STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 469, Complainant, vs. CITY OF YAKIMA, Respondent.	CASE 7800-U-89-1657 DECISION 3503-A - PECB
YAKIMA POLICE PATROLMANS ASSOCIATION, Complainant, vs. CITY OF YAKIMA, Respondent.	CASE 7915-U-89-1707 DECISION 3504-A - PECB DECISION OF COMMISSION

Webster, Mrak & Blumberg, by James H. Webster and Lynn Weir, Attorneys at Law, appeared on behalf of International Association of Fire Fighters, Local 469.

Aitchison, Snyder & Hoag, by Christopher K. Vick, Attorney at Law, appeared on behalf of Yakima Police Patrolmans Association.

Menke & Jackson, by Rocky L. Jackson, appeared on behalf of the employer.

This case comes before the Commission on a timely petition of the City of Yakima for review of a decision issued by Examiner Mark S. Downing.[1] In addition to appeal briefs filed pursuant to WAC 391-45-350, all of the parties presented oral argument before the Commission on October 9, 1990.

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1 City of Yakima, Decisions 3503 and 3504 (PECB, 1990).

BACKGROUND

The City of Yakima has created the Yakima Police and Fire Civil Service Commission (Civil Service Commission), and that body has adopted rules and regulations governing certain, but not all, personnel matters for the Yakima Fire Department and the Yakima Police Department. Some of those civil service rules are common to both departments, while others are specific rules applicable to the departments separately.

International Association of Fire Fighters (IAFF), Local 469, is the exclusive bargaining representative of a bargaining unit consisting of approximately 80 employees in the Yakima Fire Department who are "uniformed personnel" within the meaning of RCW 41.56.030(7). The IAFF and the employer were signatories to a collective bargaining agreement covering the period January 1, 1988 through December 31, 1989.

The Yakima Police Patrolmans Association (YPPA) is the exclusive bargaining representative of a similarly-sized bargaining unit of law enforcement "uniformed personnel" in the Yakima Police Department. The YPPA and the employer were parties to a collective bargaining agreement encompassing the period of January 1, 1987 through December 31, 1988.

On January 18, 1989, the Civil Service Commission adopted a number of changes in its general rules, as well as changes in the specific rules applicable to fire department and police department employees. The changes at issue in this proceeding have been detailed in the Examiner's decision at pages 3 - 4, and need not be repeated here. Generally speaking, the rules changes affected discipline of employees and their opportunities for promotion within the bargaining units represented by the respective unions.

On February 3, 1989, IAFF Local 469 filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Yakima had violated RCW 41.56.140 (Case 7800-U-89-1657).

On April 19, 1989, the YPPA filed a separate complaint charging unfair labor practices with the Commission, also alleging that the City of Yakima had violated RCW 41.56.140 (Case 7915-U-89-1707).

Both complaints alleged that the employer committed refusal to bargain violations of the "unilateral change" variety, by its implementation of the amended civil service rules concerning discipline and promotions to positions within the respective bargaining units.

On August 24, 1989, the employer filed a lawsuit in the Superior Court for Yakima County, seeking a declaratory judgment that the employer was not required to engage in collective bargaining on matters delegated to the Civil Service Commission. Both the IAFF and the Public Employment Relations Commission were named as respondents.[2] In addition to declaratory relief, the employer sought an order from the court prohibiting or staying the Commission from hearing the IAFF's unfair labor practice complaint. The Superior Court subsequently declined to assert jurisdiction,[3] at which point these unfair labor practice cases were consolidated for hearing and assigned to Examiner Downing.

On November 15, 1989, the employer filed an answer and a motion for summary judgment in Case 7800-U-89-1657. The answer admitted that the Civil Service Commission had amended its rules on January 18,

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2 Yakima County Superior Court, Cause No. 89-2-01601-9.

3 The employer has sought direct review by the Supreme Court of the lower court's refusal to assert jurisdiction in Cause No. 89-2-01601-9.

1989, but denied that the adoption and implementation of those rules was a mandatory subject of bargaining. The employer asserted that it had no duty to bargain collectively with the IAFF on the matters complained of, that those matters had been delegated to the Civil Service Commission, and that the Public Employment Relations Commission has no jurisdiction over the complaint. The employer also renewed its argument that, because the IAFF had not sought judicial review of the actions of the Civil Service Commission, that union was bound by the amended civil service rules.

On November 20, 1989, the employer filed a similar motion for summary judgment in Case 7915-U-89-1707.

On December 1, 1989, the employer filed an "admission" in the IAFF unfair labor practice case and filed its answer to the YPPA unfair labor practice complaint. The "admission" stated that the Civil Service Commission had no authority concerning wages and wage-related matters and, therefore, with reference to City of Bellevue, Decision 839 (PECB, 1980), was not similar in scope, structure and authority to the State Personnel Board. The employer's answer in the YPPA matter was identical to the answer previously filed on the IAFF complaint, except for the addition of an admission that the Civil Service Commission lacked authority over wages and wage-related matters.

During the course of negotiations for a new collective bargaining agreement with the IAFF, the employer refused to bargain on certain union proposals concerning:

1. A requirement that any rule, regulation, procedure or policy affecting wages, hours or working conditions be negotiated with the union (or awarded by an interest arbitration panel) before implementation;
2. Imposition of discipline only for just cause;
3. Promotional standards addressing examination procedures, experience requirements and selection criteria; and

4. Expansion of the contractual grievance procedure to include disputes involving conditions of employment, as well as disputes involving the interpretation of the labor agreement.

