STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PASCO POLICE OFFICERS ASSOCIATION, Complainant, vs. CITY OF PASCO, Respondent.	CASE 10369-U-93-2385 DECISION 4694 - PECB
CITY OF PASCO, Complainant, vs. PASCO POLICE OFFICERS ASSOCIATION, Respondent.	CASE 10403-U-93-2399 DECISION 4695 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hoag, Vick, Tarantino & Garrettson, by James M. Cline, Attorney at Law, appeared on behalf the union.

Joseph A. Ramirez, Attorney at Law, appeared on behalf of the employer.

On March 31, 1993, the Pasco Police Officers Association (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Pasco (employer) had committed an unfair labor practice under RCW 41.56.-140(4), by insisting to impasse on proposed management rights and hours of work clauses that would waive the union's collective bargaining rights on mandatory subjects of bargaining.[1] A management rights clause was attached as an exhibit to the statement of facts filed with the complaint.

[1] Case 10369-U-93-2385. The complaint was arguably premature when filed, because interest arbitration was not initiated until June 29, 1993. (Case 10526-I-93-225).

On April 12, 1993, the City of Pasco filed a complaint charging unfair labor practices with the Commission, alleging the union failed to bargain in good faith and committed unfair labor practices under RCW 41.56.150(4), when it reneged on a tentative agreement concerning Article V Grievance Procedures made earlier in the negotiations for a successor agreement.[2] On the same date, the employer filed an answer denying the union's allegation that the city insisted to impasse on the particular management rights clause attached as an exhibit to the union's complaint.

The union filed an amended complaint on September 10, 1993, to which it attached the correct "management rights" proposal. The employer filed an amended answer on September 7, 1993.[3]

The cases were consolidated for processing. A hearing was held at Pasco, Washington, on October 26, 1993, before Examiner William A. Lang. The parties filed post-hearing briefs on December 6, 1993.

BACKGROUND

The City of Pasco and the Pasco Police Officers' Association were parties to a collective bargaining agreement effective for the period from January 1, 1991 through December 31, 1992. While that contract was in effect, Michael Aldridge was president of the union and a member of the union's negotiation team, attorney Victor Smedstad represented the union,[4] and City Attorney Greg Rubstello represented the employer in labor relations matters.

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[2] Case 10403-U-93-2399. The Public Employment Relations Commission has no "counterclaim" procedures, so the employer's allegations were docketed as a separate case.

[3] The record does not disclose why the employer's amended answer was filed prior to the union's amended complaint.

[4] Smedstad was associated with the law firm of Hoag, Vick, Tarantino & Garrettson.

On June 17, 1992, Rubstello wrote to Smedstad, confirming the opening session for negotiations on a successor agreement to be held on July 21, 1992. In that letter, Rubstello proposed a set of ground rules as a framework for the negotiations, including:

> 1. Both parties will submit their proposals on issues of concern in written form for mutual exchange at the first scheduled negotiation session.
>
> 2. All tentative agreements shall be in writing, signed or initialed by the chief negotiators for the employer and the bargaining unit.
>
> ...
>
> 5. Tentative agreements reached on issues during the negotiations shall remove the issue from those issues subject to certification for interest arbitration by the PERC Executive Director in the event of impasse and unsuccessful efforts to resolve the issues at mediation.

In a letter dated July 9, 1992, Smedstad advised that the union would agree to the ground rules Rubstello had proposed. The parties exchanged their initial proposals on July 21, 1992.

At a negotiation session on August 25, 1992, there was considerable discussion on changing the forum for appeal of disciplinary actions. The union proposed giving the grievant employee the option of either the employer's civil service commission or arbitration under Article V - Grievance Procedure of the parties' collective bargaining agreement.

The parties met again for negotiations on September 3, 1992, and the testimony indicates that session was "fruitful". Another negotiating session was scheduled for September 22, 1992.

At the September 22 meeting, the discussion focused on whether the union would agree to retain the procedure for appeal of disciplin-

ary actions to the civil service commission, instead of the arbitration alternative proposed by the union. At one point in the session, the union took a caucus to discuss the issue. After an hour, Smedstad informed Rubstello that the bargaining team would agree to retain the current procedure. Rubstello made a note "stay w/csc" during discussions, to confirm that agreement was reached on that subject. Testimony from both Smedstad and Aldridge corroborated Rubstello's account of the September 22, 1993 bargaining session. Rubstello testified that this was a key agreement, which indicated that the employer could agree to the union being able to file grievances and veto grievances going to arbitration if the union believed that the grievance did not have sufficient merit.

On October 1, 1992, in accordance with the ground rules, Rubstello forwarded to Smedstad a document titled: "*Tentative Agreement - Successor Contract Negotiations City of Pasco & Pasco Police Officers Association*", for signature. The language proposed by Rubstello at that time for the grievance procedure was:[5]

> The City of Pasco and the PPOA, by and through their respective negotiators, tentatively agree that **Article V - Grievance Procedure** of the 1990-1992 Collective Bargaining Agreement between the parties shall continue in the successor Collective Bargaining Agreement with following additions and deletions shown below:
>
> ARTICLE V - GRIEVANCE PROCEDURE
>
> A grievance shall be defined as a dispute or disagreement raised by the Association, an employee or group employees ((~~against~~)) with the employer involving the interpretation or

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[5] The parties used differing, and sometimes inconsistent methods for denoting additions to and deletions from their previous collective bargaining agreement. The Examiner has chosen to standardize usage on the procedure used by the Legislature in bills to denote changes from existing statutes: New material is indicated by underline; deleted material is indicated by ((~~strikeout between double parenthesis~~)).

