STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2105, Complainant,	)	CASE 8866-U-90-1945
vs.	)	DECISION 4146 - PECB
PIERCE COUNTY FIRE DISTRICT 3, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Steven N. Ross, Attorney at Law, appeared on behalf of the complainant.

Edwin J. Wheeler, Attorney at Law, appeared on behalf of the respondent.

On October 24, 1990, International Association of Fire Fighters, Local 2105, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Pierce County Fire District 3 had violated RCW 41.56.140(1) and (4), as a result of certain personnel actions. A hearing was held at Olympia, Washington, on October 15, 1991, before Examiner Frederick J. Rosenberry. The parties submitted post-hearing briefs.

BACKGROUND

Pierce County Fire District 3 operates under the policy direction of a three-member board of elected commissioners. Fire Chief Ray A. Van Valkenburg is in charge of daily operations. The employer uses a traditional paramilitary chain of command that passes from the fire chief to the ranks of assistant chief, captain, lieutenant and fire fighter.

The employer recognizes International Association of Fire Fighters, Local 2105, as the exclusive bargaining representative of a bargaining unit composed of fire fighters who are "uniformed personnel" within the meaning of RCW 41.56.030(7). The bargaining relationship predates the events involved in this case. Captain William Bush was actively involved in union affairs as vice-president of the local union in 1989, and as its president in 1990.

The employer and union were parties to a collective bargaining agreement for the period from January 1, 1990 to December 31, 1990, and a successor agreement effective January 1, 1991.

Historically, the employer has operated with an assortment of personnel policies, in addition to the conditions of employment specified in the collective bargaining agreements. Since at least November 9, 1982, the employer has had a personnel policy regarding response time, as follows:

> All new employees will be required to reside within a 10 minute response time to the fire station located at 7909 40th Street West, **as a condition of employment.** New employees will be granted a 6 month grace period to establish residency as required. The purpose of this rule change is to provide some reasonable response time in the event of emergencies that require additional manpower.

[Emphasis by **bold** supplied.]

There is no dispute that the employer has a long-standing policy of expecting its firefighting staff to respond to emergency call-back requests.

In 1988, the employer embarked on a program to update and consolidate its policies and regulations, and to organize them into a manual. In about January, 1989, it hired a consultant, Richard Usitalo, to assist it in developing a comprehensive policy manual.

Captain Bush supported the employer's decision to update its policies and regulations, and he assisted in the project.

On or about May 1, 1989, the employer provided Bush with a copy of the consultant's draft for part of the policy manual. Several personnel matters were addressed in that document.

Bush thereafter met with the department's chief and assistant chief in a series of meetings, to discuss different aspects of the proposed revisions. The record fairly reflects that Bush had a dual role in those meetings, both as a captain in the department's rank structure and as a union representative. The record does not indicate that any other union representatives were involved. Several matters in dispute between the employer and union were resolved in the meetings between Bush and department officials, but conflicting opinions remained between the management and union on a number of matters.

On several different occasions, Bush attended public meetings of the employer's board of commissioners, to address the commissioners regarding the union's interests. The board of commissioners held a special meeting on April 16, 1990, to take up specific concerns raised by the union regarding a number of the proposed changes. Bush attended that meeting on behalf of the union. Some of the matters in dispute were resolved, others were not.

The board of commissioners met again on April 24, 1990. Among other matters, the finalization of revisions to the employer's policies and procedures was discussed at that meeting. The chief pointed out that certain areas were not acceptable to the union, and that further revisions may be necessary. The commissioners then voted to adopt the revised policies and procedures, as drafted up to that time. Immediately following the board's action, the union presented the employer with a letter grieving some of the personnel practices that were adopted. The union suggested, and

the board agreed, to extend grievance processing time limits contained in the parties' collective bargaining agreement for a period of up to six months, to allow additional time to attempt to resolve the disputed matters.[1]

The parties met on several subsequent occasions, to further discuss disputed revisions to the policies and procedures. Some matters were resolved, others were not.

