City of Yakima, Decision 11352-A (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 469, Complainant, vs. CITY OF YAKIMA, Respondent.	CASE 24266-U-11-6217 DECISION 11352-A - PECB CASE 24268-U-11-6218 DECISION 11353-A - PECB DECISION OF COMMISSION

Emmal Skalbania & Vinnedge, PSC, by *Sydney D. Vinnedge*, Attorney at Law, for the union.

Jeff Cutter, City Attorney, by *James T. Mitchell*, Assistant City Attorney, for the employer.

On September 21, 2011, the International Association of Fire Fighters, Local 469 (union) filed two unfair labor practice complaints; one for the firefighters bargaining unit and one for the battalion chiefs bargaining unit. The union alleged that the City of Yakima (employer) unilaterally changed the continuous duty policy. The Unfair Labor Practice Manager reviewed the complaints under WAC 391-45-110. On September 27, 2011, the Unfair Labor Practice Manager issued a preliminary ruling for employer refusal to bargain in violation of RCW 41.56.140(4) and derivative interference in violation of RCW 41.56.140(1), by unilateral changes to the number of hours that can be consecutively worked. The employer filed a timely answer. The cases were consolidated for hearing. Examiner Stephen W. Irvin conducted a hearing and issued a decision finding that the employer refused to bargain by unilaterally changing the continuous duty policy.[1]

[1] *City of Yakima*, Decision 11353 (PECB, 2012).

ISSUES

1. Did the employer refuse to bargain when it changed the continuous duty policy?
2. Did the union waive, by contract, its right to bargain changes to the continuous duty policy?

We affirm the Examiner. Hours of work are a mandatory subject of bargaining. The employer refused to bargain when it unilaterally changed the continuous duty policy. The union did not waive its right to bargain.

RELEVANT FACTS

The union represents a bargaining unit of firefighters and a bargaining unit of battalion chiefs. Jeremy Rodriguez (Rodriguez) is the union president. David Wilson (Wilson) is the Fire Chief. Bob Stewart (Stewart) is the Deputy Fire Chief. The employer and the union were parties to separate collective bargaining agreements for each bargaining unit. Those collective bargaining agreements were in effect from January 1, 2011 through December 31, 2011.

The firefighters and battalion chiefs work a 48-96 schedule. Employees are on duty for 48 consecutive hours and then off duty for 96 consecutive hours. In compliance with the employer's policies, employees were able to work overtime beyond their 48 hours of duty.

On October 29, 2010, Yakima County Medical Program Director Juan Acosta, D.O., (Acosta) sent a memorandum to the private ambulance companies operating in Yakima County attempting to limit the number of continuous hours emergency medical service (EMS) providers could work to 48 consecutive hours. On December 9, 2010, Acosta sent a second memorandum to "All Yakima County EMS Providers and Agencies" raising concerns about EMS providers working in excess of 48 continuous hours. Acosta could not recall sending the memoranda to the employer. After Wilson became the fire chief, he requested a copy of the two memoranda Acosta sent.

On April 27, 2011, Stewart sent an e-mail to the battalion chiefs and union executive board members. The e-mail notified the union that the employer would be changing administrative policy 2.02.07 Continuous Duty. The employer cited Acosta's memorandum as the basis for the change. The e-mail also identified possible areas that would change. Stewart concluded the e-mail by writing, "This e-mail is not intended as a request for permission. Instead, it is to provide you with an awareness of the 'what' and the 'why'. This issue has a direct correlation to your safety and well-being and deserves some attention."

Administrative policy 2.02.07 allowed employees to work more than 48 consecutive hours. Employees were able to "hold over" onto part of the next shift to work overtime. Specifically, the policy stated:

> 2.02.07 Continuous Duty
>
> Shift Commanders hiring shall give preference to members who would not require 72 hours of continuous duty. After failing to find a member to work who would be on less than 72 hours, the Shift Commander shall start at the top of the list calling all members not previously contacted.

On May 20, 2011, Wilson notified employees of a change to Administrative Policy 2.02.[2] Wilson wrote, "[t]he revision is based directly upon Dr. Acosta's (our MPD) position on responder fatigue..." The policy change was effective May 17, 2011. The revised administrative policy stated:

> 2.02.07 Continuous Duty
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> No member shall exceed 48 hours of continuous duty without prior approval from a Deputy Chief. Following 48 hours of continuous duty, members shall be in an off-duty status for a minimum of 10 hours before being eligible for overtime or shift trade/relief work.

