Supreme Court No. 97905-7

Court of Appeals No. 77831-5-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF EVERETT, Petitioner,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION, Respondent,

and

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 46, Respondent.

RESPONDENT INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 46 ANSWER TO PETITIONER CITY OF EVERETT'S PETITION FOR REVIEW

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I. INTRODUCTION

The City's Petition for Review fails because it does not meet the requirements for Discretionary Review under RAP 13.4. The decision of the Court of Appeals in this case does *not* conflict with a decision of this Court or any published decisions of the Court of Appeals; it does not present a significant question of law under the Constitution of the State of Washington or of the United States, and it does not present an issue of substantial public interest that has not already been determined by this Court.

The Public Employment Relations Commission (PERC) found minimum on duty shift staffing (manning) was a mandatory subject of collective bargaining between these parties. PERC's decision was based on the standards this Court set in two cases: City of Everett v. Fire Fighters, Local No. 350, 87 Wn.2d 572, 555 P.2d 418 (1976), and International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Com'n., 113 Wn.2d 197, 778 P.2d 32 (1989).

Those cases established that manning could be a mandatory subject of bargaining when it was shown to have a demonstratedly direct relationship to workload and health and safety of employees. They also established the guidelines for PERC to follow when the issue of manning

as a mandatory subject of bargaining arose, and that PERC should decide questions of the mandatory nature of manning on a case by case basis.

Review of the PERC decision, and the Court of Appeals decision affirming PERC, shows PERC engaged in a step by step application of this Court's standards to conclude manning, in this case, was a mandatory subject of bargaining.

PERC's decision did not determine how many employees would be required to be on a shift to address safety impacts. It did not determine how much money must be spent by the City to address safety issues associated with employee workload and safety. The decision did not establish the number of Firefighters to be employed by the City in general, and PERC's decision did not establish the scope, nature and extent of firefighting services the City must provide to Everett citizens.

PERC limited its holding to this case and its unique facts. It did not establish manning as a mandatory subject of bargaining in all cases. This case is an example of the proper application of this Court's guidelines to determine when manning can be a mandatory bargaining subject.

II. COUNTER-STATEMENT OF CASE

When the parties were bargaining for a successor to the 2012-2014 CBA, the Union proposed to increase minimum shift staff levels set forth in the CBA from 25 to 35. (AR 88, Finding #11). The City took the

position shift size was a permissive subject of bargaining. (AR 88, 997, Finding #12).

The parties attempted to mediate settlement of the contract negotiations, but the City made no proposals or rationale for refusing to bargain, other than claiming manning was a permissive bargaining subject. The parties were found to be at impasse. A number of issues were certified for arbitration, including shift size. (AR 88, Finding #13).

The City filed an Unfair Labor Practice Complaint (ULP) alleging the Union breached its duty to bargain in good faith by insisting to impasse the shift size proposal and submitting it to interest arbitration. The City maintained its position that shift size was always a permissive subject of bargaining. (AR 2345-2351). PERC suspended interest arbitration on the manning issue pending the outcome of the City's ULP. (AR 2343-2344).

The Union filed its Answer to the City's ULP on August 20, 2015. (AR 2331-2340). That Answer stated in pertinent part:

> 2. The Union admits the parties engaged in bilateral negotiations and mediation except for the issue involving Article 27 Health and Safety, concerning which the City refused to engage in negotiations. . . .
>
> 3. During the course of mediation the City did indicate it took the position Article 27 Health and Safety was not a mandatory subject of bargaining, while the Union, based upon *IAFF Local 1052, the Public Employee Relations Commission (No. 55802-7),* 113

> Wn.2nd 197, 778 P.2nd 32 (1989) and other case law alleged that the facts here involving increased work load imposed on the unit's members as a result of increased call volume, and a historically decreasing unit work force, implicated and adversely affected health and safety of unit members, as well as increasing work load, thus making Article 27 a mandatory subject of bargaining.
>
> 4. Based upon the facts of the case the Union did maintain an Article 27 proposal involving Health and Safety requiring the implementation of a provision placing 35 unit members on duty at all times during the negotiations process.
>
> .....
>
> 6. Thus, the proposal advanced by the Union in bargaining to impasse dealing with Health and Safety, as impacted by the number of on duty crew, is a mandatory subject of bargaining because it directly affects working conditions of bargaining unit members involving work load and health and safety.

(AR 2331-2332).

