City of Vancouver, Decision 11372 (PECB, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 452, Complainant,	CASE 24198-U-11-6198
vs.	DECISION 11372 – PECB
CITY OF VANCOUVER, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Snyder and Hoag LLC, by *Lane Toensmeier,* Attorney at Law, for the union.

Debra Quinn, Assistant City Attorney, for the employer.

On August 22, 2011, the International Association of Fire Fighters Local 425 (union) filed this unfair labor practice complaint against the City of Vancouver (employer). The complaint alleges that the employer refused to engage in collective bargaining and interfered with employee rights in violation of RCW 41.56.140(4) and (1) by refusing to process grievances to arbitration after the parties collective bargaining agreement expired on December 31, 2009. The Commission appointed Examiner Jessica J. Bradley to hear the case.

The union and employer filed motions for summary judgment, supported by declarations and exhibits. On December 27, 2011, the Examiner issued a letter ruling that summary judgment is an appropriate means to decide this case because there are no genuine issues of material fact in dispute. The parties submitted briefs, the last of which was filed on January 20, 2012.

ISSUE

Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) by refusing to process grievances to arbitration filed by interest arbitration eligible employees under an expired collective bargaining agreement?

The employer was obligated to arbitrate grievances under the parties' 2009 expired collective bargaining agreement for these interest arbitration eligible employees. In *Community Transit*, Decision 10267-A (PECB, 2009) [1] the Commission held that a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement. The employer violated RCW 41.56.140(4) and (1) by refusing to process grievances to arbitration that arose under the parties' 2009 expired collective bargaining agreement.

BACKGROUND

The union represents a bargaining unit of fire department captains and firefighters, which the parties refer to as the fire suppression employees bargaining unit. The employees in this bargaining unit are eligible for interest arbitration, as defined by RCW 41.56.430 through 41.56.492.

The employer and union were parties to a collective bargaining agreement effective January 1, 2009, through December 31, 2009. Article 27 of the 2009 collective bargaining agreement contains a grievance procedure culminating in binding arbitration.

On December 10, 2009, the Commission issued its decision in *Community Transit*.[2] This decision announced a change in case precedent concerning the obligation to arbitrate grievances under an expired collective bargaining agreement for interest arbitration eligible employees.

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1 The Commission's decision was affirmed by the Thurston County Superior Court on July 7, 2011, and is currently on appeal to the Court of Appeals Division II. *Snohomish Cnty. Pub. Transp. Benefit Area v. Public Emp't Relations Comm'n*, No. 10-2-00030-2.

2 *Community Transit* is not a unanimous decision. The majority held that grievance arbitration clauses survive the expiration of a collective bargaining agreement for interest arbitration eligible employees. The minority opinion argues that the majority incorrectly overruled long established Commission precedent and improperly fails to account for statutory authority and judicial precedent.

When the union filed its complaint in this case on August 22, 2011, the parties had not agreed on a successor collective bargaining agreement to the 2009 agreement.[3]

The union filed several grievances in 2011 alleging that the employer violated terms of the parties' 2009 expired collective bargaining agreement. Specifically, the union's complaint alleges the employer improperly denied the following requests by the union to process grievances to arbitration:

- On March 24, 2011, at Step 3 of the grievance procedure, Brian K. Carlson, Public Works Director for the employer, denied grievances filed by the union on behalf of members Judson McCauley, Scott Sloan, and Rod Rowan.
- On April 1, 2011, at Step 3 of the grievance procedure, Carlson denied grievances filed by the union on behalf of members Bob Carroll, Jason Ingram, Justin Smith, Joe Yela, and Jeremy Stuart.
- On April 15, 2011, at Step 3 of the grievance procedure, Carlson denied a grievance filed by the union on behalf of member Kyle Kirby.
- On May 9, 2011, at Step 3 of the grievance procedure, Carlson denied grievances filed by the union on behalf of members Bob Carroll, Tom Coval (two grievances), Brian Quintana, and Tom Schell.
- On June 7, 2011, at Step 3 of the grievance procedure, Carlson denied a grievance filed by the union on behalf of member Eric Becker.
- On July 20, 2011, at Step 3 of the grievance procedure, Carlson denied a grievance filed by the union on behalf of member Kyle Kirby.
- On August 12, 2011, at Step 3 of the grievance Procedure, Carlson denied a grievance filed by the union on behalf of member Greg Straub.

