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Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

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Impact Bargaining – How Does It Work?

Those readers who have faithfully read *The Firehouse Lawyer* over the more than 20 years since we started publication are familiar with the distinction between mandatory subjects and permissive subjects.

In public sector labor relations in Washington State, because this is such an important distinction, we will say a few more words about the difference to set the stage for this article concerning impact bargaining (sometimes referred to as "effects" bargaining, which is the same thing under a different name).

Mandatory subjects include wages, hours and working conditions, that you must bargain with the union before making any changes. With respect to permissive subjects: You are not required to bargain any changes to permissive subjects, but you are required to bargain the *impacts* arising out of the change to that permissive subject.

So the question becomes: which topics are mandatory and which are permissive? The answer is not that straightforward.

The test outlined in *Local 1052 v. PERC*, 113 Wn.2d 197, 203 (1989) is one we find instructive. In deciding whether a subject is mandatory or permissive one should consider: (1) the relationship the subject bears to the wages, hours

and working conditions of employees and (2) the extent to which the subject lies at the core of entrepreneurial control of the enterprise.

We can liken this to two ends of a spectrum: at one end of the spectrum, a strong tie to wages, hours or working conditions indicates the subject may well be mandatory. By contrast, if the subject relates to the basic business model, the nature of services provided by that employer, or the overall staffing of the enterprise, the subject is probably a permissive one.

This dichotomy stems initially from two U.S. Supreme Court cases that dealt with this mandatory/permissive issue in two situations involving layoffs of personnel. In *Fibreboard Paper Products. v. NLRB,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed. 2d 233 (1964) the U.S. Supreme Court (SCOTUS) said the layoffs were done due to a desire to contract out the work. Because the layoffs were clearly done for budgetary reasons, SCOTUS held the decision to layoff employees was mandatory and had to be bargained first.

By contrast, in *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed. 2d 318 (1981), the Court held that because the employer shut down part of its business, although that may have been done for budgetary reasons, on balance, the layoffs were a permissive subject. Even though these layoffs may have been made for economic reasons, the employer's right to manage its business model outweighed the union's or the employees' interest in participating in that decision.

Washington courts and the Public Employment Relations Commission seem to rule consistently with these two Supreme Court decisions. In the case of *Kitsap County v. Kitsap County Correctional Officers Guild,* 193 Wn.App. 40, 372 P.3d 769 (2016), Division 1 of the Court of Appeals held that layoffs were in that case done for budgetary reasons and therefore the decision impacted a mandatory subject the employer should have bargained about, prior to implementing the decision.[1]

However, the Division 1 court cited PERC decisions in which the staffing cuts were found to be permissive subjects as they were related to "closing operations, reorganizing, or changing the scope of services." In other words, a change that is "programmatic" or a fundamental change in the business model of the entity is a permissive subject of bargaining. Thus, it seems to us that layoffs motivated solely to cut costs—for budgetary reasons—are usually going to be mandatory subjects. But if the layoffs are part of a reorganization being done for other reasons such as greater efficiency, public safety or firefighter safety, and the like, being so close to the core of entrepreneurial control of the enterprise, these would be permissive subjects.

PERC has also found that "the size of an employer's workforce is a managerial prerogative, and therefore a permissive subject of bargaining." *City of Centralia,* Decision 5282-A (PECB, 1996).

Similarly, in *Tacoma-Pierce Health Department,* Decision 6929-A (PECB, 2001) PERC held that the restructuring of the substance abuse program at the local health department was a permissive subject even though it led to the layoff of personnel. The PERC Examiner said this plan went to the "heart of the entrepreneurial control"

[1] https://www.firehouselawyer.com/Newsletters/April2016FINAL.pdf

of management, and therefore the ULP claim of the union was dismissed.

In *City of Bainbridge Island,* Decision 11465 (PECB, 2012), a PERC Examiner ruled that a major reorganization of the workforce, leading to layoffs, was not a mandatory subject and therefore dismissed the ULP complaint. It was also noted, however, that the employer expressed a willingness to bargain the impacts of the decision to reorganize and did in fact bargain regarding those impacts, even into a mediation phase.