In addition to the above Answers, the Union also set forth Affirmative Defenses to the City's ULP. Those included:

> 8. The agreement of the parties to include Article 27 Health and Safety in the Collective Bargaining Agreement between them was based on the joint understanding that as related to the working conditions, workload, and health and safety of unit members, the number of unit members on duty at any one time, was an integral part of maintaining and assuring the health and safety of unit members, as well as ameliorating the work load of unit members.

(AR 2333).

The Union's Affirmative Defenses also referenced the fact that during negotiations and mediation, the Union pursued issues associated with shift size and workload, health and safety of Union members as they

related to increased call volume in the City (¶ 11)[1]; growth of the City in terms of population and area served by the Union (¶13); impact of a decrease in the minimum number of on duty personnel in the face of increased call volume (¶ 14); the evidence of increased risk of harm to Union members as well as citizens of the City of Everett due to the number of personnel available to respond to calls in the face of increased workload (¶ 15); the impact of insufficient time to train personnel due to the increased call volume and work load, leading to exhaustion of Union members and increased risk of harm (¶ 17); the consistent state of tiredness, sickness and possibility of injury to Union members as it related to increased work load and on duty shift size (¶ 19); the increased risk of harm to Union members due to an inability to perform building inspections as a result of increased workload (¶ 20); and the increase of long term occupational health risks to Union members due to increased exposure because the level of shift staffing and the number of calls to the fire department resulted in greater numbers of exposures to toxic elements (¶ 21).[2]

[1] Paragraph references are to the Union's Answer to the City's ULP and appear in AR 2331-2340.

[2] Rather than set forth each of the Union's allegations regarding the adverse impact on Union members' health and safety due to increased workload and shift size, the Union's full Answer and Affirmative Defenses are set forth here in Appendix A.

Following a hearing, Hearing Examiner Greer found shift size was not a mandatory subject of bargaining. (AR 75-93). The Union appealed the decision to PERC. Upon review of the hearing evidence, PERC reversed the Hearing Examiner and found that under the facts of this case, shift size was a mandatory subject of bargaining. Upon direct appeal to the Court of Appeals, that Court affirmed PERC's decision.

III. ARGUMENT

1. The Decision of the Court of Appeals is in Complete Accord With Decisions of this Court.

i. Manning can be a mandatory subject.

Forty-three years ago, this Court stated shift size in public employment "might well affect the safety of the employees and would therefore constitute a working condition, within the meaning of RCW 41.56.030(4)[3]." City of Everett v. Fire Fighters, Local No. 350 of Intern. Ass'n of Fire Fighters, 87 Wn.2d 572, 576, 555 P.2d 418 (1976).

In International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission, 113 Wn.2d 197, 778 P.2d 32 (1989)[4], this Court reversed a PERC decision because the Commission wrongfully concluded, without analysis, that manning was automatically a permissive subject of bargaining. This Court stated:

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[3] RCW Chapter 41.56 is the Public Employees' Collective Bargaining Act. RCW 41.56.030(4) defines "collective bargaining".

[4] Commonly referred to as *City of Richland.*

First, PERC may have determined that staffing level decisions, whatever their relationship to workload and safety, never can be "working conditions" included within the scope of mandatory bargaining, but can only give rise to effects bargaining. Indeed, this is the view New Jersey's labor commission advocated in a decision cited to PERC by Richland. *In re Newark Firemen's Union of New Jersey,* Pub. Empl. Relations Comm'n Dec. 76–40 (N.J.1976).[3] *When staffing levels have a demonstratedly direct relationship to employee workload and safety, however, we believe that, under appropriate circumstances, requiring an employer to bargain over them will achieve the balance of public, employer and union interests that best furthers the purposes of the public employment collective bargaining laws. We have said as much before, in another case involving fire fighter staffing levels.* In *Everett v. Fire Fighters, Local 350, Int'l Ass'n of Fire Fighters,* 87 Wash.2d 572, 555 P.2d 418 (1976), we deferred to arbitration the question of whether a fire fighter union's minimum shift proposal was a mandatory subject of bargaining, noting that

> *the size of the crew might well affect the safety of the employees and would therefore constitute a working condition, within the meaning of RCW 41.56.030(4) defining collective bargaining.*
> *Everett,* at 576, 555 P.2d 418. *See also Wenatchee,* 2 Wash. State Pub.Empl.Rel.Rptr. PD–780–1 (refusing to establish as a rule that "minimum manning clauses are non-mandatory subjects of bargaining for uniformed employees"); *Fire Fighters Union, Local 1186 v. Vallejo,* 12 Cal.3d 608, 619–21, 526 P.2d 971, 116 Cal.Rptr. 507 (1974) (equipment staffing proposal might be mandatory bargaining subject if connection can be shown to workload or safety); *International Ass'n of Firefighters of Newburgh, Local 589 v. Helsby,* 59 A.D.2d 342, 399 N.Y.S.2d 334 (1977) (same); *Narragansett v. International Ass'n of Fire Fighters, AFL–CIO, Local 1589,* 119 R.I. 506, 508, 380 A.2d 521 (1977) (station house staffing is mandatory bargaining subject in light of demonstrated relationship to workload and safety); *International Ass'n of Firefighters, Local 314 v. Salem,* 68 Or.App. 793, 684 P.2d 605 (1984) (same with respect to staffing of engine and truck companies); *In re Arbitration Between Erie, Pa. and Int'l*