On June 15, 2011, Rodriguez requested to bargain the decision and effects of the change to administrative policy 2.02 and requested the employer rescind the change. On June 24, 2011,

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[2] The Examiner's decision contains a complete copy of Administrative Policy 2.02.

Stewart responded to Rodriguez denying the union's request to bargain. The employer asserted that it had a management right to place "reasonable limits" on continuous duty hours.

APPLICABLE LEGAL PRINCIPLES

Duty to Bargain

Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, 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. *City of Richland,* Decision 2448-B (PECB, 1987), *remanded,* 113 Wn.2d 197 (1989); *Federal Way School District,* Decision 232-A (EDUC), *citing NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958). Permissive subjects of bargaining are management and union prerogatives, along with the procedures for bargaining mandatory subjects, over which the parties may negotiate. *Pasco Police Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997).

The parties' collective bargaining obligation requires that the status quo be maintained regarding all mandatory subjects of bargaining, except when such changes are made in conformity with the statutory collective bargaining obligation or terms of a collective bargaining agreement. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991). An employer 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).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, or working conditions of employees, and (2) the extent to which 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 inquiry focuses on which characteristic predominates. *City of Richland,* 113 Wn.2d at 200. The Supreme Court in *City of*

Richland held 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 predominately 'managerial prerogatives,' are classified as non-mandatory subjects." *City of Richland,* 113 Wn.2d at 200.

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects of that decision, but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Central Washington University,* Decision 10413-A (PSRA, 2011), *citing Skagit County,* Decision 6348 (PECB, 1998); *City of Kelso (Kelso I),* Decision 2120-A (PECB, 1985) (the decision to contract out bargaining unit work and the effects of the decision on the employees are mandatory subjects of bargaining); *City of Kelso (Kelso II),* Decision 2633-A (PECB, 1988)(the decision to merge operations with another employer is an entrepreneurial decision that is a non-mandatory subject of bargaining, and only the effects of that decision on employee wages, hours, and working conditions are mandatory subjects of bargaining). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decisions could constitute mandatory subjects of bargaining. *See Wenatchee School District,* Decision 3240-A (PECB, 1990).

Wages, including overtime compensation, and hours of work are mandatory subjects of bargaining. *City of Pasco*, Decision 9181-A (PECB, 2008); *City of Kalama*, Decision 6773-A (PECB, 2000). Actions reducing compensation to bargaining unit employees are generally mandatory subjects of bargaining. *City of Centralia*, Decision 5282-A (PECB, 1996).

Unilateral Change

An employer considering changes affecting a mandatory subject of bargaining must give notice to the exclusive bargaining representative of its employees prior to making that decision. *Lake Washington Technical College*, Decision 4712-A (PECB, 1995). To be timely, notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). Formal notice is not required; however, in the absence of

formal notice, it must shown that the union had actual, timely knowledge of the contemplated change. *Washington Public Power Supply System*, Decision 6058-A.

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A. If the employer's action has already occurred when the employer notifies the union (*a fait accompli)*, the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Washington Public Power Supply System*, Decision 6058-A. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Washington Public Power Supply System*, Decision 6058-A, *citing Lake Washington Technical College,* Decision 4712-A.

If the bargaining unit employees are eligible for interest arbitration, an employer may not unilaterally implement its desired change to a mandatory subject of bargaining without bargaining to impasse and obtaining an award through interest arbitration. *Snohomish County*, Decision 9770-A (PECB, 2008). Interest arbitration is applicable when an employer desires to make a mid-term contract change to a mandatory subject of bargaining. *City of Yakima*, Decision 9062-A (PECB, 2006).

Waiver

When given notice of a contemplated change affecting a mandatory subject of bargaining, a union desiring to influence the employer's decision must make a timely request for bargaining or it waives its right to bargain by its inaction. *Washington Public Power Supply System*, Decision 6058-A. Waiver is an affirmative defense. *Lakewood School District,* Decision 755-A (PECB, 1980). A key ingredient to finding a waiver by inaction is a finding that the employer gave adequate notice to the union. *Washington Public Power Supply System*, Decision 6058-A. An employer asserting that a union waived by inaction its bargaining rights bears a heavy burden of proof. The employer must prove that the union's conduct is such that the only reasonable

inference is that the union has abandoned its right to negotiate. *Clover Park Technical College,* Decision 8534-A (PECB, 2004).