> application of the specific provisions of this Agreement. It is specifically understood that any disputes regarding matters governed by Civil Service rules or statutory provisions shall not be considered grievances and not be subject to the grievance procedure hereinafter set forth. Nor shall any disciplinary actions which may be appealed to the Civil Service Commission be considered grievances and subject to the grievance procedure herein. Grievances, as herein defined, shall be processed in the following manner:

Rubstello noted the changes made as a result of discussions at the September 22 bargaining session. Rubstello also directed Smedstad's attention to a change of the word "supervisor" to "captain", which was described as an editorial change that had not yet been discussed. Rubstello asked Smedstad to review the article for the next bargaining session.

After several weeks, Rubstello telephoned Smedstad to discuss the tentative agreements. He was told that Smedstad was no longer associated with the law firm, and that another attorney would be assigned. A short time later, Attorney James M. Cline of the Hoag, Vick, Tarantino & Garrettson law firm informed Rubstello that he was to succeed Smedstad as the chief negotiator for the union on October 1, 1992.

The record shows that, at the next negotiation session on November 10, 1992, Cline disavowed what Rubstello considered a tentative agreement on retaining the appeal to the civil service commission on disciplinary matters. Cline claimed that he did not have Smedstad's notes, and did not know what had been agreed to previously. At that point, Cline was alleged to have stated the union would only agree to arbitration of grievances concerning disciplinary matters. Rubstello testified that he was greatly distressed, that he protested the union's lack of good faith on this issue, but that he realized later in the session that the parties had to move forward. He then proposed to permit arbitra-

tion under the contract if the union would waive the civil service alternative. Cline believed that a waiver of an individual's statutory right would be illegal, but he accepted the remaining provisions of the proposed tentative agreement.

On November 13, 1992, Rubstello forwarded copies of articles on which he believed there were tentative agreements to Cline, for signature. With regard to Article V, Grievance Procedure, Rubstello wrote:

> *Tentative Agreements*
> *Between*
>
> *City of Pasco*
> *&*
> *Pasco Police Officers Association*
>
> *1992 Successor Contract Negotiations*
>
> The City of Pasco and the Pasco Police Officers Association have reached a tentative agreement upon the following issues in the current successor contract negotiation:
>
> ...
> 2. Article V - Grievance Procedure of the present contract shall appear in the successor contract as written below:
>
> [The parties have not reached tentative agreement yet on the language of the first paragraph of the Article.]
>
> 1. Discussion With Supervisor - ...

As of that time, Rubstello was indicating that the parties had not yet reached agreement on that matter.

Late in November of 1992, Rubstello gave the union a new proposal on Article V, which would have permitted appeals to the city manager and to arbitration, in lieu of the civil service commission. Employees choosing to process their grievance to arbitration would be required to waive their civil service statutory appeal

rights. Rubstello added a proviso that the appeal language would revert to the provisions in the 1990-1992 contract in the event the appeal cannot be waived.

On January 12, 1993, Cline asked Rubstello to sign a request for mediation form. The mediation request was filed with the Commission on January 27, 1993,[6] and a mediator was assigned. Two of the outstanding issues to be resolved in mediation were proposals from the employer and union for new "hours of work" and "management rights" clauses.[7]

The changes proposed by the union concerning the "hours of work" clause were directed at removing waivers, as follows:

> ARTICLE XI - HOURS OF WORK
>
> Section 1. The city shall declare a standard 40 hour duty week consisting of five (5) days of 8 consecutive hours. The Association recognizes the right of the City to establish and/or modify work schedules after negotiating the same with the Association ((~~and the City recognizes the need to confer with the Association to take employee interests into account. Except for emergency situations, at least forty eight (48) hours notice will be given to the Union before an overall long term change in the regular work schedule is implemented~~)).
>
> Section 2. The employees agree to one forty (40) minute lunch break and two twenty (20) minute rest breaks during the eight (8) hour work day ((~~confine time spent on lunch and rest breaks to those periods established by the employer~~)).

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[6] Case 10224-M-93-3882.

[7] The management rights clause of the expiring collective bargaining agreement was the focus of a complaint filed by the union against the employer on February 25, 1991. The provisions of the clause were found to be too general to constitute a waiver which would permit the employer to unilaterally change working conditions. City of Pasco, Decisions 4197-A and 4198-A (PECB, 1994).

The employer proposed to continue the language in Article IX of the parties' 1991-1992 contract, including any waivers contained there.

With respect to the "management rights" clause, the union proposed changes from the parties' 1991-1992 agreement, as follows:

> ARTICLE III - MANAGEMENT RIGHTS
>
> ((~~Any and all rights concerned with the management and operation of the department are exclusively that of the Employer, unless otherwise specifically provided by the terms of this Agreement.~~))
>
> The Association recognizes:
>
> 1. The prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities and powers; and
>
> 2. That the Employer reserves those rights subject to the obligations imposed by RCW 41.56.010 et seq. concerning management in the operation of the department which include, but are not limited to the following:
>
> a. To recruit, assign, transfer or promote members to positions within the department;
>
> b. To suspend, demote, discharge, or take other disciplinary action against employees for just cause;
>
> c. To control the Department budget.
>
> 3. To take whatever actions are necessary at all times in order to insure the proper functioning of the department.

The employer countered with its own proposal, which would have completely replaced the "management rights" article of the parties' 1991-1992 contract with the following new language:

> ARTICLE III - MANAGEMENT RIGHTS
>
> The union recognizes the exclusive right and prerogative of the city to make and implement decisions with respect to the operation and

management of the police department. Provided, however, that the exercise of any and all of these rights shall not conflict with any provision of this agreement. Such rights include, but are not limited to, the following:

1. To establish the qualifications for employment and to employ employees;
2. To establish the makeup of the police department's work force and make changes from time to time, including the number and the kinds of classifications, and direct the city work force toward the organizational goals established by the city;
3. The right to determine the police department's mission, policies, and all standards of service offered to the public;
4. To plan, direct, schedule, control and determine the operation of services to be conducted by employees of the police department in the city;
5. To determine the means, methods and number of personnel needed to carry out the departmental operations and services;
6. To approve and schedule all vacations and other employee leaves;
7. To hire and assign or transfer employees within the department, or police-related functions;
8. To lay off any employees from duty due to insufficient funds;
9. To introduce and use new or improved methods, equipment or facilities;
10. To assign work to, and schedule employees;
11. To take whatever action necessary to carry out the mission of the city in emergencies;
12. To determine the budget.