In about June, 1990, the employer directed that staff performance evaluations be conducted pursuant to the recently adopted criteria. In conformity with the chain of command, Captain Bush evaluated the lieutenants and the lieutenants evaluated the fire fighters assigned to their sections. Those performance evaluations were made a part of employee personnel records. Captain Bush evaluated Lieutenant Dan Snope as "does not meet minimum requirements" in the "call-back" category,[2] because of Snope's alleged low frequency of response to emergency call-back requests. Fire fighter James Sharp was evaluated by his lieutenant as "does not meet minimum requirements" in the "call-back" category, also because of alleged low frequency of response to emergency call-back requests.

By a letter signed by Bush under date of October 9, 1990, the union notified the employer that it viewed the commissioners' April 24, 1990 adoption of revised policies and procedures as a unilateral

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1 The union also notified the employer at the April 24, 1990 meeting, that it desired to commence negotiations for a successor collective bargaining agreement to be effective January 1, 1991. The parties subsequently engaged in collective bargaining for that labor agreement concurrent with discussions regarding the proposed revisions to the employer's policies and procedures. Negotiations for a successor collective bargaining agreement were successfully completed.

2 Performance ratings for the different segments evaluated are "does not meet minimum requirements", "needs improvement", "competent", or "exemplary".

implementation. The union implied that the employer's actions were unlawful, and threatened to file unfair labor practice charges unless the employer rescinded 10 components of the policies that were identified in the union's letter.[3]

The board of commissioners convened a special public meeting on October 16, 1990, to review the policies and procedures that it adopted on April 24, 1990, and the union's letter of October 9, 1990. Bush and other members of the bargaining unit attended that meeting. The substance of the union's opposition to the cited matters was explained. Dialogue ensued between the management and union, and several more disputed issues were resolved.

At the conclusion of the October 16, 1990 meeting, three issues remained in dispute, as follows:

1. The union was opposed to the composition of the employer's job descriptions, and specifically to that portion which stated;

> Responds as required to emergency call-back to work for replacement of personnel, alarms and disasters of local to national level.

The union felt that the job descriptions were not comprehensive enough to describe the actual duties required by the employer, and that the call-back requirement was an onerous change that unduly infringed on their personal time. According to the union, the former job descriptions were more complete. The matter remained unresolved.

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[3] The policy manual segments identified by the union at that time addressed promotions, working conditions, firefighter qualifications, employment of staff, employment contracts, sick leave, drug free workplace, use of facilities, code of conduct, and position descriptions.

2. The union also was opposed to a segment of the employer's performance evaluation forms which stated:

> Responds as required to emergency call-back to work for replacement of personnel, alarms and disasters of local to national level.

According to the union, the employer did not have a practice of formally evaluating employee performance in the past. The union was particularly concerned about the performance evaluations conducted the previous June.

3. The union was opposed to that portion of the employer's fire fighter qualifications policy which stated that employees are expected to:

> Reside within a ten (10) minute response time to the fire station, located at 7909 40th Street West, as a condition of employment. New employees will be granted a six (6) month grace period to establish residency.

The union took the position that the 10 minute response time rule was tantamount to an illegal residency requirement.[4] Alternatively, the union contended that a 10 minute response time was not acceptable, even if legal. The employer maintained its position that the response time rule was legal and long-standing, and it declined to modify that policy.

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[4] Title 52 RCW sets forth regulations for the administration of fire protection districts. The statute provides in relevant part:

> RCW 52.30.050 Residency not grounds for discharge of civil service employee. Residence of an employee outside of the limits of a fire protection district is not grounds for discharge of any regularly-appointed civil service employee otherwise qualified.

The parties were unable to resolve the remaining disputed matters. On October 24, 1990, the union filed the instant unfair labor practice charge.

POSITIONS OF THE PARTIES

The union maintains that the employer has unilaterally modified job descriptions, by adding a requirement that employees must respond to emergency call-back requests. The union also claims that the employer has unilaterally commenced to evaluate employee performance regarding response to emergency call-back requests. Further, the union claims that the employer has unilaterally changed its rule requiring residence within a 10-minute response time in two ways: First, by reapplying it after a long period of disregard; and second, by applying the rule to all of the members of the bargaining unit regardless of hire date. As a remedy, the union requests that the employer be directed to rescind the disputed segments of its personnel rules and regulations, and that it be directed to bargain with the union regarding their substance.