In each letter denying the union's request for grievance arbitration in the above described grievances Carlson advised the union: "The Local's [union's] collective bargaining agreement with the City expired; therefore, the City considers this matter to be closed with no further opportunity for advancement to arbitration."

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[3] In their briefs, both parties reference the fact that they executed a new collective bargaining agreement after this complaint was filed. This fact is not in evidence and therefore is not considered in this decision.

LEGAL STANDARDS

Summary Judgment

The Commission and its examiners may grant a motion for summary judgment "if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135. The courts and the Commission define a material fact as one upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.,* 121 Wn.2d 243, 249 (1993); *State - General Administration,* Decision 8087-B (PSRA, 2004). The Commission does not grant summary judgment motions lightly since doing so involves making a final determination without the benefit of a hearing. *City of Orting,* Decision 7959-A (PECB, 2003). A summary judgment is only granted when the party responding to the motion cannot or does not deny any material facts alleged by the party making the motion.

In ruling on a motion for summary judgment, the Commission must consider the material evidence and all reasonable inferences most favorably to the nonmoving party and deny the motion if reasonable people might reach different conclusions regarding the facts. *Wood v. City of Seattle,* 57 Wn.2d 469, 470 (1960).

The Duty to Bargain and Maintain the Status Quo

A public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. RCW 41.56.030(4); *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); RCW 41.56.150(4).

RCW 41.56.470 requires an employer to maintain the status quo for uniformed, interest arbitration eligible employees, when parties have not resolved a successor collective bargaining

agreement and are waiting for an interest arbitration panel to determine the terms of a new agreement:

> Uniformed personnel — Arbitration panel — Rights of parties.
>
> During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under chapter 131, Laws of 1973.

Grievance Arbitration Provisions

In *Community Transit*, the Commission announced a change in case precedent concerning the obligation to arbitrate grievances under an expired collective bargaining agreement for interest arbitration eligible employees:

> [P]revious agency decisions holding that grievance arbitration clauses do not survive the expiration of collective bargaining agreements are inapplicable to employees eligible for interest arbitration. The unique statutory framework governing interest arbitration eligible employees leads to a conclusion that the arbitration clauses found in the grievance provisions of collective bargaining agreements do in fact survive the expiration of a collective bargaining agreement unless the parties mutually agree that the arbitration clause will expire on the date that the collective bargaining agreement expires.

In *Community Transit* the Commission explained that grievance arbitration is a mandatory subject of bargaining:

> It is well settled under the NLRA and Chapter 41.56 RCW that grievance procedures are a mandatory subject of bargaining. *United Electrical, Radio, and Machine Workers of America v. NLRB*, 409 F.2d 150 (D.C. cir. 1969); *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504 (1992). As provided for in RCW 41.56.122(2), collective bargaining agreements may contain provisions providing for final and binding arbitration of grievances arising under the terms of the collective bargaining agreement. *See also Litton Financial and Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). A clause providing for binding arbitration as a means to settle contractual grievances is also a term or condition of employment, and a mandatory subject of bargaining. *Taft Broadcasting Co., WDAF AM-FM-TV v. NLRB*, 441 F.2d 1382 (8th Cir. 1971); *Pierce County*, Decision 2693 (PECB, 1987).