> *Ass'n of Firefighters, Local 293,* 74 Pa.Commw. 245, 459 A.2d 1320 (1983) (same).
>
> *PERC also may have proceeded on the understanding that equipment staffing level determinations are such strong managerial prerogatives that, no matter how directly they affect workload and safety, employers never should be required to bargain over them. The cases just cited authoritatively refute this notion.*

Id. at 204–05, (Emphasis added).

The entire premise of *City of Richland* is that given the right set of facts, shift size can be a mandatory subject of bargaining. The City of Everett on the other hand, clung to the argument that shift size could never be a mandatory subject of bargaining. (AR 95-135, Post-Hearing Brief filed by the City of Everett; AR 25-39, Appeal Brief before PERC filed by the City of Everett; the City of Everett Court of Appeals Brief beginning at p. 21). That position is incorrect.

ii. <u>The balancing test</u>.

In addition to holding manning can be a mandatory bargaining subject, the *City of Richland* also described the balancing test to be applied when the issue to be bargained impacts both employer and employee interests.

> PERC's policy of case-by-case adjudication of scope-of-bargaining issues permits application of the balancing approach most courts and labor boards generally apply to such issues. *See, e.g., First Nat'l Maintenance Corp. v. NLRB, supra; see generally* Annot., *Bargainable or Negotiable Issues in State Public Employment*

> *Labor Relations,* 84 A.L.R.3d 242 (1978). On one side of the balance is the relationship the subject bears to "wages, hours and working conditions". On the other side is the extent to which the subject lies " 'at the core of entrepreneurial control' " or is a management prerogative. *Spokane Educ. Ass'n v. Barnes,* 83 Wash.2d at 376, 517 P.2d 1362 (quoting *Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 222–23, 85 S.Ct. 398, 409–10, 13 L.Ed.2d 233 (1964)). Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. *See generally* Clark, *The Scope of the Duty to Bargain in Public Employment,* in *Labor Relations Law in the Public Sector* 81 (1977).

Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Employment Relations Comm'n, at 203.

iii. Application of standards by PERC.

PERC began its decision in this case by noting manning is generally a permissive subject of bargaining, however, based on the entire record, the union proved that shift staffing had a demonstratedly direct relationship to workload and safety in the instant case. After balancing the interests of the City of Everett and the Firefighters/Paramedics, PERC concluded manning was a mandatory subject in this case. (AR 2).

PERC first analyzed the impact and direction of City of Everett v. Fire Fighters, Local No. 350 of the International Association of Fire Fighters, *supra.* (AR 4). The size of the crew might affect the safety of the employees and therefore constitute a working condition which would make the issue a mandatory subject of bargaining. (AR 4).

PERC noted the Supreme Court declined to make the decision regarding the mandatory nature of manning in that case and instead, referred the issue to arbitration. (AR 4). PERC also noted that after referral to arbitration, the arbitrator's conclusion that manning was mandatory in that case in 1976, did not mean it was binding on PERC in 2017. (AR 5).

PERC then discussed the purpose of the public employee bargaining laws and the fact that pursuant to legislative guide, PERC has developed rules and a body of law which makes it uniquely within PERC's jurisdiction to determine the mandatory nature of bargaining subjects. (AR 6).

PERC also discussed several Commission decisions which explained the difference between equipment staffing cases and manning (shift staffing) cases, and how they can be determined to be mandatory subjects of bargaining. (AR 6-8).

Finally, PERC began analysis of the instant case. (AR 8). Relying on *City of Richland, supra*, PERC determined that the Firefighters/Paramedics "must prove that staffing had a demonstratedly direct impact on workload and safety" to establish manning as a mandatory subject of bargaining. (AR 9).