A party may also waive its right to bargain through the language in its collective bargaining agreement. A contractual waiver of statutory collective bargaining rights must be consciously made, must be clear, and must be unmistakable. *City of Yakima*, Decision 3564-A (PECB, 1991). When a knowing, specific, and intentional contractual waiver exists, an employer may lawfully make changes as long as those changes conform to the contractual waiver. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The burden of proving the existence of the waiver is on the party seeking enforcement of the waiver. *Lakewood School District*, Decision 755-A (PECB, 1980). We have long held that typical management rights clauses claimed by employers to be waivers of union bargaining rights generally fail to meet the high standards for finding a waiver. *See Chelan County*, Decision 5469-A (PECB, 1996).

ANALYSIS

The employer asserts that the continuous duty limitations are not a mandatory subject of bargaining. While the employer agrees that overtime is a mandatory subject of bargaining, it disputes that the manner in which overtime is assigned, scheduled, and managed is a mandatory subject of bargaining. The employer argues that under the management rights clause of the collective bargaining agreement, the union waived by contract its right to bargain.

The union asserts that the employer changed the manner in which overtime was assigned when the employer made changes to the continuous duty policy. The union argues that the employer presented the change in the continuous duty policy as a *fait accompli* and that the union did not waive its right to bargain.

Overtime is a mandatory subject of bargaining. Overtime directly impacts employee wages, hours, and working conditions. Actions causing a reduction in compensation to bargaining unit members are generally mandatory subjects of bargaining. *City of Centralia*, Decision 5282-A

(PECB, 1996). The total number of continuous hours employees were able to work under the continuous duty policy impacted their ability and availability to work overtime.

Administrative Policy Chapter 2, Section 2 described how the employer managed overtime. Prior to the change, when filling a vacancy with overtime, shift commanders "shall give preference to members who would not require 72 hours of continuous duty." The use of the word "shall" required that the shift commander offer the overtime first to employees who would not be on duty for 72 continuous hours. The continuous duty policy did not otherwise limit the number of hours an employee could continuously work. After an employee completed his or her 48 hour shift, the employee was available to work overtime hours. An employee could work one additional hour or 24 additional hours.

After the change, the policy prohibited employees from working more than 48 continuous hours without prior approval from a deputy chief. The change prevented employees from working beyond their regularly scheduled shift. The change affected the number of hours employees worked and the wages they earned. The change prevented employees from being able to work beyond their regular scheduled shift. Thus, the change to the continuous duty policy was a mandatory subject of bargaining.

Prior to making changes to policies that impact mandatory subjects of bargaining, the employer must bargain with the union. The employer was required to provide notice before making the change and, upon request, bargain in good faith to agreement or impasse. When the change affects interest arbitration eligible employees, the employer must comply with the statutory impasse procedures prior to making the change. Thus, after bargaining to impasse, the parties must submit the issues to interest arbitration.

When an employer presents a change to a mandatory subject of bargaining after the employer has decided to make the change, the change is a *fait accompli* and the union is excused from requesting bargaining. In this case, the employer decided to make a change to a mandatory subject of bargaining, the continuous duty policy. On April 27, 2011, the employer notified the union of its intent to change the continuous duty policy.

The notice to the union was not an invitation to bargain the decision to change the continuous duty policy. While the employer had not finalized changes to the policy, it made clear that the decision was made. Stewart wrote, "This email is not intended as a request for permission." The employer had determined it was going to make a change and presented the decision to change the continuous duty policy as a *fait accompli*.

When presented with a *fait accompli*, a union is not required to request bargaining. However, on June 15, 2011, the union wisely preserved its rights and requested to bargain the decision and impacts. On June 24, 2011, the employer refused to bargain, citing the management rights provision of the firefighters' collective bargaining agreement. Even if the employer were within its rights to make the change, the employer was obligated to bargain the impacts of the decision. The June 24, 2011 response does not evidence a willingness to engage in even effects bargaining.

The employer and the union were parties to two separate collective bargaining agreements. The employer cited the management's rights clause in the firefighters' collective bargaining agreement as the basis for denying the union's request to bargain. The firefighter and battalion chief collective bargaining agreements contain different language on overtime and management rights. Thus, a separate analysis of each bargaining unit is necessary.

Battalion Chiefs Bargaining Unit

The battalion chiefs' collective bargaining agreement identifies how overtime hiring will occur.

> ARTICLE 16 – OVERTIME HIRING
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> In the event of a vacancy created by the shift Battalion Chief due to the use of Kelly days, vacation time, holiday time, union leave, administrative leave or sick/disability leave and Department manpower meets the minimum levels to fill all required positions, a qualified Captain from that shift will be allowed to fill the position. The roster will be set by 2100 hours of the shift before the affected shift. If no qualified Captains are available on the shift, the Battalion Chief will be offered the overtime. If the Battalion Chiefs decline and Department manpower does not meet the minimum levels to fill all required positions and there is a qualified Captain available on that shift, then that Captain will be assigned Acting Battalion Chief and an off duty Captain will be hired to backfill.