The employer maintains that it bargained with the union in good faith regarding all matters raised as part of its endeavor to revise and consolidate its policies and regulations. As evidence of its good faith, the employer points out that it met with the union on several different occasions and granted concessions to many of the union's demands. The employer further maintains that it has had a 10-minute response time rule in place for approximately nine years, that the employees have always been obligated to respond to emergency call-backs, and that neither standard of employment was changed. The employer argues that the substance of the disputed issues is such that it has the prerogative to act unilaterally regarding them. Moreover, according to the employer, it had no obligation to bargain with the union because any such

obligation was waived by the terms of the parties' collective bargaining agreement.

DISCUSSION

The complainant has the burden of proof in an unfair labor practice case. WAC 391-45-270. Where a "unilateral change" is alleged, the complainant has the burden of establishing: (1) That the dispute involves a mandatory subject of collective bargaining; and (2) that there was a decision or effect giving rise to the duty to bargain. Spokane County Fire District 9, Decision 3661-A (PECB, 1991). The burden to establish affirmative defenses to an unfair labor practice complaint lies with the party asserting the defense.

This case presents a number of issues stemming from the adoption of revised rules and regulations by the employer in 1990. The issues raised in this case are not matters of first impression, however. Similar issues have previously been raised before and decided by the Commission.

The Duty to Bargain

These parties have bargaining obligations under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Their duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on **personnel matters, including wages, hours and working conditions**, ... [Emphasis by **bold** supplied.]

The status quo ante must be maintained regarding all wages, hours and conditions of employment, except where such changes are made in

conformity with a collective bargaining obligation or the terms of a collective bargaining agreement. City of Yakima, Decision 3503-A, 3504-A (PECB, 1990), affirmed, 117 Wn.2d 655 (1991).

Chapter 41.56 RCW also specifies the procedure to be followed in the event of a breakdown in collective bargaining involving bargaining units of "uniformed personnel", as follows:

> RCW 41.56.440 UNIFORMED PERSONNEL--NEGOTIATIONS--DECLARATION OF IMPASSE--APPOINTMENT OF MEDIATOR. ... either party may declare that an impasse exists and may submit the dispute to the [Public Employment Relations] [C]ommission for mediation, with or without the concurrence of the other party. ...
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> RCW 41.56.450 UNIFORMED PERSONNEL--INTEREST ARBITRATION PANEL--POWERS AND DUTIES--HEARINGS--FINDINGS AND DETERMINATIONS. If an agreement has not been reached following a reasonable period of negotiations and mediation, and the executive director, upon the recommendation of the assigned mediator, finds that the parties remain at impasse, then an interest arbitration panel shall be created to resolve the dispute. ...
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> ...
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> RCW 41.56.470 UNIFORMED PERSONNEL--ARBITRATION PANEL--RIGHTS OF PARTIES. During the pendency of the proceeding before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other. ...

An employer of "uniformed personnel" is thus prohibited from unilaterally implementing changes in terms and conditions of employment that are mandatory subjects of bargaining, even where an impasse is reached after giving notice and engaging in good faith bargaining. If the parties are unable to resolve their conflict, they must comply with the requirements of the statute, by submitting the dispute to mediation and then proceeding to interest arbitration, if necessary. Change is possible with regard to

mandatory subjects of bargaining for "uniformed personnel", but only as agreed by the parties or as ordered through interest arbitration. City of Seattle, Decision 1667-A (PECB, 1984).

Mandatory Subjects of Bargaining

The potential subjects for discussion between an employer and union are commonly divided among three categories: "Mandatory", "Permissive" and "Illegal". Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958). Mandatory subjects of bargaining are those matters about which an employer is obligated by law to bargain in good faith, upon request, with the exclusive bargaining representative. Permissive subjects are matters of management or union prerogative which do not affect wages, hours, or conditions of employment. The parties may bargain regarding permissive subjects, but are not required by law to do so.

