STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 469,	)	CASE 7900-U-89-1699
Complainant,	)	DECISION 3564 - PECB
vs.	)	
CITY OF YAKIMA,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Webster, Mrak and Blumberg, by James H. Webster, Attorney at Law, appeared on behalf of the complainant.

Menke and Jackson, by Anthony F. Menke, Attorney at Law, appeared on behalf of the respondent.

On April 13, 1989, International Association of Fire Fighters, Local 469, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Yakima had violated RCW 41.56.140(1) and (4) by making unilateral changes in working conditions of employees represented by the union. A hearing was conducted on March 28, 1990, before Examiner William A. Lang. Post-hearing briefs were filed on May 11, 1990.

BACKGROUND

The City of Yakima provides fire suppression and related services to its citizens. Fire Chief Gerald A. Beeson headed the Yakima Fire Department at all times relevant to this proceeding.

International Association of Fire Fighters, Local 469, is the exclusive bargaining representative of all employees in the Yakima Fire Department, except temporary employees, the deputy fire chief, and the fire chief.

On September 22, 1988, the parties executed a collective bargaining agreement to replace their agreement that had expired on December 31, 1987. That agreement was retroactive to January 1, 1988, and was to be effective through December 31, 1989. During negotiations leading to that successor agreement, there were extensive discussions relating to modifications in the provisions of Article IV - Management Rights.

Fire Chief Beeson issued amendments to Fire Department Directive 3.001 on December 1, 1988, March 10, 1989, and November 1, 1989.[1] Those amendments changed Fire Department operational policies and procedures for employees to select and change vacation dates, and reduced the number of employees who may be on leave on any one day from five employees to four.

On January 25, 1989, Beeson issued changes to Fire Department Directive 3010, altering procedures for employees to schedule "Kelly days"[2].

On March 2, 1989, Beeson revised Directive 3009, "Acting Assignments", to define long-term acting assignments as three or more shifts to be filled by a "captain" rank.

The union protested, and it demanded to bargain the changes under Article XI - Collective Bargaining Procedure of the parties' 1988-89 collective bargaining agreement. The union contended that the

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[1] In early 1988, Beeson initiated a review of internal departmental policies contained in various directives. In April of 1988, Beeson issued revisions to Fire Department Directive 3.001 which were not contested by the union within the six month period of limitation set forth in RCW 41.56.160.

[2] In the vernacular of the fire service, a "Kelly day" is a day off duty built into the schedule of an individual employee, when the rest of the crew to which he or she is normally assigned will work their regular shift.

contract's provisions show no waivers can exist. The employer refused to negotiate, claiming that it had the right to make such changes under Sections 4.1 and 4.2 of Article IV - Management Rights, and under certain municipal code provisions listed in Article XXX of the collective bargaining agreement. These unfair labor practice charges followed.

PRE-HEARING MOTIONS AND RULINGS

Deferral To Arbitration

The Executive Director of the Commission sent a letter to the parties on April 19, 1989, inquiring as to whether the "unilateral change" allegations in this case should be "deferred" under Commission policy and precedent, pending outcome of grievance arbitration proceedings under the parties' collective bargaining agreement.[3]

On May 1, 1989, the employer responded to the "deferral" inquiry, indicating that no grievance had been filed and that it would assert procedural defenses to arbitration.

On May 5, 1989, the union responded to the "deferral" inquiry, asserting that arbitration would not be appropriate, because the employer intended to raise procedural defenses. Later, on May 9, 1989, the union informed the Executive Director that a grievance had been filed regarding the change in procedures for filling

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[3] See, Stevens County, Decision 2602 (PECB, 1987). The Commission's "deferral" of an unfair labor practice case is not a loss or surrender of jurisdiction. Rather, it implements the legislative preference of RCW 41.58.020(4) where "unilateral change" conduct at issue in an unfair practice case is arguably protected or prohibited by an existing collective bargaining agreement and the parties have agreed to arbitrate contract disputes.