Any employee who may feel aggrieved by the unfair or discriminatory exercise of the management rights specified above, may seek his remedy by the grievance procedure provided by this agreement.

Language similar to that contained in the opening paragraph and subparagraph 6 of the employer's proposal had been awarded by Arbitrator Thomas F. Levak on October 4, 1990, as part of an interest arbitration award involving International Association of Fire Fighters Local 1433 and the City of Pasco.

Cline told Rubstello that the employer's management rights and hours of work proposals contained waivers and, as such, were permissive subjects of bargaining that must be withdrawn at impasse. On January 14, 1993, Rubstello replied by requesting Cline's citation of Commission decisions or other authority supporting his assertion that the proposals were permissive.

On January 27, 1993, Cline wrote Rubstello that he was relying on City of Yakima, Decision 3564-A (PERC, 1991) and other decisions as the authority supporting his assertion that the employer's proposals were permissive. Rubstello responded on February 1, 1993, questioning whether the City of Yakima case was on point, as he believed that case had nothing to do with negotiability of a management rights article.

On February 4, 1993, Rubstello again wrote to inform Cline that, after further research, he was able to uncover dicta in an Examiner's decision, Seattle School District, Decision 2079 (PECB, 1984), which stated that a waiver of a mandatory subject is merely a permissive subject. Rubstello observed that the cited dicta was not mentioned when the Commission reversed the Examiner's decision in that case. Rubstello also noted that the Elkouri and Elkouri treatise, How Arbitration Works, referred to several federal cases which held that waivers of mandatory subjects were, in fact, mandatory subjects of bargaining. Cline replied on February 9, 1993, citing pages 12 and 13 of the Yakima decision as stating that waivers are permissive subjects. Cline noted, further, that waivers and obligations on other permissive subjects expire when the contract expires.

Extensive discussions took place in mediation sessions held on March 18 and 19, 1993. The mediator recommended that the parties were at an impasse and, on June 29, 1993, the Executive Director certified the parties' dispute for interest arbitration under RCW 41.56.450.

As to these cases, the positions of the parties and analysis are set forth below under separate headings.

CASE 10403-U-93-2399 (UNION BAD FAITH)

Positions of the Parties

The employer argues that the union committed an unfair labor practice when it refused to honor the tentative agreement reached on September 22, 1992 concerning Article V Grievance Procedure, by which the civil service commission was to be retained as the appeal forum for disciplinary actions. The employer believes that there was a tentative agreement, and that a change of attorneys should not permit the union to renege on the agreement.

The union argues that the employer induced the union's response by proposing an illegal provision in paragraph one of Article V, which would have forced an employee to give up a statutory right to petition the civil service commission for review of disciplinary actions. The union contends the employer did not suffer any harm, because the employer did not give up any consideration for the agreement. The union also asserts that the tentative agreement was not in writing, as required by the parties' ground rules.

Discussion

The facts set forth in the "Background" section of this decision clearly show that the parties reached an agreement, on September

22, 1993, to retain the status quo on disciplinary appeals to the civil service commission. The existence of the tentative agreement on the "forum" for discipline was corroborated by the union's negotiators. That agreement was reflected in the document which Rubstello forwarded to Smedstad on October 1, 1992: The only changes proposed by Rubstello at that time in the first paragraph of Article V - Grievance Procedure had to do with other issues that had been or were being discussed by the parties.

"Absence of Consideration" Defense -

The union's assertion that it should not be held to this agreement because the agreement was "without consideration" can be dealt with quickly. Counsel for the union misunderstands labor relations law. We are not dealing here with pure contract law. What might seem like a useful defense in a commercial transaction does not necessarily apply in labor law, which is mostly relationship-based and governed by a specific "good faith" obligation.

A collective bargaining contract is less like a contract defining rights and obligations than a constitution which defines relationships of the constituents and sets forth adjudicative procedures. Of course, there is consideration. But "consideration" in a collective bargaining context is more than that given in the form of monetary benefits; it deals as well with the relationship as employer and employee. Called as a witness for the employer, Rubstello testified on cross-examination:

> Let me put it this way: Their agreement to maintain the Civil Service language made it very easy from that point on for us to be conciliatory with those other changes they wanted.
>
> Transcript at page 92

What is more valuable, and more to the point, is for parties to deal creditably with each other, and not to hide behind legalistic

theories of contract law. The union's legalistic defense here is not persuasive.

"Absence of Written Agreement" Defense -
The union next defends that the "tentative agreement" was not in writing, in accordance with the ground rules. This contention is also without merit. The employer did, in fact, transmit for signature a document that reflected the substantive understanding reached in bargaining on September 22 concerning Article V. Responding on cross-examination as to whether the grievance article had been agreed upon, Rubstello stated:

> Not on the total, every proposition in that article. We did have agreement on the major dispute in the first paragraph of that article. That was the key. The other stuff was minor and, as I say, very easily resolved itself once they agreed.
>
> Transcript at page 94.

Rubstello continued that the changes of "supervisor" to "captain" and the rewriting of the section to deal with the association's review panel had been agreed to previously. There were minor points yet to be worked out, but the "forum" issue of concern in this unfair labor practice case was properly stated. In fact, the record shows that the language which Rubstello forwarded to Smedstad provided the basis for discussion at the November 10, 1992 session, and that the parties proceeded to sign off tentative agreements on the remaining provisions of Article V.

