City of Everett (International Association of Fire Fighters, Local 46), Decision 12671-A (PECB, 2017)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF EVERETT, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 46, Respondent.	CASE 127504-U-15 DECISION 12671-A - PECB DECISION OF COMMISSION

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The City of Everett (employer) and the International Association of Fire Fighters, Local 46 (union) have a long, mature collective bargaining relationship. Their most recent collective bargaining agreement expired on December 31, 2014. During negotiations for a successor agreement, the union proposed changing Article 27, Health and Safety to increase the minimum number of firefighters on duty from 25 to 35. The employer did not agree. On March 16, 2015, the employer notified the union that the employer thought the union's proposal was a permissive subject of bargaining.[1]

The employer and union did not reach an agreement. After mediation, Executive Director Michael P. Sellars certified the parties to interest arbitration.[2] The union identified Article 27 as an issue for interest arbitration. The Executive Director included Article 27 on the list of issues

[1] Employer (ER) Ex. 1.

[2] We take administrative notice of the Executive Director's letter certifying the parties to interest arbitration in Case 127442-I-15.

for interest arbitration. The certification noted that the employer had placed the union on notice during mediation that the employer thought the issue was a permissive subject of bargaining.

On July 20, 2015, the employer filed an unfair labor practice complaint against the union. After reviewing the complaint pursuant to WAC 391-45-110, the Commission's Unfair Labor Practice Manager issued a preliminary ruling that found a cause of action existed for union refusal to bargain in violation of RCW 41.56.150(4) by insisting to impasse on a permissive subject of bargaining.

Examiner E. Matthew Greer conducted a hearing and issued a decision. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671 (PECB, 2017). The Examiner found that the union refused to bargain by insisting to impasse on a permissive subject of bargaining. The Examiner concluded that because Article 27 addressed minimum shift staffing, it was a permissive subject of bargaining. The union appealed.

The issue before the Commission is whether the union insisted to impasse on a permissive subject of bargaining. To address that issue, we must determine who has the burden of proof in scope of bargaining cases and whether the union's proposal on Article 27 is a permissive subject of bargaining.

Shift staffing is generally a permissive subject of bargaining. Based on the entire record, the union proved that shift staffing had a demonstratedly direct relationship to workload and safety. After balancing the employer's and union's interests, we find the union's proposal on Article 27 is a mandatory subject of bargaining. The union did not insist to impasse on a permissive subject of bargaining. We reverse the Examiner.

It is helpful to understand the circumstances that brought this case to the Commission as context for this decision. Accordingly, we explain the employer's current staffing structure, the history of Article 27, the legislative intent for Chapter 41.56 RCW, and the difference between shift and equipment staffing cases. After providing this background, we address the legal principles and decide the underlying issues.

BACKGROUND

Employer's Current Staffing Structure

The employer operates a fire department that responds to calls for assistance related to residential fires, commercial fires, fires at the naval ship yard, medical emergencies, and emergencies on Interstate 5. In the fire department, employees include firefighters, paramedics, captains, battalion chiefs, assistance chiefs, the chief, and non-uniformed shop and administrative office personnel. Thirty-four employees work in the office, do not work 24-hour shifts, and are not primarily responsible for responding to calls for assistance. The union represents the firefighters, paramedics, captains, battalion chiefs, and assistant chiefs.

In 2010, as a result of a budgetary decision, the employer decided to reduce the minimum number of fire suppression employees on duty from 33 to 28. *See City of Everett*, Decision 11241-A (PECB, 2013). While the contract requires a minimum of 25 firefighters on duty, since 2010, the employer has maintained 28 fire suppression personnel on duty each shift. Article 27 concerns the number of firefighters, paramedics, captains, and battalion chiefs who work 24-hour shifts and who respond to calls for assistance. For purposes of clarity in this decision, when we discuss firefighters, we are referring to the fire suppression personnel identified in Article 27.

History of Article 27, Health and Safety

Since 1974, the parties have included Article 27, Health and Safety in their collective bargaining agreement. In 1974, Article 27—then entitled Article XXVII, Health and Safety Measures—established a minimum staffing level of 27 firefighters on duty at all times. In 1975, that number was reduced to a minimum of 25 firefighters on duty at all times.

