King Fire District 36, Decision 11120 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2950, Complainant, vs. KING FIRE DISTRICT 36, Respondent.	CASE 23401-U-10-5962 DECISION 11120 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Michael Duchemin, Attorney at Law, for the union.

Summit Law Group, by *Sofia Mabee*, Attorney at Law, for the employer.

On July 26, 2010, International Association of Fire Fighters Local 2950 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission or agency) naming King County Fire District 36, also called Woodinville Fire and Rescue (employer), as respondent. The complaint involves a bargaining unit of uniformed firefighters. On August 4, 2010, Commission staff issued a deficiency notice. On August 24, 2010, the union filed an amended complaint. On September 13, 2010, Commission staff issued a preliminary ruling that the union's amended complaint stated multiple causes of action against the employer for alleged violations of RCW 41.56.140. On October 1, 2010, the employer filed an answer to the amended complaint. On January 31, 2011, the union and employer executed a settlement agreement (Ex. 12) resolving most of the issues and reserving three issues for hearing. On February 14, 2011, Examiner Joel Greene held a hearing on the three remaining issues. On March 25 and 28, 2011, the union withdrew two of the three issues addressed at the hearing. On May 10, 2011, each party filed a post-hearing brief.

ISSUE

The issue is whether the employer refused to bargain in violation of RCW 41.56.140(4) by insisting to impasse on an alleged permissive subject of bargaining, a provision in a grievance procedure making each party responsible for its own attorney fees and representation costs.

I find the employer did not violate RCW 41.56.140(4) because the provision in the grievance procedure making each party responsible for its own attorney fees and representation costs is a mandatory subject of bargaining. Grievance procedures are included in the statutory definition of mandatory subjects of bargaining in RCW 41.56.030(4), and the provision at issue in the present case is an integral and important part of the parties' grievance procedure.

LEGAL STANDARDS

In *Yakima County*, Decision 10204-A (PECB, 2011), the Commission provided a detailed explanation of the standards used to determine whether a specific issue is a mandatory or permissive subject of bargaining:

> "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). . . . An employer or exclusive bargaining representative that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1); RCW 41.56.150(4) and (1); *see also Snohomish County*, Decision 8733-C (PECB, 2006) (a union did not commit an unfair labor practice by insisting to impasse on a deferred compensation plan).
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> Commission and judicial precedents interpreting that definition identify three broad categories of bargaining: mandatory subjects, permissive subjects, and illegal subjects. *NLRB v. Wooster Division Borg-Warner*, 356 U.S. 342 (1958); *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450 (1997) (*City of Pasco*); *Federal Way School District*, Decision 232-A (EDUC, 1977).
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> - Employee "wages, hours and working conditions" are generally "mandatory" subjects over which the parties must bargain in good faith. It is an unfair labor practice for either an employer or an exclusive

bargaining representative to refuse to bargain a mandatory subject. RCW 41.56.140(4); RCW 41.56.150(4).

- Management and union prerogatives, along with procedures for bargaining mandatory subjects, are "permissive" subjects over which the parties may negotiate, but are not obliged to do so. *City of Pasco*, 132 Wn.2d at 460 (holding that as to permissive subjects, each party is free to bargain or not to bargain, and to agree or not to agree). "Pursuing a permissive subject to impasse, *including submitting a permissive subject of bargaining to interest arbitration,* is an unfair labor practice." *State – Office of Financial Management*, Decision 8761-A, *citing Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342 (1986) (emphasis in original).

- Matters that parties cannot agree upon because of statutory or constitutional prohibitions are "illegal" subjects of bargaining. Neither party has an obligation to bargain such matters. *See, e.g., City of Seattle*, Decision 4687-B (PECB, 1997), *affirmed*, 93 Wn. App. 235 (1998), *review denied*, 137 Wn.2d 1035 (1999).

