STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 469,<br><br>Complainant,<br><br>vs.<br><br>CITY OF YAKIMA,<br><br>Respondent. | CASE NO. 6073-U-85-1137<br><br>DECISION NO. 2387 - PECB<br><br>PRELIMINARY RULING |

The complaint charging unfair labor practices was filed in the above-entitled matter on October 29, 1985. The material allegations of the complaint are as follows:

> 1. On or about June 19 and July 19, 1985, the City of Yakima by its agents and representatives, unilaterally and over the Union's objections and those of eligible bargaining unit employees, altered the criteria which had been in existence for many years for selection of fire chief. Said criteria are directly related to years of bargaining unit service and constitute the basis on which bargaining unit personnel are eligible for promotion.
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> 2. The aforesaid unilateral change affects wages, hours, and working conditions of bargaining unit personnel and alters the status quo during the term of the parties' collective bargaining agreement, which expires December 31, 1985.

The first stage in the processing of an unfair labor practice case under Chapter 391-45 WAC is the preliminary ruling called

for by WAC 391-45-110. At that stage of the proceedings, it is assumed that all of the facts alleged are true and provable. The question is whether the complaint states a claim for relief through unfair labor practice proceedings before the Public Employment Relations Commission.

The Commission does not "investigate" unfair labor practice charges for the purpose of making pre-hearing judgments as to the quality or quantity of facts available to a complainant. Ordinarily, counter-statements of facts or statements of position filed by the respondent cannot be taken into consideration. In the instant case, however, the employer submitted such a statement in a letter filed on November 7, 1985. The complainant then responded in a letter filed on November 15, 1985 which details the complainant's theory of the case and may be regarded as amendatory to the statement of facts. Specifically, the letter filed on November 15, 1985 details a civil service rule in effect for many years prior to June, 1985, bargaining history on the general subject from the 1983-84 period, and then the following:

> In the spring 1985, a vacancy arose in the Fire Chief's position. On May 21, 1985, the City Personnel Manager certified three (3) Battalion Chiefs and five (5) Captains as "eligible to compete for the position of Fire Chief" in accordance with "current Civil Service Rules". Battalion Chiefs and Captains are members of the bargaining unit represented by the Yakima Fire Fighters Association. The position was then posted, and then three of the eight eligible bargaining-unit members applied for the position. The City Manager acknowledged that the three bargaining-unit members were well qualified for the position. The next step in the procedure under the rules and past practice was to have been a competitive examination to determine placement on the register from which selection would be made.

However, without any attempt to negotiate with the Union, on June 19 and again on July 17, 1985, the City unilaterally changed the minimal service requirements for Battalion Chiefs and Captains, reduced the four-year requirement to two years,and reposted the position.

It is the Union's position that service requirements defining which members of the bargaining unit are eligible to compete for promotion constitute a long-standing past practice affecting wages, hours, and working conditions of bargaining-unit personnel. It should be noted that such requirements do not dictate who shall be selected, nor guarantee that any bargaining-unit member will be selected or even make the register. The requirements do not abridge any managerial authority to appoint the new Fire Chief. Rather, the long-standing rule establishes the threshold right of bargaining-unit members who meet the minimum service requirements to be given the first change to compete for consideration. It is an incentive for bargaining-unit personnel to remain in the Yakima Fire Department. This long-standing benefit thus directly affects only employees within the bargaining unit, for it provides rights only to those who have served in bargaining-unit positions for four or more years.

* * *

... fire fighters entering the Yakima Fire Department had a reasonable expectancy that if they rendered good and sufficient years of service, they could earn the right, under the long-standing rule, to be considered for promotion all the way up through the ranks of Chief. There was no guarantee that they would get the job, but each employee was guaranteed the right to compete for it, after serving the requisite number of years. That expectancy served as an incentive to many unit members to remain in Yakima and was as much an integral condition of employment as seniority, longevity benefits, and other emoluments of employment designed to reward and encourage length of service.

As originally filed, the complaint in this case lacked sufficient facts to base a preliminary ruling. Although the complaint has not been formally amended, it can be anticipated that it would be amended by the complainant to reflect at least the additional facts set forth in the November 15, 1985 letter, and this preliminary ruling will consider those additional facts.

