STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1064,	)	CASE NO. 7073-U-87-1443
Complainant,	)	DECISION 3129 - PECB
vs.	)	
CITY OF BELLEVUE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Webster, Mrak & Blumberg, by James H. Webster, Attorney at Law, appeared on behalf of the complainant.

Richard L. Andrews, City Attorney, by Richard L. Kirkby, Assistant City Attorney, appeared on behalf of the respondent.

On October 14, 1987, International Association of Fire Fighters, Local 1064, (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Bellevue (respondent) committed unfair labor practices within the meaning of RCW 41.56.140(1) and (4) during the course of contract negotiations and subsequent interest arbitration between the parties. Walter M. Stuteville was designated as Examiner. The parties stipulated to waive a hearing on the matter and, in lieu thereof, submitted a jointly prepared Statement of Facts. The parties filed briefs on the issue.

BACKGROUND

The collective bargaining relationship between the City of Bellevue and the union has existed for some time.[1] The bargaining unit includes approximately 120 employees holding the ranks of Fire Fighter, Fire Lieutenant and Fire Captain. The most recent collective bargaining agreement between the parties prior to these proceedings had expired on December 31, 1986. Negotiations for a successor contract resulted in an impasse. On March 27, 1987, approximately fifty-one unresolved issues were certified by the Executive Director of the Public Employment Relations Commission for interest arbitration.[2]

One of the issues certified for interest arbitration was the language of the contractual grievance procedure. The complainant's proposal for the new agreement was to change the existing language to give the union the explicit right to initiate grievances for any alleged violation of the collective bargaining agreement. The specific language of the union proposal, as certified for interest arbitration, was:

> A "grievance" means a claim or a dispute by an employee or the Union with respect to the interpretation or application of the provisions of this Agreement. The Union has the right, in its own capacity, to act as an aggrieved party in the grievance procedure.
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> No grievance shall be entertained or processed unless it is submitted within

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1 The docket records of the Commission indicate that the relationship pre-dates the creation of the Commission in 1976. The Commission's first case involving these parties, Case No. 23-M-76-1097, was transferred to the Commission by the Department of Labor and Industries pursuant to RCW 41.58.803.

2 Case No. 6811-I-87-162

> fifteen (15) business days after the first occurrence of the event giving rise to the grievance or within fifteen (15) business days after the employee or the union has obtained knowledge of the first occurrence of the event giving rise to the grievance.
>
> Step 1
> An employee and his Union representative, as provided by RCW 41.56.080; or a union representative on behalf of an employee, shall present a grievance to the employee's supervisor, who shall give his oral answer within five (5) business days after it is presented to him.

(emphasis in original)

The employer's response to the union proposal was that the language of the expired 1984-86 agreement was sufficient, and should be retained. The employer did counterpropose, however, that the contract language should be amended to allow the union to initiate grievances where the union itself was actually the aggrieved party. The employer's proposal was as follows:

> ARTICLE XXIV GRIEVANCE PROCEDURE
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> A "grievance" means a claim or dispute by an employee with respect to the interpretation or application of the provisions of the Agreement.
>
> No grievance shall be entertained or processed unless it is submitted within fifteen (15) business days after the first occurrence of the event giving rise to the grievance or within fifteen (15) business days after the employee or the Union (when the union is the aggrieved party) has obtained knowledge of the first occurrence of the event giving rise to the grievance.
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> Step 1
> An employee, with or without his union representative, as the employee so desires, shall present a grievance, as provided by RCW 41.56.080, to the employee's supervisor

> who shall give his oral answer within five (5) business days after it is presented to him.
>
> (emphasis supplied)

At the interest arbitration hearing which commenced on October 28, 1987, the employer presented testimony through Deputy Fire Chief Ronald Pedee that amplified the intention behind the employer's proposal. Pedee stated that the employer wished to limit the union's ability to file grievances to those subjects which impact the union or union business, such as union bulletin boards or administration of union security. Pedee also stated the employer's intent that the union must otherwise work through its members to file grievances.