Administrative Policy Chapter 2, Section 2 contains the language from the collective bargaining agreement in 2.02.02(1). The battalion chiefs' collective bargaining agreement neither addresses nor places a limit on the number of hours the battalion chiefs can continuously work.

The battalion chiefs' collective bargaining agreement does not contain a management rights clause. Thus, under the contract the employer did not have a management right to make changes to the continuous duty policy. The employer was required to bargain, in good faith, the decision to change the battalion chiefs' hours prior to making the change and to bargain any impacts of the change. The battalion chiefs are eligible for interest arbitration, therefore, the employer was required to bargain in good faith to agreement or impasse, and upon impasse seek mediation and interest arbitration prior to implementing any change to mandatory subjects of bargaining. The employer failed to bargain the decision and refused to bargain the impacts of the change.

Firefighters Bargaining Unit

The employer argues that under the management rights clause of the collective bargaining agreement, the union clearly waived its right to bargain overtime. The union argues that it did not waive by contract its right to bargain the continuous duty policy. Further, the union argues that the employee rights and the collective bargaining procedures articles preserve its right to bargain the changes to overtime.

Unlike the battalion chiefs' collective bargaining agreement, the firefighters' collective bargaining agreement does not address the assignment of overtime. The firefighters' collective bargaining agreement does not address the number of hours an employee may continuously work.

The collective bargaining agreement covering the firefighters' bargaining unit contains a management rights clause and an employee rights clause.

> ARTICLE 4 – MANAGEMENT RIGHTS
>
> 4.1 The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, lawful

> powers and legal authority. City affairs which are not included within negotiable matters pertaining to wages, hours and working conditions are inclusive of the following, but not limited thereto:
>
> . . .
>
> (b) The right to determine reasonable schedules of work, overtime and all methods and processes by which said work is to be performed in a manner most advantageous to the Employer. Changes to work schedules, which are intended to be applicable to Union members, shall be in written form and posted in the departmental manual.

Whether a management rights clause waives a union's right to bargain requires an analysis of the contract language. Management rights clauses can contain a list of clear and unmistakable waivers, a list of unclear and confusing non-waivers, or a mix of both. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

The employer argues that Article 4.1(b) is a clear, unmistakable waiver of the union's right to bargain overtime. We disagree.

Recently, the Commission found that a management rights clause contained a clear, unmistakable waiver of a union's right to bargain. *City of Everett*, Decision 11241-A (PECB, 2013).[3] In *City of Everett*, the employer eliminated overtime staffing of three apparatuses. The employer argued that the issue was staffing and the union waived its right to bargain through the management rights clause. The management rights clause reserved to the employer the right "to assign work and determine the location and the number of personnel to be assigned duty at any time." The management rights clause was subject to other provisions in the collective bargaining agreement, including a minimum staffing article. The Commission found that the language in the management rights clause clearly granted the employer the ability to determine the number of personnel to be assigned duty at any time. The employer could determine that it would not staff a certain vehicle because it could determine the number of personnel assigned to duty.

In this case, the management rights clause grants the employer "the right to determine . . . overtime." A reasonable reading is that the employer retained the right to determine when

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[3] The union appealed *City of Everett*, Decision 11241-A (PECB, 2013) to Thurston County Superior Court (13-2-00802-2).

overtime is necessary. However, it is not clear that the language reserved to the employer the unilateral right to determine when employees are eligible to work overtime or how many hours an employee may continuously work. The language did not grant the employer the right to change the number of hours employees may consecutively work.

The administrative policies promulgated by the employer detailed the process for assigning overtime. While the employer retained the right to determine when overtime is necessary, the employer must bargain other aspects of overtime. The employer has failed to meet its burden of proving that the union clearly and unmistakably waived the right to bargain all aspects of overtime.

CONCLUSION

The employer unilaterally changed a mandatory subject of bargaining when it changed the continuous duty policy. The continuous duty policy changed the number of hours employees could consecutively work. Hours of work are a mandatory subject of bargaining. Further, by changing the policy, the employer limited employees' availability and ability to work overtime. Overtime is a mandatory subject of bargaining that impacts wages and hours.

