STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 27, Complainant, vs. CITY OF SEATTLE, Respondent.	CASE 10901-U-94-2536 DECISION 4687-A - PECB
CITY OF SEATTLE, Complainant, vs. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 27, Respondent.	CASE 10913-U-94-2538 DECISION 4688-A - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Webster, Mrak and Blumberg, by James H. Webster and Lynn D. Weir, Attorneys at Law, appeared on behalf of the union.

Mark A. Sidran, City Attorney, by Janet K. May, Mary Kay Doherty, and Cathy Parker, Assistant City Attorneys, appeared on behalf of the employer.

On January 21, 1994, International Association of Fire Fighters, Local 27 (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Seattle (employer) refused to bargain in violation of RCW 41.56.140(4) and (1), by refusing to negotiate union proposals concerning supplemental pension benefits. (Case 10901-U-94-2536.)

On January 24, 1994, the City of Seattle filed a complaint charging unfair labor practices with the Commission, alleging that Local 27 breached its duty to bargain in good faith, in violation of RCW

41.56.150(4) and (1), by insisting on taking its supplemental pension benefits proposal to interest arbitration. It further charged that the union's proposals were in violation of the Seattle city charter, and were pre-empted by state and/or federal law. Finally, the employer alleged that the union failed to furnish a sufficiently detailed proposal supported by authority establishing the legality of its proposals. (Case 10913-U-94-2538.)

The cases are currently before Examiner Walter M. Stuteville on cross-motions for summary judgment, as detailed below.

FACTUAL AND PROCEDURAL BACKGROUND

Local 27 represents a bargaining unit of approximately 900 persons employed in the ranks of fire fighter, lieutenant, and captain in the Seattle Fire Department. The employees in that bargaining unit are covered by the Washington Law Enforcement Officers' and Fire Fighters' Retirement Act (LEOFF) created by Chapter 41.26 RCW, and are "uniformed personnel" as defined by RCW 41.56.030(7). Thus, the parties' bargaining relationship is subject to the interest arbitration procedures set forth in RCW 41.56.430 et seq.

The LEOFF pension system was created by the state Legislature "to provide an actuarial reserve system for the payment of death, disability and retirement benefits" to specifically defined law enforcement officers and fire fighters.[1] Employees who established membership in the system prior to October 1, 1977, are covered by Plan I (LEOFF I).[2] Employees who have established membership on or after October 1, 1977 are covered by Plan II (LEOFF II).[3] The

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[1] RCW 41.26.020; RCW 41.26.030(3) [law enforcement officer defined]; RCW 41.26.030(4) [fire fighter defined].

[2] RCW 41.26.005(1).

[3] RCW 41.26.005(2).

retirement and death benefits for LEOFF I employees are generally more generous, and therefore more costly, than the benefits for LEOFF II employees.

This controversy arises out of negotiations between the parties on a "reopener" within the collective bargaining agreement they signed on April 8, 1992, covering the period from August 8, 1992 to August 31, 1994. That agreement included the following provisions pertinent to this dispute:

> ARTICLE 23 - PENSIONS
>
> 23.1 Pensions for employees and contributions to pension funds will be governed by the Washington State Statutes in existence at the time.
>
> ***
>
> ARTICLE 24 - SUBORDINATION OF AGREEMENT
>
> 24.1 It is understood that the parties hereto and the employees of the City are governed by the provisions of applicable Federal Law, State Law, and the City Charter. When any provisions thereof are in conflict with the provisions of this Agreement, the provisions of said Federal Law, State Law or City Charter are paramount and shall prevail.
>
> 24.2 It is also understood that the parties hereto and the employees of the City are governed by applicable City Ordinances and said Ordinances are paramount except where they conflict with the express provisions of this Agreement.
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> * * *
>
> ARTICLE 29 - DURATION OF AGREEMENT
>
> 29.1 This Agreement shall become effective upon signing by both parties and shall remain in effect through August 31, 1994. Written notice of intent to amend or terminate must be served by the parties five (5) months prior to the submission of the City budget in the calendar year 1994 as stipulated in RCW 41.56.440.
>
> 29.2 At the appropriate time as described in Section 29.1 above, any contract changes desired by either party must be included in the opening

> letter and shall not be accepted at a later date unless mutually agreed upon by both parties.
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> 29.3 Upon thirty (30) days advanced written notification, either the City or the union may require the other party to meet for the purpose of negotiating those amendments to this Agreement which relate solely to the following issues:
>
> (a) Supplemental pension benefits, per Article 24 of this Agreement, may be opened on or before May 1, 1993, and may be arbitrated at the Union's discretion after impasse has been reached. ...

The union opened negotiations pursuant to paragraph 29.3(a) of that contract, by submitting a proposal for supplemental pension benefits for those bargaining unit members covered by LEOFF II. The union's opening proposal was to replace one paragraph in the parties' existing collective bargaining agreement which made reference to the state statutes covering fire fighter pensions with a 20-page detailed, comprehensive, proposal.

The parties conferred on the union's proposal, through meetings and correspondence. By July 12, 1993, a settlement did not appear to be forthcoming and mediation was initiated.[4]

Further meetings on the proposal did not bring about a settlement. On September 3, 1993, the employer's negotiator, Ginger Holly, sent a letter to the Executive Director of Local 27, to provide the union with the employer's assessment of the union's proposal:

> I. ISSUES OUTSIDE OF THE SCOPE OF THE REOPENER
> 1. Military leave credit
> 2. Duty disability
> 3. Non-duty disability
> 4. Disability retirement
> 5. Duty death
> 6. Non-duty death

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[4] Notice is taken of the Commission's docket records for Case 10581-M-93-3980.

> 7. Funeral benefit
>
> These issues are outside of the scope of the re-opener because they exceed the City's under-standing of the issues raised by the reopener. The union requested the reopener to discuss "supplemental pension for LEOFF II fire fight-ers." In negotiations, discussions centered on final average salary and retirement age. There-fore, the City understood the reopener to per-tain to service retirement enhancements. We did not agree to open the contract on the array of issues detailed in your proposal.
>
> Furthermore, in the global sense, your proposal establishes a primary pension relationship between the City and the LEOFF II fire fighters. Shifting the primary relationship from the State to the City was never intended when the City agreed to reopen the contract to discuss a supplement to LEOFF II benefits. We also take the position that shifting the primary pension relationship from the state to the city is preempted by state law. Providing enhancements or supplements is qualitatively different than creating an entirely new pension system, both in terms of our understanding of the reopener language and state law mandates.
>
> II. Permissive Subjects
> 1. Administration for the Pension Plan (Board, hearing, etc.)
> 2. Retiree medical and dental
> 3. Retiree's funeral benefit
>
> III. Illegal Subjects
> 1. Employer "pick-up" of employees' portion of payment to LEOFF II system when the LEOFF II system requires that employees contribute more than 7% of pay.

The union responded on November 12, 1993, requesting a full discussion on the scope of the reopener at the next meeting.

In a December 10, 1993 letter, the union's attorney, James Webster, significantly revised the union's proposal and eliminated those provisions which would have created a joint board to administer the supplemental benefits. He delineated the union's new proposal as follows:

> - Service Retirement at age 50, with benefit based on 2% of final average salary for each year of service (with COLA);
> - Duty disability retirement of 60% of base salary, if unable to return to work after 365 days of disability;
> - Duty death benefit of between 45% and 90% of base salary, depending on number of dependents.

Holly replied for the employer in a December 21, 1993 letter to the president of Local 27:

> I have received and reviewed correspondence from your attorney dated December 10, 1993 which includes the union's narrowed proposal for retirement benefits. I would like to acknowledge the fact that the union has made significant movement on its proposal.
>
> However, I must clear up an apparent misunderstanding. In his cover letter, Mr. Webster states, "based on our understanding of the City's preferences we have left benefits to be administered by the City as a fiduciary." Such is not our preference. We stated clearly at the mediation that under the City of Seattle Charter, the City does not have the authority to set up a retirement system or supplemental system for fire fighters who are covered by LEOFF. Our "preference" is that the substance of the Union proposal comply with the law. We do not see that your proposal in any way addresses this issue, despite the fact that we specifically asked for a mechanism to legally establish supplemental pension benefits for fire fighters.