In deciding whether an issue of bargaining is mandatory or permissive, this Commission examines two principal considerations: (1) the extent to which managerial action impacts the wages, hours and working conditions of employees, and (2) the extent to which a managerial action is deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) (*City of Richland*). The Supreme Court held in *City of Richland* that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are classified as non-mandatory subjects." *City of Richland*, 113 Wn.2d at 200.

The scope of bargaining is a question of law and fact for the Commission to determine on a case-by-case basis. *City of Richland*, 113 Wn.2d at 203; WAC 391-45-550. Decisions about what services will be offered by an employer are generally accepted by the National Labor Relations Board (NLRB) and various state labor relations boards as prerogatives of management and, as such, permissive subjects of bargaining. *See Federal Way School District*, Decision 232-A. On numerous occasions, this Commission has recognized that public employers have the right to "entrepreneurial control" over nonmandatory subjects of bargaining. *Snohomish County Fire District 1*, Decision 6008-A (PECB, 1998); *Wenatchee School District*, Decision 3240-A (PECB, 1990).

Where a subject relates both to conditions of employment and is a managerial prerogative, this Commission will examine the record presented to determine which characteristic predominates.

In *King County*, Decision 10576-A (PECB, 2010) the Commission described the balancing test used to determine whether an issue is a mandatory or permissive subject: "When subjects relate to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v PERC*, 113 Wn.2d 197, 200 (1989); *Federal Way School District*, Decision 232-A."

As the complaining party in the present case, the union carries the burden of proving the employer committed an unfair labor practice. *City of Seattle*, Decision 9938-A (PECB, 2009); WAC 391-45-270(1)(a).

ANALYSIS

The union and employer were parties to a collective bargaining agreement (CBA) that expired December 31, 2010. The parties began bargaining a successor agreement on May 19, 2010, and held nine bargaining sessions. The employer maintained detailed contemporaneous notes from each of the lengthy bargaining sessions. See Exs. 3 to 10; see also Ex. 34.

At the conclusion of the last bargaining session on July 30, 2010, the parties were unable to agree on several provisions. Ex. 10. Several months later, on January 31, 2011, the parties signed a comprehensive settlement agreement addressing many unresolved grievances, pending unfair labor practice complaints, and unresolved bargaining issues. Ex. 12. In the settlement agreement, the parties agreed to "roll over" the previous CBA, with a few minor changes. The roll over CBA included Section 13.09E from the parties' previous CBA. Section 13.09E addresses grievance arbitration procedures and contains the following underlined five words, which are the basis for the dispute in the present case:

> E. The arbitrator shall render a decision within thirty days of hearing. The award of the arbitrator shall be binding upon the parties hereto. The arbitrator shall have no power to alter, amend, or change the terms of this AGREEMENT. While a grievant may be "made whole" by the arbitrator, any

> punitive award by the arbitrator shall be void and unenforceable. The expense of the neutral arbitrator will be shared equally between both parties and each party shall be responsible for the costs of their own witnesses <u>and representation, including attorney's fees.</u>

Ex. 29 (capitalization original; underlining added).

During contract negotiations, the union proposed deleting from Section 13.09E the last five words underlined in the previous paragraph – "and representation, including attorney's fees." Transcript at page 75 lines 4 to 16 (hereafter Tr. at 75:4-16), referring to Ex. 20 at 25; Tr. at 84:10-12; Tr. at 30-31:18-25, 1-4; Ex. 5 at 4; Ex. 7 at 6. The union's proposed deletion would allow the union to retain the right to ask that the arbitrator require the employer to pay the union's attorney fees and representation costs. Ex. 5 at 4. The union advised the employer the union believed the disputed language, which the parties refer to as the "attorney fee waiver," was a permissive subject of bargaining. Ex. 5 at 7; Ex. 7 at 6; Ex. 8 at 1; Tr. at 56:1; Tr. at 60:9. The employer argued the attorney fee wavier was a mandatory subject of bargaining, which should be retained in Section 13.09E of the CBA. The employer reasoned that attorney fees and representation costs "should be a shared expense" because "it's fair to expect both sides to share the burdens when both sides move forward." Ex. 5 at 6, 7.