In anticipation of the IAFF filing an amended complaint charging unfair labor practices with the Commission, the employer filed a new declaratory judgment action in the Superior Court for Yakima County on February 15, 1990.[4] The employer sought a ruling that it was not obligated to bargain on the union proposals at issue in the contract negotiations.

On February 21, 1990, the IAFF filed an amended complaint with the Commission, alleging that the employer had refused to bargain the proposals at issue in the contract negotiations.

On March 1, 1990, the employer objected to the amendment of the IAFF's complaint. The Examiner initially ruled that, since the original and amended complaints involved the same issues, the Commission had jurisdiction over the allegations added in the amended complaint.

An evidentiary hearing was conducted by the Examiner on March 14, 1990. That hearing was limited to the factual issue as to whether the Yakima Police and Fire Civil Service Commission is similar in scope, structure and authority to the State Personnel Board in areas other than wages and wage-related matters.

On April 10, 1990, the Superior Court for Yakima County ruled in Yakima County Cause No. 90-2-00293 that it, rather than the Commission, had jurisdiction of the dispute covered in the IAFF's amended complaint charging unfair labor practices. As a result of that holding, the Examiner did not address the IAFF's amended complaint in his decision.

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[4] Yakima County Superior Court, Cause No. 90-2-00293-3.

The Superior Court subsequently ruled in the employer's favor on a motion for summary judgment in Yakima County Cause No. 90-2-00293, concluding that the employer had no duty to bargain with the IAFF on any matter delegated to the Civil Service Commission.[5]

In his decision issued on June 12, 1990, Examiner Downing concluded that personnel matters delegated to the Yakima Police and Fire Civil Service Commission are not exempted by RCW 41.56.100 from the scope of mandatory collective bargaining, because the Civil Service Commission is not sufficiently similar to the State Personnel Board. The City of Yakima was found to have violated RCW 41.56-.140(1) and (4), by unilaterally implementing amended civil service rules concerning the discipline and promotion of fire fighters and law enforcement officers. That decision has been brought before us by the employer's timely petition for review.

POSITIONS OF THE PARTIES

The employer seeks review of paragraphs 6 through 10 of the Examiner's findings of fact, all of the Examiner's conclusions of law, and the Examiner's remedial order. The employer argues that:

1. The challenged findings of fact are not based on the record or are conclusions of law;

2. RCW 41.56.100 exempts a public employer from the duty to bargain collectively concerning any matter delegated to <u>any</u> civil service commission;

3. There is no evidence that Yakima's Civil Service Commission acts on behalf of the City of Yakima so as to become an "employer" under RCW 41.56.030(1); and

4. The ruling of the Superior Court supersedes the Commission's jurisdiction to render any decision in this case.

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[5] The IAFF has sought direct review by the Supreme Court of the lower court's order on summary judgment and declaratory judgment.

The unions contend that the Commission retains jurisdiction. They agree with the Examiner's decision, and argue that the Commission should affirm that decision.

DISCUSSION

Evidentiary Basis for the Findings of Fact

The findings of fact challenged by the employer are set forth here in their entirety, with emphasis supplied where only a portion of the paragraph is disputed:

> 6. The three members of the Yakima Police & Fire Civil Service Commission are appointed by the city manager. Pursuant to the city ordinance relating to the police department, such appointments are subject to the approval of the city council. **There are no particular qualifications required for appointment to the Yakima Police & Fire Civil Service Commission. There are no restrictions on the prior or concurrent political activity of members of the Yakima Police & Fire Civil Service Commission. Nothing precludes appointment of an employee of the City of Yakima as a member of the Yakima Police & Fire Civil Service Commission.**
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> 7. The secretary / chief examiner of the Yakima Police & Fire Civil Service Commission is appointed directly by the Yakima Police & Fire Civil Service Commission. **There are no particular qualifications required for appointment to the position of secretary / chief examiner of the Yakima Police & Fire Civil Service Commission. Nothing precludes appointment of an employee of the City of Yakima as the secretary / chief examiner of the Yakima Police & Fire Civil Service Commission.** The secretary / chief examiner is subject to discipline or discharge on the same basis as employees of the fire and police departments.

8. The Yakima Police & Fire Civil Service Commission has, and has exercised, authority to adopt rules and regulations concerning examinations, appointments, promotions, transfers, reinstatements (including employees laid off), demotions, suspensions, discharges, probationary periods, leaves of absence without pay, and outside employment. The City of Yakima has acknowledged during the course of these proceedings that the Yakima Police & Fire Civil Service Commission lacks authority concerning wages and wage-related benefits. Nothing in the record in this proceeding establishes that the Yakima Police & Fire Civil Service Commission has, or has exercised, any authority in regards to limiting the number of suspensions that can be imposed on a particular employee in any period, or in regards to shift premiums, call-back compensation, standby compensation, workers' compensation, classification of employees, hours of work, compensatory time, training and performance evaluation.