The parties met for further negotiations on the "reopener" on January 7, 1994. At that meeting, the union's attorney responded to the employer's assertion that the pension proposals were illegal under state law and the city's charter by asserting that Chapter 41.56 RCW would prevail over the city charter.

On January 12, 1994, Assistant City Attorney Cathy Parker wrote a letter to Webster, as follows:

> This letter is in response to your proposal at the last mediation session that we follow a two-prong parallel approach to getting our Reopener to interest arbitration. You propose that we take the "scope" issue to an grievance arbitrator, and your ULP to PERC. We have considered both aspects for the proposal and respond as follows, based primarily on our concern that your proposal did not directly address our major concern, the "illegality of the proposal" issue:
>
> As you know, it is the position of the City of Seattle that the proposal of the Union is illegal and beyond the enabling authority granted to the City through its charter. We have also raised, and do not abandon, other legality arguments concerning the proposal. As you also know, it is very awkward for the parties to have matters proceeding to arbitration while questions of what the arbitrator may consider are unsettled, as that is exactly what happened to us at the SPMA interest arbitration. We took a look at the WAC rules and found that there is a good way to have these matters taken care of before they reach the arbitrator--by introducing the issue to PERC prior to certification until we have submitted our statement. PERC has let us know that they want the statement from us today. I regret that this precludes further discussion before we submit the statement, but we are quite willing to continue talking to you about the process after submission. We would urge you to agree to this format to let PERC decide the issue of what items may legally be certified to the arbitrator on an expedited basis, as a fast and clean way to attempt to move the impasse. ...
>
> As to the second prong of your proposal, we have considered your suggested approach to resolving our differences regarding the intended scope of the reopener language contained in Local 27's collective bargaining agreement regarding supplemental pensions for LEOFF II fire fighters. Grievance arbitration would be one good choice given both sides' desire for prompt action on this issue. However, the City has decided not to challenge the issue of the scope of the reopener, making such a grievance procedure unnecessary. By allowing the disability benefit and the duty death benefit to proceed with the other topics to stand or fall on other grounds than "scope," we do not intend to set forth a

> practice the parties can rely upon in any other legal argument about the sufficiency of these proposals.

The dispute was certified for interest arbitration on January 20, 1994, based on the mediator's recommendation that an agreement could not be reached in mediation.[5] These unfair labor practice charges followed.

These cases were processed by the Executive Director under the preliminary ruling procedure of WAC 391-45-110.[6] On February 9, 1994, a cause of action was found to exist with respect to the union's complaint; on February 28, 1994, a cause of action was found to exist with respect to the employer's complaint. Because the issues raised by the employer called into question the legality of the proposals being advanced by the union in interest arbitration, the certification of the supplemental pension plan issue was suspended from interest arbitration pending resolution of the unfair labor practice charges. Spokane Fire District 1, Decision 3447-A (PECB, 1990); City of Wenatchee, Decision 780 (PECB, 1980).

Consistent with recent Commission practice, the preliminary ruling letters gave the parties 21 days to file answers which specifically admitted, denied or explained each fact alleged in the complaint. Each party filed a timely answer to the complaint against it. The union's answer admitted that it had opened the agreement to bargain a supplemental pension plan, and that the parties were at impasse. The parties agreed that the scope of bargaining issues needed to be resolved before they could be submitted to interest arbitration.

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[5] Case 10894-I-94-230.

[6] At that stage of the proceedings, all of the facts alleged in each complaint were assumed to be true and provable. The question there was whether, as a matter of law, the complaints stated claims for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

On February 28, 1994, the employer and union filed cross-motions for summary judgment, which were accompanied by briefs and affidavits on the factual background of the negotiations. The parties filed additional briefs and affidavits on March 14, 1994, and filed reply briefs on March 21, 1994, all concerning their respective motions for summary judgment.[7] On May 27, 1994, the union notified the Executive Director that it was seeking arbitration of a grievance it had filed to obtain an interpretation of the reopener language through the procedure specified in the parties' contract.[8]

On October 21, 1994, the Executive Director denied the motions for summary judgment filed by both parties.[9] He found that genuine issues of material fact still remained to be resolved. The same order deferred the processing of the unfair labor practice charges, pending the outcome of the grievance arbitration.

In a decision issued on December 11, 1994, Arbitrator Carlton J. Snow held that the employer violated the parties' contract by refusing to bargain the union's proposal to finality, and that the employer breached its duty to bargain by unilaterally concluding the union's proposal was illegal and in violation of the city charter. The arbitrator ruled the employer could only challenge the legality of the union's proposal in an appropriate forum after bargaining the proposals on supplemental pensions to finality.

On June 21, 1995, the undersigned was assigned as Examiner, to conduct further proceedings pursuant to Chapter 391-45 WAC.

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[7] The parties agreed upon a briefing schedule on the motions for summary judgment, without any consultation with or direction from the Commission.

[8] The grievance had been filed in response to the employer's assertion that the subordination clause of the agreement precluded the union's reopener proposal.

[9] City of Seattle, Decisions 4687 and 4688 (PECB, 1994).

On July 31, 1995, the union filed a renewed motion for summary judgment and a memorandum in support of that motion. On August 23, 1995, the employer filed its own renewed motion for summary judgment, along with a responsive brief. On October 9, 1995, the union then filed a reply memorandum in support of its renewed motion for summary judgment. It was followed by the employer's reply brief on November 13, 1995.

POSITIONS OF THE PARTIES

The union argues that there are no genuine issues of material fact, and that it is entitled to a judgment as a matter of law. It claims the employer has violated state law by refusing to submit the union proposals concerning supplemental pension benefits for LEOFF II employees to interest arbitration. It further contends that its proposals to supplement the LEOFF II retirement plan (i.e., to improve service retirement benefits, increase disability retirement benefits, and increase the benefits paid to survivors of LEOFF II members killed in the line of duty) are mandatory subjects of collective bargaining and are not in conflict with either the city charter or state law. In the alternative, it asserts that Chapter 41.56 RCW would prevail if its proposals were in conflict with other state laws, because of the supremacy statement contained in RCW 41.56.905. The union also asserts that the employer waived its subordination argument under paragraph 24.1 of the parties' contract when it agreed to negotiate the disability and death benefit proposals within the scope of the contract reopener.

The employer argues for a summary judgment in its behalf, based upon the claim that the union has committed an unfair labor practice by presenting a proposal in negotiations which is in violation of the city charter and is pre-empted by state law. It argues that paragraph 24.1 of the parties' contract subordinates the parties' contract to conflicting provisions of state law or the

city charter. Furthermore, it alleges that the union negotiated to impasse on a proposal for disability benefits which is not subject to interest arbitration by state law. Finally, the employer complains that the union's proposals were not sufficiently detailed because it did not identify a legal method of providing supplemental pension benefits to bargaining unit members.

DISCUSSION

Motions for Summary Judgment

The Commission's rules provide for summary judgments at WAC 391-08-230, as follows:

> WAC 391-08-230 SUMMARY JUDGMENT. A summary judgment may be issued if the pleadings and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that one of the parties is entitled to a judgment as a matter of law. Motions for summary judgment made in advance of a hearing shall be filed with the agency and served on all other parties to the proceeding.

As was stated in the earlier decision on this case, a summary judgment is not available if there are contested issues of fact.

Close review of the answers filed by the parties in these cases had indicated they framed several contested issues of fact, as follows:

* The union's answer contested the employer's allegation that the employer had bargained collectively within the meaning of RCW 41.56.030(4), and further disagreed as to which party had the obligation to research the legality of the union's proposal.
* The union's answer denied that its proposal was insufficiently detailed as to be incomplete.
* The union's answer denied the employer's allegation that it had bargained regressively.

* The employer's answer contested the union's allegations that it had refused to bargain on the LEOFF II supplemental plan, that it had characterized the union's proposal as "beyond the scope of bargaining", or that the city preferred to administer the plan as a fiduciary.