In 1976, the employer and union reached impasse on negotiations for a collective bargaining agreement. *City of Everett v. Fire Fighters, Local No. 350 of the International Association of Fire Fighters*, 87 Wn.2d 572, 573 (1976). They proceeded to mediation and fact-finding. *Id.* The employer rejected the recommendations of the fact-finding panel. *Id.* The union sought to invoke the interest arbitration procedure in RCW 41.56.450–90. *Id.* The employer refused to submit to interest arbitration and sought a declaratory judgment that the interest arbitration provisions of

RCW 41.56.450–90 were unconstitutional and that the minimum crew clause in the contract was not a mandatory subject of bargaining. *Id.*

After deciding that the interest arbitration provisions of RCW 41.56.450–90 were constitutional, the Court turned to the issue of whether a minimum crew clause was a mandatory subject of bargaining. *City of Everett v. Fire Fighters, Local No. 350 of the International Association of Fire Fighters*, 87 Wn.2d at 576. The Court commented that the size of the crew might affect the safety of employees and therefore constituted a working condition within the meaning of RCW 41.56.030(4). The Court refrained from ruling on whether minimum staffing was a mandatory subject of bargaining and deferred the issue to interest arbitration. *Id.*

The parties proceeded to interest arbitration before an arbitration panel chaired by Dean Joseph A. Sinclitico. The arbitrator concluded that because parties could bargain permissive subjects, they were properly "matters in dispute" for interest arbitration. *City of Everett v. Fire Fighters, Local No. 350 of the International Association of Fire Fighters* (1976) (Sinclitico, Arb.).[3] The arbitrator concluded that staffing was a mandatory subject of bargaining because staffing involved the safety of the firefighters. *Id.* at 11. The arbitrator awarded Article 27 as follows:

> The parties recognize that manning (crew size, on duty shift force), vitally affects the efficient and economic operation of the department in providing the best possible service to the community and further, that changes from the present minimum level agreed to in prior contracts do affect the safety and job security of the members of the Union, and therefore agree as follows:
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> The City agrees to maintain a firefighting force of at least twenty-five (25) men on duty at all times. The City further agrees to maintain at least three (3) firefighters on each fire suppression company, one of whom shall be a captain; to maintain two (2) firefighters on each aid car and to maintain a battalion chief who will be on duty with each fires suppression platoon.
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> The City further agrees to use the attrition method in reaching the twenty-five (25) man minimum crew level. Attrition is defined as voluntary quit, dismissal for just and sufficient cause, permanent disability, retirement or death.

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3 ER Ex. 7.

This language has continued in the parties' successor collective bargaining agreements with only minor changes.

While the arbitrator found the union's proposal in 1976 to be a mandatory subject of bargaining, the Commission is not bound by that ruling. The Commission does not consider whether parties have agreed to include a subject in a collective bargaining agreement when deciding whether an issue is mandatory. WAC 391-45-550. Conversely, the arbitrator considered the parties' history of bargaining and the inclusion of manning in their collective bargaining agreement in reaching his conclusion. We do not consider the parties' prior agreements to include Article 27 in their collective bargaining agreements when determining whether the union's proposed change to Article 27 is a permissive subject of bargaining.

Legislative Intent for Chapter 41.56 RCW

In 1975, before the Court decided *City of Everett v. Fire Fighters, Local No. 350 of the International Association of Fire Fighters*, the Legislature enacted Chapter 41.58 RCW establishing the Public Employment Relations Commission effective January 1, 1976. The purpose of Washington State's collective bargaining laws

> is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010. By enacting Washington State's collective bargaining laws, the Legislature obligated employers and employees to "[e]xert every reasonable effort to make and maintain agreements" on wages, hours, and working conditions. RCW 41.58.040(1). The laws were designed to place an employer and its employees on equal footing and give employees a voice in employment relations. The laws neither compel agreement nor abrogate an employer's control of its enterprise.

Recognizing the importance of uninterrupted and dedicated services of uniformed personnel, the Legislature declared the existence of a public policy against strikes by uniformed personnel as a

means of settling labor disputes. RCW 41.56.430; *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373, 379 (1992). To promote this policy, the Legislature granted firefighters interest arbitration as a method to resolve their disputes. RCW 41.56.030(13); RCW 41.56.450. The Legislature did not intend interest arbitration to "displace the negotiating process"; rather, the Legislature intended interest arbitration "to be used to promote uninterrupted and dedicated service by uniformed personnel and to avoid strikes." *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d at 381, *citing* RCW 41.56.430.

Since 1976, the Commission has developed rules and a body of case law around interest arbitration eligible employers and unions pursuing permissive subjects of bargaining to impasse and interest arbitration. Chapter 391-55 WAC; *Cowlitz County*, Decision 12483-A (PECB, 2016). It is within the Commission's jurisdiction, not an arbitrator's, to determine whether a subject of bargaining is mandatory or permissive.