Whether a particular personnel action is a mandatory subject of bargaining is a question of law and fact for the commission to decide. WAC 391-45-550; Kitsap County Fire District 7, Decision 2872-A (PECB, 1989). In Spokane County Fire District 9, Decision 3661-A (PECB, 1992), the Commission set forth two principal considerations in determining whether a duty to bargain exists: (1) The Commission will consider the impact of management's contemplated actions upon the wages, hours or working conditions of the affected employees; and (2) The Commission will consider the extent to which the action is deemed to be an essential management prerogative.

Where an employer's personnel actions concern a managerial decision of the sort that is the core of entrepreneurial control or decisions involving fundamental changes in the scope, nature or direction of the enterprise, rather than labor cost, then there is

no duty to bargain. Spokane County Fire District 9, Decision 2860 (PECB, 1988).

Even if a personnel decision does not require discussion with or concurrence by the union, there is a mandatory duty to bargain any effects of such a decision which have a substantive impact on the wages, hours or conditions of employment of bargaining unit employees. Spokane County Fire District 9, supra.

The 10-Minute Response Time -

The union contends in this case that the employer's "10-minute response time" rule is a mandatory subject of bargaining. The matter of fire fighter response time was extensively addressed by the Commission in Kitsap County Fire District 7, supra, as follows:

> The **residency requirement** [in close proximity], in the case at issue, was imposed because the employer wanted to assure adequate response time to emergencies where a call-out of off-duty personnel was needed. The employer's objective may be worthwhile, but resolution would affect the employees throughout their employment and **was a mandatory subject for collective bargaining.** [Emphasis by **bold** supplied.]

In the case at hand, the employer's desire for the 10-minute response time requirement is motivated by the same considerations discussed in the Kitsap County case. The Commission has already held that such reasonable motivation does not pre-empt the employer's bargaining obligation under the statute. The employer's own rule characterizes this as a "condition of employment". It is clear that the disputed response time rule is a mandatory subject of collective bargaining.[5]

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[5] The question of whether the employer's "10-minute response time" rule violates the letter or spirit of RCW 52.30.050 is not at issue before the Examiner in this proceeding.

The Emergency Call-Back Requirement -

The union contends in this case that the employer's "respond to emergency call-backs" requirement is also a mandatory subject of bargaining. Changes in employees' duties or work hours that effect their terms and conditions of employment are normally regarded as mandatory subjects of bargaining, either directly or because of their impact on the wages to be paid for performing the work. In Seattle School District, Decision 2079-C (PECB, 1986), time allocation standards and shift changes were found to be mandatory subjects of bargaining. In City of Hoquiam, Decision 745 (PECB, 1979), the employer effectively changed the rate of pay for performing particular assignments, by eliminating a position paid at a premium rate and transferring the work to a lower-paid classification.

In the case at hand, there can be no doubt that the policy which the employer desires to enforce has a direct impact on employee hours of work. Employees are **required to respond** to emergency calls during what would otherwise be their leisure time. The requirement to respond is stated as a part of the job duties. There can be no doubt that the employer's requirement that employees respond to emergency call-back requests has a direct impact on employee hours of work and is therefore a mandatory subject of bargaining.

Performance Evaluations -

It is apparent in the case at hand that the frequency of employee responses to call-back requests was not a subject of inquiry under formal employee evaluation procedures prior to the unilateral adoption of the revised personnel rules.[6] After the new policy was

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[6] Even the existence of an "evaluation" procedure is unclear. The employer did not contradict fire fighter Sharp's testimony that employee performance was not evaluated prior to the adoption of the revised policy manual in 1990.

adopted, however, the employer commenced to use employee response to call-backs as a rating factor in evaluating employee performance, and that those performance evaluations became a part of the employer's personnel records.