In their briefs and responsive briefs filed on the renewed motions for summary judgment, the parties now agree that no genuine issues of material fact remain. The focus of their arguments was on their respective statutory and contractual positions:

* In its memorandum of July 31, 1995, the union's focus was on the issue of whether the employer violated its duty to bargain under Chapter 41.56 RCW, by refusing to submit the union's proposal to interest arbitration. On the remaining issues characterized as "factual" by the Executive Director in his preliminary ruling, the union asserted that they were all legal issues, resolvable through the procedure for summary judgment.

* The employer's August 23, 1995 brief in response to the union's renewed motion for summary judgment and in support of its motion for summary judgment failed to even address any factual issues. The employer's entire focus was on arguments concerning the statutory interpretation.

Based upon those briefs and memoranda, the Examiner concludes that both complaints are appropriate for summary judgment.

<u>Sufficiently Detailed Proposal</u>

In its complaint, the employer alleged that the union had not supplied it with sufficiently detailed materials to constitute a reasonable or complete proposal. It specifically charged that the union had failed to propose a legal method for the employer to provide supplemental pension benefits to fire fighters. Further, it alleged that, when the employer requested during bargaining that the union furnish it with a legal rationale for its proposals, the

union countered that it was the employer's responsibility to identify a legal way to provide supplemental pension benefits.

From the documentation supplied by the parties, this charge must be dismissed. As submitted in April of 1993, the union's original proposal for supplemental pensions consisted of 3 new paragraphs in the body of the collective bargaining agreement and a 20 page "Memorandum of Agreement on Pension BENEFITS". That original proposal was extremely detailed, and very specific. On December 10, 1993, the union submitted a revised proposal consisting of 10 pages. The revised proposal withdrew proposed mechanisms for administering the supplemental benefits and, in response to what it identified as the employer's preferences, the union proposed that the new pension benefits be administered by the employer as a fiduciary.

From a March 16, 1994 affidavit supplied by the employer's lead negotiator, Ginger Holly, it is apparent that the union had specifically outlined its theory that Chapter 41.56 RCW would prevail in the event of a conflict with the Seattle City Charter. The affidavit indicates the union asserted that position at the parties' mediation session on January 7, 1994, and it then recounts an ongoing discussion between the parties on the subject of the legal supremacy of statute vs. charter vs. contract language. Thus, the employer's claim that the union submitted an insufficient proposal is not even supported by its own affidavit.

Scope of Bargaining

The categorization of potential bargaining subjects dates back to at least NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), where the Supreme Court of the United States held that the duty to bargain under the National Labor Relations Act (NLRA) is limited to so-called "mandatory" subjects. In a legion of subsequent cases, labor relations administrative agencies and

courts have divided potential issues among the categories of "mandatory", "permissive" and "illegal" subjects of bargaining.

The union correctly argues that the mandatory subjects of bargaining under Chapter 41.56 RCW include matters that directly impact the "wages, hours and working conditions" mentioned in RCW 41.56.030(4). Permissive subjects under this analysis are those matters which have been considered remote from wages, hours and working conditions, including matters which are regarded as prerogatives of employers or of unions. See: Federal Way School District, Decision 232-A (EDUC, 1977); Renton School District, Decision 706 (EDUC, 1979). Illegal subjects are those matters where an agreement between an employer and union would contravene applicable statutes or court decisions.

The union also correctly argues that the National Labor Relations Board (NLRB) has long held that pensions are encompassed within the terms "wages" and "conditions of employment", as used in the National Labor Relations Act. Inland Steel Co., 77 NLRB 1, enforced, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1948).[10] It contrasts its proposals on supplementing fire fighter pensions with "managerial decisions that only remotely affect 'personnel matters' and decisions that are 'managerial prerogatives' [that] are classified as non-mandatory subjects", citing International Association of Fire Fighters Local 1052 v. PERC, 113 Wn.2d 197 (1989). See, also, Spokane Education Association v. Barnes, 83 Wn. 2d 366 (1974).

Pre-empted Subjects -

In this case, the union has proposed to change the parties' collective bargaining agreement to require the employer to supplement both the LEOFF II pension system and the industrial

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[10] It should be noted that early in its history, the Commission grafted Inland Steel onto Washington State public sector law in City of Tacoma, Decision 319 (PECB, 1977).

insurance system regarding duty disability payments and duty death payments. It proposed that those benefits be funded by the employer, with nominal or no contributions from the employees. It described its proposal as requiring the employer to create and administer an auxiliary pension system for LEOFF II fire fighters. Specifically, the union's proposal for its collective bargaining agreement with the city would:

* Reduce the service retirement age from the "55" specified in RCW 41.26.030 to "50";

* Compute the final average salary from the highest consecutive 24 months of service, instead of 60 months as specified in RCW 41.26.030(12)(b);

* Compute disability leave benefits at 60 percent of base salary, instead of using the statutory formula identified in RCW 41.04.500; and

* Change the duty death benefit from a range of 60 percent to 70 percent of base salary (as identified in RCW 51.32.050 depending on the number of surviving dependents), to a range of 45 percent to 90 percent (depending on the number of dependents).

A question arises in this case as to whether the pension system provided by the Legislature for Washington law enforcement officers and fire fighters, and/or the union's proposed supplements to that statutory system for fire fighters working for this employer, can be incorporated under the general rubric of "wages" and classified as a mandatory subject of bargaining.

The union's line of analysis under traditional NLRA precedents fails to take account of fundamental difference between private sector entities and public sector entities. In contrast to the private sector, public sector employers are created by the Legislature and only have those prerogatives or powers specifically granted to them by (or properly inferred from) statutes. Whether the public employer is a city, a county, or a junior taxing district (e.g., public hospital district, irrigation district, port

district or public utility district), the public entity lacks the inherent rights which are recognized for natural persons and private sector corporations. Thus, the Borg-Warner categorization must be modified to include a forth category in the public sector: **pre-empted** subjects of bargaining.

The concept of pre-emption is not new to government, or even to labor-management relations. Congress has occupied the field of regulating collective bargaining in private sector enterprises affecting interstate commerce, through the National Labor Relations Act and the Railway Labor Act. There is no authority left for state legislatures to deal with private sector bargaining matters pre-empted by the federal government. San Diego Building Trades v. Garmon, 359 U.S. 236 (1958). An early Commission case further illustrates this concept as between the state and federal governments: The issue in Washington State Ferries, Decision 479-A (MRNE, 1978) was the manning of a jetfoil vessel. The Commission ruled that the determination of minimum manning requirements for safe operation were pre-empted by federal law, having been delegated by Congress to the United States Coast Guard. The Commission thus held that it was not authorized to review or overrule safety standards determined by the Coast Guard, and that any appeal of such standards would have to be taken up through appropriate federal channels.[11] An example of the pre-emption principle between two state laws is found in a case involving contracting out of bargaining unit work, Hoquiam School District, Decision 2489 (PECB, 1989), where the Examiner wrote:

> Any duty of the employer to bargain with the union, whether under Chapter 41.56 RCW or under the collective bargaining agreement, depends

[11] The Commission did carve out a narrow exception, holding that when the jetfoil was chartered to the Washington State Ferries (a public employer then under the Commission's jurisdiction), negotiations on staffing above the minimum did come under the Commission's jurisdiction.

> upon the work **lawfully** being bargaining unit work. ... In other words, RCW 28A.24.055 and WAC 180-20-106 had pre-empted the ability of the school district to use its own employees (or anything other than commercial transportation) to accomplish this particular work. Under these particular circumstances, the decision on the merits of the substantive issue raised by the grievance merges with and controls both the contractual and statutory duty to bargain questions which have been raised by the union. Since the trip in question was not (and could not be made to be) bargaining unit work, there was no duty to bargain.

[Emphasis by **bold** supplied]

Thus, if the union's proposals concerned matters where state law gives (or leaves) the employer no authority, there would have been nothing for the City of Seattle and Local 27 to bargain about and no duty to bargain under Chapter 41.56 RCW.

The union points out that courts in other jurisdictions have found union proposals concerning retirement benefits to be mandatory subjects that are properly submitted to interest arbitration. In evaluating the three decisions cited by the union in support of that statement, it is recognized that any decision from another state must be considered not just for its specific holding, but also in light of the statutory context from which the decision was made. Each state has its own statutes governing pensions for public employees; those states that have adopted a public sector collective bargaining law have each done so individually; no two states have laws that are precisely alike.