Difference Between Shift Staffing and Equipment Staffing Cases

The union's proposal on Article 27 is a shift staffing proposal, as opposed to an equipment staffing proposal or a "mixed" equipment-shift staffing proposal. In mixed equipment-shift staffing cases, a change in minimum staffing directly impacts equipment staffing which in turn results in a finding that shift staffing is a mandatory subject of bargaining.

In *City of Centralia*, Decision 5282-A (PECB, 1996), the employer initially assigned at least three firefighters to each 24-hour shift and relied on the callback of off-duty personnel for overtime to maintain the minimum staffing level. After entering into agreements with neighboring jurisdictions to receive the assistance of volunteer firefighters when needed, the employer reduced its crews from three to two firefighters. As a result, the employer sent one fire truck staffed by two firefighters, rather than three, to respond to calls. The union notified the employer of its concern about operating with two firefighters on duty and requested bargaining.

The issue in *City of Centralia* presented shift and equipment staffing components. The employer's decision was to staff each shift with fewer personnel, but the end result was that the employer's only first-response equipment was staffed with fewer personnel. Shift staffing and equipment

staffing became one and the same on the facts of the case. *City of Centralia* was a mixed equipment-shift staffing case.

In *Spokane International Airport (International Association of Fire Fighters, Local 1789)*, Decision 7889-A (PECB, 2003), the collective bargaining agreement set the minimum staffing level at five firefighters on duty. The employer proposed eliminating the minimum staffing language from the collective bargaining agreement. The union proposed changing the language and later proposed maintaining the existing contract language. The union asserted the number of firefighters on duty was directly related to safety.

The examiner in *Spokane International Airport (International Association of Fire Fighters, Local 1789)* decided the case as a question of how many firefighters were required to staff the equipment necessary to respond to an airliner crash, not as a minimum staffing case. *Spokane International Airport (International Association of Fire Fighters, Local 1789)*, Decision 7889 (PECB, 2002). Federal Aviation Administration (FAA) regulations required that two fire trucks respond to an aircraft fire. *Id.* The union presented evidence that five to seven firefighters were required to safely respond to an emergency on the airport runway. *Id.* The examiner concluded "that the union's concern with minimum staffing [was] over equipment staffing as it relate[d] to worker safety, a mandatory subject of bargaining." *Id.*

The employer appealed, asserting that the issue was shift staffing, not equipment staffing. The Commission found that the case involved both shift and equipment staffing. *Spokane International Airport (International Association of Fire Fighters, Local 1789)*, Decision 7889-A. The issue was whether it was the employer's prerogative to establish the minimum number of firefighters on each shift that would respond to an aircraft emergency in FAA-required vehicles. The Commission found the evidence insufficient to determine if fewer than five firefighters could safely respond to an aircraft emergency on the runway. The union's safety concerns were stronger than the employer's interest in pursuing its mission. The employer's proposal was a mandatory subject of bargaining.

In this case, the employer has, within its discretion, directed the fire department to have a zero-growth budget since 2008. The employer reduced the minimum number of firefighters on duty from 33 to 28 in 2010. Since decreasing the minimum staffing level, the employer has neither reduced the number of personnel assigned to an apparatus nor changed the number and type of apparatuses required to respond to calls. In the case of a call for a cardiac arrest, a minimum of seven people on an engine, a paramedic unit, and, possibly, an aid unit respond.[4] If no aid unit is available, a second engine responds.[5] For a residential fire, a minimum of 17 personnel respond.[6] For a commercial fire, a minimum of 21 personnel respond.[7] The employer's decision on minimum staffing has not impacted equipment staffing.

In *City of Centralia* and *Spokane International Airport (International Association of Fire Fighters, Local 1789)*, the minimum number of firefighters on duty impacted the number of firefighters on each apparatus. In this case, the union's proposal to increase the minimum number of firefighters on a 24-hour shift could result in more units being staffed but would not affect how many firefighters are on each apparatus. This case is about the minimum number of firefighters on duty, not equipment staffing.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission uses its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision

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4 Tr. Vol. I, 121:18–24.

5 *Id.*

6 Tr. Vol. I, 121:9–13.

7 *Id.*

7087-B (PECB, 2002). The Commission reviews factual findings for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Public Employment Relations Commission v. City of Vancouver*, 107 Wn.App. 694, 703 (2001); *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

Burden of Proof

In a case alleging refusal to bargain by insisting to impasse on a permissive subject of bargaining, the complainant bears the burden to prove the respondent insisted to impasse on a permissive subject of bargaining. WAC 391-45-270(1)(a); *Cowlitz County*, Decision 12483-A. The respondent is responsible for presenting its defense and has the burden of proof for affirmative defenses. WAC 391-45-270(1)(b); *Whatcom County*, Decision 8512-A.