An employer has an inherent right to evaluate its operations and the performance of its employees. See, City of Seattle, Decision 359 (PECB, 1978), where a union's assertion that the employer was obligated to bargain its decision to conduct performance evaluations was dismissed on the basis that the right to conduct such evaluations "stems from deeply within the management function".

In the case now before the Examiner, the employer has included provision for formal evaluations in its revised personnel policies. Regardless of past circumstances, the standard found in Seattle, supra, is applicable. Notwithstanding the concerns of the fire fighter about potential adverse impacts of a negative performance evaluation, the employer has an inherent right to conduct such evaluations and maintain them in its personnel records. The union's interest in this subject area is limited to such "effects" as may flow from the evaluations, traditionally including the seniority and discipline/discharge provisions of a labor contract.

The Existence of an Occasion for Bargaining

The conclusion that either party could have demanded bargaining on either or both of the particular mandatory subjects involved here during contract negotiations does not resolve this case. During times when there is a collective bargaining agreement in effect, there may be no occasion for bargaining unless one of the parties is proposing to change the status quo.

The Requirement to Respond to Emergency Call-Backs -
The union would have the Examiner find that the employer's adoption, in April of 1990, of a provision in job descriptions that

required employees to respond to emergency call-back requests constituted a change of practice and required concurrence by the union prior to implementation. On the basis of the record made here, the Examiner disagrees.

The employer provides fire protection services, responding to emergencies as they arise. A requirement that its employees respond to emergency call-backs is directly related to that mission. The union acknowledges that this employer has had a long-standing policy requiring its employees to respond to emergency call-back requests. Thus, nothing has changed because of the employer's continued expectation that its employees will respond in that manner. There is no evidence to indicate that there was a substantive change in employee terms and conditions of employment when the employer included reference to emergency call-back requirements in job descriptions.

It is undisputed that there were no specific standards for compliance with the "emergency call-back" requirement in the past, and that no specific standards for compliance have been adopted by the management. Absent a substantive change, there was no obligation on the part of the employer to collectively bargain with the union regarding the matter. The unilateral inclusion of a reference to emergency call-backs in the updated job descriptions does not violate Chapter 41.56 RCW.

The 10-Minute Response Time -

The union acknowledges that the disputed rule was adopted in 1982. The union claims, however, that the "10-minute response time" rule has not been enforced, historically, and that it has not been applied to existing employees.

Fire fighter James Sharp testified that his residence was approximately three minutes travel time from the employer's fire station when he was hired in July, 1986. One month later, in August, 1986,

he relocated his residence approximately 13 minutes of normal driving time away from the fire station. Sharp testified that he informed the fire chief of the foregoing at the time that he moved, and that he was not told that he must move closer to the fire station. According to Sharp, it was not until after the commissioners re-adopted the 10 minute response time rule in 1990 that the employer sought compliance.

Captain Bush testified that he was not aware of any fire fighter having been admonished to move closer to the station, notwithstanding that at least three fire fighters reside more than 10 minutes' driving time from the fire station.

The union's position also draws support from inconsistent job opening announcements issued by the employer approximately one month after the controversial rule was adopted in 1982. One of those, dated December 12, 1982, stated that an employee must live within a 10-minute response time to the fire station.[7] The second memorandum, also dated December 12, 1982, stated that it was a requirement of the job that the selected employee:[8]

> ... reside within a **10 to 15 minute** response time to the station, in the event of emergencies a reasonable response time from home is required. [Emphasis by **bold** supplied.]

The latter document appears to have been signed by the fire chief and the newly hired employee on December 16, 1982, as if to

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7 The December 12, 1982 job announcement appears to contain a typographical error. The document indicates that the job being filled would be effective January 2, 1982. It is inferred that an error was made in typing the new year, and that job was opening as of January 2, **1983**.

8 Because of the signatures on the memorandum the Examiner infers that the memorandum confirmed certain terms and conditions of employment of a successful applicant.

constitute some sort of employment contract between the employer and the individual.