"acting" positions, and that the employer had actually raised procedural objections to the grievance.

On May 16, 1989, the Executive Director issued a preliminary ruling pursuant to WAC 391-45-110, concluding that an unfair labor practice violation could be found if all of the facts alleged in the complaint were true and provable. The parties were notified that "deferral" had been considered and rejected.[4]

At the hearing in this matter, the employer argued that this controversy centers on interpretation of the parties' collective bargaining agreement, and should therefore be deferred to arbitration. The Examiner denied the employer's motion, noting that the employer had previously stated that it would assert, and had asserted, procedural defenses to arbitration.

Motion to Make Complaint More Definite and Certain

On November 20, 1989, the employer filed a motion under WAC 391-45-050, seeking to have the complaint made more definite and certain. The employer therein alleged that the statement of facts accompanying the complaint contained general allegations, with no specific reference to which personnel policies and/or directives were involved. At the same time, the employer filed its answer, which admitted or denied each of the allegations of the complaint.[5]

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[4] The "deferral" procedure is not used where the employer indicates it will assert procedural defenses to arbitration. Dismissal of a grievance on procedural grounds would not yield the desired contract interpretation on the "protected by contract" defense asserted by the employer in the unfair labor practice case, and so would merely delay the proceedings before the Commission.

[5] The employer's answer was physically attached to its motion to have the complaint made more definite and certain.

In a subsequent telephone conversation, the undersigned Examiner advised counsel for the employer that the issues were joined by the employer's answer, which admitted or denied each allegation of the complaint and raised affirmative defenses, so that the Examiner did not see a need for further clarifications of the allegations. The Examiner observed that the purpose of WAC 391-45-050 was to enable the respondent to prepare an answer, and to thereby frame the issues for hearing. The motion to make more definite and certain was denied.

DISCUSSION

There is no dispute as to the facts. The parties stipulated that Fire Chief Beeson issued new directives after October 13, 1988, altering procedures on "Kelly days", scheduling of vacations, the number of employees who could be on leave on any one day, and the selection of acting company officers. The employer admits to unilaterally changing working conditions. The union made demands to bargaining the changes, but Beeson refused to negotiate, claiming that he had the right to make changes under the re-negotiated management rights clause and the municipal code.[6]

Changes of Mandatory Subjects of Bargaining?

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

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[6] The City of Yakima has argued in other cases now pending before the Public Employment Relations Commission that matters involving discipline and promotions within the bargaining unit which are covered by rules of the Yakima Police & Fire Civil Service Commission are not subject to collective bargaining under Chapter 41.56 RCW. City of Yakima, Decisions 3503 and 3504 (PECB, 1990). Those decisions have been appealed to the Commission.

> "Collective bargaining" means ... negotiations on personnel matters, including wages, hours and working conditions ...

The determination as to whether a particular subject is a mandatory subject for collective bargaining is a question of law and fact for the Commission to decide. WAC 391-45-550. In determining such questions, the Commission initially investigates whether the matter directly impacts wages, hours or working conditions of bargaining unit employees. Lower Snoqualmie Valley School District, Decision 1602 (PECB, 1983). When the subject does not directly involve wages or hours, the Commission will balance the employer's need for entrepreneurial judgement against the employees' interest in their terms and conditions of employment. Edmonds School District, Decision 207 (EDUC, 1977).

Prior to the events giving rise to this case, the practice was that up to four employees could be off work at the same time for reasons of vacation, holiday, and "Kelly days". A fifth employee could also be off work if there was nobody absent on disability at the time. The changes at issue in this case decreased the employee opportunity for leaves, by adding military leave and business leave to the list of types against which the first four leave opportunities were to be measured. In addition, the disputed changes limited the fifth leave opportunity, by designating it as stand-by, thus eliminating a leave when no one is on disability. Moreover, the number of vacation opportunities is now predicated on whether "manpower permits".[7]

The employer does not appear to contend that the scheduling of vacation, "Kelly days", or the procedures for the selection of "acting assignments" are, themselves, non-mandatory subjects of