9. On January 18, 1989, the Yakima Police & Fire Civil Service Commission adopted changes to its rules and regulations concerning: (1) The discipline of employees within the bargaining units referred to in paragraphs 2 and 3 of these findings of fact; and (2) the promotion of employees to positions within the bargaining units referred to in paragraphs 2 and 3 of these findings of fact. Those changes were made without notice to or collective bargaining with the exclusive bargaining representatives identified in paragraphs 2 and 3 of these findings of fact.

10. The City of Yakima unilaterally implemented and acted upon the changes of rules adopted by its civil service commission on January 18, 1989, without notice to or collective bargaining with the exclusive bargaining representatives identified in paragraphs 2 and 3 of these findings of fact. Such actions at least include the filling of certain vacancies

> under the revised civil service rules during or about February of 1989.

As to paragraphs 6 through 8 of the Examiner's findings of fact, we note that the factual record in these cases includes certain admissions made by the employer, as well as copies of City of Yakima ordinances 1.46 and 1.54 and copies of both the general and specific rules of its Civil Service Commission that were submitted by the employer. The Examiner was entitled to draw factual inferences from the contents of those admissions and exhibits, as well as from Chapters 41.06, 41.08 and 41.12 RCW, and from Title 356 WAC.[6] The Examiner was also entitled to draw inferences from the absence of contrary language in the record. We have reviewed the Examiner's findings of fact in that context. The employer has not offered any argument as to how paragraphs 6 through 8 are contradicted by the record. We find no error.

As to paragraphs 9 and 10 of the Examiner's findings of fact, the employer takes issue with the language stating that changes to the civil service rules were made "without notice" to the exclusive bargaining representatives in these cases. We find that objection well taken. The complaints filed by the unions did not allege a lack of prior notice of the civil service rule changes at issue. They alleged instead a unilateral change over the union's objection, without bargaining. Implicitly, if not expressly, the unions conceded the fact of notice. Paragraphs 9 and 10 of the findings of fact will be revised accordingly, but those revisions do not affect the outcome of these cases. The issue before the Commission was, and remains, the employer's refusal to bargain the changes before their implementation.

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[6] Title 356 WAC consists of the "Merit System Rules" adopted by the State Personnel Board pursuant to Chapter 41.06 RCW.

The Commission's Jurisdiction In This Case

Regarding the employer's multiple challenges to the Examiner's conclusions of law, we first address the issue of whether the Commission continues to have jurisdiction in these matters.

Prior to the Examiner's decision, the Superior Court for Yakima County had ruled that the City of Yakima has no duty to bargain collectively on any matter delegated to the Yakima Civil Service Commission for Fire Employees. City of Yakima v. International Association of Fire Fighters, Local 469, Yakima County Superior Court Cause No. 90-2-00293-3. The employer contends that decision supersedes the jurisdiction and authority of the Commission to render or enforce any contrary decision. We disagree.

This Commission's jurisdiction to determine and remedy unfair labor practices is based on RCW 41.56.160, which expressly states that the Commission's power is not affected or impaired by any other means of adjustment. The Commission obtained jurisdiction over the subjects in controversy in these cases in February of 1989 (i.e., when the IAFF filed its unfair labor practice complaint in Case 7800-U-89-1657), and April of 1989 (i.e., when the YPPA filed its complaint in Case 7915-U-89-1707). The employer's attempt to invoke the jurisdiction of the Superior Court postdated the Commission's assertion of jurisdiction on the allegations actually decided by the Examiner. The employer's request for a stay of Commission proceedings regarding the unfair labor practice complaints decided herein was denied by the Court. It is appropriate, therefore, for the Commission to decide the issues presented.

Sound judicial precedent and the Administrative Procedures Act both provide for the exhaustion of administrative remedies, where available, in order for the judiciary to have the benefit of the Commission's expertise in interpreting and applying the collective bargaining statutes adopted by the Legislature. Statutory

interpretations made by administrative agencies established by the Legislature to administer specific statutes are accorded considerable weight by the courts, especially when the administrative agency has expertise in a highly specialized area of law. See, e.g., Community College v. Personnel Board, 107 Wn.2d 427 (1986); Yakima v. Yakima Police, 29 Wn.App. 756 (1981).

We do not read State v. Northshore School District, 99 Wn.2d 232 (1983), relied on by the employer, as requiring a different result. The Northshore case was the product of a unique procedural history, and is distinguishable on its facts. Acting under his constitutional authority, the State Auditor brought declaratory judgment actions against certain school districts, challenging a practice known as "release time" whereby those employers had provided paid leave time to permit teachers to perform their duties as education association officials. Although no case or controversy was then pending before it, the Public Employment Relations Commission sought to intervene, arguing that: (1) the Commission had exclusive jurisdiction to address the "assistance and domination" unfair labor practice issue growing out of those facts, and the court's only function was to review the Commission's decision; or (2) the doctrine of primary jurisdiction required the court to defer the matter to the Commission.[7] The Supreme Court held that the general jurisdiction of the superior courts of this state had not been preempted by the Educational Employment Relations Act,[8] and that the trial court had not abused its discretion in declining to apply

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[7] Primary jurisdiction is a doctrine used by a court in deciding whether it should refrain from exercising jurisdiction over a case or controversy until an administrative agency with special competence and expertise in an area, and with legislative authority to resolve a particular issue, has had an opportunity to do so. It does not displace the jurisdiction of a court but merely allocates power between courts and agencies to make initial determinations. Jaramillo v. Morris, 50 Wn.App. 822, 828 (1988).

