FIREHOUSE LAWYER

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FIREHOUSE LAWYER SURVEY

The interim results of the *Firehouse Lawyer* Survey are shown on page 7 below. We would like to obtain information from the Pierce County fire districts that have not yet reported, and include the final results in the September issue of the *Firehouse Lawyer*. As we do, I think you will find the results interesting.

COMMITTEE BACKS OFF ON MINIMUM RESPONSE STANDARD

Facing substantial opposition, the 1,200 Committee on Fire Service Organization and Deployment of the NFPA abandoned plans, for now, to adopt minimum national fire response standards at a meeting in Baltimore in July. The response time controversy was sent back to NFPA's Standards Council, so the issue is not completely dead. Clearly, while NFPA guidelines are not legally binding, local governments are often confronted with the argument in litigation or contract disputes that the NFPA is the nationally adopted standard and therefore applicable in negligence cases.

UPDATE ON COMP TIME BILL

The Family Friendly Workplace Act never made it out of the Senate. While the primary purpose of the bill is to allow workers in the private sector to earn compensatory time in lieu of overtime pay and to allow flexible work schedules, Section 213 of the bill would amend the FLSA. This section would clarify who is entitled to overtime pay in both the public and private sectors. The bill would address a significant problem of local governments who continue to be sued by executive and administrative employees for overtime pay. The bill would clarify the so-called "salary basis" regulations especially with respect to exempt employees who are paid a salary that is not subject to a reduction for partial day absences. The problem with the regulation has always been the conflict with most public accountability statutes, prohibiting public employers in most states from paying employees for hours they did not work. An example of such a state law is Article VIII, Section 7 of the Washington State Constitution which prohibits gifts by local governments.

UNEMPLOYMENT COMPENSATION - MISCONDUCT MUST BE SERIOUS

Occasionally, a fired employee will be denied unemployment compensation because of the state statute disallowing unemployment compensation to employees fired for "misconduct". Under an Idaho

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statute similar to the one in Washington, the issue arose in *Folks v. Moscow School District*, 933 P.2d 642 (Idaho 1997). Folks, the orchestra teacher at Moscow Junior High School had an informal relationship with Lee, the school principal, and sometimes used profanity in his presence without any discipline. Folks had overseen the orchestra program for 17 years and it meant a lot to her. At one point, Lee told Folks he was canceling the orchestra program. The next day Lee spoke to Folks in the teachers' lounge and after some discussion, Folks began yelling at Lee using profanity in front of other teachers and students.

After a hearing, the school district fired Folks for her outburst. Folks applied for unemployment benefits and it was initially denied due to employment-related misconduct. Misconduct was defined as willful, intentional disregard of the employer's interest or deliberate violation of the rules or standards of behavior that the employer had a right to expect. This standard is very similar to the case law interpreting the statute in Washington. The appeals examiner also found Folks ineligible but the State Industrial Commission reversed.

In the case, the Idaho court upheld the Commission and found that given the total circumstances, this was not misconduct. The court and the Commission characterized it as non-serious disrespect as opposed to intentional insubordination. Folks' reaction was an emotional knee jerk reaction to a stressful situation and her use of profanity was previously accepted by Lee without discipline. Therefore, the court held Folks was properly entitled to unemployment compensation and did not commit serious misconduct. This case presents an object lesson to employers that unemployment compensation is not easily denied due to misconduct. It must be serious misconduct and the behavior of the employee, if justified under the circumstances, probably will not support denial of unemployment, even if the discharge or discipline might be readily sustained.

DECREASING FIRE COMMISSIONERS

Substitute Senate bill 5684 became Chapter 43 of the laws of 1997. The statute will add a new section to RCW 52.14 on fire protection district commissioners. The specific purpose of the statute is to provide a mechanism for reducing a five member Board of Commissioners to a three member board. Essentially, the new statute provides that either the commissioners or the registered voters (by presenting a petition signed by 10% of the resident electors) can place on the ballot a proposition to decrease the board from five to three members. The proposition takes a majority, and there are statutory provisions regarding the procedure for implementation. The statute was effective July 27, 1997. We are not certain whether there is a significant need for this statute, as all districts we have encountered with five member boards have been quite satisfied with the increase.

MANAGEMENT RIGHTS CLARIFIED

On June 26, 1997, the State Supreme Court issued a decision in *Pasco Police Officers' Assoc. v. City of Pasco*. The dispute involved two issues. First, the union alleged that the city committed an unfair labor practice by insisting to impasse on a proposed management rights clause. Second, the city claimed the union committed an unfair labor practice by breaching an oral promise to accept the existing grievance procedure, essentially "reneging" during bargaining. This article pertains only to the management rights issue, as the other question was more factual in nature and not, in our opinion, as important in terms of precedent.

In bargaining, the city proposed a broad but not unusual

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management rights clause. The Association saw it as a proposal that the union waive its right to engage in collective bargaining. Pursuing that view, the Association contended that this broad management rights clause could not be a mandatory subject of bargaining, and must be withdrawn at impasse rather than submitted to interest arbitration. The city maintained that the management rights clause included topics that were within the definition of "wages, hours and working conditions" and therefore was a mandatory subject on which it could insist on bargaining to impasse. Both the Hearing Examiner and the Public Employment Relations Commission held that the city's position on the management rights clause was correct.

On certain issues, both parties sought review by the Superior Court, but it certified the case to the Court of Appeals pursuant to the Administrative Procedure Act. That court then transferred the matter to the Supreme Court directly, asserting that the case presented issues of broad public import qualifying for direct review. Based upon the court's decision, we would agree that the case is of broad public importance.