During contract negotiations, the parties were unable to resolve this disagreement.[1] The settlement agreement between the parties preserved the union's right to litigate the attorney fee waiver provision, whether the last five words in Section 13.09E represents a mandatory or permissive subject of bargaining:

> 8. . . . Notwithstanding the withdrawl/dismissal of the Union's Unfair Labor Practice Complaints and the signing of a "roll over" CBA, with the above-referenced revisions, the Parties expressly agree that the Union does not waive and shall retain its right to litigate its allegations concerning: . . . (c) that the attorney fee waiver in the existing grievance procedure is a permissive subject.

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[1] The parties used three terms to characterize that they were unable to agree on the attorney fee waiver provision: "impasse;" "tabled;" and "agree to disagree." Ex. 7 at 6 ("tabled"); Ex. 8 at 1 ("impasse"); Ex. 9 at 10 ("tabled" and "agree to disagree"); Tr. at 31:15-17; Tr. at 48:1-12; Tr. at 56:8-11; Tr. at 60:6-12, 21-24; Tr. at 83-84:14-25, 1-3. The employer's chief administrative officer testified that the parties used these three terms "interchangeably." Tr. at 73:16-22.

Ex. 12 at 3. The employer acknowledged that this provision in the settlement agreement authorizes the union to challenge the attorney fee waiver in the present unfair labor practice proceeding. Employer's brief at 10 ("the parties . . . signed a new CBA containing Article 13 and agreed to allow the Local to pursue this unfair labor practice complaint").

I find the disputed provision in the grievance procedure making each party responsible for its own attorney fees and representation costs is a mandatory subject of bargaining. RCW 41.56.030(4) (underlining added) includes "grievance procedures" in the statutory definition of mandatory subjects of bargaining:

> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to <u>grievance procedures</u> and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

Numerous Commission decisions reiterate that grievance procedures are mandatory subjects of bargaining.[2] *Community Transit*, Decision 10267-A (PECB, 2009) ("It is well settled under the NLRA and Chapter 41.56 RCW that grievance procedures are a mandatory subject of bargaining."); *Asotin County*, Decision 9549-A (PECB, 2007) ("This Commission has consistently held that grievance procedures are mandatory subjects for collective bargaining . . . ."); *City of Pasco*, Decision 3804-A (PECB, 1992) ("The definition of 'collective bargaining' contained in RCW 41.56.030(4) includes specific mention of 'grievance procedures' as a mandatory subject of bargaining.").

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[2] Examiner decisions similarly confirm that grievance procedures are mandatory subjects of bargaining. *Pasco Housing Authority*, Decision 5927 (PECB, 1997), *aff'd*, Decision 5927-A (PECB, 1997), *aff'd*, Wash. St. Pub. Empl. Rel. Rep. CD-983 (Franklin County Super. Ct., No. 97-2-50572-3, 1998), *aff'd,* 98 Wn. App. 809 (2000) ("RCW 41.56.030(4) specifically makes grievance procedures a mandatory subject of collective bargaining"); *Clark County*, Decision 3451 (PECB, 1990) ("An employer must negotiate, upon demand, regarding grievance procedures, as that topic is a mandatory subject of bargaining.").

Richland School District, Decision 8454 (PECB, 2004) supports the conclusion that the disputed provision in the grievance procedure making each party responsible for its own attorney fees and representation costs is a mandatory subject of bargaining. In *Richland School District*, the CBA provided for a grievance appeal hearing before the school board but was silent regarding who could attend the hearing. The board unilaterally imposed a restriction that only three individuals representing the union could attend the hearing. The union demanded to bargain the attendance limitation. The board refused to bargain, and the union filed an unfair labor practice complaint.