[8] Chapter 41.59 RCW.

the doctrine of primary jurisdiction in the context of that case. Contrary to the arguments of the employer here, the Supreme Court did not hold in Northshore that, once administrative proceedings have begun, the decision of a court with general jurisdiction supersedes the jurisdiction and authority of this Commission to render a contrary decision.

The subsequent decision of Washington State Court of Appeals in Mutual of Enumclaw v. Human Rights Commission, 39 Wn.App 213 (Division I, 1984), suggests just the opposite of the interpretation placed on Northshore by the employer here. In Enumclaw, a superior court and the Washington State Human Rights Commission had concurrent jurisdiction to enforce the law against discrimination.[9] The court held that, when the jurisdiction of two tribunals is invoked concerning the same subject or controversy, the tribunal first obtaining jurisdiction has the power to decide the controversy to the exclusion of the other. Id., citing State ex rel. Uland v. Uland, 36 Wn.2d 176 (1950).

The IAFF and YPPA had a right to seek, and did seek, determination by this Commission as to whether RCW 41.56.140 has been violated by the employer. The employer thereafter took its claims into court, without exhausting available administrative remedies. The court declined to assert jurisdiction over the unfair labor practice complaints that the Examiner has heard and decided. Yakima County Cause No. 89-2-01601-9. The court just decided, in a related case, a legal issue that is also before the Commission here. Yakima County Cause No. 90-2-00293-3. Given these facts, we conclude that the decision of the court in Cause No. 90-2-00293-3 does not supersede the jurisdiction of this Commission.

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[9] Chapter 49.60 RCW.

The Scope of the Civil Service Exemption

The central issue in this case concerns the scope of bargaining required by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Specifically at issue is whether the employer is exempted through a proviso of RCW 41.56.100 from an obligation to bargain over matters delegated by ordinance to its Civil Service Commission.

As of January 18, 1989, when the action disputed in this case took place, RCW 41.56.100 provided:

> A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative: PROVIDED, That nothing contained herein shall require any public employer to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW.[10] Upon the failure of the public employer and the exclusive bargaining representative to conclude a collective bargaining agreement, any matter in dispute may be submitted by either party to the commission. (emphasis supplied)

The employer argues that the underscored proviso (hereinafter, the "civil service proviso") exempts a public employer from the duty to bargain matters delegated to any civil service commission; that civil service commissions need not be similar in scope, structure and authority to the State Personnel Board.

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[10] Chapter 41.06 RCW is titled the "State Civil Service Law", and it creates both the State Personnel Board and the Department of Personnel to administer that law.

The legislative history of RCW 41.56.100 and subsequent amendments to Chapter RCW 41.56 RCW, as well as the statutes providing for the creation of civil service commissions, has been well described by the Examiner in his decision at pages 20 - 42. That history is incorporated herein by reference.[11]

The question before us is one of statutory interpretation, and we approach it with the applicable rules of statutory construction in mind. Principal among those is the mandate that this Commission must endeavor to ascertain and give effect to the intent of the Legislature. See, e.g., Ravsten v. Labor & Industries, 108 Wn.2d 143, 150 (1987); Service Employees, Local 6 v. Superintendent of Public Instruction, 104 Wn.2d 344, 348 (1985). Legislative intent can be derived from the face of a statute where the intent is clear and unambiguous. See, e.g., Human Rights Commission v. Cheney School District 30, 97 Wn.2d 118, 121 (1982). Here, however, the proviso of RCW 41.56.100 is not clear and unambiguous.

The employer has a tenable argument that the words "similar in scope, structure and authority" in the civil service proviso refer only to the antecedent "personnel board", and not to "civil service commission". The unions have an equally tenable argument that the "similar in scope, structure and authority" qualifier applies to the entire phrase "civil service commission or personnel board."

We concur with the Examiner that the exemption in RCW 41.56.100 was intended to apply to only those civil service commissions that are similar in scope, structure and authority to the State Personnel Board. While the employer has argued that application of the rule of last antecedent requires a ruling in its favor here, the Washington courts have long noted that a mechanistic use of

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[11] When questioned on the point at oral argument, the employer indicated that it did not dispute the Examiner's recitation of that legislative history, although it did not concur with the conclusions drawn by the Examiner.

statutory construction rules should not override evidence as to the legislative intent. See, e.g., Tacoma v. Taxpayers, 108 Wn.2d 679, 693 (1987). We attach significance to the Legislature's failure to disturb Commission precedent regarding the scope of the exemption in RCW 41.56.100, and to judicial precedent indicating that Chapter 41.56 RCW should be construed to preserve as large a sphere of collective bargaining as possible. See, e.g., Zylstra v. Piva, 85 Wn.2d 743 (1973).