The Commission explained that, with respect to interest arbitration eligible employees, a grievance arbitration provision of a contract is part of the status quo that must be maintained beyond contract expiration:

> We now hold that under Chapter 41.56 RCW, a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement. Our reasons for reaching such a conclusion are as follows.
>
> The state courts recognize that "there is a strong presumption that all disputes arising under a collective bargaining agreement are subject to arbitration; that presumption holds unless negated expressly or by clear implication." *Olympia Police Guild v. City of Olympia*, 60 Wn. App. 556, 559 (1991), *citing United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). Similarly, when the Legislature enacted the interest arbitration provisions for uniformed employees in 1973, it declared that the purpose of the provision was to:
>
> > recognize that there exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.
>
> RCW 41.56.430. Although RCW 41.56.430 was enacted in conjunction with the interest arbitration provisions as an alternative means for setting the terms and conditions of employment should the parties disagree about them, the Legislature nevertheless recognized that, at least for uniformed personnel, there must be a method in place to promote "the dedicated and uninterrupted public service" of those employees.
>
> Our conclusion holding an arbitration clause as a term and condition of employment, as opposed to a creature of the contract, ensures that interest arbitration eligible employees will have a continuous method for resolving labor disputes during the interim period between collective bargaining agreements, including the resolution of grievances that private sector employees would otherwise go on strike over, should the parties agree.

The Commission acknowledged that *Community Transit* represented a change in case law and did not find Community Transit committed an unfair labor practice in violation of 41.56 RCW. The Commission explained that the decision would only apply prospectively:

> [B]ecause our holding changes the manner in which arbitration clauses are enforced for interest arbitration eligible employees, and because this employer relied upon what was valid precedent when it declined to arbitrate the union's post-expiration grievances, the standards announced in this decision will only apply prospectively.

ANALYSIS

Summary Judgment

The parties concurred in using summary judgment to decide this case. This case is appropriate for summary judgment because there are no material facts in dispute.

Obligation to Maintain Grievance Arbitration Provisions

The fire suppression employees at issue in this case are interest arbitration eligible. The employees had an expired collective bargaining agreement that contained a grievance provision ending in binding arbitration. *Community Transit* explained that in cases involving interest arbitration eligible employees, an employer is obligated to arbitrate grievances that arise under an expired collective bargaining agreement as part of maintaining the status quo on mandatory subjects of bargaining.

Prospective Nature of the *Community Transit* Decision

The employer argues that the new case law announced in *Community Transit* should not apply in this case because the parties' collective bargaining agreement was negotiated before the Commission issued the new case law. The employer argues that that the Commission's explicit ruling to apply *Community Transit* on a prospective basis should be interpreted to include not applying it to contracts negotiated prior to December 10, 2009, the date the Commission issued its decision in *Community Transit*.

The employer relies upon the fact that in *Community Transit* the Commission did not find a violation because its decision represented a change in case precedent:

> When this employer declined to arbitrate the post-expiration grievance, the employer relied upon what was then valid agency precedent. Although we have re-examined and overruled existing agency precedent and have adopted a new standard, we cannot apply that standard to this complaint. Our decision must be prospective in nature, and the union's complaint is dismissed.

The employer in this case also argues that it should have had an opportunity to negotiate a new collective bargaining agreement before the standard in *Community Transit* should apply. Specifically, the employer relies upon language in *Community Transit* (emphasis added) indicating that grievance arbitration clauses survive the expiration of a collective bargaining agreement unless the parties agree to the contrary:

> We now hold that under Chapter 41.56 RCW, a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, <u>unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement.</u>

The employer advocates that the Commission's decision to apply *Community Transit* on a prospective basis should be interpreted to include not applying it to contracts negotiated prior to the date the Commission issued its decision. The employer argues that at the time it negotiated the 2009 collective bargaining agreement, Commission precedent held that the right to proceed to grievance arbitration expired with the term of the collective bargaining agreement. The employer argues that *Community Transit* should be interpreted to allow the employer an opportunity to negotiate a new collective bargaining agreement under the *Community Transit* precedent so it can bargain whether the grievance arbitration clause survives the expiration of the collective bargaining agreement.