The Examiner in *Richland School District* (underlining original; footnote omitted) found the school board committed an unfair labor practice when it refused to engage in good faith bargaining over a mandatory subject of bargaining, the procedures for processing a grievance:

> Grievance procedures are a mandatory subject of bargaining under Chapter 41.56 RCW. *City of Pasco,* Decision 3368-A (PECB, 1990), *aff'd, City of Pasco v. Public Employment Relations Commission,* 119 Wn.2d 504 (1992). Given the explicit reference to "grievance procedures" in RCW 41.56.030(4), there is no need to engage in the balancing exercise used when assessing whether particular "working conditions" are a mandatory subject of bargaining. The hearings before the school board at issue here are clearly part of the grievance process utilized by the union and employer, so the Examiner rejects the employer's contention that it had a management prerogative to unilaterally change the procedure for grievance hearings.

Although the Examiner stated there was no need to apply the *City of Richland* balancing test to determine whether the grievance procedures at issue were a mandatory subject of bargaining, the Examiner applied the balancing test and reached the same conclusion: the attendance limitation was a mandatory subject of bargaining.

In the present case, the provision making each party responsible for its own attorney fees and representation costs is a mandatory subject just like the attendance limitation in *Richland School District*. The provisions in each case are integral and detailed parts of the parties' grievance procedures, which are mandatory subjects of bargaining under statute and case law.

Application of the *City of Richland* balancing test confirms the conclusion that the attorney fee waiver provision making each party responsible for its own attorney fees and representation costs is a mandatory subject of bargaining. On one side of the balance test is the extent to which the subject impacts employee wages, hours, and working conditions. The provision at issue defines each party's financial responsibility when a grievance is submitted to arbitration. The costs of arbitration, which can be substantial, affect the union's and employee's ability and decision whether to file and pursue a grievance. The ability to file and pursue a grievance directly involves the administration of the CBA and is a matter of deep and direct concern to employees and the union. On the other side of the balance test is the extent to which the subject is an essential management prerogative. The decision whether each party pays its own attorney fees and representation costs in a grievance arbitration hearing is not a topic that that lies at the core of the employer's entrepreneurial control. Application of the balancing test supports my finding that the attorney fee waiver provision at issue is a mandatory subject of bargaining.

The Union's Positions

The union places heavy if not exclusive reliance on *Port of Ilwaco*, Decision 970 (PECB, 1980). In *Port of Ilwaco*, the Port insisted that the CBA include in the grievance procedure a provision – referred to as a "legal liability clause" – requiring that a party who breaches the CBA shall be liable to pay the attorney fees and other necessary expenses incurred by the nonbreaching party. The union brought an unfair labor practice charge alleging the employer conditioned execution of the CBA on a permissive subject of bargaining, the legal liability clause. The Examiner agreed with the union and found the legal liability clause was a permissive subject.

The union's reliance on *Port of Ilwaco* is misplaced for the following three reasons: First, *Port of Ilwaco* found the legal liability clause was "too much related to the internal administrative procedures of the parties, and is not sufficiently directly related to the grievance procedure or personnel matters." The provision at issue in the present case directly relates to, and is an integral and important component of, the procedures used to process employee grievances. Second, *Port of Ilwaco* indicated the legal liability clause at issue in that case "remotely relate[s] to grievance procedures," "only relates to the grievance procedure or personnel matters in an indirect manner," and is "too much related to the internal administrative procedures of the

parties." The provision at issue in the present case directly relates to the grievance procedure. Third, *Port of Ilwaco* relied upon a 1974 decision by the National Labor Relations Board (NLRB) and ruled the legal liability clause was analogous to "indemnity provisions, performance bonds, 'save harmless' clauses, and union liability provisions," which are permissive subjects of bargaining because "they are not matters which relate primarily to the working relationship between the employer and its employees." The provision at issue in the present case relates to the wages, hours, and working conditions of the employees because it is an essential part of the grievance process and directly influences decisions whether to file, pursue, or litigate a grievance to arbitration.