Early Judicial Precedent -
The Commission's initial interpretation of the civil service proviso followed the first judicial examination of that proviso. In City of Seattle v. Auto Sheet Metal Workers, WPERR CD-74 (1979), the Superior Court for King County addressed the issue of whether RCW 41.56.100 applied to a new personnel system adopted by the City of Seattle. The Court held that the civil service commission at issue there did not qualify for the exemption, because it was not similar in scope, structure or authority to the state personnel board. Supra at p. 72. The trial court, therefore, clearly viewed the "similarity" language of the civil service proviso as applicable to civil service commissions, not just to personnel boards.[12]

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[12] Upon review, the appellate court discussed some of the legislative history surrounding Chapter 41.56, and concluded that the apparent purpose of the Legislature's 1967 changes was to answer concerns expressed in the Governor's earlier veto message. In the court's view, the Legislature "adopted one of several possible approaches to resolving the closely related problem of avoiding the possible conflicts, between collective bargaining and the merit principle and merit systems ... This is accomplished by RCW 41.56.100." Seattle v. Auto Metal Workers, 27 Wn.App. 669 (1980). The Court then proceeded to uphold the trial court's ruling on other grounds, without directly addressing the issue of whether the RCW 41.56.100 civil service proviso exempted all civil service commissions or just those similar in scope ... to the state personnel board. Id.

Commission Precedent -

When the issue first came before the Public Employment Relations Commission in 1980, the Examiner's decision in City of Bellevue, Decision 839 (PECB, 1980) cited the trial court decision in Auto Sheet Metal Workers and held that, in order to qualify under the civil service proviso of RCW 41.56.100, the particular civil service body must be similar in scope, structure and authority to the state personnel board created by Chapter 41.06 RCW.

All subsequent Commission rulings on the issue have applied the civil service proviso of RCW 41.56.100 in a similar manner. City of Walla Walla, Decision 1999 and 1999-A (PECB, 1984); City of Wenatchee, Decision 2216 (PECB, 1985); and City of Bellevue, Decision 3156-A (PECB, 1990).

Absence of Legislative Amendment -

The Legislature has repeatedly amended Chapter 41.56 RCW, including 41.56.100, without disturbing the Commission's interpretation of the disputed civil service proviso. For example, three years after the 1980 City of Bellevue decision, the Legislature amended RCW 41.56.905 to state that Chapter 41.56 RCW should be liberally construed with conflicts resolved in favor of the dominance of that chapter:

> The provisions of this Chapter . . . shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this Chapter conflicts with any other statute, ordinance, rule or regulation of any public employer,[13] the provisions of this Chapter shall control.

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[13] RCW 53.18.015 addresses the interrelationship between Chapter 53.18 RCW, which is applicable to port districts and their employees, and Chapter 41.56 RCW. That statute has no application or bearing in these cases.

In Department of Transportation v. State Employees' Insurance Board, 97 Wn.2d 454 (1982), the Supreme Court found significant the fact that on five occasions when the SEIB act had been amended, the Legislature did not repudiate the statutory construction employed by that agency. See, also, Newschwander v. Board of Trustees of the State Teachers Retirement System, 94 Wn.2d 701, 711; Green River College v. Higher Education Personnel Board, 95 Wn.2d 108 (1980). Here, the Legislature has amended Chapter 41.56 RCW numerous times since the agency interpretation of the civil service proviso announced in 1980.[14] None of the enacted amendments repudiate the agency's interpretation.

RCW 41.56.100 was last amended in 1989.[15] By that time, the Legislature had expressed its intent that the provisions of Chapter 41.56 RCW should prevail over other statutes, and the Commission had for nine years been applying the exemption in RCW 41.56.100 only if a civil service commission were shown to be similar in scope, structure and authority to the State Personnel Board. In amending RCW 41.56.100 in 1989, the Legislature made no changes evidencing disagreement with the Commission's interpretation.

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[14] Since 1980, Chapter 41.56 RCW has been amended in some respect by: Laws of 1983, ch. 287; Laws of 1984, ch. 150, § 1; Laws of 1985, ch. 7, § 107; Laws of 1985, ch. 150, § 1; Laws of 1987, ch. 135, § 1; Laws of 1987, ch. 484, §1; Laws of 1988, ch. 110, § 1, 2; and Laws of 1989, ch. 45, § 1.

[15] Laws of 1989, ch. 45 § 1. The only change was the addition of new material, as follows:

> ... If a public employer implements its last and best offer where there is no contract settlement, allegations that either party is violating the terms of the implemented offer shall be subject to grievance arbitration procedures if and as such procedures are set forth in the implemented offer, or if not in the implemented offer, if and as such procedures are set forth in the parties' last contract.

In a parallel development that reinforces our conclusion here, we note that the Legislature amended RCW 41.08.050, a provision of the civil service statute relating to fire fighters, in 1987 without disturbing the Commission's interpretation of RCW 41.56.100.[16]

Recent Judicial Precedent -

The issue of whether Chapter 41.56 RCW would prevail over civil service laws was addressed by the Supreme Court in Rose v. Erickson, 106 Wn.2d 420 (1986). That case dealt with a perceived conflict between Chapter 41.56 RCW and Chapter 41.14 RCW, which establishes a civil service system for county sheriff employees. The court held that the Legislature did not intend the procedures of Chapter 41.14 RCW to supplant Chapter 41.56 RCW, and that the latter statute should prevail.

Chapter 41.14 RCW closely parallels Chapters 41.08 and 41.12 RCW. We do not find any differences between the various civil service statutes that suggest the requirements of Chapter 41.56 RCW should not likewise prevail over the civil service laws for police and fire fighters, in the event of a conflict.