In this case, the employer has failed to meet its burden to prove that the union waived its right to bargain. First, with respect to the battalion chiefs' bargaining unit, the collective bargaining agreement did not contain a management rights clause or any other waiver. Second, with respect to the firefighters' bargaining unit, the employer failed to establish that the collective bargaining agreement contained a clear, unmistakable waiver of the union's right to bargain all aspects of overtime.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Stephen W. Irvin are AFFIRMED and ADOPTED as the Findings of Fact of the Commission.

The Commission makes these additional Findings of Fact:

17. Article 16 in the battalion chiefs' collective bargaining agreement addresses overtime hiring. Administrative Policy 2.02.02 contains language that reflects the language of Article 16. The battalion chiefs' collective bargaining agreement does not address the number of hours battalion chiefs can continuously work.

18. The battalion chiefs' collective bargaining agreement does not contain a management rights clause. The employer did not have a contractual right to make changes to the continuous duty policy.

19. The battalion chiefs' bargaining unit did not waive its right to bargain changes to the continuous duty policy.

20. The firefighters' collective bargaining agreement does not contain an article addressing overtime.

21. The firefighters' collective bargaining agreement contains a management rights clause:

> ARTICLE 4 – MANAGEMENT RIGHTS
>
> 4.1 The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, lawful powers and legal authority. City affairs which are not included within negotiable matters pertaining to wages, hours and working conditions are inclusive of the following, but not limited thereto:
>
> . . .
>
> (b) The right to determine reasonable schedules of work, overtime and all methods and processes by which said work is to be performed in a manner most advantageous to the Employer. Changes to work

schedules, which are intended to be applicable to Union members, shall be in written form and posted in the departmental manual.

22. Article 4.1(b) of the firefighters' collective bargaining agreement is not a clear and unmistakable waiver of the union's right to bargain all aspects of overtime.

23. Article 4.1(b) of the firefighters' collective bargaining agreement did not grant the employer the right to unilaterally change the number of hours employees may consecutively work.

24. The firefighters' bargaining unit did not waive its right to bargain changes to the continuous duty policy.

Conclusion of Law 1 issued by Examiner Stephen W. Irvin is AFFIRMED and ADOPTED as the Conclusion of Law of the Commission.

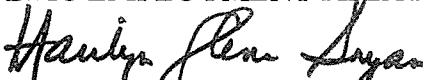
Conclusion of Law 2 is modified:

2. By its actions described in Findings of Fact 10, 12, 13, 15-24, the employer refused to bargain in violation of RCW 41.56.140(4) and (1).

The Order issued by Examiner Stephen W. Irvin is AFFIRMED.

ISSUED at Olympia, Washington, this 6th day of May, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	24266-U-11-06217	FILED:	09/21/2011	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	FIREFIGHTERS				
DETAILS:	Firefighters				
COMMENTS:					

EMPLOYER: CITY OF YAKIMA
ATTN: MICAH CAWLEY
129 N 2ND ST
YAKIMA, WA 98901
Ph1: 509-901-9114 Ph2: 509-575-6000

REP BY: JAMES MITCHELL
CITY OF YAKIMA
200 SOUTH THIRD STREET
YAKIMA, WA 98901-2830
Ph1: 509-575-6030

PARTY 2: IAFF LOCAL 469
ATTN: MICHAEL WAGNER
507 S 5TH AVE
YAKIMA, WA 98902
Ph1: 509-930-4919

REP BY: ALEX SKALBANIA
EMMAL SKALBANIA AND VINNEDGE
3600 15TH AVE W SUITE 201
SEATTLE, WA 98119-1330
Ph1: 206-281-1770 Ph2: 206-799-6937

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

CASE NUMBER:	24268-U-11-06218	FILED:	09/21/2011	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	SUPERVISORS				
DETAILS:	Battalion Chiefs				
COMMENTS:					

EMPLOYER: CITY OF YAKIMA
ATTN: MICAH CAWLEY
129 N 2ND ST
YAKIMA, WA 98901
Ph1: 509-901-9114 Ph2: 509-575-6000

REP BY: JAMES MITCHELL
CITY OF YAKIMA
200 SOUTH THIRD STREET
YAKIMA, WA 98901-2830
Ph1: 509-575-6030

PARTY 2: IAFF LOCAL 469
ATTN: MICHAEL WAGNER
507 S 5TH AVE
YAKIMA, WA 98902
Ph1: 509-930-4919

REP BY: ALEX SKALBANIA
EMMAL SKALBANIA AND VINNEDGE
3600 15TH AVE W SUITE 201
SEATTLE, WA 98119-1330
Ph1: 206-281-1770 Ph2: 206-799-6937