The language in the *Community Transit* decision does not support the employer's position. The Commission issued its decision in *Community Transit* on December 10, 2009. When the employer in this case refused to process grievances to arbitration from March 2011 through

August 2011, *Community Transit* had been published for over a year. *Community Transit* holds that in situations involving interest arbitration eligible employees, an employer has an obligation to arbitrate grievances arising under the parties' expired collective bargaining agreement unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement. In this case, the employer and union did not explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement.

The prospective nature of *Community Transit* exempted cases in which a party refused to arbitrate a grievance prior to the date the decision was issued. The Commission did not provide an exemption for arbitrating grievances that arose under contracts negotiated prior to the December 10, 2009, date of issuance. The situation facing this employer was not analogous to the position of the employer in *Community Transit.* In the present case, the change in case precedent was not a surprise. When the employer refused to process grievances to arbitration in March through August 2011, Commission case law required the employer to arbitrate those grievances. This employer was not following valid agency precedent when it refused to arbitrate grievances under the parties 2009 expired collective bargaining agreement.

Additional Employer Arguments

The employer argues that the grievance arbitration clause survives only for actions that arose during the contract period and relies upon *City of Yakima*, Decision 3880 (PECB, 1991). In *Community Transit* the Commission analyzed *City of Yakima* and ruled that it does not address post-expiration grievances:

> The issue in the *City of Yakima* was not the arbitrability of a grievance that arose after the expiration of a collective bargaining agreement, rather the case was about application of this agency's "deferral to arbitration" policy. The deferral to arbitration policy provides that a complaint alleging that an employer's conduct in a "unilateral change" case is arguably protected or prohibited by a contract may be "deferred" to arbitration, as opposed to having this agency make a determination through a hearing. Because the *City of Yakima* case was not about the arbitration of post-expiration grievances, the comments in that case regarding the arbitrability of grievances after the expiration of a contract are, at best, non-binding dicta.

The employer also argues that even if it has an obligation to arbitrate the grievances under the 2009 expired collective bargaining agreement, the union should be estopped from bringing these grievances to arbitration because the union failed to follow the agreed upon grievance process by not filling a notice for arbitration on any of the grievances, as required by the language in the expired agreement. This grievance timeliness argument falls outside of the scope of this unfair labor practice proceeding.

The employer further explains that the union should not be able to arbitrate its grievances related to the employers shift trade policy because other circumstances have now made any remedy moot. Arguments about the merits of remedies in grievance arbitration also fall outside the scope of this unfair labor practice proceeding.

CONCLUSION

The bargaining unit in this case is comprised of fire suppression employees who are eligible for interest arbitration, as defined by RCW 41.56.430 through 41.56.492. *Community Transit* holds "that under Chapter 41.56 RCW, a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement." The prospective nature of *Community Transit* exempted cases in which a party refused to a arbitrate grievance prior to the date the decision was issued. The employer's refusal to arbitrate grievances occurred in March 2011 through August 2011, over a year after the Commission established a new standard in *Community Transit.*

Community Transit obligated the employer to maintain the grievance procedure contained in the expired collective bargaining agreement and to continue to process grievances to arbitration. The employer violated RCW 41.56.140(4) and (1) by refusing to process grievances to arbitration from March 24, 2011, through August 12, 2011, while the parties were negotiating a successor collective bargaining agreement.

FINDINGS OF FACT

1. The City of Vancouver (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. International Association of Fire Fighters Local 425 (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union is the exclusive bargaining representative of a bargaining unit of all captains and firefighters employed by the employer, which the parties refer to as the fire suppression bargaining unit.

4. The employees in bargaining unit described in Finding of Fact 3 are eligible for interest arbitration, as defined under the provisions of RCW 41.56.430 through 41.56.492.

5. The employer and union were parties to a collective bargaining agreement effective January 1, 2009, through December 31, 2009.

