STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF RICHLAND, Complainant,	CASE NO. 6312-U-86-1221
vs.	DECISION 2486-A - PECB
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 1052, Respondent.	ORDER OF DISMISSAL

On July 3, 1986, the undersigned Executive Director issued a Preliminary Ruling in the above-entitled matter, concluding that the employer's "refusal to bargain" unfair labor practice complaint failed to state a claim for relief pursuant to RCW 41.56.150(4) by its allegation that the union was bargaining to impasse and seeking interest arbitration on the following proposal:

> NEW ARTICLE --
> Agreement Binding of Successors
>
> This agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by the consolidation, merger, annexation, transfer or assignment of either party hereto; or affected, modified, altered, or changed in any respect whatsoever by any change of any kind of the ownership or management of either party hereto; or by any change geographically or otherwise in the location or place of business of either party hereto.

The complainant was allowed fourteen days to file an amended complaint alleging facts sufficient to show a cause of action. On July 17, 1986, the complainant filed its second amended complaint, revising its amended complaint of May 23, 1986.

Pursuant to WAC 391-45-110, it is presumed for the purposes of this preliminary ruling that all of the facts alleged in the second amended complaint are true and provable. The question before the Executive Director is whether the complaint as amended states a claim for relief available through the unfair labor practice provisions of Chapter 41.56 RCW.

Analysis of a refusal to bargain complaint must begin with an understanding of the bargaining obligations imposed by statute on both the employer and the union. RCW 41.56.100 provides:

> A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative. . .

The scope of the duty to bargain is defined by RCW 41.56.030(4), which provides:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions. . .(Emphasis added)

In NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), and in legion subsequent cases, labor boards and the courts have

divided the issues arising in the workplace among categories of "mandatory", "permissive" and "illegal" subjects of bargaining. In Borg-Warner, the U.S. Supreme Court held that the duty to bargain under the National Labor Relations Act is limited to mandatory subjects. The so-called mandatory subjects under Chapter 41.56 RCW are those matters impacting "personnel matters, including wages, hours and working conditions". See also Spokane Education Association v. Barnes, 83 Wn. 2d 366 (1974). The permissive subjects under this analysis are those matters which have been considered remote from wages, hours and working conditions, including matters which are regarded as prerogatives of employers or of unions. See: Federal Way School District, Decision 232-A (EDUC, 1977); Renton School District, Decision 706 (EDUC, 1979). The illegal subjects are those matters which neither the employer nor the union have the authority to negotiate, because agreement would contravene applicable statutes or court decisions.

Although the Commission has reserved to itself the authority to decide whether a particular matter is a mandatory subject of bargaining, the Commission strongly encourages free discussion of any proposals by the parties, as stated in WAC 391-45-550:

> It is the policy of the commission to promote bilateral collective bargaining negotiations between employers and the exclusive representatives of their employees. Such parties are encouraged to engage in free and open exchange of proposals and positions on all matters coming into the dispute between them. The commission deems the determination as to whether a particular subject is mandatory or nonmandatory to be a question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction. It is the policy of the commission that a party which engages in collective bargaining with respect to any particular issue does not and cannot thereby

> confer the status of a mandatory subject on a nonmandatory subject.

In determining whether a particular matter is a mandatory subject of bargaining, the Commission initially determines whether such matter directly impacts the wages, hours and working conditions of bargaining unit employees. Lower Snoqualmie Valley School District, Decision 1602 (PECB, 1983).

This case looks ahead to the possibility that a public entity might decide to consolidate, merge, annex, transfer or assign fire protection services to some other entity. The possible consequences of such a decision include the termination of such services (leading to the destruction of the bargaining unit), or the continuation of such services by the new entity (leading to the question of whether and under what terms employees will be retained by the successor employer).

If the decision to consolidate or annex results in the destruction of the bargaining unit, the decision to consolidate or annex may itself not be a mandatory subject of bargaining, but the affected employees have the right to bargain with the original employer regarding the effects of any such decision. See Entiat School District, Decision 1361-A (PECB, 1982).

If the decision to consolidate or annex results in the transfer of services performed by bargaining unit employees to the new entity, such a decision clearly directly impacts the wages, hours and working conditions of the employees. Decisions to sub-contract or transfer bargaining unit work have long been held to be a mandatory subject of collective bargaining. Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964); South Kitsap School District, Decision 472 (PECB, 1978); City of Kennewick, Decision 482-B (PECB, 1980); City of Vancouver, Decision 808 (PECB,1980); City of Mercer Island, Decision 1026-A (PECB, 1981). The next

step beyond "subcontracting" or "skimming" of bargaining unit work is transfer of the entire business to another employer. In any of these circumstances, the employees have a clear interest in effectively assuring the preservation of their jobs and their previously negotiated wages, hours and working conditions. As noted in the preliminary ruling issued previously in this case (Decision 2486), this is by no means the first situation in which a union has proposed a "binding on successors" provision for inclusion in a collective bargaining agreement, and successorship clauses have been held to be a mandatory subject of bargaining. United Mineworkers of America (Lone Star Steel), 639 F.2d 545 (10th Cir., 1980).

The employer argues in its second amended complaint that, based on the recent enactment of Chapter 254, Laws of 1986 (which specifies rights of fire department employees upon consolidation or annexation of agencies), it is without authority to vary those statutory rights and obligations. Although admitting that it has a duty to bargain with the union over the effects of any decision to consolidate, merge, annex, transfer or assign fire protection to some other party, and further admitting that any successor employer will have an obligation to bargain with its employees over the terms and conditions of their employment, Richland apparently assumes that the recent legislation dealt with all issues of concern to employees involved in consolidation or annexation situations. Close examination of the cited legislation indicates that it does not entirely occupy the field, specifying all rights. On the contrary, while the recent legislation covers some issues that may arise (such as probationary status, minimum wages and service credits for new employees of the consolidated employer), the legislation also expressly contemplates the involvement of the exclusive bargaining representative of the affected employees in determining what the rights of employees shall be for purposes of

layoffs after the consolidation. The union's proposal in bargaining evidences concerns regarding successorship that have not been addressed by the recent legislation. The union's proposal on successorship directly impacts the wages, hours and working conditions of bargaining unit employees.

The essence of the employer's argument is that acceptance of the union's proposal on successorship would limit the flexibility of the successor employer. As indicated in City of Auburn, Decision 901 (PECB, 1980), the extent to which a union proposal would affect the flexibility of an employer is a matter of substance involving the future interests of the parties. Such matters are for an arbitration panel to decide pursuant to RCW 41.56.450 in the absence of agreement between the parties in conventional negotiations or mediation.

> If "cost" and "limitation of management flexibility" were the criteria for determining whether union proposals were mandatory subjects for collective bargaining, most wage, benefits and hours proposals would be subject to challenge and the scope of bargaining defined in the statute would be rendered meaningless.

City of Auburn, supra, at page 2.

The fact that the employer may see a particular proposal on a mandatory subject to be offensive or burdensome does not make the proposal permissive or illegal. The arbitration panel is empowered to reject or modify union proposals which it finds unwarranted under the criteria set forth in RCW 41.56.460. Accordingly, the employer's complaint does not state a claim for relief available through the unfair labor practice provisions of Chapter 41.56 RCW.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above entitled matter is dismissed.

DATED at Olympia, Washington, this 29th day of September, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

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