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[7] Presumably, if illness or absences for other listed reasons limited the number of vacation opportunities, a request for vacation time off would be denied.

bargaining. Indeed, work rules and the scheduling of vacation and other leaves were held to be mandatory subjects of bargaining in City of Clarkston, Decision 3286 (PECB, 1986). Policies and procedures for promotion to positions within the bargaining unit are also considered mandatory subjects under both the public and private sector case law. City of Wenatchee, Decision 2216 (PECB, 1985).[8] By implication, "acting assignments" procedures used to temporarily fill higher-level positions within the bargaining unit would similarly be mandatory subjects for bargaining.

The employer does argue that the union's effort to bargain the number of employees on leave on any one day is an impermissible request to bargain the employer's "manning" requirements. Citing City of Yakima, Decision 1130 (PECB, 1981), the employer characterizes the union's complaint "as a challenge to the employer's ability and rights to establish minimum manning requirements for its business operations". According to the employer's logic, the scheduling of vacation or other leaves of absence would, in effect, determine the number of employees on duty. In the employer's view, that is the same as bargaining "manning".

Paid leave time (e.g., vacations, holidays and "Kelly" days) is directly and substantially related to hours of work, and is a mandatory subject of collective bargaining. Faced with proposals in collective bargaining that would provide paid leave time to its employees, an employer would need to consider the long-term ramifications of loss of productive capacity or the cost of hiring additional employees to maintain the same level of service. Once the employer has agreed to give employees paid time off, the scheduling of that time off is only indirectly concerned with shift

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[8] See, also, City of Yakima, Decision 2387-B (PECB, 1986), where the Commission dismissed an unfair practice complaint against this employer's refusal to bargain promotional procedures to the position of fire chief, ruling that the union was not entitled to bargain for positions outside of the bargaining unit.

staffing. When faced with being short-staffed on a particular day or shift, an employer has short-term alternatives available to it other than interfering with paid leave rights, including requesting employees to voluntary change leave dates, or having other employees work overtime. The Examiner thus rejects the employer's contention that the subject of how many employees can be absent on any one day is a permissive subject of bargaining.

An alternative view of the situation would be to accept the employer's basic premise and develop the logic from that base. Even if it were to be determined that the decision on how many employees could be on leave on any one day was a permissive subject of bargaining, however, the employer would still have had an obligation to bargain with the union concerning the effects of such a decision on employee wages, hours and working conditions. The obligation of an employer to bargain "effects" was reiterated by the Commission in Wenatchee School District, Decision 3240-A (PECB, 1990) and City of Bellevue, Decision 3343-A (PECB, 1990). Both of those decisions cited International Association of Fire Fighters v. PERC, 113 Wn.2d 197 (1989), which was an outgrowth of a dispute as to the "wage" impacts of a change in other working conditions.[9]

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[9] The Richland case had a complex history that has ended without a final ruling on the merits. The union did not challenge the employer's right to change staffing in its fire department, but proposed a contract reopener to negotiate wages in the event of such a change. The employer argued that staffing and work assignments were permissive subjects of bargaining. The Examiner ruled in City of Richland, Decision 2448-A (PECB, 1987) that the union had the right to present evidence that resulting workload increases had a wage impact, noting:

> The crux of the city's contention is to foreclose the union opportunity to demonstrate effect. If the union is unable to do so, its proposals will not prosper.

The Commission reversed. The Supreme Court of Washington eventually remanded the case to the Commission for reconsideration, but the case was then withdrawn by the employer prior to a ruling.

The Commission did not find an unfair labor practice violation in City of Richland, Decision 2448-B (PECB, 1987), but it fundamentally agreed with the Examiner on the existence of a duty to bargain "effects", indicating that a duty to bargain "effects" arose out of the statute itself.[10] The Examiner thus concludes that the employer had a bargaining obligation under RCW 41.56.030(4).

Waiver by Contract?

The employer contends that the parties' collective bargaining agreement and municipal ordinances incorporated into that contract constituted a waiver of any bargaining rights the union may have had on the subjects at issue here.