The Examiner recognizes that final agreements must be put in writing under State ex. rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), but that is not the issue here. The tentative agreement was reduced to writing and simply awaited signature. The failure of the union to sign the tentative agreement cannot be imputed to the employer, who did what was necessary to comply with the ground rules and get this issue off the bargaining table.

"Illegal Proposal" Defense -

The union's contention that the agreement reached on September 22, 1992 was induced by an illegal proposal is barely worthy of comment. The fact that the tentative agreement was reached at an arms length negotiation with the union being represented by counsel should be sufficient to satisfy the argument. Moreover, the record shows that the employer proposal which the union now terms "illegal" was initially offered by the employer only after the union reneged on its agreement to leave all discipline cases with the civil service commission.[8] Finally, the record shows that the first "waiver of rights" proposal was actually made by the union, which initially wanted the option of going to either arbitration or the civil service commission. The record does not show any union reliance or inducement which would support such a frivolous charge.

Continued Viability of Claim -

A concern arises here as to whether the employer "waived" this claim by its subsequent conduct. It was held in Renton School District, Decision 1608 (PECB, 1982) that a union waived its right to bargain a wage rate for a classification, by its conduct of waiting four months to raise the issue after being notified of its existence. One available view of the facts in this case is that the employer abandoned the September 22 tentative agreement when it offered other compromises at later bargaining sessions, and/or by noting subsequently that paragraph one of Article V was still "open". The employer provided ample testimony, however, that it felt it was forced to renegotiate the subject by the circumstances of the change in union attorneys, and by its desire to reach agreement without further delays. Speculation about whether the employer might have dropped this issue in the face of an overall agreement is not controlling; the fact remains that the employer initiated its unfair labor practice charge against the union within

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[8] The employer made the optional proposal at the November 13, 1992 bargaining session, after the union refused to honor the tentative agreement.

the statutory six month period after the union's November 10, 1992 action to disavow the tentative agreement.

Effect on the Negotiations -

The Examiner credits the employer's evidence that it regarded this tentative agreement as a substantial breakthrough in the parties' negotiations.[9] The Examiner believes that the policy of the Public Employees' Collective Bargaining Act will best be served by holding the union to its tentative agreement. Accordingly, a violation will be found against the union.

CASE 10369-U-93-2385 (Insistence to Impasse)

Positions of the Parties

The union argues that the employer committed an unfair labor practice by insisting to impasse on waivers of the union's right to engage in collective bargaining on "hours" and various items in the "management rights" clause. The union cites Commission precedent as authority for the proposition that neither an employer or union may impasse on permissive subjects.

The employer argues that the precedent cited by the union is not on point, and that the Commission has yet to decide whether a management rights clause containing waivers of union bargaining rights is itself a mandatory subject of bargaining. The employer contends that its "management rights" and "hours of work" proposals both deal with mandatory subjects of bargaining, and cites federal precedent to support its belief that such clauses are mandatory

[9] In the autumn of 1992, these parties had only recently received the decision in City of Pasco v. PERC, 119 Wn.2d 504 (1992), where the Supreme Court of the State of Washington unanimously ruled that a proposal for a contractual remedy to parallel and/or replace the civil service forum was a mandatory subject of bargaining.

subjects of bargaining. The employer also argues that the union failed to carry its burden of proof as to the timeliness of its objections, and that the union's management rights proposal induced negotiations and a counter proposal.

Discussion

The precise issue to be resolved in this case is whether, after bargaining in good faith to an impasse, an employer may seek interest arbitration on proposed "management rights" and "hours" provisions which contain waivers of union bargaining rights on mandatory subjects of collective bargaining. While seemingly narrow in scope, this is a deceptively difficult question, implicating fundamental issues of labor law relating to the duty to bargain in good faith, unilateral changes, and the scope of bargaining.

Statutory and Precedent Background -

This case arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which is patterned after the National Labor Relations Act (NLRA) as amended by the Labor-Management Relations Act of 1947. The onset of a collective bargaining relationship marks a status quo of wages, hours and working conditions, from which the parties' future conduct may diverge. Under both state and federal law,[10] the duty of an employer to bargain in good faith can be divided into two basic obligations: The first is the general obligation to refrain from making unilateral changes affecting its organized employees with regard to certain mandatory subjects of bargaining; the second is the obligation to meet and negotiate with the exclusive bargaining representative of its employees in good faith, with a view toward reaching agreement on those mandatory subjects of bargaining.

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[10] Federal precedent is properly used in the interpretation of Chapter 41.56 RCW, where the statutes are similar. Nucleonics Alliance v. PERC, 101 Wn.2d 24 (1984).

The policy basis for the long-standing prohibition against "unilateral change" was articulated by the Supreme Court of the United States in a case decided under the NLRA:

> We hold that **an employer's unilateral change** in conditions of employment under negotiation is ... a violation of paragraph 8(a)(5), for it **is a circumvention of the duty to negotiate which frustrates the objectives** of paragraph 8(a)(5) much as does a flat refusal.

NLRB v. Katz, 369 US 736 (1962) at page 743 [emphasis by **bold** supplied].

Countless decisions of the Commission and the National Labor Relations Board (NLRB) have stated and reiterated the duty of an employer to give notice to the exclusive bargaining representative, and to provide opportunity for collective bargaining, before implementing changes affecting its represented employees.