A complainant meets its burden of proof by showing that (1) the respondent made a proposal on a putative permissive subject, such as minimum staffing; (2) the complainant followed the requirements of WAC 391-55-265(1)(a) and placed the respondent on notice during negotiations that the complainant believed the respondent's proposal was a permissive subject of bargaining; (3) the respondent advanced the issue to interest arbitration; and (4) the executive director certified the parties to interest arbitration and included the issue on the list of issues for interest arbitration.

If the complainant meets its burden of proof on a shift staffing proposal, then the burden of proof shifts to the respondent. WAC 391-45-270(1)(b). To meet its burden of proof, the respondent must prove that staffing had a demonstratedly direct impact on workload and safety. *City of Richland*, 113 Wn.2d at 204. If the respondent meets its burden of proof, then the complainant bears the ultimate burden of proof. According to *City of Richland*, the complainant must demonstrate that under the appropriate circumstances the balance of public, employer, and union interests tips in the complainant's favor. *Id.* at 203–04.

Duty to Bargain

A public employer has a duty to bargain with the exclusive bargaining representative of its employees over mandatory subjects of bargaining. RCW 41.56.030(4). "[N]either party shall be compelled to agree to a proposal or be required to make a concession . . . ." *Id.* Thus, a balance must be struck to reflect the natural tension between the parties' obligations to bargain in good faith and the statutory admonition that parties are not required to make concessions or reach an agreement. *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Snohomish*, Decision 1661-A (PECB, 1984).

An interest arbitration eligible party can bargain to impasse and seek interest arbitration of a mandatory subject of bargaining. *City of Bellevue*, Decision 11435-A (PECB, 2013). A party commits an unfair labor practice when it bargains to impasse over a permissive subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338, 342 (1986). It is well established that if a subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not to bargain and to agree or not to agree. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450, 460 (1997); *Whatcom County*, Decision 7244-B (PECB, 2004). A party eligible for interest arbitration refuses to bargain by insisting to impasse only when the party advances a permissive subject of bargaining to interest arbitration. *Cowlitz County*, Decision 12483-A; *Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134-C (MRNE, 2016), *citing City of Lynnwood (International Association of Fire Fighters, Local 1984)*, Decision 7637 (PECB, 2002); *City of Richland (International Association of Fire Fighters, Local 1052)*, Decision 1225 (PECB, 1981).

The inclusion of a permissive subject of bargaining in a collective bargaining agreement does not render that subject mandatory. WAC 391-45-550; *see also Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971); *Spokane International Airport (International Association of Fire Fighters, Local 1789)*, Decision 7889-A; *King County Fire District 36*, Decision 11120-A (PECB, 2013). Agreements on permissive subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 344; *Cowlitz County*, Decision 12483-A.

Scope of Bargaining

Whether a particular subject is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989).

While the balancing test calls upon the Commission and its examiners to balance these two principal considerations, the actual application of this test is more nuanced and is not strictly black and white. Subjects of bargaining fall along a continuum. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours and working conditions," also known as mandatory subjects of bargaining. RCW 41.56.030(4). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives, which are permissive subjects of bargaining. *City of Richland*, 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of each case. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. The decision focuses on which characteristic predominates. *Id.*

Application of Standards

The ultimate issue before the Commission is whether the union unlawfully insisted to impasse on a permissive subject of bargaining. Before we can address that issue, we must address the parties' arguments about which party bears the burden of proof in a case alleging refusal to bargain by insisting to impasse.

Burden of Proof

On appeal, the union asserted that, as the complainant, the employer bore the burden to prove by a preponderance of the evidence that shift staffing is a permissive subject of bargaining. The employer argued that the preponderance of evidence standard is inapplicable in scope of bargaining cases, such as this case. The employer asserted that we must start from the premise that staffing is a fundamental management prerogative and, as such, a permissive subject of

bargaining. The employer argued that the union had the burden to prove staffing had a demonstratedly direct relationship to workload and safety.

The complainant bears the burden of proof in a case alleging unfair labor practices. WAC 391-45-270(1)(a). In *Spokane International Airport (International Association of Fire Fighters, Local 1789)*, Decision 7889-A, the Commission placed the burden on the employer to prove that the union insisted to impasse on a permissive subject of bargaining. The employer alleged the union's proposal on minimum staffing was permissive but did not present evidence or argument to counter the union's evidence. When the employer did not rebut the union's evidence, the Commission found the employer had not met its burden of proof.