Chief Van Valkenburg testified that he felt that the 10 minute response time rule could be invoked at any time, if necessary. He indicated that he has not made an issue of the location of the residence of those employees who may live beyond the 10 minute response time limits, however, preferring to place emphasis on the importance of frequent employee response to emergency call-back requests. The chief acknowledged that fire fighter Sharp notified him that he would be moving to Steilacoom, but claimed having no recollection of Sharp reporting that he would be residing beyond a 10-minute response time from the fire station.

An employer is not at liberty to use an abandoned rule to avoid a bargaining obligation some eight years later, when it seeks to enforce a rule concerning maximum response time. Analysis of the facts of this case indicates that there was a substantive change of a condition of employment, and the employer was not free to unilaterally impose such a change of practice.

Evidence of what appears to be a general lack of interest and diligence in enforcement of the "10-minute response time" rule is found in the chief's own testimony, and in his December 16, 1982 signature on the employment memorandum permitting a "10 to 15 minute" response time. Further, the credible testimony of both Bush and Snope weighs heavily against the employer's claim that there was no change in the employment standard. Other than the employer's assertions that it has had a long-standing rule, it presented no substantive evidence to support its claim that the rule it adopted in 1982 has been uniformly, or even consistently, enforced since its adoption. The evidence indicates otherwise.

Even if some aspects of the rule adopted in 1990 were found to be a reaffirmation of a policy in effect since 1982, it is clear that

the coverage of the rule was expanded in 1990. The rule adopted in 1982 was directed only to those employees hired after its adoption. The rule most recently adopted by the employer makes no discernable distinction regarding applicability based on date of hire. On its face, the rule now in dispute is applicable to all employees, regardless of their hire date.

A union does not hold bargaining rights for applicants for employment, and an employer can unilaterally establish hiring criteria. City of Yakima, Decision 2387-B (PECB, 1986). Where the effects of pre-hire criteria have ongoing effect on the individuals hired as employees, they become terms and conditions of employment, however. A bargaining obligation may then exist. Kitsap County Fire District 7, supra.

Noting that the applicability of the recently-adopted rule to current employees was never raised prior to the hearing in the instant matter, Chief Van Valkenburg testified that the intent of the rule, notwithstanding its text, was not to be automatically applicable to all of the employees regardless of their date of hire. That does not, in the view of the Examiner, absolve the employer of its bargaining obligations which go beyond a hiring preference, and would evidently continue to apply to a newly hired employee throughout his or her tenure of employment. The rule adopted in 1990 gave rise to an occasion for bargaining under Chapter 41.56 RCW.

Waiver of Bargaining Rights

A union may waive its statutory bargaining rights by agreement or by inaction. Waivers by inaction are found where, after having been given adequate notice of a proposed change on a mandatory subject of bargaining, the union fails to make a timely request for bargaining on the subject. Newport School District, Decision 2153 (PECB, 1985); City of Pasco, Decision 2603 (PECB, 1987); Mukilteo

School District, Decision 3795-A (PECB, 1992). A waiver by contract occurs where a union agrees to provisions in the parties' collective bargaining agreement that permit the employer to make changes regarding mandatory subjects of bargaining at its discretion. Seattle School District, Decision 2079-A (PECB, 1985); City of Yakima, Decision 3564-A (PECB, 1991).[9]

The employer asserts, as an affirmative defense, that the union waived its bargaining rights in this case. The employer points to a contract provision entitled "Supplemental Agreement", which states:

> Section 1. This agreement may be amended only upon mutual consent of both parties. Either party may notify the other party in writing of its desire to negotiate. However, **neither party can compel the other to enter into negotiations during the term of this Agreement.** Upon agreement, amendments will be signed by the responsible Union and Employer representatives and shall become a part of the larger Agreement and subject to all its provisions. It is understood that disputes arising from this Article shall not be eligible for referral to either grievance or interest arbitration.
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> Section 2. Neither an employee nor the Employer will intentionally waive any provisions of this contract, unless such waiver is mutually agreed upon by the Union and the Employer.