The occurrence of an "impasse" in collective bargaining provides a limited exception to the prohibition against unilateral changes. Impasse may permit an employer that has given notice, and that has bargained in good faith upon request, to make changes without the agreement of the exclusive bargaining representative, so long as those changes have previously been proposed to that organization. Pierce County, Decision 1710 (PERC, 1983). It is fundamental that impasse does not permanently relieve either party of the duty to bargain. At most, the duty to bargain becomes dormant on one or more issues when a deadlock is reached between the parties as to them,[11] until changed circumstances indicate an agreement on those issues may again be possible. In short, impasse does not eliminate the obligation of either party to negotiate in a sincere desire to reach agreement.

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[11] Pierce County explicitly held that an impasse on a single issue did not suspend the duty to bargain on other issues.

In both the private and public sectors, the NLRB, the Commission, and the courts continue to apply the Borg-Warner doctrine,[12] under which potential subjects of bargaining are divided into three categories: Mandatory, permissive and illegal. In determining "scope of bargaining" questions, the Commission initially investigates whether the proposal directly impacts the wages, hours or working conditions of bargaining unit employees. Lower Snoqualmie Valley School District, Decision 1602 (PECB, 1983). When the proposal 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); City of Richland, 113 Wn.2d 197 (1989).

The ultimate effect of a scope of bargaining determination is on what the parties may lawfully do with their proposals. It is well settled that a party may bargain to impasse on any "mandatory" subject of bargaining. Once the point of "impasse" has been reached, however, it is unlawful for a party to insist upon "permissive" subjects as a condition of reaching agreement.[13]

In Klauder, et al. v. San Juan County Sheriff's Guild, 107 Wa.2d 338 (1986),[14] the Supreme Court held that a collective bargaining agreement provision on a permissive subject could not be carried forward in a successor agreement without the approval of both parties. Relying on Fibreboard Paper Products Corp. v. NLRB,[15] the Court concluded that RCW 41.56.030(4) parallels the bargaining duty

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[12] NLRB v. Borg-Warner Corp., 356 U.S. 342 (19); remanded, 260 F2d 785 (6th Cir., 1958). See City of Seattle, Decision 4163 (PECB, 1992) for an extensive discussion on this topic.

[13] Borg-Warner, supra, at 349.

[14] Washington Public Employment Relations Reporter, CD 389.

[15] 379 U.S. 203 (1964), at 209.

established in section 8(d) of the NLRA, and that an analysis of federal precedent would be helpful in understanding the state statute. The court cited NLRB v. Sheet Metal Workers, Local 38,[16] observing:

> A party violates the duty to bargain collectively if it insists, as a precondition to reaching an agreement, on inclusion of a provision concerning a non-mandatory subject for bargaining, that is, a subject other than the mandatory issues of wages, hours, and other terms and conditions of employment.

The contract provision at issue in Klauder was an "interest arbitration" procedure for negotiating successor contracts. The Supreme Court's application of federal precedent to that issue resulted in the declaration that, in general,

> [T]hose issues that deal with wages, hours and other terms and conditions of employment are subjects about which the parties must bargain and are categorized as "mandatory" subjects. On the other hand, the parties need not bargain on other matters which are referred to as "permissive" issues including those which deal with procedures by which wages, hours and other terms are established.

The Court observed that, under the union's view there, a party that once agreed to an interest arbitration provision could find itself locked into that procedure for as long as the bargaining relationship endured. It expressed concern, as a matter of public policy, that the existence of a self-perpetuating system could lessen the incentives to bargain in good faith toward an agreement.

There are some statutory and common law limitations which distinguish public sector collective bargaining in Washington from the private sector:

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[16] 575 F.2d 394 (2d Cir. 1978).

* The Washington common law is that strikes by public employees are unlawful. Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wa.2d 317 (1958). RCW 41.56.120 expressly does not grant public employees a right to strike. Thus, unions operating under Chapter 41.56 RCW are not in the same position to bring economic pressure to bear as are their private sector counterparts, when employers threaten to implement a proposal at impasse. Some states, including Illinois and Ohio by statute and Montana and California by court decision, have given their public employees the same right to strike as private sector employees. Other states have dealt with the distinction in various ways. In Pennsylvania, for example, a court recently ruled that a public employer may not implement its final offer even if it bargained in good faith to impasse, because the employees did not have the right to strike.[17]

* For public employees generally, the terms and conditions of a collective bargaining agreement remain in effect under RCW 41.56.123 for one year after the stated expiration date of a collective bargaining agreement. The effect of that statute is to delay implementations of "unilateral changes" for the specified period, unless the parties agree to waive the provision. RCW 41.56.123 is expressly inapplicable, however, to bargaining units eligible for "interest arbitration" under RCW 41.56.430 et seq., including the bargaining unit involved in this case.

* The "impasse/implement" rule has been effectively abolished in Washington for public employees who are subject to interest arbitration under RCW 41.56.430 et seq. RCW 41.56.470 expressly provides that existing wages, hours and other conditions of employment cannot be changed by either party without the consent of the other during the pendency of proceedings before the interest

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[17] Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 518 C.D. 1992 (PA Commwealth Court, 1/20/93). The court reasoned that the state's public sector collective bargaining law provided no express authority to unilaterally implement absent a strike.

arbitration panel. Strike penalties have been prescribed in RCW 41.56.490. For the bargaining unit of "uniformed personnel" involved in this case, interest arbitration takes the place of the legal and economic pressures of "impasse".

Continued Viability of Claim -

The employer argues that the union in effect waived its objections, because they came late in the negotiations, and that it would not be fair for one party to raise objections to a permissive subject after discussing the topic in order to get concessions. Alternately, the employer argues that the union initiated the controversy with its own management rights proposal, and thereby induced the employer into a responsive counterproposal. These arguments are not persuasive.

Free and open discussion of proposals is encouraged, and "scope" arguments are not subject to waiver, under WAC 391-45-550:

> COLLECTIVE BARGAINING--POLICY. 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 dispute between them. The commission deems **the determination as to whether a particular subject is mandatory or non-mandatory 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 non-mandatory subject**.
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> [Emphasis by **bold** supplied.]