The employer met its burden of proof on the essential elements of the case. The union made a proposal on staffing. "[G]eneral staffing levels are fundamental prerogatives of management" and a minimum shift staffing clause, such as Article 27, is generally considered a permissive subject of bargaining. *City of Richland*, 113 Wn.2d at 205. The employer complied with WAC 391-55-265(1)(a) and placed the union on notice during mediation that it thought the union's proposal on Article 27 was a permissive subject of bargaining.[8] The union requested that the Executive Director certify Article 27 to interest arbitration. When the Executive Director certified the parties to interest arbitration, he included Article 27 on the list of issues.[9] In its answer, the union admitted these facts.[10]

Shift or general staffing levels, however, are not exclusively reserved to the rights of management. If a union presents evidence that the shift staffing relates to workload and safety, as the union in this case did, then we must balance how the minimum shift staffing relates to employees' wages, hours, and working conditions against the employer's interest in entrepreneurial control or managerial prerogatives. If a union is able to show that the shift staffing level had a "demonstratedly direct relationship to employee workload and safety," then requiring an employer

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8 ER Ex. 1.

9 ER Complaint.

10 Union (UN) Answer.

to bargain staffing will result in a balance of the interests of the public, employer, and union in furtherance of the public employment collective bargaining laws. *City of Richland*, 113 Wn.2d at 204.

As discussed below, the union met its burden and proved that the shift staffing level had a "demonstratedly direct relationship" to employee workload and safety. The employer retained the burden to prove that, on the balance, its interest in unilaterally setting staffing levels outweighed the union's interests in workload and safety and the public's interest in an effective fire suppression service. After balancing the parties' interests as required by *City of Richland*, the employer did not meet its burden to prove that its interests predominated.

The City of Richland Application

The Union's Interests

The union asserted that the minimum number of firefighters on duty impacts workload and safety, tipping the balance to require negotiations over the proposal on minimum staffing. The union offered evidence that increasing call volume and a static staffing level resulted in a larger workload as well as health and safety issues. The union's evidence also addressed response time, inspections, and training as those subjects relate to safety.

Workload

Over time, the employer has seen an increase in call volume while decreasing the minimum number of firefighters on duty.[11] In 1978, the employer maintained a minimum of 26 firefighters on shift and responded to 4,980 calls.[12] In 2008, the employer maintained a minimum of 33 firefighters on shift and responded to 18,512 calls. In 2014, the employer maintained 28 firefighters on shift and responded to 21,389 calls.

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11 UN Ex. 17.

12 ER Ex. 24.

Comparing the number of dispatches per unit from the employer's 2012 Annual Report[13] and the dispatches from 2012,[14] a decrease in the minimum number of firefighters on duty and the increase in call volume resulted in firefighters responding to more calls throughout their shifts. For example, Engine 1 responded to 3,685 calls in 2012 and 4,770 calls in 2015. Engine 1 was staffed each day in 2012 and 2015. Engine 3 responded to 1,586 calls in 2012 and 1,003 calls in 2015. While no evidence showed the number of shifts during which Engine 3 was staffed in 2012, the employer staffed Engine 3 for 112 shifts in 2015.

In May 2007, the fire department prepared a needs assessment.[15] The assessment explained that "[w]hen an engine company responds to 10 or more alarms per day, they are considered to be 'ineffective' for all subsequent responses or additional duties, such as training or inspections."[16] The needs assessment identified the national standard of "effective" responses as less than 10 calls per day.[17] While the chief may not have given the needs assessment to the mayor, the department recognized that the workload of the firefighters was, in 2007, reaching a point where the firefighters' ability to be effective would be impacted.

On the day Battalion Chief Jeffrey Edmonds testified, Engine 6 had responded to eight calls by noon. In the three shifts that Captain Michael Lande worked before testifying, he responded to 14, 15, and 16 calls. Lande typically responds to 10 to 15 calls per shift. The unrebutted evidence showed that calls for service in the city of Everett have increased while the number of firefighters on duty has remained 28.

The employer asserted that "more time in a day on 911 calls simply means less time on other tasks or less free time." The employer argued there was "nothing exceptional, unexpected, burdensome,

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13 UN Ex. 18, at 26.

14 ER Ex. 37.

15 UN Exs. 2 and 12.

16 UN Ex. 2, at 4.

17 UN Ex. 2, at 5.

or onerous about the overall 'workload.'"[18] In addition to responding to calls, firefighters perform other duties during their 24-hour shifts. Those duties include cleaning the fire station, maintaining the grounds, writing reports, inspecting buildings, and receiving training to maintain and develop their skills.