To be effective, any waiver of statutory bargaining rights must be specific to the subject matter, and knowingly made. City of Kennewick, Decision 482-B (PECB, 1980); City of Seattle, Decision 1667-A (PECB, 1984). The Commission has repeatedly held that a

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[9] Disputes regarding matters clearly addressed by the terms of the parties' collective bargaining agreement may appropriately be deferred to that agreement's grievance and arbitration mechanism for resolution.

general management rights clause that does not contain specific language regarding the subjects at issue does not constitute a waiver of rights to bargain regarding mandatory subjects. City of Clarkston, Decision 3286 (PECB, 1989). The Examiner can find no substantive evidence that the union knowingly and consciously agreed to waive its right to bargain with the employer regarding the imposition of a "response time" rule affecting employee rights in the selection of their residence. The subject is not addressed in the parties' collective bargaining agreement. The employer's claim of waiver is without merit, and is rejected.

Deferral to Arbitration

In the circumstance presented here, "deferral" of the dispute to the arbitral process is not appropriate. There would need to be a basis to conclude, at the outset, that the employer's conduct was "arguably protected or prohibited" by the parties' contract. City of Yakima, Decision 3564-A (PECB, 1991). The "supplemental agreement" and general "management rights" clauses of this contract are not sufficient. Kitsap County Fire District 7, Decision 2872-A (PECB, 1988).

Further, the apparent willingness of the parties to keep the contractual grievance process alive does not compel a "deferral". The record reflects that, at the time that the revised policies were first adopted by the board of commissioners, the parties agreed to extend any time limits that may have been applicable to the processing of a grievance. That circumstance is not relevant to the issues that are before the Examiner.

Conclusions -

The union has met the threshold burden of demonstrating that one of the three personnel actions contested in this case was subject to collective bargaining. It is clear that the parties did not have a complete agreement on the matter when the employer adopted the

revised personnel rules in April of 1990, and the employer itself acknowledged the potential need for further negotiations. Were this not a case involving "uniformed personnel" it would be necessary to evaluate the evidence concerning the meetings between Captain Bush and employer officials, to determine whether an "impasse" had been reached after good faith bargaining between the employer and union. Since the bargaining unit involved is subject to the "interest arbitration" procedure, it was an unfair labor practice under City of Seattle, supra, for the employer to make a unilateral implementation of the "10-minute response time" rule without exhausting the mediation procedure and obtaining a favorable ruling from an interest arbitrator.

FINDINGS OF FACT

1. Pierce County Fire District 3 is a municipality of the State of Washington, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 2105, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of employees of Pierce County Fire District 3. The employees in that bargaining unit are "uniformed personnel" under RCW 41.56.030(7).

3. From an unspecified date prior to any of the events giving rise to this proceeding, the employer has required its fire fighter employees to respond to emergency call-backs.

4. In November of 1982, the employer adopted a personnel rule requiring that future employees reside within a "10-minute response time" to the employer's fire station. Under the terms of that rule, new employees were to be granted a six-

month transition period following their hire date, in which to comply with the personnel rule.

5. In December of 1982, the employer apparently deviated from the personnel rule referred to in paragraph 4 of these findings of fact, by entering into a written memorandum with a newly-hired employee in which the policy was stated as a "10 to 15 minute" response time.

6. In August of 1986, the employer apparently deviated from the personnel rule referred to in paragraph 4 of these findings of fact, by permitting fire fighter James Sharp to move his residence to Steilacoom only one month after he was hired on July 1, 1986. The fire chief was aware of the relocation of Sharp's residence, and took no steps to assure that Sharp's new residence was within 10 minutes driving time away from the fire station.

7. Captain William Bush testified that, since the inception of the "10-minute response time" rule, he is not aware of any fire fighter ever being admonished to move closer to the employer's fire station, notwithstanding the fact that at least three fire fighters reside more than 10 minutes travel time from the station.

8. Fire Chief Van Valkenburg acknowledged that he has not enforced the "10-minute response time" rule since its inception in 1982.

9. The employer has not presented any evidence that it expected and required absolute compliance with its 10 minute response time rule at any time subsequent to its adoption in 1982.