If the reorganization model costs more than the original model for doing business (or about the same), that also of course cuts against the argument that it is being done for budgetary reasons. If the reorganization seems to save money for the employer, that may make the determination a bit more difficult, but the evidence may demonstrate that cost cutting was not the primary objective. In that instance, we believe the decision to reorganize is not a mandatory subject of bargaining, but since it could impact the wages, hours and/or working conditions of employees, there should be bargaining about those impacts.

However, it is well established that although it is an unfair labor practice to refuse to bargain about a mandatory subject, it is also an unfair labor practice to insist to impasse that an employer must bargain a change affecting a permissive subject. See *Kitsap County v. Kitsap County Correctional Officers Guild,* 179 Wn. App. 987, 998 (2014).

The advice that we would therefore give to employers faced with this complex situation presented when a reorganization is contemplated to change the provision of services to the public, is to examine all of the reasons for the move. If the primary reason or reasons are something other than simply cutting costs, then the decision is probably not a mandatory subject requiring bargaining, but once the employer gives notice of its decision, it should simultaneously offer to enter into impact bargaining. In virtually every case of reorganization, layoffs or some other changes to wages, hours or working conditions are a likely consequence. So be careful and consult labor counsel if there is any doubt as to how to proceed.

Bills Enacted This Session

Just a quick note to let our readers know what legislation relating to the fire service actually made it to the Governor's desk. HB 1159 allows an increase from a five-member board of a fire district to a seven-member board, with a majority vote of the electorate. The law is effective on July 25, 2-21. This bill was sponsored by Rep. Bronoske, who is employed at West Pierce Fire & Rescue.

ESHB 1168[2] represents the most comprehensive legislation relating to wildland fire response and forest health ever seen in Washington State. In the biennial budget, due to this law, there will be more than $54 million in 2021-2022 and more than $74 million in 2022-23 appropriated for these purposes. A truly historic enactment for the state forestlands.

SB 5198[3] permits ambulance services established by associations comprised entirely of municipal

[2] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/House%20Passed%20Legislature/1168-S2.PL.pdf?q=20210430104138

[3] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Passed%20Legislature/5198.PL.pdf?q=20210430103924

entities located in rural areas having insufficient personnel resources to use ambulance drivers:

- Without medical or first aid training
- But who must:

  a. be at least 18 years of age;
  b. pass a background check;

  c. be accompanied by a non-driving EMT; and

  d. Must limit patient care to the level they are trained

This law is also effective July 25, 2021.

SB 5338[4] provides authority to fire districts to provide training on workplace safety and other training to improve prevention of industrial accidents. The bill also allows interlocal agreements to do the same thing. We believe this was an issue arising in Clark County. It is not a mandate and is essentially permissive. Although fire districts are special districts with limited powers, perhaps the Legislature recognized that a fire department's statutory authority to "protect life and property" is broad enough to permit training that falls outside the scope of fire protection and EMS.

HB 1034[5] removes park and recreation district levies from the $5.90 limitation of RCW 84.52.043 pertaining to pro-rationing of taxes. There have been many of these types of bills in recent years for various types of municipal corporations. However, this bill was amended at Senate Ways and Means Committee to only apply upon islands located within counties with more than two million county residents. Thus it appears to us that this special legislation, which takes effect July 25, 2021, only applies in King County. Moreover, we are not familiar with any islands in King County that also have Park and Recreation Districts, except for Vashon Island. A good example of how special legislation can be tailored so that it applies very narrowly.

ESHB 1189 relates to tax increment financing available in cities, counties and ports. This is not a new proposal exactly. Our clients have asked over the years about legislation like this that limits or eliminates property taxes on certain properties (usually in urban areas) when deemed desirable by the local government for policies such as urban renewal or affordable housing. The concern is that when used extensively this type of tax relief could damage fire district or RFA revenue streams. Apparently, a lot of attention has been given to ameliorate any potential impacts of that nature due to this particular legislation.

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[4] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5338.SL.pdf

[5] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/House%20Passed%20Legislature/1034.PL.pdf?q=20210430103844