Time spent not responding to calls or spent performing other duties is equally valuable to the firefighters. It is beyond dispute, however, that the firefighters' work while on calls is quite different from what they do while not on calls. Responding to calls is more physically strenuous, mentally stressful, and often fraught with danger. Downtime allows firefighters to recover from responding to calls.

In sum, the union proved that staffing levels had a demonstratedly direct impact on the firefighters' workload.

Health and Safety

Firefighting is an inherently dangerous, high-stress profession that impacts firefighter health and safety through exposure to chemicals or bodily fluids, ill or injured individuals, and fires. The dangerous nature of the job is recognized by certain statutory presumptions of illnesses.[19]

The union presented unrebutted expert and witness testimony about the effects of responding to an increasing number of calls on firefighter health and safety. According to Dr. Carl Brodkin, as firefighters respond to more calls, their risk of contracting certain illnesses increases. Dr. Kerry Keuhl offered unrebutted evidence about the effect of fatigue on firefighters. The union asserted, and the expert evidence offered by the union supports a conclusion, that the increased call volume without an increase in minimum staffing caused the firefighters to respond to more calls and thus increased their exposure to known health risks.

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[18] ER Post-Hearing Brief, at 25 (emphasis omitted).

[19] RCW 51.32.185.

The expert evidence also leads to the conclusion that when a fatigued firefighter responds, the firefighter may not be acting in the best frame of mind because, as Dr. Keuhl explained, fatigue causes persons to believe they are performing better than they are. As firefighters respond to more calls, they become more fatigued, lose stability, lose muscular ability, and are at a greater risk of strain or sprain and experience decreased mental abilities. Dr. Keuhl's testimony, based on his extensive research, leads to the conclusion that the risk of injury to the firefighter, and even the public, increases as a result of physical and mental exhaustion.

The firefighters' physical and mental health are also adversely impacted each time the firefighters receive and respond to a call. The union offered testimony from supervisory employees about fatigue among the firefighters. As Battalion Chief Roger Westlund explained, firefighters experience a fight-or-flight response when their pagers go off announcing a call. Their heart rate increases, their breathing increases, and they sweat.[20] In the opinion of Edmonds, the firefighters he supervises are fatigued at the end of a shift. They have little opportunity to recover when they are responding to calls timed close together. Battalion Chief Donald Plucker agreed and explained that it is difficult to find firefighters to accept overtime. Westlund sees firefighters making less than the best decisions when they become fatigued. This evidence coupled with the expert testimony confirms that the shift staffing level had a demonstratedly direct relationship to safety.

The employer characterized the union's evidence as "anecdotal." The Commission and its examiners are required to base findings of fact "on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.461(4). The battalion chiefs were in the best position to testify about the level of fatigue they had observed among their staff. Such observations are the type of evidence that reasonably prudent persons would rely on. Further, the employer did not rebut the battalion chiefs' testimony.

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[20] Tr. Vol. IV, 662:2–18.

Plucker explained that more firefighters are calling in sick or injured.[21] In 2014, the fire department had 31 reported incidents, 361 days away, and 275 restricted days.[22] In 2015, the fire department had 39 reported incidents, 525 days away, and 387 restricted days.[23] From the evidence, it is difficult to conclude what caused the injuries. However, the evidence showed that time loss increased.

Increases in the number of calls responded to each shift directly impact firefighters' safety and the safety of the public they serve. As the number of calls increases throughout a shift, firefighters' mental and physical readiness for the next call are adversely impacted. Fatigue directly impacts safety.

Response Time

Fire departments measure response time, or the amount of time it takes to get to an emergency. Response time increases when fewer firefighters are on shift. Response time has a direct impact on the safety of firefighters and citizens. The longer a fire burns, the more dangerous it becomes to people and property.

In 2007, the department recognized that for some of its apparatuses' response times were increasing.[24] In 2010, the employer took three apparatuses out of service by eliminating overtime staffing of Engine 3 (E-3), Aid Car 2 (A-2), and Aid Car 6 (A-6). *City of Everett*, Decision 11241-A. The union presented unrebutted evidence that increasing staffing would decrease response time.[25] The testimony of Nichole Taylor and Union Exhibit 27 showed that by adding staff and apparatuses, the firefighters could respond more quickly. At the current staffing level, the firefighters could respond within eight minutes on 29.3 percent of the roads within the

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21 Tr. Vol. IV, 647:12–23.