POSITIONS OF THE PARTIES

The union's undergirding argument is that union access to the grievance procedure is an issue on which it has no obligation to bargain, so that insistence by the employer upon limits to the union's ability to process grievances is an unfair labor practice. The union alleges that, although the existence and form of grievance procedures in collective bargaining agreements are generally considered to be mandatory subjects of bargaining, not all matters relating to grievance procedures are mandatory subjects of bargaining. It particularly asserts that the right to initiate grievances should not be a subject for bargaining. The complainant argues that the employer's position derogates the union's status as exclusive bargaining representative. Finally, quoting from Bethlehem Steel, 133 NLRB 1347 (1963), the union asserts that the employer's proposal for "Step 1" violates "the union's unqualified right to be present at the adjustment of grievances" (emphasis in original).

The employer frames the issue as: Whether the employer must accede to the union's demand that the union be granted the sole right to file grievances under the collective bargaining agreement. The employer argues that it bargained in good faith on the issue, that it was not required to make concessions on the issue, and that it was under no obligation to agree to a waiver of the statutory right of employees to file grievances under a contract. As a final point, the employer asserts that it did not insist on its grievance procedure proposal as the price of full agreement. Rather, the respondent maintains that the issue was only one of 51 issues and sub-issues that were certified for interest arbitration. The employer thus reasons that the impasse on access to the grievance procedure did not cause or substantially contribute to the impasse in negotiations, and was not an unfair labor practice.[3]

DISCUSSION

The Union's Duty of Fair Representation

The complainant, as a labor organization certified as the exclusive bargaining representative of employees for the

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[3] In a grandiose conclusion to its defense, the respondent proposed to hoist the union on its own petard, asserting that it was the union's proposal that resulted in the employer's committing any unfair labor practice. The employer suggests that, by proposing to change the contract language, the union brought forth a counter-proposal from the employer, and induced the employer to commit an unfair labor practice. The Commission's rules do not provide for "counterclaims". The employer did not file unfair labor practice charges against the union under Chapter 391-45 WAC, and no allegations against the union are properly before the Examiner in this case.

purposes of collective bargaining, has defined statutory rights and responsibilities. As the exclusive bargaining agent, it is the only entity allowed to represent bargaining unit employees in matters of "wages, hours and working conditions". RCW 41.56.080; RCW 41.56.030(4). Under the National Labor Relations Act, the definition of the duty of fair representation imposed upon an exclusive bargaining representative in the private sector is:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct . . . .

Vaca v. Sipes, 386 U.S. 171 (1967).

The same type of obligation has been found applicable to unions representing public employees under Chapter 41.56 RCW. City of Redmond, Decision 886 (PECB, 1980). Much of the precedent on the duty of fair representation has developed through cases involving administration of collective bargaining agreements, and specifically in administration of contractual grievance procedures.

In Washington, the Legislature was quite specific in regards to mentioning grievance procedures within the definition of collective bargaining:

> RCW 41.56.030 Definitions
>
> . . .
>
> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written

> agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ... (emphasis supplied)

Further, the Legislature enacted provisions in 1973 to make grievance arbitration available to all public employers and public employees covered by Chapter 41.56 RCW,[4] and to make the members of the Commission staff available to serve as grievance arbitrators without cost to the parties.[5] When it created the Public Employment Relations Commission in 1975, the Legislature endorsed the use of grievance arbitration as "the desirable method" for the resolution of disputes arising out of interpretation or application of an existing collective bargaining agreement.[6] With this focus on grievance processing comes additional significance to the distinction between access to the grievance machinery of the contract and procedural details of the procedure.

The question of whether the union must have the ability to file a grievance is significantly different from questions such as whether there are three or four steps in the procedure and what the time limits on each step shall be. The procedural issues

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4 RCW 41.56.122(2).

5 RCW 41.56.125.

6 RCW 41.58.020(4). The language of our statute is patterned after Section 204(d) of the federal Labor-Management Relations Act of 1947 (the Taft-Hartley Act). See, also, City of Tukwila, Decision 1975 (PECB, 1985).

are frequently negotiated; the union's access to the grievance procedure goes to the heart of the representation function itself.

If a union's failure to use the grievance procedure in a collective bargaining agreement is actionable conduct on the part of a bargaining unit employee (as part of the union's duty of fair representation); then access to the grievance machinery of the collective bargaining agreement is an important element in the union's fulfilling of its responsibility as the exclusive bargaining representative in representing the members of the bargaining unit. Without the ability to file grievances, or with severe limits on that ability, the exclusive bargaining representative is crippled in its contract administration responsibility.