6. Article 27 of the parties' 2009 collective bargaining agreement contains a grievance procedure culminating in binding arbitration.

7. The grievance arbitration procedure, described in Finding of Fact 6, is a mandatory subject of bargaining.

8. At all material times Brian K. Carlson, Public Works Director, was an agent of the employer.

9. On March 24, 2011, at Step 3 of the grievance procedure, Carlson denied grievances filed by the union on behalf of bargaining unit members Judson McCauley, Scott Sloan, and Rod Rowan.

10. On April 1, 2011, at Step 3 of the grievance procedure, Carlson denied grievances filed by the union on behalf of bargaining unit members Bob Carroll, Jason Ingram, Justin Smith, Joe Yela, and Jeremy Stuart.

11. On April 15, 2011, at Step 3 of the grievance procedure, Carlson denied a grievance filed by the union on behalf of bargaining unit member Kyle Kirby.

12. On May 9, 2011, at Step 3 of the grievance procedure, Carlson denied grievances filed by the union on behalf of bargaining unit members Bob Carroll, Tom Coval (two grievances), Brian Quintana and Tom Schell.

13. On June 7, 2011, at Step 3 of the grievance procedure, Carlson denied a grievance filed by the union on behalf of bargaining unit member Eric Becker.

14. On July 20, 2011, at Step 3 of the grievance procedure, Carlson denied a grievance filed by the union on behalf of member bargaining unit Kyle Kirby.

15. On August 12, 2011, at Step 3 of the grievance Procedure, Carlson denied a grievance filed by the union on behalf of member bargaining unit Greg Straub.

16. As described in Findings of Fact 8 through 15, from March 24, 2011, through August 12, 2011, Carlson sent separate letters denying requests by the union for grievance arbitration. In each of the denial letters Carlson advised the union that: "The Local's [union's] collective bargaining agreement with the City expired; therefore, the City considers this matter to be closed with no further opportunity for advancement to arbitration."

17. As of August 22, 2011, the date the complaint was filed, the union and employer had not reached a successor agreement to the parties 2009 expired collective bargaining agreement.

CONCLUSIONS OF LAW

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

2. By refusing to arbitrate grievances of its interest arbitration eligible employees as described in Findings of Fact 4 through 17, the employer refused to bargain by failing to maintain status quo terms and conditions of employment in violation of RCW 41.56.140(4) and (1).

ORDER

City of Vancouver, 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 arbitrate grievances of employees in the fire suppression bargaining unit that were filed under the parties 2009 expired collective bargaining agreement, until the employer and union reach a successor collective bargaining agreement. [4]

   b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under 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. Process the grievances that are described in Findings of Fact 8 through 15 to grievance arbitration.

[4] See footnote three.

b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

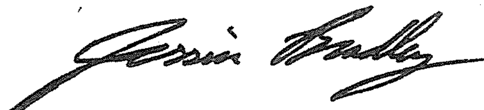
c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the City Council of the City of Vancouver, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the 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 complainant with a signed copy of the notice provided by the Compliance Officer.

e. Notify the Compliance Officer, 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 14th day of May, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, 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.

CASE 24198-U-11-6198
DECISION 11372 - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *CITY OF VANCOUVER* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to arbitrate grievances filed by employees in the fire suppression bargaining unit under the 2009 expired collective bargaining agreement.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL process the grievances that we denied from March 2011 through August 2011 to grievance arbitration as described in the 2009 collective bargaining agreement.

WE WILL maintain the terms and conditions of employment from the expired collective bargaining agreement while negotiating a successor collective bargaining agreement.

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.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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MARILYN GLENN SAYAN, CHAIRPERSON
PAMELA G. BRADBURN, COMMISSIONER
THOMAS W. McLANE, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER: 24198-U-11-06198 FILED: 08/22/2011 FILED BY: PARTY 2

DISPUTE: ER GOOD FAITH

BAR UNIT: FIREFIGHTERS

DETAILS: -

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