Village of Fairport v. Newman, 457 N.Y.S. 2d 145 (New York, 1982), was cited for the proposition that an impasse regarding retirement benefits was subject to interest arbitration, because such benefits were conditions of employment. The court wrote:

> It is clear that retirement benefits are a mandatory subject of negotiation. ... **We note**

> **that legislation has been enacted to exclude retirement benefits from the definition of conditions of employment which are mandatory subjects of negotiation, but implementation has been postponed until July 1, 1983.** Under the latest postponement of the effective date, retirement benefits may be negotiated as long as any change does not require an act of the Legislature. Since retirement benefits are at this juncture conditions of employment, ... they were a proper subject for impasse arbitration.

[Emphasis by **bold** supplied]

Apart from indicating that the New York law was in the process of being changed, the decision provides a clear factual distinction from the instant case: No language similar to the "may be negotiated as long as any change does not require an act of the Legislature" is cited or found in the instant case.

The union asserted that the decision in Town of Barrington v. International Brotherhood of Police Officers, Local No 351, 621 A.2d 716 (Rhode Island, 1993) gave an interest arbitration board jurisdiction to require an employer to modify a state-managed pension program, to allow for the retirement of police officers after 20 years. The Rhode Island Supreme Court included the following statement in its decision, however:

> We agree with the town's suggestion that an arbitration board has no power to amend or disregard state statutes. However, **when the state has delegated to the local legislative body the power to amend a state-managed pension plan in its uncontrolled discretion**, we fail to perceive the distinction between its ability to implement such a change in respect to a state-mandated program from its ability to amend a private pension program wholly controlled by the council.

[Emphasis by **bold** supplied]

Again, however, the statutory context of specific authority for bargaining of retirement benefits in Rhode Island appears to be

substantially different from the situation existing under the LEOFF system in Washington.

Finally, the union argues that City of East Providence v. Local 850, International Association of Fire Fighters, 366 A.2d 1151 (Rhode Island, 1976), gave a local employer authority to modify its pension program to allow for the retirement of fire fighters after 20 years. This case was cited in Barrington, and concerned the same Rhode Island statute. Again, however, the Rhode Island Supreme Court emphasized that the negotiability and arbitrability of public employee pensions benefits were dependent upon the statutory framework which created them:

> The city relies primarily on Trice v. City of Cranston, 110 R.I. 724, 297 A.2d 649 (1972). However, in that case we decided only that a decision by the city council to amend the fire fighter's pension plan overrode an inconsistent decision made by the mayor. We did not say that the city council had the exclusive power to take such an action. In fact, our decision in that case lends support to exactly the opposite conclusion. We said that the power of the Legislature was paramount:
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>> In Marro v. General Treasurer, 108 R.I. 192, 273 A.2d 660 (1971), we emphasized that the General Assembly's power to provide for and regulate the payment of pensions to policemen overrides any municipal charter provisions which purport to do the same. What was said about pensions due the Cranston police applies equally to that municipality's firefighters.
>
> **The board is given the power to amend the pension plans by statutes of state-wide effect enacted by the Legislature** and which apply to all cities and towns. It follows that the board is not prevented from exercising this power by the provisions of the city charter.

[Emphasis by **bold** supplied]

In East Providence, the pension was privately managed, which is another clear factual distinction from the Washington LEOFF system.

In a case which the union did not argue, Streetsboro Education Association v. Streetsboro City School District, 626 N.E.2nd 110 (Ohio, 1994), the Ohio Supreme Court ruled that a determination on whether contractual language or a state statute prevails is dependent upon a finding as to whether the conflict involves a statute which precludes collective bargaining:

> [T]he General Assembly has unequivocally evinced a willingness to take a subject or part of a subject out of the realm of collective bargaining.

That is precisely the type of analysis which must be applied to the case now before the Examiner.

The LEOFF System -
In 1970, the Washington State Legislature implemented a state-wide pension system for law enforcement officers and fire fighters. The following statutes explain the purpose of the LEOFF system, and the class of employees designated by law as "members" of that system:

> 41.26.020 Purpose of chapter. The purpose of this chapter is to provide for an actual reserve system for the payment of death, disability, and retirement benefits to law enforcement officers and fire fighters, and to beneficiaries of such employees, thereby enabling such employees to provide for themselves and their dependents in case of disability or death, and effecting a system of retirement from active duty.
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> * * *
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> 41.26.040 System created--Membership--Funds. The Washington law enforcement officers' and fire fighters' retirement system is hereby created for fire fighters and law enforcement officers.

> (1) Notwithstanding RCW 41.26.030(8), **all fire fighters and law enforcement officers employed as such on or after March 1, 1970, on a full time fully compensated basis in this state shall be members of the retirement system established by this chapter** with respect to all periods of service as such, **to the exclusion of any pension system existing under any prior act.**
>
> (2) **Any employee serving as a law enforcement officer or fire fighter on March 1, 1970,** who is then making retirement contributions **under any prior act shall have his membership transferred to the system established by this chapter** as of this date. ...

[Emphasis by **bold** supplied.]

The decision of the Supreme Court of the State of Washington in Mulholland v. Tacoma, 83 Wn.2d 782 (1974), described the factual situation which surrounded the creation of the LEOFF retirement system, as follows:[12]

> The LEFF act **brought all full-time fire fighters and law enforcement officers into a single statewide system to replace the multitude of prior separate retirement systems.** Plaintiff and all other persons employed full time as law enforcement officers or fire fighters on or after March 1, 1970, became members of the LEFF system. RCW 41.26.040(1). As of that date, plaintiff's **membership in the first class cities retirement system was mandatorily transferred to the LEFF system, RCW 41.26.040(2)**, and contributions as such to the date of his retirement from the Tacoma police department on February 15, 1971.
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> ...
>
> In obvious recognition of [a cited] holding, the legislature preserved all the benefits provided by retirement acts existing prior to LEFF. Specifically, RCW 41.26.040(2) provides:
>
> > [A law enforcement officer's or fire-fighter's] benefits under the prior retirement act to which we was making

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[12] What is now known universally as the "LEOFF system" was termed the "LEFF system" in this early decision.

> > contributions at the time of this transfer shall be computed as if he had not transferred. For the purpose of such computation, the employee's creditability of service and *eligibility for service* or disability *retirement* and survivor and all other benefits *shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred.*
>
> ...
> Examination of the legislative history confirms our interpretation.
>
> Representative Kuehnle stated on a point of inquiry as follows:
>
> > **This new law transfers present members of police and firemen pension systems into the new system without any choice on their part.** I wish you would clarify for me how their rights under the existing systems will be protected.
>
> *House Journal* 1477 (1969).
>
> Representative Richardson responded:
>
> > It is the intent of the legislature that presently employed police officers and fire-fighters, now covered under chapter 41.20 and chapter 41.18 RCW who are to have their membership transferred mandatorily from those existing acts to Engrossed Substitute Senate Bill No. 74 [LEFF], will have all rights and all benefits preserved completely as now provided by those prior acts.
>
> *House Journal* 1477 (1969).
>
> [*Italics* in original; emphasis by **bold** supplied.]

Thus, from early in its history, the Supreme Court has referred to the LEOFF statute in absolute and pre-emptive terms (e.g., "**brought all ... into a single statewide system**", "**membership ... was mandatorily transferred**", and "**transfers present members ... into the new system without any choice on their part**").