Further, the Commission must be suspect of theories which would allow the right of access to the grievance procedure be waived or bargained away by the exclusive bargaining representative. Such proposals diminish the statutory rights of the public employees in the bargaining unit. In NLRB v. Tomco Communications, the Court stated:

> Here the company wanted to exclude the union from the first step of the grievance processing and dictate who the Union representatives should be in subsequent steps. This, it is contended, is a matter of concern between the union and the employee, not between the employer and the employees.

567 F.2d 871 (9th Circuit, 1978) at footnote No. 8 on page 880.

Thus, to protect the rights of represented employees, the rights of their duly certified exclusive bargaining representative must also be protected. One purpose of having union

representation available in grievance processing is to reduce or eliminate the potential for employer intimidation or harassment which might take place were the employee to present the grievance individually.

Among the stipulated exhibits submitted by the parties in this case is a position paper developed by the employer on the issue of the grievance procedure:

> CITY'S PROPOSAL:
> The City's proposed change to the contract language consists of granting the Union a limited right to file grievances on its own behalf.
>
> CITY RATIONALE:
> A. The City is opposed to the Union having an unlimited right to generate grievances without the grievance originating from an employee in the bargaining unit, except when the Union as an entity is the aggrieved party.
>
> 1. The City believes that the grievance procedure should continue to represent their interests of employees. The Union's proposal has the potential to open the gates for the filing of grievances for harassment purposes, to correct mistakes made in bargaining or for other strategic reasons.
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> 2. The Union already has the legal remedy to enforce its contract in court. With the City's proposal, the contract will add the right of the Union to grieve on its own behalf when the Union as an entity is the aggrieved party (e.g., Union recognition, Union membership, Union bulletin boards, etc.).
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> 3. A longstanding history of employee right to grieve (not Union) has prevailed in Bellevue. This has served the parties well. Only one grievance has been processed as far as Step 3 of the grievance procedure in the last 15 years. The Union

> has not demonstrated any sound reason as to why it has to have the right to grieve without the participation and agreement of the employee.
>
> 4. The Union may assert that this amendment is necessary because some employees "might be" unwilling to file grievances out of some fear that they would be subject to harassment or coercion by the Department. This argument is without merit in fact or law. In addition, contract language prohibits reprisals of any kind against an employee for participation in the grievance procedure, Article I, section 4. Reprisals are also prohibited by the bargaining statute, RCW 41.56.140(1).

(emphasis in original)

It is therefore clear that the intention of the employer was to limit the union's access to the grievance procedure, and to thereby limit the union's ability to fulfill its statutory representation function. Contrary to the unsupported statement in Paragraph 4 of the foregoing employer document, reprisals and harassment, or fear of reprisals and harassment, are often a motivation for employee organizing activity in the first place. To allow an employer to limit access to the grievance procedure by declaring that access to the grievance procedure to be bargainable would be to allow for the possibility of just such intimidation or harassment.

When employees organize for the purposes of collective bargaining and choose an exclusive bargaining representative under Chapter 41.56 RCW, they establish a three-cornered relationship in which the employer and union become the parties to a contract and the employer is no longer at liberty to deal directly with the employees. The employer's proposal in this case that one party to the contract (the union) may only use the enforcement procedures provided for in the contract through

a third party (the employees) when dealing with the other party to the contract (the employer), substantially limits the ability of the union to function as the representative for the entire bargaining unit, particularly where the issue at hand may not be unanimously supported, or even a popular one, among the employees.

Mandatory Subject for Bargaining

Against the background of the duty of fair representation which derives from RCW 41.58.080, the issue remains as to whether the union's access to the grievance procedure is a mandatory subject for collective bargaining under RCW 41.56.030(4).

Wages, Hours or Working Conditions? -
The Commission, the National Labor Relations Board, and the courts have generally found matters to be mandatory subjects of bargaining if they set a term or condition of employment, or regulate the relationship between employer and employee. International Union of Operating Engineers, Local 12, 187 NLRB 430, 432 (1970); Federal Way School District, Decision 232 (EDUC, 1977).

Union access to the grievance procedure neither sets a term or condition of employment of bargaining unit employees, nor regulates the relationship between employer and employee. Rather, it involves the relationship between the union and the employer and/or the relationship between the union and the employees. It thus is outside the scope of mandatory subjects of bargaining. See, Tomco Communications, supra, where the Court, citing NLRB v. Borg-Warner, 356 U.S. 352 (1958), held that the issue of who files a first step grievance is not a mandatory subject of bargaining.