The "notify and file" procedure used by the union in this case approximated the procedure outlined in King County Fire District

39, Decision 2328 (PECB, 1985), deviating only by filing of the complaint earlier than indicated in that case. The employer's "waiver by conduct" and "inducement" arguments are rejected.

Federal Precedent -

Placing its focus on federal case law, in the claimed absence of Commission precedent directly on point, the employer particularly cites NLRB v. American National Insurance Company, 343 US 395 (1952), and its progeny, as authority for the proposition that a management rights clause is a mandatory subject of bargaining. In American National, the specific issue before the NLRB was whether the act of proposing a management rights clause was a per se violation of the duty to bargain. The NLRB ruled that a clause under which the employer was to retain the initial right to schedule as a condition of employment for the duration of the contract was an unfair labor practice, because it was in "derogation of the statutory rights to bargain conditions of employment". The Supreme Court reversed, holding that an employer's insistence on a broad management rights clause giving the employer complete discretion in setting certain conditions of employment was not per se unlawful.[18] American National was then cited as support for the ruling, in NLRB v. Tomco Communication Inc., 567 F.2d 871 (9th Cir., 1978), that an employer may impasse on a management rights clause.[19] There have been exceptions to the American National rule, as noted below, but those exceptions have no application in this case.

In American National and Tomco, the record did not show that any acts of bad faith bargaining accompanied the employer's insistence

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[18] A dissent by three Justices contended that an employer which conditions acceptance of a waiver clause as a condition precedent to an agreement is guilty of a refusal to bargain.

[19] The same decision also upheld the right to impasse on a "zipper" clause.

on its management rights proposal. That distinguishes those cases from San Isabel Electric Services, 225 NLRB 1073 (1976) and Florida Machine & Foundry Corp., 174 NLRB 170, remanded 441 F.2d 1005, cert. denied 409 US 846 (1972), where the NLRB and courts held that employers unlawfully insisted to impasse on broad management rights clauses reserving the absolute right to unilaterally promulgate work rules and safety rules. The San Isabel and Florida Machine cases are extreme examples of bad faith bargaining conduct, in which a management rights proposal was only one of many factors supporting finding a refusal to bargain violation. The record made in the instant case does not sustain a finding that the employer acted in bad faith, and so is more like American National.

Impasses on proposals that circumvent the right of union to represent employees have also been struck down. In Toledo Blade Co. and Toledo Typographical Union No. 63, 295 NLRB 626, remanded 907 F.2d 1220 (D.C. Cir, 1990),[20] the employer bargained to impasse on a proposal which would have permitted it to bypass the union and deal directly with the employees on retirement and separation incentives. The employer's goal was to negotiate individual "buy outs" of lifetime job guarantees. Relying on American National, the NLRB found that the mere fact the proposal involved a statutory waiver did not make it a permissive subject. The court reversed, holding the clause was "permissive" because it concerned direct dealing with employees to the exclusion of the union. Therefore, the employer could not lawfully insist to impasse on a proposal that would deprive the union pro tanto of its role of exclusive representative. There is no such "circumvention" aspect in the case now before the Examiner.

Certain of the employer's arguments based on American National are not persuasive. The Supreme Court majority observed in that case

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[20] Cert denied, 111 S.Ct 767 (1991), on remand, 301 NLRB 70 (1991).

that the negotiation of management rights clauses was a common practice in the industry where the case arose, and it declared that bargaining for more flexibility in such matters would be denied employers under the NLRB's approach, even though the result may be contrary to the industry practice. The employer makes the same argument in this case, citing similar clauses in all of its collective bargaining contracts with other bargaining units within its workforce. The employer also cites many of the contracts signed by public employers who are used as "comparables" in negotiating with this bargaining unit. Indeed, a Bureau of National Affairs report on a November, 1992, study of collective bargaining contract clauses indicated that management rights clauses were found in each of the 400 contracts studied. The Commission has, however, looked to the specific terms of proposals and contract clauses, not just to their titles.

Some of the other federal precedent relied upon by the employer here is inapposite. TCI of New York, 301 NLRB 122 (1992), which is offered as authority for the proposition that a "zipper" clause is also a mandatory subject of bargaining, did not actually deal with whether an employer could impasse on a "zipper" proposal. Rather, the question there was whether an existing "zipper" clause supported a company's unilateral decision to end its bonus plan. The NLRB held that the "zipper" clause supported the action because the employer negotiated a change of language which put the union on notice that all prior agreements and past practices were to be ended. Several other decisions held that management right clauses that do not deal specifically with the subject matter being claimed probably would not support a waiver defense of a unilateral action by an employer. During bargaining the union must clearly intend, express and manifest a conscious relinquishment of its right to bargain before a waiver can be found. Intermountain Rural Electrical Association, 305 NLRB 1107, 984 F2d 1562 (10th Cir., 1993). The fact remains, however, that American National is the controlling federal precedent on the issue involved here.

Commission Precedent -
Commission precedent concerning the requirements for finding a waiver is generally in harmony with the federal cases cited by the employer. For example, City of Wenatchee, Decision 2194 (PECB, 1985), which required that waivers be consciously made and be clear and unmistakable, is similar to Intermountain Rural Electric. Differing from the employer about the existence of Commission precedent controlling this case, the union relies on three Commission cases as support for its argument that waivers of mandatory subjects are themselves permissive subjects of bargaining, so that neither an employer nor a union may impasse on them.