In addition to the statute which establishes the LEOFF system, the Legislature has spoken to the pre-emption issue in at least two

other statutes. Chapter 35A.11 RCW, which empowers first class cities, is of particular relevance in this case: The Legislature established there what powers are **not** vested in the legislative bodies of the City of Seattle and similar public employers:

> Chapter 35A.11
>
> LAWS GOVERNING NONCHARTER CODE CITIES AND CHARTER CODE CITIES--POWERS
>
> ...
>
> 35A.11.020 Powers vested in legislative bodies of noncharter and charter code cities. **The legislative body of each code city shall have power to** organize and regulate its internal affairs within the provisions of this title and its charter, if any; ... **fix the compensation** and working conditions **of ... employees and establish and maintain** civil service ... systems, **retirement and pension systems** not in conflict with the provisions of this title or of existing charter provisions until changed by the people: PROVIDED, That **nothing in this section or in this title shall permit any city, whether a code city or otherwise, to enact** any provisions establishing or respecting a merit system or system of civil service for firemen or policemen ..., or enact **any provision establishing or respecting a pension or retirement system for firemen or policemen which provides different pensions or retirement benefits than are provided by general law for such classes.** ...

Emphasis by **bold** supplied]

Chapter 41.56 RCW itself, while providing for interest arbitration, contains language limiting the authority of arbitrators to the functions and powers which the Legislature has given to cities:

> 41.56.465 Uniformed personnel--Interest arbitration panel--Determinations--Factors to be considered. (1) In making its determination, the panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as additional standards or guidelines to aid it in reaching a decision, it shall take into consideration the following factors:

> (a) The constitutional and **statutory authority of the employer**; ...
>
> [Emphasis by **bold** supplied]

The Examiner thus concludes that the Legislature intended, when passing the LEOFF statute, to occupy the field of retirement and pension benefits for law enforcement officers and fire fighters, by incorporating all such personnel (including those who had theretofore been covered by pre-existing county or municipal fire fighter pension systems) into the single, state-wide and uniform system. In so doing, the Legislature pre-empted the ability of the City of Seattle to bargain supplements or changes to that system.

To now argue, as the union does in this case, that this employer should be able to establish a separate pension system, even if only as a supplement to the benefits provided under the LEOFF, contradicts the legislative intent of the statute establishing the LEOFF system, the enabling statute for first class cities, and the provisions of the collective bargaining statute which are particularly relevant to impasse resolution for uniformed employees. The City of Seattle has no authority in this subject area, therefore retirement and pension benefits are not a mandatory subject of collective bargaining under Chapter 41.56 RCW.

Waiver and Subordination

During the course of the meetings and correspondence between the parties concerning the union's supplemental pension proposals, the parties wove arguments concerning the scope of the "reopener" clause in their contract, as well as the effect of the "subordination of agreement" and "waiver of employer defenses" clauses, taken together. Some of the arguments advanced by the parties invoke Chapter 41.56 RCW, so they are discussed here notwithstanding the conclusion on the scope of bargaining issue in this case.

Waiver by Contract -

The employer's assertion that its charter prohibits the establishment of a supplemental pension system for fire fighters, is based on Article XXII, Section 13, as follows:

> RETIREMENT, DISABILITY, PENSION AND DEATH BENEFIT SYSTEM: The Legislative Authority may, by ordinance, establish a retirement and pension system for superannuated officers and employees of the City and of the Seattle Public Library, and may likewise so provide for a system of death benefits and for a disability pension system to cover permanent, partial or temporary disability incurred by such officers and employees, and any such disability pension system so established shall thereupon, to the extent of any conflict, supersede the provision for compensation during disability provided for in this chapter. ... **City officers or employees who are members of other employees' pension systems pursuant to state law shall not at the same time be eligible to membership hereunder.**

[Emphasis by **bold** supplied.]

The argument put forward by the union was that any provision of the city charter which prohibits adoption of the union's supplemental pension proposal is superseded by Chapter 41.56 RCW. From that it would then follow that the clause subordinating the parties' contract to the city charter was also superseded by Chapter 41.56 RCW. The union thus reasons that, by mandating bargaining over "wages" which traditionally include pensions, Chapter 41.56 RCW requires the employer to bargain the disability and pension plans.

Spokane v. Spokane Police Guild, 87 Wn.2d 457, (1976), which is cited by the union, resolved the constitutionality of the interest arbitration process. It also established that Chapter 41.56 RCW will prevail over conflicting provisions of a city's charter:

> The legislature in [Chapter 41.56 RCW] not only made such a delegation [of authority to interest arbitrators that was otherwise delegated to the

> mayor and city council] lawful and mandatory by enactment of this law, but provided in RCW 41.56.905 that the provisions of the act "shall control" in case of conflict with "any other statute, ordinance, rule or regulation of any public employer as it relates to uniform employees ...

See, also, Rose v. Erickson, 106 Wn.2d. 420 (1986). However, in the instant case, the union waived its right to insist on bargaining provisions in conflict with the city's charter. Article 24.1 of the parties' collective bargaining agreement contains the following language:

> **It is understood that the parties hereto** and the employees of the City **are governed by** the provisions of applicable Federal Law, and **the City Charter.** When any provisions thereof are in conflict with the provisions of this agreement, **the provisions of said** Federal Law, State Law, or **City charter are paramount and shall prevail.**

[Emphasis by **bold** supplied.]

A party that waives a statutory right in a contract will be bound by that waiver for the life of the contract.

Waiver by Conduct -

The union argues that the contract language should not be held to be controlling in this case, because the employer waived its challenge to the scope of the reopener during the course of the correspondence between the parties, when the union proposed grievance arbitration to resolve the employer's concern regarding the scope of the union proposal. The union bases this waiver argument on a statement made in a January 12, 1994 letter from Parker to Webster:

> As to the second prong of your proposal, we have considered your suggested approach to resolving our differences regarding the intended scope of the reopener language contained in Local 27's

> collective bargaining agreement, regarding supplemental pensions for LEOFF II fire fighters. Grievance arbitration would be one good choice given both sides' desire for prompt action on this issue. However, the City has decided not to challenge the issue of the scope of the reopener, making such a grievance procedure unnecessary. By allowing the disability benefit and the duty death benefit to proceed with the other topics to stand or fall on other grounds than "scope", we do not intend to set forth a practice the parties can rely upon in any future proceedings of any kind, **nor do we waive any other legal argument about the sufficiency of these proposals**.

[Emphasis by **bold** supplied.]

The burden of establishing the existence of a waiver rests upon the party asserting the waiver. City of Yakima, Decision 3564-A (PECB, 1991).[13] In this case, it is the union that is asserting a waiver argument based upon the employer's letter. However, the statement cited by the union is narrow and clearly focused. Contrary to the union's assertions, the employer clearly did not waive all of its arguments concerning Article 24.1. It waived only the narrower issue of the scope of the contract reopener language, and agreed that the reopener could include "disability benefit" and "duty death". The employer's assertion that the contract language subordinates the contract to the City Charter must, therefore, be taken into account.

The subordination clause of the parties' collective bargaining agreement specifically subordinates that agreement to the city charter. As also referenced above, the city charter specifies that employees covered by other pension systems, such as the LEOFF II

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[13] In that case, the employer was contending that certain language changes to its management rights clause gave it the authority to institute unilateral changes. However, the employer was not able to prove that the union could be presumed to have known what was intended when it accepted the language relied upon as a waiver.

system, are not eligible to participate in a City of Seattle pension, death benefit, or disability benefit system. Thus, the employer persuasively argues that the union's supplemental pension proposal could never be effected. Even if the employer bargained with the union and came to some agreement, implementation of such an agreement would be nullified through the application of the city charter and the subordinations of agreement clause.

The Arbitration Decision -
When the employer took the position that the subordination clause of the parties' contract precluded the union's proposal for supplemental benefits, the union countered that the employer was not adhering to the "reopener" language in the same contract. To enforce that position, the union initiated a grievance and the parties submitted that issue to Arbitrator Carlton J. Snow on the basis of stipulations, briefs and reply briefs.

