.

21. The employer proposed elimination of an existing article providing for minimum staffing on each shift of between five and seven fire fighters.

22. The union rejected this based on safety concerns and insists the minimum staffing article remain in the contract as is.

23. The union bargained this issue to impasse and insists on its inclusion in matters scheduled for interest arbitration.

24. The union provided substantial evidence establishing this issue as an equipment staffing issue and connecting it with wages, hours, and working conditions.

25. The employer timely filed unfair labor practices claims against the Union on all issues.

26. The union timely filed a partial summary judgment action on three issues: training and safety, rules and regulations, and inclusion of the supplemental agreement.

27. In opposing partial summary judgment, the employer relied upon information given in confidence to a mediator. This informa-

tion is privileged and absent waiver by an opposing party cannot be used in evidence.

28. The union did not object to testimony offered by the employer regarding its ex parte communication with the mediator, did not move to strike said testimony, and cross-examined the employer's witness regarding the employer's communication with the mediator.

CONCLUSIONS OF LAW

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

2. The following issues are permissive subjects of bargaining: the union's proposals on training and safety, the supplemental agreement, and communications.

3. The union committed unfair labor practices by bargaining those issues to impasse and insisting on including them in interest arbitration.

4. The employer did not produce sufficient evidence to establish that the union committed an unfair labor practice by negotiating to impasse the employer's proposal to eliminate existing language on rules and regulations in the current agreement.

5. The existing article on minimum staffing, to the extent it deals with equipment staffing, is connected to wages, hours, and working conditions and is a mandatory subject of bargaining.

6. The union waived objection to testimony concerning the employer's ex parte communications with the mediator.

7. This testimony establishes a material question of fact as to whether the employer should have relied on the mediator to impart its position to the union on the issues of training and safety, rules and regulations, and the supplemental agreement.

ORDER

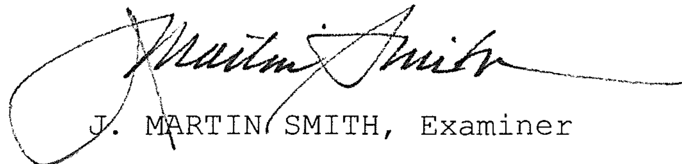
1. The union's motion for partial summary judgment is denied.

2. The union shall withdraw the following from issues certified for interest arbitration: demands regarding training and safety, the supplemental agreement dated December 2, 1999, and communications, including any surviving demands regarding the employer joining the SCCC, or those included in the package proposal of October 6, 2000.

3. The Union may proceed to interest arbitration regarding the retention of the minimum staffing article and rules and regulations.

Issued at Olympia, Washington, the 29th day of October, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, 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.