The union argues, on the other hand, that the contract does not empower the employer to make unilateral changes in mandatory bargaining areas, and the contract specifically requires negotiations under Article XI, when changes in mandatory subjects of bargaining are contemplated.

The Management Rights Clause -
It is well settled that a waiver of statutory collective bargaining rights must be consciously made, and must be clear and unmistakable. The burden of proof lies with the party claiming the waiver. It was noted in City of Wenatchee, Decision 2194 (PECB, 1985), that employers have advanced "waiver" arguments in a number of cases, based on management rights clauses. Each such case must be considered on the basis of its unique circumstances. The language of the applicable collective bargaining agreement and the relevant evidence must be carefully scrutinized to ascertain the intent of the parties in fashioning the provisions.

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[10] The Commission concluded that the union's proposal was overly broad.

The employer does not contend that it would have had the right to make unilateral changes in schedules and work rules under the management rights clause in the parties' 1986-87 agreement. That contract had provided, in relevant part:

> ARTICLE IV - MANAGEMENT RIGHTS
>
> The union recognizes the prerogative of the city to operate and manage its affairs in all respects in accordance with its responsibilities, powers and authority. Affairs of the City concerning such prerogative is reserved include, but are not limited to, the following matters, which are not included within negotiable matters pertaining to wages, hours and working conditions:
>
> a. The right to establish reasonable work rules.
>
> b. The right to schedule overtime work in a manner most advantageous to the city and consistent with the requirements of municipal employment and the public interest.
>
> ...
>
> e. The right to determine reasonable schedules of work and to establish the methods and processes by which work is to be performed.

The employer does place great emphasis on changes negotiated in Article IV - Management Rights in the parties' current contract, claiming that they provide new authority for the employer to make unilateral changes. The current contract specifies:

> ARTICLE IV - MANAGEMENT RIGHTS
>
> The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, lawful powers and legal authority. City affairs which are not included within negotiable matters pertaining to wages, hours and working conditions are inclusive of the following but not limited thereto:
>
> 4.1 The right to establish and institute [reasonable] work rules and procedures upon

> reasonable notice to bargaining unit members. All personnel rules and policies developed by the Employer which are intended to be applicable to Union members shall be in written form and posted in the departmental manual.
>
> 4.2 The right to determine reasonable schedules of work, overtime and all methods and processes by which said work is to be performed in a manner most advantageous to the Employer. Changes to work schedules which are intended to be applicable to Union members shall be in written form and posted in the departmental manual.

(Emphasis supplied[11])

Analysis of the negotiated changes in the management rights clause fails to support the employer's contention that there was a substantial change in the meaning of that clause, however.

The preamble of the management rights clause mentions "negotiable matters pertaining to wages, hours and working conditions", and seems to say that the employer does not need to bargain on enumerated mandatory subjects such as work rules and changing schedules. There is no evidence of what the parties intended by that preamble language, but it was carried over from the previous agreement and the evidence is clear that the provisions of Article IV were not construed by either party as waivers of the bargaining obligation while the predecessor contract was in effect.

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[11] The underlined words in the current version identify new language. The bracketed word "reasonable" does not appear in the current contract, but is included to show the position from which it was deleted. The last sentence of the introductory paragraph was re-arranged without evident change of its meaning, and so is not underlined. Similarly, subsections b. and e. of the prior contract appear to have been merely consolidated into Subsection 4.2 of the current contract, and so are not underlined as "new".

The insertion of the words "lawful" and "legal" in the preamble added little to the legal significance of the clause, since the same limitations are already implied by the context.[12] The additional words "and institute" and "procedures" in Section 4.1 are also redundant.

The deletion of "reasonable" would seem to change nothing, since it is customary for arbitrators of labor-management disputes dealing with "work rules" to imply that any work rule must be "reasonable" if it is to be enforced.[13] An alternative interpretation of the language changes concerning "rules" is that the union rights enumerated in the previous contract were actually enlarged by the requirement that any new rules applicable to the bargaining unit be in "written form and posted in the department manual". There is no indication that the parties contemplated a waiver of bargaining rights by requiring notice and posting. The employer's rights could actually have been restricted or impeded by such additional procedural requirements.