Further, to frame the issue it would decide, PERC stated:

> Shift or general staffing levels, however, are not exclusively reserved to the rights of management. If a union presents evidence that the shift staffing relates to workload and safety, as the union in this case did, then we must balance how the minimum shift staffing relates to employees' wages, hours, and working conditions against the employers' interest in entrepreneurial control or managerial prerogatives. If a union is able to show that the shift staffing level had a "demonstratedly direct relationship to employee workload and safety," then requiring an employer to bargain staffing will result in a balance of interests of the public, employer, and union in furtherance of the public employment collective bargaining laws. *City of Richland*, 113 Wn.2d at 204.

(AR 12-13).

PERC followed the steps outlined in *City of Richland*, first analyzing the interests of the Firefighters/Paramedics and the evidence presented through the hearing. That included: 1) Workload (AR 13-15); 2) Health and Safety (AR 15-17): 3) Response Time (AR 17-18); 4) Inspections (AR 18); 5) Training (AR 18-19).[5]

PERC concluded the Firefighters/Paramedics had met their burden to prove staffing impacted workload and safety. (AR 19).

PERC then examined the City of Everett's interests as presented through the hearing:

> The employer articulated interests in maintaining control over staffing and its budget. The employer *relies heavily on the premise that staffing is, generally a permissive subject of bargaining.* An employer's right to determine the size of its workforce is "at the core of entrepreneurial control." Entrepreneurial control is akin to

[5] PERC noted in reviewing the evidence presented by the Firefighter/Paramedics that the evidence of witnesses and experts relating to the effects of responding to an increasing number of calls on firefighter health and safety was unrebutted. (AR 15).

> an employer's duty to manage its affairs. *Spokane Education Association v. Barnes*, 83 wn.2d 366, 376 (1974). *The employer has not argued or presented evidence that negotiating the number of firefighters on duty would impinge the employer's ability to manage its affairs.*[6]
>
> The employer's argument that it could not afford the union's proposal is not persuasive. While the employer communicated to the union that the union's proposal was expensive, the employer did not tell the union that the employer could not afford the proposal. However, the employer introduced evidence at the hearing about the cost of the union's proposal. Employer exhibits 22 and 23 showed the cost to pay a firefighter. Arguments raised only at the hearing and not presented to the other party during the negotiations should not be allowed to form the basis of a party's argument that proposal is or is not a mandatory subject of bargaining. *See City of Spokane,* Decision 4746 (PECB, 1994).

(AR 20, emphasis added).

PERC balanced the interests of both parties based on the arguments and evidence presented and concluded:

> The employer has a strong managerial prerogative in controlling the size of its workforce. Apart from the employer's argument that it cannot afford to hire more firefighters – which the Commission will not consider because that argument was made for the first time at hearing – the employer *presented no other evidence that would support its assertion that staffing, in this case, should be a permissive subject of bargaining.*
>
> The union presented compelling evidence that the firefighters are fatigued, unable to complete training and unable to complete inspections as a result of the employer's decision to maintain a minimum staffing level of 28. The employees' interests in

[6] This reasoning belies the City's assertion PERC impinged on the City's ability to define scope of service or that PERC improperly substituted its judgment for that of the City. (Petition for Review at p.9-10). The City simply failed to present any evidence on the issues, instead, relying on their belief that manning could never be a mandatory subject of bargaining.

> workload and safety outweighs the employer's right to determine the number of firefighters assigned to each 24 hour shift.

(AR 21, emphasis added).

Essentially, the record showed, and PERC concluded, the City made no effort to show bargaining shift size would impinge the City's ability to provide firefighting services to the City of Everett. The City failed to provide any convincing evidence manning should not be a mandatory subject of bargaining under the facts of this case.

PERC concluded:

> By finding the union's proposal in this instance to be a mandatory subject of bargaining, we are not finding that a proposal on minimum staffing would be a mandatory subject of bargaining every time the parties negotiate. Each round of bargaining would present facts for analysis. While this does not provide parties with certainty about what topics are mandatory subjects of bargaining, it does effectuate the appropriate balance.

(AR 22).

PERC applied the correct standards to determine manning was a mandatory subject of bargaining in this case.

iv. Court of Appeals decision.

As shown above, PERC's analysis was in complete alignment with the direction this Court established in *City of Richland*. The Court of Appeals decision affirmed PERC's decision, and is also in accord with the *City of Richland*.

At the outset, the Court of Appeals rejected the City's blanket argument that *City of Richland* stood for the proposition that manning could never be a mandatory subject of bargaining. City of Everett v. Public Employment Relations Commission, 451 P.3d 347, 350 (October 28, 2019).