Last, the union also argues that if the employer prevails in the present case, this would contradict the union's right to recover attorney fees as embodied in RCW 49.48.030. RCW 49.48.030 requires an employer to pay attorney fees to an employee who wins a judgment for wages owed by the employer to the employee and reads as follows:

> In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer . . . .

I find the union's argument is misplaced. RCW 49.48.030 addresses payment and collection of wages, legal actions by employees to recover back wages. RCW 49.48.030 regulates unpaid wage claims and is not a collective bargaining law. RCW 49.48.030 is not relevant to the analysis of whether a provision in a grievance procedure making each party responsible for its own attorney fees and representation costs is a mandatory or permissive subject of bargaining.

Conclusion

I find Section 13.09E, the provision in the grievance procedure making each party responsible for its own attorney fees and representation costs, is an integral and important part of the grievance procedure and is a mandatory subject of bargaining. The union did not carry its burden of proving the employer committed an unfair labor practice when the employer insisted to impasse that Section 13.09E should be retained in the CBA.

FINDINGS OF FACT

1. King County Fire District 36, also called Woodinville Fire and Rescue (employer), is a public employer within the meaning of RCW 41.56.030(13).

2. International Association of Fire Fighters Local 2950 (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and is the exclusive bargaining representative of a bargaining unit of uniformed firefighters.

3. The union and employer were parties to a collective bargaining agreement (CBA) that expired December 31, 2010. The parties began bargaining a successor agreement on May 19, 2010, and held nine bargaining sessions. At the conclusion of the last bargaining session on July 30, 2010, the parties were unable to agree on several provisions.

4. On January 31, 2011, the parties signed a comprehensive settlement agreement addressing many unresolved grievances, pending unfair labor practice complaints, and unresolved bargaining issues. In the settlement agreement, the parties agreed to "roll over" the previous CBA, with a few minor changes. The roll over CBA included Section 13.09E from the parties' previous CBA. Section 13.09E addresses grievance arbitration procedures and contains the following underlined five words, which are the basis for the dispute in the present case:

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5. During contract negotiations, the union proposed deleting from Section 13.09E the last five words underlined in Finding of Fact 4 – "and representation, including attorney's

fees." The union advised the employer the union believed the disputed language, which the parties refer to as the "attorney fee waiver," was a permissive subject of bargaining. The employer argued the attorney fee wavier was a mandatory subject of bargaining, which should be retained in Section 13.09E of the CBA

6. During contract negotiations, the parties were unable to resolve the disagreement described in Finding of Fact 5. The settlement agreement between the parties preserved the union's right to litigate the attorney fee waiver provision, whether the last five words in Section 13.09E represents a mandatory or permissive subject of bargaining

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in the present case under Chapter 41.56 RCW and Chapter 391-45 WAC.

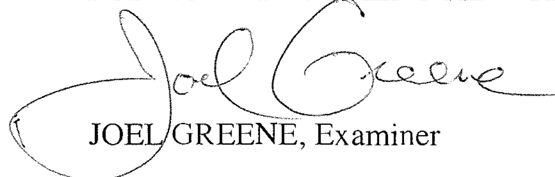
2. The provision in the parties' collective bargaining agreement making each party responsible for its own attorney fees and representation costs is a mandatory subject of bargaining as defined by RCW 41.56.030(4). As described in Findings of Fact 3 through 6, the employer did not violate RCW 41.56.140(4) and (1) when it insisted to impasse that the provision should be retained in the parties' collective bargaining agreement.

ORDER

I hereby dismiss the union's complaint charging unfair labor practices in the present case.

ISSUED at Olympia, Washington, this 14th day of July, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JOEL GREENE, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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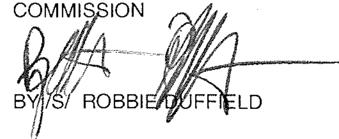

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23401-U-10-05962	FILED:	07/26/2010	FILED BY:	PARTY 2
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BAR UNIT:	FIREFIGHTERS				
DETAILS:	-				
COMMENTS:					

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