Most of the amendments negotiated in 1988 thus appear to be editorial in nature, designed to make the language more easily understood. They merely restated prior language without substantive change of meaning. The added language does not clearly indicate agreement on waiver or modification of the bargaining obligation under Chapter 41.56 RCW.

In City of Wenatchee, supra, as in the instant case, the management rights clause stated that the employer had:

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[12] i.e., one would not infer that the absence of the word "lawful" or "legal" permitted the employer to act in a manner that was unlawful or illegal.

[13] For a discussion of the customs and practice in arbitration of grievances concerning "rules", see: Elkouri and Elkouri, How Arbitration Works, Fourth Edition, at pages 553 - 556.

> [A]uthority to adopt rules for the operations of the department and the conduct of its employees ... to schedule hours of work, to determine the number of personnel to be assigned duty at any time, and to perform all other functions not otherwise expressly limited by this agreement in accordance with Wenatchee Fire Department Civil Service Rules And Regulations.

The Commission nevertheless held that the employer violated the statutory obligation to bargain, by its unilateral implementation of personnel policies concerning distribution of overtime work. The failure of the union to negotiate incorporation of a departmental manual into the collective bargaining agreement in Wenatchee did not constitute a waiver to bargain the mandatory subjects contained in that manual.

In City of Sumner, Decision 1839-A (PECB, 1984), the management rights clause recognized, as in this controversy, that:

> [T]he prerogative of the employer to operate and manage its affairs in all respects in accordance with its responsibilities.

The Commission nevertheless ruled that this clause did not enable the city to avoid its obligation to bargain a change in paydays.

The management rights clauses in Wenatchee and Sumner are typical of the general language found in many public sector collective bargaining agreements. While the city cites those cases here as authority for it to make unilateral changes in the exercise of management's ability to adopt and implement rules, those decisions did not hold that management rights clauses permitted unilateral changes. Such general clauses have been generally determined insufficient to constitute a waiver of an employer's obligation to changes in mandatory subjects of bargaining. City of Kennewick, Decision 482-B (PECB, 1980). In the instant case, the management

rights clause relied upon by the employer contains no specific mention of the number of employees who can be on leave at any one time, or of policy on acting assignments. Thus, the contract provisions themselves do not grant such rights to the city.

Nor can a "waiver" conclusion be based on testimony concerning the bargaining history. There is a dispute in the evidence regarding the negotiations on the management rights clause of the current contract. Beeson testified that the purpose of the proposed changes was to grant the employer authority to make scheduling changes, but there is no evidence that the employer ever specifically informed union negotiators that the employer wanted control over the scheduling of vacation or Kelly days, acting assignments, or the number of employees that could be off work on any one day. Union negotiators testified they did not recall the employer communicating such an intent, and there is no evidence of any objective manifestations showing that the union agreed to abdicate employee rights or union rights by accepting the language change. The intent of Chapter 41.56 RCW is to enable public employees the right to bargain in a meaningful way with their employer on matters concerning wages, hours, and working conditions. This obligation is not to be easily disregarded. Employees are not to be "blindsided" by clever contract provisions fashioned to conceal a hidden agenda of making real changes in working conditions. South Columbia Irrigation District / East Columbia Irrigation District, Decision 1404-A (PECB, 1982). A "deal" to give up rights must be consciously delivered. "Gotcha" has no place in labor relations, and is not conducive to the public interest in stable employment relationships. RCW 41.56.010. Perhaps, the union might have been receptive to some concession or compromise here, but there is no evidence of one having been made. The Examiner is unable to conclude that what is now put forth as the employer's true intentions were ever agreed upon at the bargaining table.