The Supreme Court pointed out that, with respect to alleged errors of law, the court may substitute its interpretation of the law for that of the Public Employment Relations Commission. However, as it has stated many times before, the court said it would accord great weight in determining legislative intent, when a statute is ambiguous, to the agency (PERC) which must interpret the statute. This great deference is afforded PERC because of the expertise of the agency.

The court also recognized again that the courts and PERC will look to precedent established by the National Labor Relations Board with respect to interpretations of similar provisions in the National Labor Relations Act. Decisions interpreting that federal act are persuasive but not controlling authority.

The Supreme Court reiterated existing law in Washington that our Public Employees Collective Bargaining Act is construed to mean that the parties must engage in "collective bargaining" in good faith, meaning that they approach the table as equals and resolve differences through a "give and take" process. The law does not mandate any particular result or procedure, but only requires the parties to bargain in good faith. Refusal to so bargain means an absence of a sincere desire to reach agreement. However, even stubborn disagreement in support of fixed positions on items in dispute has consistently been regarded as permissible bargaining conduct.

With regard to the topics about which the employer and the union representative bargain, it is well-settled that issues addressing wages, hours and other terms and conditions of employment are mandatory subjects about which the parties must bargain. By contrast, the parties do not need to bargain on other matters, referred to as permissive or non-mandatory subjects of bargaining. Examples would include procedures by which wages, hours and other conditions of employment are established.

Based upon the foregoing principles, it is an unfair labor practice for a party to bargain to impasse over a non-mandatory or permissive subject. Impasse is defined as a situation where, after a reasonable period of good faith negotiations, the parties have reached their final positions but remain at odds over one or more bargaining subjects.

With uniformed personnel, in the event of impasse, a mediator is appointed. After a reasonable period of negotiations and mediations, if impasse remains then interest arbitration is pursued. During the pendency of interest arbitration, existing wages, hours and other conditions of employment remain in effect.

The Association argued throughout this case that the

management rights and hours of work proposals submitted by the

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employer constituted "waivers" of its collective bargaining rights. Therefore, they reasoned, the management rights and the hours of work proposals must be permissive and not mandatory subjects. The Supreme Court strongly pointed out that the union's analysis was flawed. PERC did not directly address the precise issue of whether the proposals constituted "waivers", but instead pointed out that management rights and hours of work clauses are ordinarily considered mandatory subjects.

The Supreme Court analyzed the context in which the claim of "waiver" might arise. Typically, a waiver is only found when it is explicitly stated or clear and unmistakable. A waiver of bargaining rights must be knowingly made and specifically address the subject upon which the waiver is claimed. A waiver can be found by specific action such as agreeing to particular contract language or by inaction such as failing to raise timely objection to an act or proposal.

It seems to this commentator that the union's mistake was in trying to claim that an act by the employer, i.e., the submittal of a management rights clause and an hours of work clause, could somehow operate as a waiver by the union. Only the union's action or inaction can be found to be a waiver and therefore the submittal of anything by the employer can hardly be deemed union action. The Supreme Court said: "We need not determine whether a waiver of collective bargaining rights is a mandatory or permissive subject of bargaining, however, because this is not a waiver case despite the fact that throughout all of its argument, the Association classified the management rights and hours of work clauses as 'waivers'."

As the court pointed out, typically waivers arise during the pendency of an agreement and focus on whether a union has given its assent or waived objections to some unilateral employer action. Waiver is most often advanced as an affirmative defense to a unilateral change or refusal to bargain unfair labor practice complaint. We have never seen a waiver claim advanced by an employer, alleging that their submittal of a proposal in bargaining somehow constituted a waiver by the union. While the argument may be creative, we can understand why it did not succeed. The Supreme Court then stated: "The issue of waiver was not present. PERC was clearly correct in its analysis."

The court did caution employers by noting that a public sector employer cannot unilaterally impose management rights or hours of work clauses, but may only insist on them until impasse. Also, a management rights clause could not invade the union's statutory right and duty to be the exclusive bargaining representative. For example, in the *Toledo Blade* case under the NLRB, the employer proposed a management rights clause that would have allowed it to directly address employees over retirement issues. The federal circuit court held such a clause to violate the NLRA.

In *Pasco*, the court also rejected the Association's argument that somehow our state law was different from the NLRA, because there is no right to strike for uniformed personnel in Washington. The Supreme Court said that made no difference to the analysis.

The Supreme Court did insist on looking at the content of the management rights clause to make sure that the items included related to wages, hours or working conditions. It is important to note that the court looks to the particular proposal and not the general concept of management clauses.

Justice Talmadge wrote an interesting concurring opinion, noting the lack of a clear definition of permissive and mandatory subjects of bargaining in our state's public employee collective bargaining laws. He suggested legislative action, noting that a very generalized management

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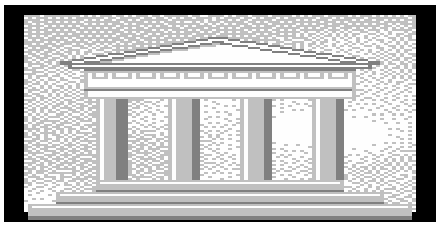
rights clause might strip a union of its ability to do its job, but also noting that a narrowly construed management rights clause would swallow up management rights altogether. Clearly, it would take legislative action to authorize PERC to adopt administrative rules defining or categorizing topics with respect to their permissive or mandatory nature. (Mr. Quinn served as a Commissioner of the Public Employment Relations Commission from 1986 to 1990.)



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NOTA BENE:

Since January 1, 1997, Mr. Quinn has developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to non-participating Pierce County departments for $50.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) have been completed, to comply with the "vertical standards". Mr. Quinn has also been developing numerous policy Resolutions and SOPs on various department topics such as open meetings, open records, patient records, etc.

Please call for information.