The union cites Seattle School District, supra, as holding that waivers of mandatory subjects are merely permissive subjects of bargaining. The employer responds that the mention of waivers being permissive in this case was dicta which did not rest on any authority. A careful reading of the Seattle decision indicates that the statement concerning waivers being a permissive subjects was supported indirectly by Shell Oil Company, 93 NLRB 161 (1951).[21] Although that case enforced a contract waiver on which the parties had previously agreed, the NLRB observed there that "the union was not required to bargain at all with respect to waiving a right ..." That observation was predicated in part on the earlier NLRB decision in American National, 89 NLRB 185 (1950), holding that it was a per se violation of Section 8(a)(5) and (1) to insist on a broad management prerogative clause as a condition of agreement. As noted above, however, the NLRB's American National holding was later reversed by the Supreme Court. Thus, the precedent value of Shell Oil was also severely diminished.

The Examiner in Seattle School District, supra, also relied on Federal Aviation Administration, 14 FLRA 89 (1984), where the Federal Labor Relations Authority dealt with the expiration of waivers with the termination of a contract. The undersigned

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[21] Cited in the text of the decision as 93 NLRB 20 (1951).

Examiner does not place much precedential value on the "scope of bargaining" rulings made under the federal government scheme of labor relations, because that system differs substantially from the private sector and the Washington public sector. In the Federal system a veritable thicket of federal statutes, regulations and interpretations extensively regulates the minutia of what may or may not be bargained and to what extent. Excluded from bargaining in the federal governmental sector are such mandatory subjects as wages, premiums, and hours of work.

The union relies on a statement found within a discussion of "deferral to arbitration" in City of Yakima, supra, as follows:

> **Waivers of statutory bargaining rights are not, themselves, a mandatory subject of bargaining.** Employers are sometimes willing to agree on a "permissive" subject, knowing that they will be able to back out of that agreement when the contract expires. See, e.g., WAC 391-45-550. Employers are sometime willing to make concessions on other issues, in order to obtain waivers of union bargaining rights giving them a free (or less hindered) hand in administering their operations during the life of the contract. **In practical application, one of the principal distinctions between "mandatory" and "permissive" subjects is that the status quo must be maintained on mandatory subjects after the expiration of a collective bargaining agreement, while obligations concerning a permissive subject expire with the contract in which they were contained.** One of the inherent forces which motivate employers to sign contracts (or contract extensions) with unions is the preservation of contractual waivers of union bargaining rights.

City of Yakima, Decision 3564-A at page 12. [Emphasis by **bold** supplied.]

There was no citation or rejection of American National. The precise issue of whether the employer could impasse on a management rights clause was not even at issue in Yakima. Rather, the contro-

versy there was whether waivers contained in the parties' existing management rights clause were sufficient to permit the fire chief to make unilateral changes in the scheduling of vacations, holidays and kelly days. After deciding that "deferral to arbitration" was not appropriate there, the Commission interpreted the management rights clause and ruled that the waivers did not control.[22]

The other Commission precedent cited by the union here, City of Richland, supra, is also of questionable value. The undersigned Examiner held in that case that a union proposal to reopen wage negotiations if staffing changed was a mandatory subject of bargaining. This Commission reversed, but its decision was ultimately reversed and the case was remanded back to the agency for further proceedings in line with the Examiner's original decision. The dispute was then resolved by the parties, however, without further decisions from either the Examiner or Commission.

Conclusions -

At the outset, it should be noted that a mandatory subject does not lose its status as such if one party gains complete control over the subject pursuant to collective bargaining. The issue in this case arises when one party will not agree in bargaining to yield such control.

The positions of the employer and the union in this controversy describe extremes. The employer argues under the federal model for the bargainability of comprehensive management rights and hours of work clauses which, if granted, could displace the union in many areas of bargaining. The union argues under Commission precedent against the bargainability of any clause which seeks to waive the

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[22] There is recent federal authority which supports the Commission's observations in City of Yakima that a management rights clause does not survive the expiration of a contract. See: Furniture Rentors Inc., 143 LRRM 1249 (1993).

bargaining rights secured by the statute. A fault with the approaches of both parties is that they mix the "impasse" and "mandatory subject" concepts as if they were one.

A rule that would permit "unilateral implementation" of proposals giving an employer future unilateral discretion over mandatory subjects would mean many impasses would not be resolved. Once an employer achieved a broad management rights clause of the type described in American National and a "zipper" clause, the union representing its employees could be foreclosed from bargaining for the duration of the agreement regardless of the circumstances. The danger of self-perpetuation of waivers that the Washington Supreme Court foresaw in Klauder with respect to interest arbitration procedures could come to pass, and such an employer could perpetuate its position by repeated use of the unilateral implementation device at impasse. If implemented upon impasse, a proposal giving the employer complete discretion over mandatory subjects of bargaining would thus impair post-impasse negotiations by giving the employer the ability to take unilateral action, which the Supreme Court of the United States has said "must of necessity obstruct bargaining".[23] Such a result would be the antithesis of good faith collective bargaining. In summary, substantial mischief could occur if "waivers" could be imposed on a union through impasse.

The principle suggested in Seattle School District, supra, and City of Yakima, supra, contains the other extreme. It would trap the employer and union in a continuous round of bargaining over any substantive change in a mandatory subject, such as work schedules in the Seattle example. It would not appear to the interest of either labor or management that an employer be left without some flexibility to manage its operations. This is likely the reason that many collective bargaining contracts, including those subject

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[23] NLRB v. Katz, 369 US 736, 747 (1962)

to interest arbitration, contain negotiated "management rights" clauses and other waivers. That is also the rationale which underlies the Supreme Court's decision in American National.

Accepting that neither party can "unilaterally implement" a waiver of statutory rights on the other because of the existence of an impasse, the question remains of whether it is lawful for a party to continue to insist on a waiver after an impasse has been reached. In most situations, the ultimate decision of a party to accept a waiver as part of a negotiated settlement would raise the same considerations discussed in the quotation from City of Yakima that is set forth above. Categorization of the "management rights" clause as a mandatory subject of bargaining would not change the fact that the waivers contained in such a clause would expire with the collective bargaining agreement under both state and federal precedent cited above.