Narrow Construction of Exceptions -

The employer's argument here is similar to one made in Public Utility District No. 1 of Clark County v. PERC, 110 Wn.2d 114 (1988). The employer in that case sought to have language in RCW 41.56.020 construed as an absolute exemption that would have removed all public utility districts from the coverage of Chapter 41.56 RCW and the jurisdiction of this Commission. In ruling that only a limited exemption was intended, the Supreme Court noted that a policy requiring liberal construction is a command that the

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[16] RCW 41.08.050 was amended by Laws of 1987, ch. 339, § 1, to allow a city, town or municipality to exclude the fire chief as an employee covered under the civil service act. The Legislature made no change that would suggest it was repudiating the preemptive authority of Chapter 41.56 RCW over local civil service boards.

coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. Id. at 119. See, also, Nucleonics Alliance v. Washington Public Power Supply System, 101 Wn.2d 24, where the Supreme Court ruled that a broad exemption from the class of covered municipal corporations would not effect the purpose of providing public employees the right to join and be represented by labor organizations for the purposes of collective bargaining.

The employer argues that it was the Legislature's intent to exempt public employers from any duty to collectively bargain matters delegated to any civil service commission. Under the statutes applicable to police and fire fighters, the matters delegated to local civil service commissions may include: Examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions, discharges, and "any other matters connected with the general subject of personnel administration ...". RCW 41.08.040 (1); RCW 41.12.040(1). This potential delegation of duties is so broad that a ruling exempting matters delegated to any civil service commission would allow public employers to effectively avoid collective bargaining with their police and fire fighters, except perhaps for wages and wage-related matters. We think it obvious from provisions in Chapter 41.56 RCW specific to uniformed personnel, e.g., RCW 41.56.430 - .490, that such a result was not contemplated by the Legislature.

Construing the civil service proviso as providing a limited, not absolute, exemption for civil service commissions better reconciles the apparent conflict between the statutes. Such a construction is also consistent with the long line of Supreme Court precedent indicating that Chapter 41.56 RCW should be construed to preserve as large a sphere of collective bargaining as possible. PUD No. 1 of Clark County v. PERC, supra; Nucleonics Alliance v. WPPSS, supra; Zylstra v. Piva, supra; Roza Irrigation District v. State, 80 Wn.2d 633 (1972).

The employer has articulated concerns regarding the continued viability of civil service commissions if we find a bargaining obligation as to matters delegated to such commissions. We have considered the employer's arguments, but do not find them persuasive. Contrary to the employer's contentions, our interpretation of RCW 41.56.100 does not nullify all local civil service commissions in the State of Washington.

There may be some civil service commissions that have been delegated sufficient independence and authority to qualify as similar in scope, structure, and authority to the State Personnel Board. In such cases, no bargaining obligation would arise. Where covered employees have not chosen to engage in collective bargaining through an exclusive bargaining representative, the continued viability of a local civil service commission is obvious.

If employees have exercised their statutory rights to representation and collective bargaining under Chapter 41.56 RCW, our ruling here does not affect or limit the authority of a civil service commission to act with respect to matters that are permissive, not mandatory, subjects of bargaining. For example, civil service rules regarding promotion to positions outside the bargaining unit would not be affected.[17] Even as to mandatory subjects of bargaining, our ruling does not disturb the status quo. Our holding here simply prevents an employer from implementing changes of civil service rules affecting mandatory subjects of collective bargaining until it satisfies its bargaining obligation under Chapter 41.56 RCW.

If the bargaining process results in an agreement to handle certain matters differently than specified in the applicable civil service

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[17] See, City of Yakima, Decision 2387-B (PECB, 1986), where we ruled that standards for promotion to the position of fire chief were not a mandatory subject of collective bargaining under Chapter 41.56 RCW.

rules, civil service commissions have the authority, by statute, to change their rules. RCW 41.08.040(1). If a civil service commission adopts new rules on mandatory subjects only after a public employer has satisfied its bargaining obligation, and the rules adopted are consistent with what occurred in the collective bargaining process, no conflict arises. City of Bellevue, Decision 3156-A (1990). Should a civil service commission choose not to change its rules, perhaps because they apply as well to non-represented employees, then the Legislature has indicated its intent that the collectively bargained result should prevail. RCW 41.56.905; Rose v. Erickson, supra.

We have considered the Superior Court's decision in City of Yakima v. IAFF, supra, even though we do not view that ruling as depriving this Commission of jurisdiction to resolve the issue presented. Without any mention of RCW 41.56.905 or Rose v. Erickson, supra, the Yakima court concluded that there was a legislative intent that civil service commissions and their enactment of rules and regulations for the hiring, retention and discipline of personnel have greater paramount importance than the interests attributed to collective bargaining.[18] With all due respect, and for the reasons discussed herein, we do not find the court's reasoning to be persuasive.

The question of which tribunal's analysis is the correct one will undoubtedly have to be decided by a higher court. We can only base our decision on what we believe to be the interpretation that best reconciles the conflicting statutes in light of previous Supreme Court precedent. In our view, the Examiner properly applied the civil service proviso of RCW 41.56.100 in these cases.

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[18] Oral opinion, at page 6.