The Court of Appeals concluded:

> We hold the Washington State Supreme Court decision in International Ass'n of Fire Fighters, Local Union 1052 does not support the City's argument that without regard to workload and safety, as a matter of law shift staffing is never a mandatory subject of collective bargaining. Because the Union proposal to amend Article 27, Health and Safety, to increase the minimum number of firefighters and paramedics on duty for each shift both relates to "conditions of employment and is a managerial prerogative," PERC did not err in balancing the City and Union interests to determine "which of these characteristics predominates." Int'l Ass'n of Fire Fighters, Local Union 1052, 113 Wash.2d at 203, 778 P.2d 32.

Id. at 357.

The Court of Appeals went through a step by step review of how PERC had applied the guidelines established in *City of Richland.* That included: 1) the balancing test, *Id.* at 357; 2) management prerogative, *Id.* at 358; 3) public interest, *Id.* at 358; 4) cost, *Id.* at 358; and 5) increased workload and safety, *Id.* at 359.

The Court of Appeals concluded substantial evidence supported PERC's decision. As a result, the Court of Appeals affirmed PERC. *Id.*at

363. The decision of the Court of Appeals is not in conflict with any Supreme Court or Court of Appeals decisions.

2. The Balance of The City's Arguments have no Merit.

The City's other arguments include the claims PERC reached an erroneous conclusion, exceeded its authority, improperly usurped the City's ability to budget, and improperly injected a public interest factor. Those arguments fail to meet the standard for Discretionary Review. If the City wished to have those issues addressed, it should have sought reconsideration in the Court of Appeals. Regardless, the arguments fail to show PERC's decision was wrong, or justify Discretionary Review.

i. Review of Agency decision.

Appeal of a PERC decision is regulated by Chapter 34.05, RCW, the Administrative Procedure Act. Public Employees Relations Com'n v. city of Vancouver, 107 Wn.App. 694, 702, 33 P.3d 74 (2001). The test is whether the findings of the Commission are supported by substantial evidence in the record or whether the action of the agency was arbitrary or capricious. City of Federal Way v. Public Employment Relations Commission, 93 Wn.App. 509, 511-12, 970 P.2d 752 (1998).

An action is arbitrary and capricious within the meaning of the APA when the action is willful and unreasoning, without consideration and disregards the facts and circumstances involved in the situation.

Where there is room for two opinions, the action is not arbitrary and capricious even though one may believe the wrong conclusion has been reached. A party alleging an act was arbitrary and capricious carries a heavy burden. Pierce County Sheriff v. Civil Service Commission of Pierce County, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

The Public Employment Relations Commission's interpretation of the public bargaining statute is entitled to substantial weight. City of Pasco v. Public Employment Relations Commission, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

ii. PERC did not improperly exclude cost evidence.

PERC rejected the City's cost arguments because the City had never raised the issue of inability to pay during the negotiations. This was not an arbitrary decision by PERC. PERC held:

> Arguments raised only at hearing and not presented to the other party should not be allowed to form the basis of a party's argument that a proposal is or is not a mandatory subject of bargaining. *See City of Spokane*, Decision 4746 (PECB, 1994).

(AR 20, Court of Appeals finding the decision was not arbitrary or capricious, City of Everett v. Public Employment Relations Commission, *supra* at 359).

On the other hand, the Firefighters/Paramedics made it well known from the very beginning that their position was based on the argument

there was a demonstratedly direct relationship between workload, health and safety under the facts of this case. The Firefighters/Paramedics' arguments were properly considered at the hearing and by PERC.

The attempt by the City to introduce cost evidence only at the hearing highlighted the City's failure to bargain in good faith during negotiations. *See* City of Everett, *supra* at p. 359. In addition, the City failed to show how cost alone impacted PERC's need to determine whether or not the increased workload for the Firefighters/Paramedics had a demonstratedly direct relationship to workload, health and safety. The City failed to establish any nexus between cost and safety.

This was not a case of PERC "effectively putting nothing on the City's side of the scale."[7] It was a case of the City providing absolutely no evidence to show how manning, as a mandatory bargaining subject, impinged on the City's rights (AR 20). It was not up to PERC to develop the City's arguments and present evidence on the City's behalf. The City simply and utterly failed to show why manning, under the facts of this case, should not have been a mandatory subject of bargaining.

Review of the record shows the evidence put forth by the Firefighter/Paramedics was unrebutted, a fact noted by PERC multiple

[7] Petition for Review at p.13.

times. (AR 14, 15, 16, 17). The Court of Appeals also noted the City's failure to rebut the Firefighter/Paramedic evidence:

> Unchallenged findings of fact and unrebutted testimony establish a dramatic increase in the volume of calls to the fire department with no increase in the number of firefighters and paramedics to respond to the calls.