22 ER Ex. 52.

23 ER Ex. 53.

24 UN Ex. 2, at 4.

25 UN Ex. 27.

employer's jurisdiction.[26] By adding E-3, A-2, and A-6, the firefighters could respond within eight minutes on 48 percent of the roads within the employer's jurisdiction.[27]

In the past, battalion chiefs had the ability to move apparatuses around the city.[28] By doing so, the battalion chiefs placed resources in a manner that would reduce response times. At least one battalion chief, Westlund, no longer reassigns apparatuses, in part, because the crews are busy responding to calls.

Inspections

Each shift, firefighters are assigned a certain number of inspections. Fire Marshal Eric Hicks explained that the software used to track inspections schedules a new, future inspection on the day an inspection is completed. If the firefighters find a violation of the fire code, then the software schedules a reinspection. A fire inspector, not a firefighter, is assigned to reinspect. Hicks agreed with union witnesses that the amount of work the firefighters have impacts their ability to conduct inspections.

Due to their increased workload, the firefighters do not have the time to complete all of the inspections they are assigned. The firefighters may be in the middle of an inspection when they receive a call and are unable to complete the inspection. During an inspection, firefighters are able to familiarize themselves with a building and learn information that could be helpful in the event of a fire. Completing fewer inspections prevents firefighters from having this knowledge. Inspecting buildings can increase safety and eliminate potential fire hazards.

Training

Training can improve firefighters' safety and ensure firefighters are competent to perform their duties at calls. The employer provides two types of trainings for the firefighters: mandatory training directed by the assistant chief of training and fire company-level training.

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26 UN Ex. 27-D; Tr. Vol. III, 455.

27 UN Ex. 27-I.

28 Tr. Vol. IV, 659–61.

According to the union's evidence, mandatory training is completed but may not be effective due to the number of calls firefighters must respond to during training.[29] The training may continue while firefighters respond to a call. When the firefighters return, they attempt to pick up where they left off. In the past, the employer has assigned overtime to allow firefighters to participate in training.[30] Westlund also used to assign apparatuses to different stations during training, but due to the number of calls he no longer makes those adjustments.[31] All mandatory training is eventually completed.

Fire company-level training is designed to improve skills and teamwork. However, company-level training may not take place because firefighters are busy responding to calls for assistance. Edmonds sees that lack of company-level training when he is an incident commander. After an incident, Edmonds prepares a post-incident report in which he includes recommendations for improvements.[32] In Edmonds' opinion the firefighters are not as efficient as they used to be because they are not able to train at the company level. Training helps firefighters work as a team on skills necessary to perform their job. Less training means less competence—a direct impact on safety.

Conclusion

The union met its burden to prove that staffing impacted workload and safety. The firefighters' workload has increased while staffing has remained the same. At the current staffing level, firefighters have experienced increased health and safety risks, such as increased fatigue and an inability to train and perform inspections, because they are responding to more calls.

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29 Tr. Vol. III, 528–31.

30 Tr. Vol. III, 539:8–10; Vol. IV, 570:12–13.

31 Tr. Vol. IV, 659:24–660:6.

32 Tr. Vol. III, 529–31.

The Employer's Interests

The employer articulated interests in maintaining control over staffing and its budget. The employer relies heavily on the premise that staffing is, generally, a permissive subject of bargaining. An employer's right to determine the size of its workforce is "at the core of entrepreneurial control." Entrepreneurial control is akin to an employer's duty to manage its affairs. *Spokane Education Association v. Barnes*, 83 Wn.2d 366, 376 (1974). The employer has not argued or presented evidence that negotiating the number of firefighters on duty would impinge the employer's ability to manage its affairs.

The employer's argument that it could not afford the union's proposal is not persuasive. While the employer communicated to the union that the union's proposal was expensive, the employer did not tell the union that the employer could not afford the proposal.[33] However, the employer introduced evidence at hearing about the cost of the union's proposal. Employer Exhibits 22 and 23 showed the cost to pay a firefighter. Arguments raised only at hearing and not presented to the other party during negotiations should not be allowed to form the basis of a party's argument that a proposal is or is not a mandatory subject of bargaining.[34] *See City of Spokane*, Decision 4746 (PECB, 1994).

The Balance

To determine whether the union insisted to impasse on a permissive subject of bargaining, we must determine whether the union's proposal to increase the minimum staffing level to 35 is a mandatory subject of bargaining. The Commission is required to perform a case-by-case analysis and must balance the facts of each case. The balancing test must necessarily consider the employer's interest in determining the size of its workforce, the union's interests in workload and safety, and the public's interest in receiving effective services.