There is also a conflict within the contract which contradicts drawing a "waiver" conclusion from Article IV. The language relied upon by the employer must be taken in context with Article XI of the same contract, which clearly states that all changes in working conditions subject to Chapter 41.56 RCW must be bargained:

> ARTICLE XI
> COLLECTIVE BARGAINING PROCEDURE
>
> 11.1 General. All negotiable matters pertaining to wages, hours and working conditions shall be established through the negotiation procedures as provided by RCW 41.56. No ordinances existing at the time of execution of this Agreement relating to wages, hours and working conditions for members of the bargaining unit shall be amended or repealed during the term of this agreement without written concurrence of both parties.
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> 11.2 Each year, as appropriate, the Union shall submit to the City Manager and the City Manager may submit to the Union a written proposal for any changes in matters pertaining to wages, hours and working conditions desired by the Union or the city for the subsequent year. These written proposals shall be submitted in accordance with the requirements of RCW 41.56, as amended by S.B. 2852(1979). The Union and the City shall follow the collective bargaining procedure set forth in the said statute. All agreements reached shall be reduced to writing which shall be signed by the City Manager and the Union's representatives.

Where two provisions of an agreement appear to be in conflict, the Examiner must attempt to find an interpretation which gives effect to each. The use of the words: "City affairs which are not included within negotiable matters pertaining to wages, hours and working conditions are inclusive of the following" in the management rights clause implies that the parties intended to give them meaning, and those words should not be declared surplusage if a reasonable meaning is available that is consistent with the rest of the agreement. Indiana Bell Telephone Co., 88 LA 122 (Arbitrator

Feldman, 1986). Where two contract clauses bear on the same subject, the more specific provision is customarily given preference. Coca-Cola Foods, 88 LA 129 (Arbitrator Naehring, 1986); Pierce County, Decision 1671-A (PECB, 1984).[14] In this case, any general waivers within the management rights clause must be limited by the express provisions of Article XI - Collective Bargaining Procedure. See City of Clarkston, supra, where similar specific contract provisions were given preference over general rights granted in a management rights clause.

The "Acting Assignments" Clause -

The employer also looks to Article 17.1 - Acting Assignments as further evidence that the city was given specific prerogative to make acting assignments. That provision states, in relevant part:

> 17.1 Acting Assignment. The city will pay acting assignment pay of at least 5% above the normal base pay or the pay rate of the D-Step of the next higher pay grade, whichever is greater, for an individual for such period of continuous service, provided the individual serves a minimum of ten (10) hours in such higher classification, having been so assigned by the fire chief or his designated agent and provided further that the individual exercises the responsibility, including operation and administrative duties as they apply. (emphasis supplied)

The employer cites Seattle School District, Decision 2079-B (PECB, 1986), in support of its argument that "where it has the right to

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[14] In Pierce County, an agreement was found to contain a valid waiver as applied to a union security clause. The waiver stated:

> Sheriff's Civil Service Employees are governed by RCW 41.14 which shall control if it conflicts with this agreement.

Detailed civil service rules incorporated by the quoted reference directly conflicted with the union security provision.

appoint acting officers, it follows that the employer has the right to alter the procedures whereby company officers are selected and appointed". The Examiner disagrees. The Commission found specific contract waivers in Seattle School District. No such specific contract waivers are applicable here.

For the employee involved, the essence of an "acting" assignment is a pay increase for performing duties of a higher-paid classification (i.e., wages, a mandatory subject of bargaining). Whether specified in the parties' contract or written down in the employer's procedures, there evidently was some established practice regulating who and when "acting" status was implemented. The authority to "appoint" an employee does not carry with it a blanket authority to change the system under which such appointments are made. There is nothing in the above-quoted language which waives the union's right to negotiate changes in procedures. The fact that the need for changes may have been discussed in negotiations does not grant a waiver to the city to later make changes in policies which are mandatory subjects of bargaining. The contract states the fire chief makes the appointment. The conditions under which such appointments are to be made must be negotiated.