City of Everett, *supra* at 359.

> The unrebutted testimony of the fire department chiefs and captains supports PERC finding a demonstrably direct relationship between workload and safety. The testimony established the increased demand to respond to calls resulted in safety risks to the crews on duty for each shift.

Id. at 360.

Expert testimony was offered without objection. City of Everett, at 362

The Court of Appeals also noted:

> The uncontroverted testimony supports the unchallenged finding that states:
>
> > Firefighters have safety interests that are related to shift staffing. When firefighters respond to service calls, they are exposed to hazardous elements that can cause physical and psychological injuries. Some of these elements include smoke, fumes, dangerous chemicals, blood-borne pathogens, and being struck by falling objects or vehicles. The exposure to these elements can lead to immediate injury or illness, or to more long term impacts as a result of cumulative exposure. Responding to increased numbers of service calls increases exposure to risk elements.

Id. at p.362-63.

The City's conclusory argument that PERC substituted its judgment of the public interest for the City's elected officials also fails.[8] That is the same argument which this Court rejected when it decided public employee collective bargaining was not unconstitutional in City of Everett v. Fire Fighters, Local No. 350, *supra*, at 574.

PERC did not substitute its judgment for the determination of the City's elected officials. PERC analyzed the evidence and lack thereof set forth by the City, to determine manning, under the facts of this case, was a mandatory subject of bargaining.

iii. PERC did not inject a "new" public interest element into the balancing equation.

The *City of Richland* held that the public interest must be an element in the balancing equation to determine whether or not manning will be a mandatory subject of bargaining. *Id.* at 204. PERC specifically recognized this mandate when it made the decision in this case. (AR 20-21). To claim it is improper to include the public's interest in the balancing test is simply specious. *See* City of Everett, *supra* at 358.

iv. There is no new issue of public interest.

This Court has already held that under certain circumstances, manning can be a mandatory subject of bargaining. This case does

[8] Petition for Review at p.10.

nothing to change that ruling. PERC's decision, by its terms, limits this case to the facts as presented *in this case only.* (AR 22). The decision *does not hold manning is always a mandatory subject of bargaining.* There is no continuing public interest element to this case because it does not present a new or different issue of public interest. (RAP 13.4(b)(4)).

IV. CONCLUSION

The City fails to establish any arguments which meet the standard for Discretionary Review under RAP 13.4(b). The decision of the Court of Appeals is not in conflict with other decisions; it does not present a significant question of law under the Constitution of the State of Washington or the United States, and as decided, the case does not involve a new or different issue of substantial public interest that should be determined by the Supreme Court.

PERC correctly decided manning was a mandatory subject of bargaining under the facts of this case. Affirmance was proper.

Based on the arguments presented in this Answer to Petition for Review, the City's Petition for Review must be denied.

RESPECTFULLY submitted this 19th Day of December.

COGDILL NICHOLS REIN WARTELL ANDREWS

By: /s/ W. Mitchell Cogdill
W. Mitchell Cogdill, WSBA #1950

APPENDIX A

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF EVERETT, Complainant, vs. IAFF LOCAL 46, Respondent.	Case No. 127504-U-15 RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES TO CITY'S COMPLAINT CHARGING UNFAIR LABOR PRACTICES

Comes now Respondent IAFF Local 46, and submits this answer and affirmative defenses to the Unfair Labor Practice charge, the statement of facts, and the proposed remedy as alleged by the Complainant City of Everett.

ANSWER

1. The Union admits all of the City's assertions in Paragraph 1 of its Statement of Facts except that there are 164 bargaining unit members.

2. The Union admits the parties engaged in bilateral negotiations and mediation except for the issue involving Article 27 Health and Safety, concerning which the City refused to engage in negotiations. The Executive Director did certify issues

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for interest arbitration by letter dated July 2, 2015, including Article 27 Health and Safety.

3. During the course of mediation the City did indicate it took the position Article 27 Health and Safety was not a mandatory subject of bargaining, while the Union, based upon *IAFF Local 1052, the Public Employee Relations Commission (No. 55802-7)*, 113 Wn.2nd 197, 778 P.2d 32 (1989) and other case law alleged that the facts here involving increased work load imposed on the unit's members as a result of increased call volume, and a historically decreasing unit work force, implicated and adversely affected health and safety of unit members, as well as increasing work load, thus making Article 27 a mandatory subject of bargaining.

4. Based upon the facts of the case the Union did maintain an Article 27 proposal involving Health and Safety requiring the implementation of a provision placing 35 unit members on duty at all times during the negotiations process.