10. In April, 1990, the employer's board of commissioners adopted consolidated and revised departmental rules and regulations,

including certain personnel policies. The action was taken over the objections of the union. Further meetings and negotiations between the employer and union resolved all of the issues between them, except: (a) A rule requiring employees to reside at a location that will allow them to report to the fire station within 10 minutes; (b) revised job descriptions which include a requirement that fire fighters respond to emergency call-back requests; and (c) provision for the formal evaluation of employees in various criteria, including the frequency of responses to emergency call-back requests.

11. In about June, 1990, the employer commenced to formally evaluate employee performance. Certain employees received low or unsatisfactory ratings regarding their frequency of response to emergency call-back requests.

CONCLUSIONS OF LAW

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

2. Pierce County Fire District 3 has an inherent right to evaluate its operations and the performance of its employees, so that it was under no duty to bargain collectively pursuant to RCW 41.56.030(4) and RCW 41.56.140(4) prior to its adoption or implementation of personnel policies called for in the evaluation of its employees.

3. By its reiteration, in April of 1990, of its long-standing policy of requiring its employees to respond to emergency call-back requests, Pierce County Fire District 3 has not made or implemented any change of employee wages, hours or working

conditions, and has not given rise to an occasion for collective bargaining under RCW 41.56.030(4), and so has not committed any unfair labor practice under RCW 41.56.140(4).

4. By its adoption and/or re-activation, in April of 1990, of its previously abandoned policy of requiring that its employees reside within a "10-minute response time" from the fire station, Pierce County Fire District 3 has made and implemented a change of employee wages, hours or working conditions, giving rise to an occasion for collective bargaining under RCW 41.56.030(4).

5. By its agreement to the "Supplemental Agreement" clause contained in the collective bargaining agreement between it and Pierce County Fire District 3, International Association of Fire Fighters, Local 2105, has not waived its statutory collective bargaining rights under RCW 41.56.030(4) with regard to a "residency" requirement not addressed in that collective bargaining agreement.

6. Pierce County Fire District 3 has committed, and is committing, an unfair labor practice under RCW 41.56.140(4), by its unilateral implementation of a "10-minute response time" on its employees represented by International Association of Fire Fighters, Local 2105.

ORDER

Pierce County Fire District 3, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to bargain collectively with International Association of Fire Fighters, Local 2105, as the exclusive bargaining representative of the employees in the appropriate unit described in paragraph 2 of the foregoing findings of fact.

   b. Enforcing a rule requiring that employees reside within a 10-minute response time to the employer's fire station.

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

   a. Rescind its requirement that fire fighters reside within a 10 minute response time of the employer's fire station.

   b. Provide International Association of Fire Fighters, Local 2105, with notice of any proposed changes of wages, hours, or working conditions of employees represented by that organization, and specifically with respect to any proposals to require that employees reside within a minimum response time to the employer's fire station.

   c. Upon request, bargain collectively in good faith with Local 2105 prior to implementing any minimum response time to the district's fire station, so that the exclusive bargaining representative has a reasonable opportunity to suggest alternatives and voice objections.

   d. In the event of impasse, refrain from implementing any change of employee wages, hours or working conditions except as ordered by an interest arbitration panel constituted under RCW 41.56.450.

e. 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 above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

f. Notify the above-named complainant, 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 above-named complainant with a signed copy of the notice required by the preceding paragraph.

g. 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 required by this order.

Entered at Olympia, Washington, on the 28th day of August, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

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 OUR EMPLOYEES:

WE WILL restore the status quo ante, by rescinding the rule requiring that employees reside within a 10-minute response time to the fire station.

WE WILL provide International Association of Fire Fighters, Local 2105, notice of any proposed changes of wages, hours, or working conditions of employees represented by that organization and, upon request, bargain collectively in good faith with Local 2105.

WE WILL in the event of impasse, refrain from unilaterally implementing any change of employee wages, hours or working conditions except as ordered by an interest arbitration panel constituted under the laws of the State of Washington.

DATED: _____

PIERCE COUNTY FIRE DISTRICT 3

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 Employment Relations Commission, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.