The Specific Mention of "Grievance Procedure" -
"Grievance procedures" is specifically listed as a subject for bargaining in the definition of "collective bargaining" found in RCW 41.56.030(4), but that is not conclusive on the specific issue presented here. The nexus of "grievance procedures" to both "wages, hours and working conditions" and to other dispute resolution mechanisms was discussed in City of Tukwila, supra, under the heading: "Nexus with Wages, Hours and Working Conditions".[7] It was concluded there that the procedures of collective bargaining, including negotiations ground rules, representation and unit determination procedures, unfair labor practices and interest arbitration, are not mandatory subjects of bargaining for reasons consistent with Tomco, supra.

Union access to the grievance procedure is distinguishable, both factually and legally, from the details of the grievance procedure itself. Thus, while parties may propose changes in components of the grievance procedure such as documentation, time limits and number of steps, they may not limit the standing of the exclusive bargaining representative.

Obligation To Agree To A Proposal

The respondent defends its refusal to concede to the union's proposal as an exercise of its freedom from any obligation to make a concession or agree to a proposal advanced by the union. As stated in RCW 41.56.030(3):

> "Collective bargaining" means the performance of the mutual obligations of a

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[7] The Tukwila case involved a union's insistence, to impasse, upon inclusion of "interest arbitration" provisions in a contract covering employees who were not "uniformed personnel" within the meaning of RCW 41.56.030(7).

> public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, ... except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. (emphasis supplied)

The argument misses the point, however. Having language limiting the union's access to the grievance procedure in the previous contract may have been enforceable, as between the parties, during the life of that contract, but did not make such a limitation a mandatory subject of bargaining. WAC 391-45-550. Whatever waiver of statutory rights was made in the expired contract died with that contract. Seattle School District, Decision 2079 (PECB, 1984). Thus, even though it was responding to a proposal made by the union, the employer's position paper and bargaining proposal put it in the posture of being the moving party in support of a limitation which was not carried forward as part of the status quo. The concession was being asked of the union (i.e., that it give up its statutory right to enforce its contract), not of the employer.

Even if the "no duty to agree to a proposal or make a concession" principle were somehow applicable here, the things that are "otherwise provided for in this chapter" include the language of RCW 41.56.080:

> CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent all public employees within a bargaining unit without regard to membership in said bargaining representative: ...

When read together, the underscored provisions from RCW 41.56.030(4) and RCW 41.56.080 confirm the holding of Tomco, supra, that the union has no duty to bargain away its ability to file grievances.

Conflict with Individual Rights

The employer has asserted (incorrectly) that the union's proposed language would give it the sole right to file and process grievances, and it contends that it has no obligation to agree to a waiver or restriction of employees' statutory right to present a grievance themselves. The argument is based on the proviso to RCW 41.56.080 which, after establishing the principle of exclusive representation by a bargaining representative, goes on to say:

> PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.

The plain terms of the union's proposal indicate, however, that the union has not proposed anything in conflict with RCW 41.56.080. The complainant's proposal merely added the union as a party with standing to file a grievance at the first step of the contractual procedure. Employees had that right in the previous contract, and they continued to have it under the union's proposal. The issue was the ability of the union to file independent of any particular employee, not that it have the sole right to file grievances.

The Multiplicity of Issues at Impasse

The employer defends that, because the grievance procedure was only one of some 51 issues and sub-issues at impasse, the union cannot argue that the impasse on grievance filing was a condition precedent to any agreement. The argument is so lacking in merit, in light of Commission precedent, as to suggest that it be deemed frivolous.

RCW 41.56.450 provides for interest arbitration when impasse is reached in the negotiation of contracts involving "uniformed employees" such as those in the bargaining unit involved here. Under procedures which date back to City of Wenatchee, Decision 780 (PECB, 1979), and which were re-examined in King County Fire District No. 39, Decision 2328 (PECB, 1985), it is an unfair labor practice for either a union or management to pursue a non-mandatory subject in interest arbitration. Each issue must stand on its own, and must be resolved by the interest arbitration panel under the standards set forth in RCW 41.56.460. A party is not obligated to risk an adverse ruling from the interest arbitration panel on a non-mandatory subject, and so is entitled under Commission precedent to have it taken off the table even if there are other mandatory subjects in dispute between the parties. This employer took benefit of that procedure in City of Bellevue, Case No. 2633-U-80-384, when this union sought to advance a "minimum manning" issue in interest arbitration.