5. There has been no grievance filed by either party.

6. Thus, the proposal advanced by the Union in bargaining to impasse dealing with Health and Safety, as impacted by the number of on duty crew, is a mandatory subject of bargaining because it directly affects working conditions of bargaining unit members involving work load and health and safety.

Having fully answered the City of Everett's Complaint of an Unfair Labor Practice, it is affirmatively alleged as follows:

AFFIRMATIVE DEFENSES

7. The City and the Union have had in existence a version of or the same Article as Article 27 Health and Safety contained in the Collective Bargaining Agreement since 1973.

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8. The agreement of the parties to include Article 27 Health and Safety in the Collective Bargaining Agreement between them was based upon the joint understanding that as related to the working conditions, workload, and health and safety of unit members, the number of unit members on duty at any one time, was an integral part of maintaining and assuring the health and safety of unit members, as well as ameliorating the work load of unit members.

9. This recognition and agreement was altered in 1976 when the City took the position it was unconstitutional to impose interest arbitration requirements on it pursuant to RCW 41.56, and that minimum staffing was not a mandatory subject of bargaining under any circumstance, and the City therefore should not have to bargain that provision. Litigation followed that reached the Washington State Supreme Court, culminating in the decision of *Everett v. Everett Firefighters*, 87 Wn.2d 572, 555 P.2d 418 (1976). The Supreme Court recognized the Trial Court's findings, without deciding, that minimum staffing requirements had been negotiated in the past, and that it did appear the size of the crew might well affect the safety of the employees, and would therefore constitute a working condition within the meaning of RCW 41.56.030(4).

10. All successive Collective Bargaining Agreements following the initial inclusion of the Health and Safety Article dealing with crew size, included a health and safety article that required a minimum staffing of at least 25.

11. The City's recognition of the relationship between the shift size of unit personnel, and health and safety and work load has been pronounced. From 2007 until 2009 the City had 27 personnel dedicated and on duty for Fire and BLS manning, and in 2009 until late 2010 it had 29 personnel dedicated and on duty for Fire and BLS manning for 12 hours per day, and 27 on duty for 12 hours per day. During each of the four years, 2007 through 2010, the City also

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dedicated 6 personnel on duty for Fire and ALS manning. This dedicated manning exceeded the mandatory minimum staffing of 25 and instead provided for a minimum staffing of 33 in 2007 and 2008, and 33 or 35 in 2009 and most of 2010. Commencing in October of 2010 the City began a systematic reduction in staffing by not hiring overtime to staff three of the Department's Fire and BLS units, and not hiring new personnel to replace retiring personnel. This has resulted in the Department now utilizing a minimum staffing of only 22 personnel on Fire and BLS manning, and 6 for Fire and ALS manning, for a total of 28 on duty personnel, down 7 personnel from the 35 on-duty personnel in 2010. The minimum on duty staffing has remained the same from 2010 through this date.

12. That the City and the Union recognized the relationship between minimum unit members on duty and their safety is set forth in Article 27 itself, which provides that if the City wishes a change in the manning requirements during the course of the Contract, it is to be submitted to arbitration if it is not agreed to, or a determination as to whether the City's proposal

> ... will improve efficiency of service and that it does not reasonably impair the safety of the firefighting force.

13. Since the implementation of Article 27, and its predecessors, the population of the City of Everett, its land area, call volume, number of fire stations, and unit personnel have exponentially increased. In 1978 the City of Everett had a population of 52,000, a city land area of 22.68 square miles, a call volume of 4980, 5 fire stations, no less than 130 unit personnel, and actual minimum daily staffing of 26 unit personnel. In 2009 the City had a population of 103,500, a city land area of 31.88 square miles, a call volume of 18,541, and minimum daily staffing of 33 to 35 unit personnel, 6 fire stations and 173 unit members, including 14 office

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staff. In 2014 the City had a population of 104,900, a city land area of 34.16 square miles, a call volume of 21,389, 6 fire stations, 158 unit personnel, including 14 office staff, and a minimum daily staffing of 28.

14. While the call volume for the City of Everett Fire Department has increased dramatically, the number of personnel available to respond to the call volume has decreased over time. This has had the effect of not only increasing the workload of the personnel on duty, but has done so at the expense of training time, eliminating in some cases even the ability to eat lunch, providing no opportunity on many occasions to clean rigs of bacteria and other pathogens unit members must respond in, requiring personnel to continue to work their entire shift, or great portions of their entire shifts, with an accumulation of bacteria and pathogens, exposing unit members to sickness and, because of the increased workload and exhaustion attendant thereto, injury. In addition, on duty and off duty personnel are performing their jobs and reporting to duty tired by not having an ability to rejuvenate and refresh between the many calls they must respond to, and maintain the other obligations and duties unit members have at the stations, including training and other related obligations.