The bargaining unit involved here is subject to the interest arbitration procedures of RCW 41.56.430 et seq. in the event of an impasse in collective bargaining negotiations. Those impasse procedures explicitly prohibit unilateral changes in the terms and conditions of employment. Thus, the question of whether a party may bargain to impasse on waivers (and, impliedly, submit its proposals on such issues to an interest arbitrator) must be decided in this case on a different fact situation than was faced by the Supreme Court in American National.

In the interest arbitration setting, impasse is only a step in the bargaining process which triggers arbitration. Since arbitration is the final step in collective bargaining negotiations, the extremes described above are not as likely to occur in the first place, and their repeated recurrence is even less likely. Whether one party or the other would prevail on a waiver clause proposal in interest arbitration would, like the resolution of disputes on other mandatory subjects, be dependent on the reasonableness of the

arguments made. For this reason, extreme positions generally do not prosper in the marketplace which is arbitration.
For the reasons cited above, the question of whether an employer who has advanced a waiver clause within the American National precedent may impasse and seek interest arbitration on its proposal is answered in the affirmative.

FINDINGS OF FACT

1. The City of Pasco is a "public employer" within the meaning of RCW 41.56.030(1).

2. The Pasco Police Officer's Association, a bargaining representative within the meaning of RCW 41.56.030 (5), is the exclusive bargaining representative of law enforcement employees of the City of Pasco who are "uniformed personnel" within the meaning of RCW 41.56.030(7).

3. The parties' to this proceeding were parties to a collective bargaining agreement that expired on December 31, 1992. The parties began negotiations for a successor agreement on July 21, 1992, with Attorney Victor Smedstad representing the union and City Attorney Greg Rubstello representing the employer. Michael Aldridge was president of the union, and was a member of the union's bargaining team. As part of their ground rules for the negotiations, the parties agreed to reduce tentative agreements in writing for signature.

4. At an early stage in the negotiations, the employer proposed management rights and hours of work language by which the union would waive its statutory bargaining rights on certain matters for the life of the collective bargaining agreement.

5. At an early stage in the negotiations, the union proposed to alter the procedures for appeal of employee disciplinary action. At a negotiation session on September 22, 1992, the union agreed to withdraw its proposed change in the appeal procedure of disciplinary actions, and retain the provisions of Article V Grievance Procedure of the previous contract, under which the civil service commission was designated as the forum to decide such matters. Rubstello prepared a written tentative agreement, and forwarded it to Smedstad for signature. There were minor changes remaining to be made within the context of the oral tentative agreement, but the document correctly dealt with the issue of the forum for resolution of disputes concerning disciplinary actions.

6. On or about October 1, 1992, Attorney James M. Cline replaced Smedstad as the representative of the union. At a negotiation session held on November 10, 1992, Cline disavowed any knowledge of the tentative agreement, claiming he did not have Smedstad's notes. Cline stated the union would never agree to retaining the civil service commission as the forum for disciplinary actions. Rubstello protested, but made other proposals in an effort to finalize the negotiations.

7. Rubstello forwarded certain contract articles to Cline on November 13, 1992, and requested signature on behalf of the union. With respect to Article V, Rubstello noted that the method of appeal was still open.

8. Late in November of 1992, Rubstello proposed a new approach with an appeal to the city manager and then to arbitration. Negotiations continued with little success.

9. On January 12, 1993, the parties declared impasse and requested mediation from the Commission. After two days of mediation, the mediator recommended that the impasse continued.

The Executive Director then certified the outstanding issues to interest arbitration under RCW 41.56.450.

10. During the course of the negotiations, the union objected to management proposals concerning management rights and hours of work, on the basis that they contained waivers on mandatory subjects of bargaining. The parties discussed the legality of impassing on the articles in an exchange of letters. The employer nevertheless sought interest arbitration on its proposals.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter under Chapter 41.56 RCW.

2. By its actions to withdraw from a tentative agreement concerning the forum for appeal of disciplinary actions, as described in paragraphs 5 and 6 of the foregoing findings of fact, the Pasco Police Officers' Association has failed and refused to bargain in good faith, and has committed an unfair labor practice in violation of RCW 41.56.150(4).

3. By its action to pursue its proposals on management rights and hours of work, as described in paragraphs 4 and 10 of the foregoing findings of fact, the City of Pasco has not committed, and is not committing, an unfair labor practice under RCW 41.56.140(4).

Based on sworn testimony during the hearing, exhibits received into evidence, the post-hearing arguments and brief of the parties, and the record as a whole, it is

ORDERED

1. [Case 10369-U-93-2385] The complaint charging unfair labor practice filed by the Pasco Police Officer's Association against the City of Pasco is DISMISSED.

2. [Case 10403-U-93-2399] The Pasco Police Officers' Association, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   a. CEASE AND DESIST from:

      (1) Refusing to bargain in good faith by withdrawing from the tentative agreement reached in collective bargaining on the subject of the forum for resolution of disputes concerning disciplinary actions.

      (2) 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.

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

      (1) Withdraw its proposal on the forum for discipline disputes from the current negotiations between the parties, and accept the continuation of Article V of the parties' previous collective bargaining agreement in the successor contract being negotiated by the parties.

      (2) 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.

(3) 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.

(4) 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, this 26th day of April, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

William A. Lang

WILLIAM A. LANG, 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

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 bargain in good faith with the City of Pasco.

WE WILL not withdraw from a tentative agreement concerning the forum for appeal of disciplinary matters, in violation of RCW 41.56.140(4), and accept the continuation of Article V of the parties' previous collective bargaining agreement in the successor contract being negotiated by the parties.

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.

DATED: _____

PASCO POLICE OFFICERS ASSOCIATION

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