REMEDIES

The union has requested that attorney's fees be assessed against the respondent. With the possible exception of the "one of 51" argument, the positions taken by the employer in

this case cannot be judged to be "callous and inexcusable disregard of the rights of its employees". City of Bremerton, Decision 2733 (PECB, 1987); AFFIRMED: Decision 2733-A (PECB, 1988). The case is one of first impression on most issues, and the circumstances do not warrant an extraordinary remedy. The request for attorney's fees is denied.

FINDINGS OF FACT

1. The City of Bellevue, a public employer as defined by RCW 41.56.030(1), operates a fire department.

2. International Association of Fire Fighters, Local 1604, a "bargaining representative" within the meaning of RCW 41.56.030(3), has been, at all times pertinent, the exclusive representative of non-supervisory fire fighters employed by the City of Bellevue.

3. The employer and union were parties to a collective bargaining agreement effective from January 1, 1984 to December 31, 1986. That agreement included language which spoke only to the initiation of grievances by bargaining unit employees, with no mention of the union being able to independently initiate grievances.

4. During negotiations for a subsequent collective bargaining agreement, the union proposed that either the union or the employee would have the ability to initiate grievances.

5. The employer resisted the union's proposal on access to the grievance procedure, and counterproposed that the union be allowed to file grievances only where the union was itself the aggrieved party.

6. The parties reached an impasse in their negotiations for a successor contract and, following mediation, the issue of union access to the grievance procedure was certified, along with 50 other issues, for interest arbitration. The employer did not thereupon withdraw its proposal limiting the union's access to the grievance procedure.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to 41.56 RCW.

2. Access to the grievance machinery of a collective bargaining agreement is a statutory right of the exclusive bargaining representative of the bargaining unit covered by such agreement, as an incident to the duty of fair representation established by RCW 41.56.080, and is not a mandatory subject of collective bargaining under RCW 41.56.030(4).

3. By its pursuit of limitations on the right of the exclusive bargaining representative to file grievances on behalf of itself and the employees it represents following the certification of an impasse and appointment of an interest arbitration panel pursuant to RCW 41.56.450, the City of Bellevue has interfered with the exclusive bargaining representative of its employees and has failed and refused to bargain in good faith, and so has committed and is committing unfair labor practices in violation of RCW 41.56.140(2) and (4).

5. By its conduct in insisting, to and beyond the point of impasse, on limiting the right of the exclusive bargaining representative of its employees in the grievance proce-

dure, the City of Bellevue has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by RCW 41.56.040, and has engaged in unfair labor practices in violation of RCW 41.56.140(1).

ORDER

IT IS ORDERED that the City of Bellevue, its officers and agents, shall immediately:

1. Cease and desist from:

   A. Refusing to recognize the right of International Association of Fire Fighters, Local 1604, to initiate and process grievances as the exclusive bargaining representative of its fire fighter employees.

   B. Pursuing any proposal to limit access by the exclusive bargaining representative of its employees to the grievance procedure of a collective bargaining agreement beyond the point of impasse.

   C. In any other manner interfering with the exercise by its employees of their right to engage in activities protected by Chapter 41.56 RCW.

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

   A. Withdraw any proposal to limit the union's access to the grievance procedure which is currently pending in collective bargaining between the parties prior to the formation of any interest arbitration panel.

B. Notify all employees, by posting, in conspicuous places on the employer's premises where notices to bargaining unit 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 City of Bellevue and shall be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Bellevue to insure that said notices are not removed, altered, defaced or covered by other material.

C. Notify the International Association of Fire Fighters, Local 1604, in writing, within twenty (20) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a copy of the notice required herein.

D. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required herein.

DATED at Olympia, Washington, the 23rd day of February, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT refuse to recognize the right of International Association of Fire Fighters, Local 1604, to initiate and process grievances as the exclusive bargaining representative of fire fighter employees.

WE WILL NOT pursue, beyond the point of impasse, any proposal to limit access by International Association of Fire Fighters, Local 1604, to the grievance procedure of a collective bargaining agreement.

WE WILL NOT in any other manner interfere with the exercise by our employees of their right to engage in activities protected by Chapter 41.56 RCW.

WE WILL withdraw our proposal to limit the union's access to the grievance procedures from collective bargaining between the parties.

CITY OF BELLEVUE

By:_____

Dated:_____

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

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