Application of the "Similarity" Test

The employer has also taken issue with the Examiner's conclusion that the Yakima Police and Fire Civil Service Commission is not similar in scope, structure and authority to the State Personnel Board. We find no error in the Examiner's application of the "similarity" test. The employer's objections seem grounded in the belief that such similarity should not be required of civil service commissions; an argument we have already discussed and rejected.

The "Acts on Behalf of" Defense is Untimely

The employer contends there is no evidence of record that its Civil Service Commission acts on behalf of the City of Yakima. This contention apparently seeks to raise an issue as to the Commission's jurisdiction under RCW 41.56.030(1). That statute provides, in relevant part:

> "Public Employer" means any officer, board, commission, council or other person or body acting on behalf of any public body governed by this chapter as designated by RCW 41.56-.020, or any subdivision of such body. (emphasis supplied)

This is a new defense, raised for the first time in connection with the employer's petition for review of the Examiner's decision.

In its answers to the complaints filed herein, the employer asserted that the Commission lacked jurisdiction, but only because the exemption in RCW 41.56.100 applied. It did not assert a defense under RCW 41.56.030(1). To the contrary, the employer affirmatively declared that, except for those defenses noted in its answer, the employer raised no further legal defenses, saying:

> Except as alleged above, both in answer and affirmative defenses, Respondent, City of

> Yakima, raises no further legal defense to complainant's complaint charging unfair labor practice. All issues are legal issues subject to final disposition by summary judgment.

We find no mention in any of the pleadings that the employer sought to avoid the jurisdiction of this Commission on the basis that its Civil Service Commission does not "act on behalf of" the City of Yakima. Thus, the Examiner properly found that the Yakima Police and Fire Civil Service Commission acts on behalf of the City of Yakima, within the meaning of RCW 41.56.030(1).

The Conclusions of Law Regarding "Notice"

Consistent with our earlier discussion regarding paragraphs 9 and 10 of the Examiner's findings of fact, paragraphs 5 and 6 of the Examiner's conclusions of law will be revised to remove lack of notice of the civil service rule amendments as a basis for concluding that the employer has violated RCW 41.56.140(1) and (4).

The Remedial Order

For the most part, the Examiner has appropriately remedied the employer's violation of RCW 41.56.140(1) and (4) through orders designed to restore the status quo ante until such time as the employer satisfies its bargaining obligation. We agree with the employer, however, that the Examiner's remedial order is excessive in one respect that we find to be more punitive than corrective.

In Section 2(c) of the order, the Examiner required the employer to retain those employees who it had unlawfully promoted at the higher pay rate of the promotional position until they either terminate their employment, are promoted to an equal or greater pay rate, or refuse such a promotion. The Examiner was responding to a specific request by the YPPA for an extraordinary remedy because of a rift

caused within the YPPA bargaining unit by the employer's unlawful refusal to bargain the civil service rules changes.

We can appreciate the awkwardness caused the YPPA in having to take a position that benefits some bargaining members to the detriment of others. Nevertheless, such hard choices often arise in the collective bargaining setting. Similar situations arise in grievance procedures and arbitration whenever a union successfully asserts that a more senior bargaining unit member was improperly bypassed for promotion in favor of a less senior employee; i.e., the union's position necessarily benefits one member of the unit to the detriment of another. In such cases, the standard remedy is not to retain both individuals at the pay level for the higher position. The individual improperly promoted is returned to his/her previous position and the higher position is granted to the individual entitled to promotion with backpay. An award of more than that in this case amounts to an extraordinary remedy for which we do not find sufficient justification.

We concur with the Examiner that those employees who received a promotion under the amended civil service rules, for which they would not have been eligible under the prior rules, will have to be returned to their previous positions. Each will be entitled to retain the wages earned from their work in the promotional position, and will take with them the knowledge that they gained while serving in the promotional position. The fact that such an individual received a financial benefit from the employer's unlawful actions, though, does not justify the continued maintenance of their wages at the higher level once services are no longer being rendered in the higher position, nor should they be allowed any competitive advantage vis-a-vis others in the bargaining unit who were not similarly favored.

For the purposes of future promotions, those who would not have been eligible for promotion under the old (and restored) civil

service rules must be treated as if they remained in their prior (and restored) positions during the period in question. Such individuals should not retain any direct benefit vis-a-vis their colleagues when competing for future promotions; although, as a practical matter, they will indirectly benefit from the knowledge and experience gained while serving in the higher rank.

FINDINGS OF FACT

The findings of fact issued by Examiner Mark S. Downing are affirmed and adopted as the findings of fact of the Public Employment Relations Commission except for paragraphs 9 and 10, which are amended to read as follows:

9. On January 18, 1989, the Yakima Police and Fire Civil Service Commission adopted changes to its rules and regulations concerning: (1) The discipline of employees within the bargaining units referred to in paragraphs 2 and 3 of these findings of fact; and (2) the promotion of employees to positions within the bargaining units referred to in paragraphs 2 and 3 of these findings of fact. Those changes were made without the employer having exhausted its collective bargaining obligations with the exclusive bargaining representatives identified in paragraphs 2 and 3 of these findings of fact.

10. The City of Yakima unilaterally implemented and acted upon the changes of rules adopted by its civil service commission on January 18, 1989, without having exhausted its collective bargaining obligations with the exclusive bargaining representatives identified in paragraphs 2 and 3 of these findings of fact. Such actions at least include the filling of certain vacancies under the revised civil service rules during or about February of 1989.