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[33] Tr. Vol. I, 261:25–262:18; Vol. II, 293:15–294:11; Vol. IV, 690:14–21.

[34] The employer introduced Employer Exhibit 36, which was a letter from the captains on the effect of the employer's 2010 decision to eliminate overtime staffing. In the letter, the captains asserted that the employer's decision would have an effect on the services provided to the citizens. This letter was from the captains, not from the union. Accordingly, we do not find that the union made new arguments at hearing that it did not raise with the employer during negotiations.

The employer has a strong managerial prerogative in controlling the size of its workforce. Apart from the employer's argument that it cannot afford to hire more firefighters—which the Commission will not consider because that argument was made for the first time at hearing—the employer presented no other evidence that would support its assertion that staffing, in this case, should be a permissive subject of bargaining.

The union presented compelling evidence that the firefighters are fatigued, unable to complete training, and unable to complete inspections as a result of the employer's decision to maintain a minimum staffing level of 28. The employees' interests in workload and safety outweighs the employer's right to determine the number of firefighters assigned to each 24-hour shift.

In most cases, the Commission has recognized that the public acts through its elected representatives. *City of Yakima (Yakima Police Patrolman's Association)*, Decision 1130 (PECB, 1981). However, in a case such as this, the public's interest in safety must be weighed. *City of Richland*, 113 Wn.2d at 204. The public places its trust and safety in the hands of professional firefighters and paramedics. The public has a strong interest in receiving assistance from a firefighter that is not physically, emotionally, or psychologically fatigued from the effects of responding to 10 to 16 calls per shift. Each call may have a different physical, emotional, or psychological toll on a firefighter. It is in the public's best interest that firefighters are able to respond in the best possible frame of mind so that they make sound decisions and move safely in high-risk situations.

Based on the record before us, we find that shift staffing had a demonstratedly direct impact on employee workload and safety. Requiring the employer to bargain staffing in this case would achieve the appropriate balance of public, employer, and employee interests. The union's proposal on Article 27 is a mandatory subject of bargaining.

CONCLUSION

The employer met its initial burden and proved that the union insisted to impasse on a shift staffing proposal. The burden shifted to the union. The union established that staffing had a

demonstratedly direct impact on workload and safety. The ultimate burden of proof remained with the employer to present evidence that its interest in unilaterally establishing staffing levels was greater than the union's and public's interests in adequate fire suppression staffing and employee safety. The employer failed to present any such evidence. The employer has not met its burden to prove that the union unlawfully insisted to impasse on a permissive subject because in this case staffing is a mandatory subject of bargaining.

By finding the union's proposal in this instance to be a mandatory subject of bargaining, we are not finding that a proposal on minimum staffing would be a mandatory subject of bargaining every time the parties negotiate. Each round of bargaining would present facts for analysis. While this does not provide parties with certainty about what topics are mandatory subjects of bargaining, it does effectuate the appropriate balance.

ORDER

Findings of Fact 1 through 5 and 7 through 17 entered by Examiner E. Matthew Greer are AFFIRMED and adopted as the findings of fact of the Commission. Findings of Fact 6, 18, and 19 are VACATED and the following findings of fact are entered:

6. Calls for service are dispatched by SnoPac 911. SnoPac provides emergency dispatch services for 37 municipalities within Snohomish County, including the City of Everett.

18. Firefighting is an inherently dangerous, high-stress profession that impacts firefighter health and safety through exposure to chemicals or bodily fluids, ill or injured individuals, and fires. Increases in the number of calls responded to each shift directly impact firefighters' safety and the safety of the public they serve. As the number of calls increase throughout a shift, firefighters' mental and physical readiness for the next call are adversely impacted. Fatigue directly impacts safety.

19. The union established that staffing had a demonstratedly direct relationship to firefighter workload and safety.

Conclusion of Law 1 entered by Examiner E. Matthew Greer is AFFIRMED and adopted as a conclusion of law of the Commission. Conclusions of Law 2 and 3 are VACATED and the following conclusion of law is substituted:

2. Based upon Findings of Fact 3, 5, 7 through 9, 12, and 14 through 19, the union did not refuse to bargain in violation of RCW 41.56.150(4) when it insisted to impasse on a proposal to increase the minimum staffing level.

The Order issued by Examiner E. Matthew Greer is VACATED. The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 3rd day of October, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

MARK BUSTO, Commissioner

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RECORD OF SERVICE - ISSUED 10/03/2017

DECISION 12671-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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