The Municipal Code References -

The municipal code provisions which the city cites as authority to make unilateral change are simply listed in the agreement. Article XXX is restated in pertinent part as follows:

ARTICLE XXX
MUNICIPAL CODE SECTIONS
PERTAINING TO FIRE DEPARTMENT LEOFF[15] EMPLOYEES

2.04	Group Insurance
2.04.010	Plan Adopted
2.04.030	City Contributions
2.16	Bonds For Officers

[15] Examiner's note: "LEOFF" evidently refers to the "Law Enforcement Officers and Fire Fighters" retirement system created by Chapter 41.26 RCW, which covers some of the employees represented by the union here.

2.16.010 Bonds Required - Amount
2.20 Salaries
...
2.20.060 Transfer, Promotion, Reclassification, Demotion or Reinstatements of Employees
...
2.40.030 Sick Leave
...

The specific municipal code provisions relied upon by Beeson are restated, in pertinent part, as follows:

> Section 2.40.030(C)(1) Every employee must report to the representative designated by his department head the reason for the absence as far in advance of the starting of his scheduled work day as possible, but in no event shall this report be made later than the first day of absence.
>
> Section 2.22.060
> ...
> C. All vacation leave must be requested in advance and approved by the Fire Chief or his designee.
>
> D. Vacation leave must be taken at such times as the employee can be spared, but an employee will be allowed to take his leave when he desires if it is possible to schedule it at that time.

This language was in the parties' previous agreement, and was not asserted at that time as authority for making unilateral changes. The references to the municipal code contained in Article XXX do not rise to the level of the one cited in Pierce County, supra, where the union had specifically agreed to be bound by the civil service arrangements in the event of conflict with the provisions of the collective bargaining agreement. There is no such specificity here. Article XXX does not contain any provisions which clearly state that the union waives any rights or that the municipal code supersedes the agreement. In fact, Article XI

specifically states that no ordinances which relate to wages, hours and working conditions shall be amended or repealed during the term of the agreement without written concurrence of both parties. The conclusion reached is that Article XXX does nothing more than provide information.

The municipal code provisions state that the fire chief has the authority to make decisions in a number of areas, including scheduling and vacation. In granting the authority to make decisions, the code does not state in what manner the authority is to be exercised. Under Chapter 41.56 RCW, Beeson must exercise his authority through agreement negotiated in the give and take of collective bargaining. In short, Beeson has the right to establish and institute work rules only after complying with the obligation to negotiate under Chapter 41.56 RCW.

Waiver by Inaction or Conduct

The employer also defends on what amounts to a "waiver by inaction" theory, contending that the union negated its bargaining rights by taking the position that it would no longer participate in the monthly management-labor committee meetings under Article 28.3 of the parties' contract. Beeson testified that Wendlin Geffre, the president of the Local 569, put him on notice during the autumn of 1988 that the union was no longer interested in discussing any issue with him in monthly management-labor meetings, because nothing was ever resolved. Beeson was then asked:

> Q. And based on the statements Mr. Geffre made to you in this meeting you've just described, you made no effort to communicate with the union with respect to the proposed changes in the directives thereafter?
>
> A. Based on that discussion, based on the management rights and the contract that was negotiated, that's correct. I made

> no effort to discuss that with the bargaining unit.
>
> Q. And instead, in the case of Exhibit Number 6, you felt it appropriate simply to select someone from the bargaining unit with which to work?
>
> A. That's exactly what I did.
>
> Transcript, page 88, lines 12-24.

The Examiner recognizes that this testimony may evidence a deep-seated attitude problem between the parties,[16] but it does not support the employer's assertion of a broadly-based waiver by the union of its statutory bargaining rights.

The management-labor committee was a contractual forum, set up by the parties for discussion of problems arising out of contract interpretations and other matters they considered important. The committee was not intended to function as or supplant the bargaining teams established in Article 10.1 of the same contract, or to replace the statutory collective bargaining process. The fact that the union refused to participate in the monthly meetings (possibly a violation of the contract) did not empower Beeson to unilaterally make changes in working conditions, especially when the union later made timely demands to bargain the changes under the statute.