In his arbitration award issued on December 11, 1994, Snow ruled for the union. Concerning the employer's declaration that the union's proposals on supplemental pension benefits were contrary to the subordination clause of the collective bargaining agreement and to the city charter, Snow opined:

> In the negotiation stage, either party might consider proposals from the other party to be illegal and should say so. It is also possible that one party will consider proposals of the other to be unreasonable, unrealistic, over-reaching, or, otherwise, objectionable. Such a reaction, however, would not negate the duty of the parties to negotiate and attempt to achieve an amiable bargain. When the Employer unilaterally refused to bargain in this case pursuant to Article 29.3(a) premised on a conclusion that a proposal from the other party, if adopted, would violate a separate provision of the parties' agreement, the Employer breached its contractual duty to the Union. The Employer was critical of the Union's reliance on the subjective belief of the Union president that the scope of proposals put forth by the Union were not restricted by

> the subordination clause. Yet, the Employer used its own subjective reasoning to conclude that a specific proposal of the Union violated the law and the parties' contract. The parties, however committed themselves to a different approach. They agreed in Article 29.3(a) to negotiate until reaching an impasse. When that time comes, the impasse could be arbitrated at the Union's discretion. It would be for an arbitrator to test the alleged illegality of the Union's proposal, and presumably he or she would not foist an illegal contractual provision on the parties. If an arbitrator did so, presumably a court of law would not sustain such a decision.

The union now argues that the arbitrator has construed the collective bargaining agreement so as to not excuse submission of the supplemental pension proposals to interest arbitration.

An arbitrator's authority is limited to the interpretation of the parties' collective bargaining agreement. Under the "deferral to arbitration" policy enunciated by the Commission in City of Yakima, Decision 3564-A (PECB, 1991), the Commission will accept the fair and regular decisions of arbitrators as controlling **only** on waiver by contract defenses in "unilateral change" unfair labor practice cases. An arbitrator is not empowered to interpret state statutes, however, and the Commission **does not** defer to arbitrators' rulings on statutory matters such as unit determinations, interference and discrimination, or other types of "refusal to bargain" claims.

As fire fighters, the employees in the bargaining unit involved here are statutorily endowed with access to interest arbitration as an impasse resolution procedure. RCW 41.56.430 et seq. A party which questions the propriety of a proposal being advanced in negotiations subject to interest arbitration must first communicate its concerns to the opposite party. King County Fire District 39, Decision 2328 (PECB, 1985). If the proponent does not drop the offensive proposal or modify it to eliminate the claimed illegality, Commission precedent calls for the objecting party to file and

process an unfair labor practice complaint before the Commission prior to the interest arbitration:

> Parties to "interest arbitration" proceedings under RCW 41.56.430 _et seq_. may have occasion to claim that the proposal advanced by the other party in interest arbitration is unlawful. Under a procedure that dates back to the proceedings which led to _City of Wenatchee_, Decision 780 (PECB, 1980), such a party may file and obtain a ruling on an unfair labor practice complaint prior to risking submission of the issue to an interest arbitration proceeding on issues where their bargainability and/or the good faith of their proponent have been called into question by the filing of an unfair labor practice complaint. See, _King County Fire District 39_, Decision 2328 (PECB, 1985). If the unfair labor practice case results in a conclusion that the proposal was unlawful, or was unlawfully advanced, the proponent will be ordered to withdraw it from the bargaining table and from interest arbitration. See, _City of Yakima_, Decision 1130 (PECB, 1981). If the unfair labor practice case results are otherwise, suspended issues can be remanded to the interest arbitration panel for a ruling on their merits.

Spokane Fire District 1, _supra_.

The employer has followed the dictates of Commission precedent. When the arbitrator stated, "When faced with a potentially illegal proposal, bargain", he did not rule in a manner consistent with Washington law and Commission policy. Contrary to the arbitrator's analysis, the employer does have a mechanism available to challenge the legality of the union's bargaining proposals. The union's reliance on the arbitrator's decision in this case is misplaced.

Statutory Conflict

A key part of the union's argument is that the collective bargaining statute must prevail in the event of a conflict between Chapter 41.56 RCW (which mandates bargaining between public employers and

their employees on "wages"), and either Chapter 41.26 RCW (which establishes the LEOFF pension system) or Chapter 35A.11 RCW (which enumerates the powers of first class cities). It relies on RCW 41.56.905 as source of this "supremacy" argument:

> 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, the provisions of this chapter shall control.

In this case, however, the potential conflict between the collective bargaining law and the pension law has been resolved by the Legislature in the same way the Ohio General Assembly did, in Streetsboro, supra, i.e., by occupying the field and effectively taking the subject out of the employers' authority to control.

Chapter 41.56 RCW was first enacted in 1967, and has covered "wages, hours and working conditions" from the time of its enactment. Two provisions in Title 41 RCW cast doubt on whether local governments had much discretionary authority (and, thus, room for bargaining) concerning pensions for fire fighters under the "Firemen's Relief and Pensions" laws (chapters 41.16 and 41.18 RCW) that pre-dated the LEOFF system. Chapter 41.04 RCW, which is captioned "General Provisions", includes:

> 41.04.130 Extension of provisions of retirement and pension systems by the cities of first class to nonincluded personnel. Any city of the first class may, by ordinance, extend, upon conditions deemed proper, the provisions of retirement and pension systems for superannuated and disabled officers and employees to officers and employees with five years of continuous service and acting in capacities in which they would otherwise not be entitled to participation in such systems: PROVIDED, That **the following shall be specifically exempted from the provisions of this section.**
>
> ...

> (2) **Members of the fire department who are entitled to the benefits of the firemen's relief and pension fund as established by state law.**

Chapter 41.28 RCW, which is captioned "Retirement of Personnel in Certain First Class Cities", includes:

> 41.28.030 Employees within or excluded from the system.
>
> ...
>
> (2) **The following shall be specifically exempted from the provisions of this chapter:**
>
> ...
>
> (b) **Members of the fire departments who are entitled to the benefits from the firemen's relief and pension fund as established by state law.**

Enforcement of the duty to bargain through unfair labor practice procedures was not added to Chapter 41.56 RCW until 1969,[14] and no case is cited or found in which a ruling was made on the bargainability of pensions before the LEOFF act went into effect.[15] Thus, it is difficult to theorize that pension benefits were ever a mandatory subject of bargaining under Chapter 41.56 RCW.

The LEOFF system was created by a statute passed in 1969, with a delayed effective date of March 1, 1970.[16] Regardless of what might have been the duty to bargain between 1967 and 1970, it is clear from Mulholland, supra, that the Legislature intended to "occupy the field" in 1970. Pensions created under earlier

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[14] 1969 ex.sess ch. 215.

[15] Chapter 41.56 RCW was administered by the Department of Labor and Industries from 1967 through 1975. Decisions issued by that agency were not published or indexed.

[16] 1969 ex.sess ch. 209. At a minimum, the close timing of events would have limited the opportunity for unfair labor practice litigation on the duty to bargain pension matters under Chapter 41.56 RCW.

legislation were required to be transferred into the LEOFF system under RCW 41.26.040, without any room for collective bargaining on either that decision or its effects. RCW 35A.11.020 reinforces this intent, by clearly forbidding any public employer from enacting "any provision establishing or respecting a pension or retirement system for fire fighters".

The union nevertheless argues that RCW 41.56.905 mandates that the collective bargaining statute supersede any conflicting statute. It cited Commission decisions where the statutory authority of public employers to set wages, establish civil service systems, and establish municipal personnel systems were all held to be subject to the duty to bargain as established in Chapter 41.56 RCW. None of those cases is on point with the instant case, however. Each of the cited cases involved the exercise of discretion and authority conferred upon the public employer; none of those cases involved a dispute where a state statute has pre-empted an issue which might otherwise have been a mandatory subject of bargaining.

The union cited Ayers v. Tacoma, 6 Wn.2d 545, 554 (1940), as standing for the proposition that first class cities have authority implied from the state constitution and their enabling statutes to establish pension systems for their employees. Ayers specifically excepts matters in conflict with state law, however:

> Undoubtedly, **in the absence of legislative expression to the contrary**, cities of the first class, under pertinent charter provisions, have power to establish by ordinance lawful pension systems for their employees.

[Emphasis by **bold** supplied.]

Furthermore, Ayers can only be relied upon as a general statement concerning municipal powers and responsibilities, as it was decided long before either Chapter 41.56 RCW or Chapter 41.26 RCW were passed by the Legislature.

While RCW 41.56.100 specifically confers authority on public employers to engage in collective bargaining, the employer aptly points out that Chapter 41.56 RCW is not an enabling statute for public employers to exercise other types of authority. Thus, any bargaining must be done within the bounds of substantive authority granted elsewhere. This is recognized in the definition of collective bargaining at RCW 41.56.030(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**, ...