The bargaining unit involved in this case consists of uniformed "firefighter" personnel of the City of Yakima. That unit has been the subject of previous litigation before the Commission and the courts, such that a review is instructive.

In City of Yakima, Decision 837 (PECB, 1980), the question before the Commission was the continued propriety of a "mixed" unit which at that time included both persons who were "uniformed personnel" within the meaning of RCW 41.56.030(6) and fire department employees who were not "uniformed personnel" within the meaning of that statute. A quotation from the then-existing collective bargaining agreement which is contained in that decision indicates that the position of "Chief" was excluded from the bargaining unit. The historical mixed unit was split into two units, each of which specifically excluded the chief of the fire department.

In City of Yakima, Decision 1765 (PECB, 1983), the Commission accepted a stipulation of the parties excluding the newly created position of "deputy chief" from the uniformed personnel bargaining unit, so that both the chief and deputy chief of the fire department were excluded from the uniformed personnel bargaining unit.

Earlier, in International Association of Fire Fighters, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978), the question before

the Supreme Court was the inclusion of persons holding the rank of "Battalion Chief" in the bargaining unit. In its recitation of the factual background for its decision, the Court twice made reference to the chief of the Yakima Fire Department as "the executive head of the bargaining unit". Reviewing the precedent of its decision in Municipality of Metropolitan Seattle v. Department of Labor and Industries, 88 Wn.2d 925 (1977), the Yakima court stated:

> We were of the opinion that the nature of the trust with which public officials are charged led to a legislative judgment that officials should have freedom not only to control, hire, or fire confidential employees, but also to work with the confidential employees unrestrained by collective bargaining. (emphasis supplied).

The exclusion of the executive head of the bargaining unit (the fire chief) was seemingly a given throughout the Court's decision. The Court thus went on:

> By excluding from the provisions of a collective bargaining act persons who work closely with the executive head of the bargaining unit, and who have, by virtue of a continuous trust relation, assisted in carrying out official duties, including formulation of labor relations policy, such conflict is avoided. And, public trust is protected since public officials have the full loyalty and control of intimate associates. (emphasis supplied).

The dissenting opinion, which also described the fire chief as the executive head of the bargaining unit, differed only as to the application of the exclusionary standard to the facts of the case.

The essence of the present complaint is that the city has refused to bargain with the union on provisions which would have

the effect of exercising control over the employer in its decision to hire a new chief for the fire department. Although the complaint and amendatory letter do not specifically describe the fire chief as the "executive head of the bargaining unit", there is nothing whatever from which to infer that the role and authority of that position have changed significantly from the situation which prevailed in the cases described above.

The complainant's reliance on City of Wenatchee, Decision 2216 (PECB, 1985) and citation therein of City of Green Bay, Decisions 12352-B, 12402-B (Wisconsin ERC, 1975) is misplaced. The facts in Wenatchee involved bargaining over promotions within the bargaining unit for which the complainant union was recognized as exclusive bargaining representative. In addition to dealing with intra-unit promotions, the same Green Bay decision held that the employer there had no duty to bargain concerning criteria for promotion to uniformed service para-military ranks excluded from the bargaining unit of non-supervisory police employees represented by the union.

To the extent that rank-and-file firefighters employed by the City of Yakima have any expectancy of promotion through the ranks of the fire department, the forum for enforcement of their rights must be the one appropriate to the right claimed. The processes of political action and civil service operate in spheres separate and apart from the processes of collective bargaining, and violations of rights arising from those processes would have to be remedied through means other than the collective bargaining process. The collective bargaining statute protects the right of employees to bargain concerning their wages, hours and working conditions, RCW 41.56.030(4), but it does not require good faith bargaining on every subject perceived to be of concern to bargaining unit employees. Some matters are deemed to be management prerogatives outside the scope of mandatory

collective bargaining. See: City of Yakima, Decision 1130 (PECB, 1981) involving a union demand to bargain "minimum manning". Accord: Pierce County, Decision 1710 (PECB, 1983). Given the strong words of the Supreme Court about avoidance of interference with the hiring and control of "confidential employees" who would merely be subordinates of the executive head of the bargaining unit, there is no basis to suggest that a lesser standard could be applied to the executive head position itself.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is dismissed as failing to state a cause of action.

DATED at Olympia, Washington, this 30th day of January, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

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