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[16] Earlier in his testimony, Beeson had recalled needing an employee's reaction to a proposed directive in order to clear up a misunderstanding on the proposal, and of having solicited comments from Lieutenant Simpson. Beeson was then asked:

> Q. The question was how did you select Lieutenant Simpson for this task?
>
> A. To answer that, we selected someone that we felt was rational and reasonable, and would sit down and discuss it on an objective basis.
>
> Transcript, page 85, line 22 to page 86, line 3.

FINDINGS OF FACT

1. The City of Yakima is a "public employer" within the meaning of RCW 41.56.030(1). At all times pertinent hereto, Gerald A. Beeson was fire chief.

2. International Association of Fire Fighters, Local 469, a "bargaining representative" within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of non-supervisory fire fighter employees of the City of Yakima. At all times pertinent hereto, Wendlin Geffre was the president of the union. The employees involved are "uniformed personnel" covered by the interest arbitration procedures of RCW 41.56.430, et seq.

3. During the time pertinent hereto, the union and the employer were engaged in collective bargaining negotiations to replace their agreement which expired on December 31, 1987. The parties' collective bargaining agreement did not contain clear and unmistakable waivers of the union's right to bargain concerning changes of wages, hours and working conditions not specified in the contract.

4. On or after October 13, 1988, Beeson issued new directives which made changes in the selection and changing of vacation dates, the number of employees which may be on leave on any one day, the scheduling of "Kelly" days, and the selection of acting assignments. Such matters affect the wages, hours and working conditions of bargaining unit employees.

5. At various times, Beeson discussed the various changes with Lieutenant Simpson, a bargaining unit employee. The record does not contain specific evidence of what was said during such conversations, or that any negotiations took place.

6. Local 469 made timely demands to bargain the changes referred to in paragraph 4 of these findings of fact.

7. Beeson refused to bargain the changes, claiming a right to make such changes under the contract.

CONCLUSIONS OF LAW

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

2. The changes in work schedule described in paragraph 4 of the foregoing findings of fact affected the wages, hours and working conditions of bargaining unit employees, and were mandatory subjects of collective bargaining within the definition of RCW 41.56.030(4).

3. By unilaterally adopting the changes of wages, hours and working conditions referred to in paragraph 2 of these conclusions of law, and by refusing to bargain in response to a timely request to bargain concerning said changes, the City of Yakima has committed, and is committing, unfair labor practices in violation of RCW 41.56.140(1) and (4).

ORDER

The City of Yakima, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing and refusing to bargain in good faith with International Association of Fire Fighters, Local 469, as

the exclusive bargaining representative of its employees in the appropriate bargaining unit described herein, with respect to all wages, hours and working conditions, and specifically with respect to vacation scheduling, number of employees off on any one day, filling of acting assignments, and the scheduling of "Kelly" days.

b. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

a. Reinstate the work schedule policies subject to this order which were in effect prior to October 13, 1988.

b. Give notice to and, upon request, bargain collectively in good faith with the International Association of Fire Fighters, Local 469, prior to implementing any change of wages, hours or working conditions of employees in the bargaining unit; and, in the event that resolution of any dispute is not achieved through negotiations, submit the dispute for mediation and, if necessary, for interest arbitration for determination as required by RCW 41.56-.430, et seq.

c. 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.

d. 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.

e. 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.

Dated at Olympia, Washington on the 21st day of September, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM A. LANG, Examiner

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

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL NOT refuse to bargain collectively with International Association of Fire Fighters, Local 469, regarding changes in vacation scheduling, number of employees who may be scheduled off duty on any one day, scheduling of "Kelly" days or acting assignments for employees represented by Local 469.

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

WE WILL give notice to and, upon request, bargain collectively in good faith with, International Association of Fire Fighters, Local 469, prior to making unilateral changes of wages, hours or working conditions of employees represented by Local 469.

DATED: _____

CITY OF YAKIMA

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, 603 Evergreen Plaza FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.