[Emphasis by **bold** supplied.]

By statute, the authority to provide pensions for fire fighters has been expressly excluded time and time again from the variously enumerated powers of local governments. In addition to Chapter 41.26 RCW, this includes RCW 35A.11.020 and the latest legislative directions in amendments to the section setting forth standards for interest arbitration decisions, 1993 ch. 398, effective July 1, 1995; 1995 ch. 273, effective July 1, 1995. In its current form, that section provides:

> 41.56.465 Uniformed personnel--Interest arbitration panel--Determinations--Factors to be considered. (1) In making its determination, the panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as additional standards or guidelines to aid it in reaching a decision, it shall take into consideration the following factors:
>
> ...
>
> (c)
>
> ...

> (ii) For [fire fighters], comparison of the wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of like personnel of public fire departments of similar size on the west coast of the United States. However, when an adequate number of comparable employers exists within the state of Washington, other west coast employers may not be considered;
>
> ...
>
> (2) Subsection (1)(c) of the section **may not be construed to authorize the panel to require the employer to pay, directly or indirectly, the increased employee contributions resulting from chapter 502, Laws of 1993 or chapter 517, Laws of 1993 as required under chapter 41.26 RCW.**

[Emphasis by **bold** supplied]

The Commission's role in statutory interpretation was clearly enunciated in City of Yakima, Decision 3503-A (1991):

> 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).

If the intent of the various statutes already cited was not sufficiently unambiguous, the legislative debates on the amendments to the LEOFF system in 1993 surely makes the historical and present intent of the Legislature perfectly evident:

> Substitute House Bill No. 1294 was read the second time.
>
> ...
>
> POINT OF INQUIRY
>
> Representative Summers yielded to a question by Representative Locke.

> Representative Locke: In the Appropriations Committee you were the sponsor and drafter of the Substitute House Bill.
>
> Section 10 of Substitute House Bill No. 1294 contains a direction to an interest arbitrator that the arbitrator should not require employers of police officers and fire fighters to pay any of the increased employee retirement contributions that result from benefits contained in the bill.
>
> Is it the intent of this section to change current policy regarding retirement issues and collective bargaining?
>
> Representative Summers: No. The intent of this section is <u>not</u> to <u>change</u> current policy, but rather **to <u>maintain</u> our current policy that retirement issues of any kind are not subject to collective bargaining**, and therefore should not be considered in interest arbitration. **The retirement contributions that the employees currently make are not subject to bargaining**, and therefore **should not be considered in interest arbitration.** The retirement contributions that employees currently make are not subject of bargaining, and neither should any increased contributions due to improved benefits.

[Emphasis by <u>underline</u> in original; emphasis by **bold** supplied.]

Thus, it is clear that supplements to the state-mandated LEOFF II pension system have been pre-empted from bargaining by the Legislature, and that the union's charge that the employer has unlawfully refused to bargain pension supplements must fail.

<u>Disability Leave Supplement Proposal</u>

Under the parties' collective bargaining agreement, fire fighters are provided with an allowance on retirement for disability (pursuant to RCW 41.26.130) and a disability leave supplement (pursuant to RCW 41.04.500).

The union's proposal concerning disability leave supplements was as follows:

> After 365 days of DISABILITY, if the employee is unable to return to full duty the employee shall be retired. The Duty Disability Retirement benefit shall be 60% of BASE SALARY of the position held when disabled, excluding acting assignment. A disabled employee may be required to work in an appropriate limited duty assignment. Limited duty assignments shall not interfere with appropriate rehabilitation treatments or therapy.
>
> While on limited duty, an employee shall be paid 100 percent of BASE SALARY and continue receiving all benefits of the Employee's regular assignment. An employee and the City may mutually agree to a limited duty position or another position with the City, and so long as the employee occupies such position the Disability Retirement benefit will be deferred.
>
> DUTY DISABILITY BENEFITS under this Agreement shall cease when the employee is returned to full duty. Employees who have reached SERVICE RETIREMENT age may apply for Service Retirement regardless of time on DISABILITY.
>
> The CITY shall bear the entire cost of workers' compensation benefits, and no part of employee contributions shall be used for such cost.

According to the employer, the union's proposal would increase disability leave benefits for disabled fire fighters from the "50 percent" rate that the employer is currently paying under RCW 41.04.500 to a "60 percent" rate.[17]

RCW 41.04.500 is among several provisions added to Chapter 41.04 RCW in 1985.[18] Other sections added at that time include:

> RCW 41.04.535 Disability leave supplement for law enforcement officers and fire fighters--Greater benefits not precluded. Nothing in RCW 41.04.500 through 41.04.530 shall preclude

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[17] A fire fighter on a duty disability receives benefits equal to 50 percent of their salary from the State Industrial Insurance System operated under Title 51 RCW.

[18] 1985 c 462.

> employers of law enforcement officers and fire fighters and such employees from **entering into agreements** which provide benefits to employees which are greater than those prescribed by RCW 41.04.500 through 41.04.530, nor is there any intent by the legislature to alter or in any way affect any such agreements which may now exist.
>
> * * *
>
> RCW 41.04.550 Disability leave supplement for law enforcement officers and fire fighters-- Not subject to interest arbitration. Disability leave supplement payments for employees covered by this act **shall not be subject to interest arbitration as defined in RCW 41.56.430 through 41.56.905**.
>
> [Emphasis by **bold** supplied]

Thus, there is specific authority for negotiations between the parties on disability leave supplements, in contrast to pension supplements. Equally specific, however, is the exclusion of disability leave supplements from interest arbitration in the event of an impasse in bargaining.

The union asserts that its proposal does not require payments for time loss due to a **temporary** total disability, as described in RCW 41.04.500 through .550, but rather applies to permanent absence due to the disabled employee being unable to ever return to work. Thus, the union argues that its proposal is not subject to the prohibition against interest arbitration found in RCW 41.04.500.

A close reading of the union's proposal does not, however, support its argument. RCW 41.04.500 authorizes "a disability leave supplement to such employees who qualify for payments under RCW 51.32.090 due to a temporary total disability". Although the first sentence of the union's proposed language refers to retirement after a period of 365 days of disability, the remainder of the proposal clearly refers to the conditions of a temporary disability. Limiting a supplement to disability leave proposal by stating that it would eventually culminate in a disability retirement creates a

distinction without a difference. It does not succeed in removing the proposal from the statutory prohibition against interest arbitration of disability leave supplements.

Furthermore, in seeking to evade one demon, the union walks into the jaws of another. By arguing that its proposal is not affected by RCW 41.04.550, the union removes its proposal from the negotiability authorized by RCW 41.04.535 and re-casts it as a "pension" benefit over which there is no duty to bargain at all. Thus, the union has attempted to obtain interest arbitration that is clearly **excluded** from that process by RCW 41.04.550, or it has attempted to obtain interest arbitration on a non-mandatory subject of bargaining. Either way, the union has committed an unfair labor practice.

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 27, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of approximately 900 employees holding the ranks of fire fighter, lieutenant, and captain in the Seattle Fire Department.

3. The employees in the above-referenced bargaining unit are fire fighters within the meaning and coverage of the Washington State Law Enforcement Officers and Fire Fighters retirement system (LEOFF). That system has two plans, LEOFF I which covers employees hired before October 1, 1977, and LEOFF II which covers employees hired on or after October 1, 1977.

4. The employees in the above-referenced bargaining unit are "uniformed employees" within the meaning of RCW 41.56.030(7),

so that the collective bargaining relationship between the employer and union is subject to interest arbitration pursuant to RCW 41.56.430 through .905.

5. The answers and renewed cross-motions for summary judgment filed by the parties frame no genuine issues of material fact to be resolved in these matters.

6. A collective bargaining agreement covering the above-referenced bargaining unit, which was in effect between the parties from April 8, 1992 through August 31, 1995, contained: (a) a paragraph indicating that employee pensions and pension contributions would be governed by the statutes of the state of Washington; (b) a paragraph indicating the agreement was subordinate to the city charter; and (c) a paragraph indicating that either party could "re-open" the contract on or before May 1, 1993, for the purpose of bargaining on the issue of supplemental pension benefits.