CONCLUSIONS OF LAW

The conclusions of law issued by Examiner Mark S. Downing are affirmed and adopted as the conclusions of law of the Public Employment Relations Commission except for paragraphs 5 and 6, which are amended to read as follows:

5. By unilaterally implementing amended civil service rules concerning discipline of fire fighters and promotions to positions within the bargaining unit represented by International Association of Fire Fighters, Local 469, without having bargained collectively with that organization as the exclusive bargaining representatives of its employees, the City of Yakima has committed and is committing unfair labor practices in violation of RCW 41.56.140(4) and (1).

6. By unilaterally implementing amended civil service rules concerning discipline of law enforcement officers and promotions to positions within the bargaining unit represented by the Yakima Police Patrolmans Association, without having bargained collectively with that organization as the exclusive bargaining representatives of its employees, the City of Yakima has committed and is committing unfair labor practices in violation of RCW 41.56.140(4) and (1).

AMENDED ORDER

The City of Yakima, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Giving effect to the amendments adopted on January 18, 1989, to rules of the Yakima Police and Fire Civil

Service Commission concerning discipline of employees represented by International Association of Fire Fighters, Local 469 and/or the Yakima Police Patrolmans Association, or concerning promotions to positions within the bargaining units represented by those organizations.

b. Refusing to bargain collectively in good faith with International Association of Fire Fighters, Local 469, concerning changes of rights and procedures affecting the discipline of employees represented by that organization, or concerning changes of rights and procedures affecting the promotion of employees to positions within the bargaining unit represented by that organization.

c. Refusing to bargain collectively in good faith with the Yakima Police Patrolmans Association concerning changes of rights and procedures affecting the discipline of employees represented by that organization, or concerning changes of rights and procedures affecting the promotion of employees to positions within the bargaining unit represented by that organization.

d. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. Take the following affirmative action to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Give notice to and, upon request, bargain collectively in good faith with International Association of Fire Fighters, Local 469, prior to implementing any change of wages, hours or working conditions of employees in the

bargaining unit of "uniformed" fire fighting personnel represented by that organization.

b. Give notice to and, upon request, bargain collectively in good faith with the Yakima Police Patrolmans Association prior to implementing any change of wages, hours or working conditions of employees in the bargaining unit of "uniformed" law enforcement personnel represented by that organization.

c. Vacate any positions within the affected bargaining units that have been filled since January 18, 1989, by promotion of persons who would not have qualified for such promotion under the civil service rules in effect prior to January 18, 1989. The employees removed from said positions:
   (1) Shall retain the wages received for their work in the promotional positions up to the date of this Order;
   (2) Shall be returned to the positions they would have held but for the employer's unlawful promotion of them, with all rights and benefits that would have accrued to them as the result of continuous work in such positions; and
   (3) Shall retain no other direct benefit or status as a result of their unlawful promotions.

d. Re-fill the positions affected by the immediately preceding paragraph c. from the list of employees who applied for such promotion and would have then qualified for such promotion under the civil service rules in effect prior to January 18, 1989, and make each such employee whole for their loss of pay and benefits, by payment of back pay from the date on which the position was unlawfully filled to the effective date of the

promotion made pursuant to this Order. Such back pay shall be computed as provided in WAC 391-45-410.

e. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

f. Notify each of the above-named complainants, in writing, within 30 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 each of the above-named complainants with a signed copy of the notice required by the preceding paragraph.

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Dated at Olympia, Washington, this 29th day of October, 1990.

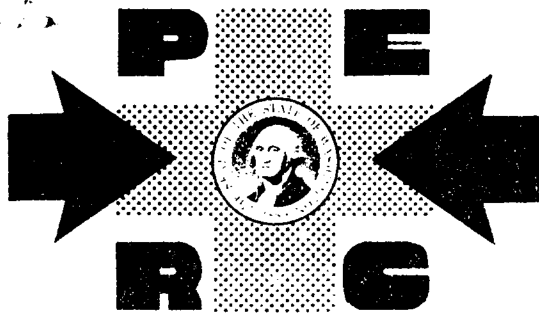
PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

JOSEPH F. QUINN, Commissioner

APPENDIX



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL cease giving effect to the changes of civil service rules adopted by the Yakima Police and Fire Civil Service Commission on January 18, 1989, to the extent that they affect mandatory subjects of collective bargaining.

WE WILL vacate certain promotions made since January 18, 1989, where the employee promoted would not have qualified under the civil service rules in effect prior to that date.

WE WILL re-fill those vacated positions with employees who applied for and qualified for such promotions under the civil service rules in effect prior to January 18, 1989, and will make such employees whole for their loss of pay and benefits.

WE WILL give notice to and, upon request, bargain collectively in good faith with International Association of Fire Fighters, Local 469, and the Yakima Police Patrolmans Association prior to making any change affecting the wages, hours and working conditions of employees represented by those organizations.

WE WILL NOT refuse to bargain collectively with the International Association of Fire Fighters, Local 469, and the Yakima Police Patrolmans Association regarding discipline and promotions to positions within the bargaining units represented by those organizations.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: ____________________

CITY OF YAKIMA

BY: ______________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza, FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.