15. There have been occasions where there have been so few on duty crew members available to respond to emergencies and fires, that insufficient numbers of personnel have had to respond to emergencies and fires and either proceed immediately to assist being understaffed, or wait while the emergency became more dire and critical, and for other personnel to appear to assist if at all. The risk of harm, as well as actual harm, experienced by on duty personnel is magnified in these situations. In addition, there is an increased risk of harm to the citizens of Everett, and by allowing the emergency to become more involved by the time crews arrive, the

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unit members' risk of harm is exponentially increased. This is especially acute involving crews assigned to the north end of the City of Everett.

16. It is not uncommon in the City of Everett for the call volume to be so excessive there are not enough rigs or personnel to dispatch to calls, resulting in the late arrival at emergency scenes.

17. Because there is not sufficient time to train because of the call volumes related to the number of personnel, unit personnel are less able and ready on a daily basis to respond to the many emergencies confronting them, thus putting them further at risk. This, combined with the exhaustion experienced by unit members because of the heavy call volume and lack of personnel to appropriately respond, further increases the risk of harm to these personnel.

18. Historically the City had responded to lack of training time because of call volume, by calling back crews for overtime to cover the training of on duty personnel when there was otherwise no time to train on duty personnel. That no longer occurs.

19. Unit personnel are consistently run down, tired, sick, and more prone to injury on the job because of the lack of personnel in relationship to the number of calls.

20. In addition, because of the number of calls, combined with the number of personnel to respond to the calls, it is difficult for unit members to conduct the required inspections within the City, which directly leads to a lack of knowledge by unit members of buildings/structures within the City, thus increasing the risk of harm when unit personnel respond to fires or emergencies within those buildings, not knowing the layout or the configuration of the individual buildings.

21. In general, the long term occupational health risks of unit personnel has increased and is increasing daily with the current configuration of manpower and number of calls.

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22. Given the above, the health and safety article, Article 27, proposed by the Union is a mandatory subject of bargaining because shift staffing, given the facts, directly relates to work load of unit personnel and the health and safety of the unit personnel.

REMEDY SOUGHT

1. The Union denies that the remedy requested by the City is appropriate under the facts of this case.

2. The Union seeks an Agency determination that its proposal involving Health and Safety Article 27 involving staffing levels constitutes a mandatory subject of bargaining because staff levels under the facts of this case have a demonstrably direct relationship to employee workload and safety, requiring the City to bargaining over these as enunciated in *IAFF Local 1052 v. Public Employee Relations Commission No. 55802-7*, 113 Wn.2d 197, 778 P.2d 32 (1989).

3. The Union seeks a finding that not only its proposal, Article 27, under the facts of this case, is a mandatory subject of bargaining, but that the City be ordered to engage in bargaining mediation, and interest arbitration if necessary, immediately following the issuance of the decision, and that there be an award of attorneys' fees to the Union with all reasonable and necessary costs.

4. Furthermore, should there be any injuries or illnesses of affected unit personnel that occur in the interim, and result directly or in part because of the lack of appropriate staffing, that there be required a subsequent fact finding hearing(s) to determine the relationship of the injuries and/or illnesses to the lack of staffing, and to require appropriate damages, compensation and attorneys' fees to the unit members involved/injured and/or made sick.

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5. A finding that the City, by allowing staffing to be reduced in the face of dramatically increased call volume during a lengthy period of growth within the City, has exercised any prerogative it might have to determine staffing levels to the point it has created a safety and workload issue, making staffing a mandatory subject of bargaining.

Date: August 20, 2015

W. Mitchell Cogdill
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DECLARATION OF DELIVERY

I, SUSAN EGBERT, declare the following is true and accurate

On August 20, 2015 I caused to be emailed and mailed the foregoing Union's Answer to City of Everett's Complaint Charging Unfair Labor Practice, addressed as follows:

Public Employment Relations Commission
PO Box 40919
Olympia, WA 98504-0919

Lawrence Hannah
Perkins Coie
The PSE Building
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Executed at Everett, Washington, this 20th day of August, 2015.

Susan Egbert

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Answer to Petition for Review to be served by email, addressed to the following:

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Dated this 19th day of December, 2019 at Everett, Washington.

/s/ Susan Egbert
Susan Egbert

COGDILL NICHOLS REIN WARTELLE ANDREWS

December 19, 2019 - 11:25 AM

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