7. The union submitted a timely request for bargaining on supplemental pension benefits for fire fighters covered by the LEOFF II pension system. The union thereafter submitted comprehensive and detailed proposals for amendment of the parties collective bargaining agreement and a memorandum of agreement which would require the employer to create a supplemental pension plan augmenting both the LEOFF II pension system and the current statutory industrial insurance system regarding duty disability payments and duty death payments. The benefits were to be funded by the employer with nominal or no contributions from the fire fighters.

8. Under RCW 41.26.430 and RCW 41.26.030(12)(b), the LEOFF II plan provides for service retirement at age 55, with benefits based on the employee's average salary for the highest consecutive 60 months of service. The union proposed service

retirement at age 50, with benefits based on the average salary for the highest consecutive 24 months of service.

9. RCW 41.26.470 requires an employer to supplement the State industrial insurance provided for fire fighters with disability leave benefits at a cost of approximately 50 percent of the employee's base salary. The union proposed to increase the employer's responsibility to 60 percent of the employee's base salary.

10. The duty death benefit provided under RCW 51.32.050 for survivors of an employee who loses his or her life on the job is between 60 percent and 70 percent of the employee's base salary, based upon the number of dependents surviving. The union proposed to change the percentage range of benefits to between 45 percent and 90 percent, based upon the number of dependents surviving.

11. The parties met and discussed the union's proposals concerning supplemental benefits for LEOFF II employees. During those negotiations, the employer steadfastly maintained that the union's proposals were outside of the employer's authority under state law and/or the city charter.

12. In response to the employer's objections based on state law and/or the city charter, the union responded during the parties' negotiations that the duty to bargain mandated in Chapter 41.56 RCW superseded the city charter.

13. Mediation was requested on July 12, 1993, and a Commission mediator was involved in the parties' subsequent negotiations.

14. The union submitted revised proposals on December 10, 1993, dropping or modifying some its proposals based on objections previously stated by the employer.

15. The interest arbitration procedure was initiated on January 20, 1994, with the following issues certified for interest arbitration: Changing the service retirement age; changing the duty disability retirement percentage paid by the employer; and increasing the duty death benefit.

16. On January 21, 1994, the union filed the complaint charging unfair labor practices docketed as Case 10913-U-94-2538. the union alleged that the employer had refused to bargain concerning the union's proposal for supplemental pension benefits.

17. On January 24, 1994, the employer filed the complaint charging unfair labor practices docketed as Case 10913-U-94-2538. The employer alleged that the union had bargained to impasse on supplemental pension benefits which are in violation of the city charter and pre-empted by state and/or federal law.

18. The unfair labor practice charges filed by both parties were each found to state a cause of action under WAC 391-45-110, and the interest arbitration proceedings on those issues were suspended by the Executive Director of the Commission, pending resolution of the unfair labor practice cases.

19. Prior to February 28, 1994, each party filed a timely answer to the complaint against it.

20. On February 28, 1994, the employer and union each filed a motion for summary judgment along with briefs, reply briefs and supporting affidavits.

21. On May 27, 1994, the union notified the Executive Director that it filed for arbitration of the contract reopener language through the procedures specified in the parties' collective bargaining agreement.

22. On October 21, 1994, the Executive Director denied the summary judgment motions filed by both parties, and deferred the processing of these unfair labor practice cases pending the arbitration proceedings on the union's grievance.

23. On December 11, 1994, Arbitrator Carlton J. Snow issued a decision in which he held that the employer had violated the collective bargaining agreement. His ruling that the employer should have bargained the supplemental pension proposals to finality, and then challenged their legality in an appropriate court of law, is not consistent with Commission precedent.

24. On July 31, 1994, and August 23, 1994, respectively, the union and the employer filed renewed motions for summary judgment and memoranda in support of their respective motions. The parties then each filed reply briefs.

25. State statutes which provide pension benefits for municipal employees other than fire fighters, including RCW 35A.11.020 (which enables noncharter and code cities to provide retirement systems), RCW 41.28.030 (which provides for retirement systems for first class cities), and RCW 41.40.120(4) (the Washington Public Employees' Retirement System), specifically exclude fire fighters from their coverage.

26. The Seattle City Charter, which specifically provides for an employee retirement and pension system, excludes employees who are members of other pension systems pursuant to state law.

27. The union has sought interest arbitration on its proposal labeled temporary total disability, which includes provisions for disability retirement.

28. While permitting negotiations on such matters, the statute governing disability leave for fire fighters, RCW 41.04.550,

specifically provides that disability leave benefits shall not be subject to interest arbitration.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW.

2. Based on the admissions contained in the answers filed by the parties, along with the motions and briefs filed by the parties, these matters are appropriate for summary judgment under WAC 391-08-230.

3. By enacting Chapter 41.26 RCW, the Legislature has pre-empted the authority of the City of Seattle to act on pension benefits for the fire fighters, so that the union's proposals for supplemental pension benefits were not a mandatory subject for collective bargaining under RCW 41.56.030(4).

4. By enacting RCW 41.04.550, the Legislature has explicitly prohibited interest arbitration in the event of an impasse in collective bargaining on disability benefits for fire fighters in the above-referenced bargaining unit.

5. By the events described in the foregoing Findings of Fact, the City of Seattle has not refused to bargain collectively under RCW 41.56.030(4) with International Association of Fire Fighters, Local 27, and has not committed an unfair labor practice within the meaning of RCW 41.56.140(4).

6. By bargaining to impasse on its proposals concerning supplemental pension benefits, and by seeking to obtain interest arbitration on its proposals concerning supplemental pension benefits and disability benefits, as described in the foregoing Finding of Fact, International Association of Fire

Fighters, Local 27, has failed and refused to bargain in good faith under RCW 41.56.030(4), and has committed unfair labor practices in violation of RCW 41.56.150(4).

ORDER

1. [Case 10901-U-94-2436] The complaint charging unfair labor practices filed by the International Association of Fire Fighters, Local 27, is DISMISSED.

2. [Case 10913-U-94-2438] International Association of Fire Fighters, Local 27, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   a. CEASE AND DESIST from:

      (1) Refusing to bargain collectively with the City of Seattle, by insisting to impasse and seeking to obtain interest arbitration concerning pension benefits supplemental to the Washington Law Enforcement Officers and Fire Fighters Retirement System Act, Chapter 41.26 RCW.

      (2) Refusing to bargain collectively with the City of Seattle, by seeking to obtain interest arbitration concerning disability benefits, contrary to RCW 41.04.550.

   b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

      (1) Withdraw all proposals advanced in collective bargaining with the City of Seattle on the subject of supplemental pension benefits.

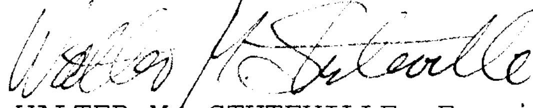
(2) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. 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.

(3) Notify the above-named complainant, in writing, within 20 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 above-named complainant with a signed copy of the notice required by the preceding paragraph.

(4) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 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.

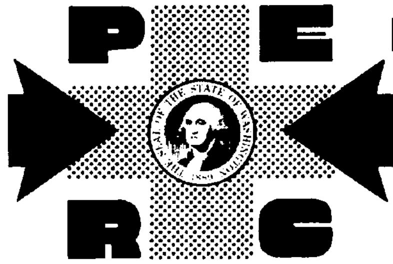
ISSUED at Olympia, Washington, this 7th day of June, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.



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 EMPLOYEES:

WE WILL NOT refuse to bargain collectively with the City of Seattle, by insisting to impasse and seeking to obtain interest arbitration concerning pension benefits supplemental to the Washington Law Enforcement Officers and Fire Fighters Retirement System Act, Chapter 41.26 RCW.

WE WILL NOT refuse to bargain collectively with the City of Seattle, by seeking to obtain interest arbitration concerning disability benefits, contrary to RCW 41.04.550.

WE WILL withdraw all proposals advanced in collective bargaining with the City of Seattle on the subject of supplemental pension benefits.

DATED: ____________________

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 27

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 Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.