STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL I-369,	)	
Complainant,	)	CASE 12920-U-97-3116
vs.	)	DECISION 6058-A - PECB
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,	)	DECISION OF COMMISSION
Respondent.	)	

Davies, Roberts & Reid, by Kenneth J. Pedersen, Attorney at Law, appeared on behalf of the complainant.

Melvin N. Hatcher, Attorney at Law, and Julie S. Marboe, Certified Legal Assistant, appeared on behalf of the respondent.

This case comes before the Commission on a petition for review filed by the Washington Public Power Supply System, seeking to overturn a decision issued by Examiner Walter M. Stuteville.[1]

BACKGROUND

The Washington Public Power Supply System (employer) and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local I-369 (union) are parties to a collective bargaining relationship involving resource protection officers, nuclear security officers, emergency operations facility communications center operators, and

[1] Washington Public Power Supply System, Decision 6058 (PECB, 1997).

watchpersons. A collective bargaining agreement was in effect between the parties from November 4, 1994 through October 31, 1997.

Prior to events giving rise to this controversy, the employer had a policy which prohibited smoking in its buildings and enclosed areas, and which limited smoking to outside areas on the employer's premises. The policy had not been a subject of bargaining up to early April of 1996.

A union staff representative heard from a union steward that the employer was going to be reviewing the tobacco policy and, on April 12, 1996, the employer gave the union telephonic notice that a committee had been established to review the tobacco policy. By letter of April 17, 1996, the employer informed the union that it was reviewing its smoking policy, and that a committee had been formed "to assess the current situation and trends and to make recommendations".

A revision to the employer's policy on April 18, 1996, prohibited smoking near entries and on pathways, and established specific designated smoking areas.

By memorandum of May 23, 1996, to all employees, the employer informed its employees of the following:

> Research indicates that the use of tobacco adversely impacts the health and well-being of smokers and non-smokers exposed to tobacco smoke, interferes with productivity, results in increased maintenance cost of facilities, and contributes to escalated health insurance premiums. Together, these concerns have prompted the Supply System to change its existing smoking policy.
>
> The Supply System is committed to providing all employees with a comfortable and healthy

> work environment, free from the negative effects of tobacco use. In support of that commitment, ***effective June 3, 1996,*** *smoking will be prohibited on Supply System property, with the exception of 10 locations designated as temporary smoking areas.* A list of these areas is attached.
>
> The designated smoking areas are to be used by employees, contractors, vendors, job applicants, and any other individuals on Supply System property. Smoking will no longer be permitted between buildings or in parking lots. *The smoking areas will remain in effect until* ***early 1997,*** *when the Supply System will issue a revised policy mandating a total tobacco-free work environment.* Full compliance with these changes will be expected of all employees, and any violation of the rules will be handled by individual supervisors.

[Emphasis by **bold** in original; emphasis by *italics* supplied.]

There is no indication that any of the foregoing changes were communicated to the union prior to their announcement to employees.

In early June, 1996, the union staff representative heard that the smoking committee and management may be going in different directions. By letter of June 12, 1996, the union's business representative wrote to the employer's labor relations manager stating the following:

> It has come to OCAW's attention that the Supply System plans some drastic changes in their current Smoking Policy.
>
> It is our understanding the Supply System reported to the Security Officers it was talking or working with the "Unions" on a revised Smoking Policy. As of this date, OCAW has not heard one word from the Supply System about a change in the policy.

> **If the Supply System plans to change their Smoking Policy, OCAW demands the parties meet and bargain on the issue.**
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> [Emphasis by **bold** supplied.]

By letter of June 26, 1996, the employer advised the union that it stood "ready and willing to meet at reasonable times to discuss any item brought up by the Union". The employer gave the union a name and phone number of its contact if the union wished to schedule a meeting. The employer also attached a copy of a smoking policy dated November 30, 1993, which it characterized as being in effect at the time.

Employer officials, the smoking committee established by the employer, and union officials met on July 16, 1996, to discuss the issue of the smoking policy. From that meeting, the union understood that:

- The smoking committee recommended that the outdoor smoking areas continue to exist, but management was going in a different direction;

- The employer's concerns were health costs, productivity and sick leave; and

- If there were going to be any future changes in policy, the management and union would get together and bargain on the topic.

The employer understood from the same meeting that:

- It conveyed the message to the union that policies apply to everyone;

- It was willing to discuss only the effects of the smoking policy; and

- It clearly stated it would be going to a tobacco-free environment by early January.

On or about November 1, 1996, the union contacted the employer's labor relations manager and asked about the smoking policy. A meeting was scheduled for November 19, 1996.

By a letter which was dated November 18th, but which was handed to the union representative at the meeting on November 19th, the employer informed the union that "Earlier this year, the Supply System began planning for a smoke free/tobacco free environment". The letter also stated:

> Attached is a draft of the proposed modifications to General Information Handbook (GIH) 4.2.4. This GIH will implement a Supply System wide tobacco free working environment effective January 1, 1997.

So far as it appears from this record, the policy attached to that letter was the first time the employer had provided the text of its proposed changes to the union. At the meeting on November 19th, the union asked the employer not to implement the policy, and the union understood the employer's representative agreed to more meetings.

By letter dated December 11, 1996, the union proposed that:

- Certain areas designated as covered smoking areas be furnished with benches or chairs;

- Certain other areas be designated as smoking areas;

- The employer fund non-smoking clinics, with details to be worked out in negotiations;

- The employer pay for and supply products that help people stop smoking, with details to be worked out in negotiations; and

- The employer set up a committee of union-designated security officers and three employer-designated individuals to work on additional stop smoking programs.

The union's letter also stated:

> We insist that the Supply System not unilaterally implement its proposed rule, until negotiations are completed on all issues.
>
> OCAW suggest we meet on these proposals as soon as possible. Please advise.

On December 20, 1996, the union and employer met to discuss the union's proposals.

By letter of December 23, 1996, the employer informed the union of the following:

> We have had the opportunity to review and carefully consider all of the points discussed in our meeting, Friday, December 20, 1996, regarding tobacco use at the Supply System.
>
> We have determined we will proceed with the policy as previously intended effective January 1, 1997. ...

The employer issued Policy GIH 4.2.4, effective January 1, 1997. The policy prohibited tobacco use on the employer's premises, equipment, and vehicles, and stated that employees violating the

policy may be subject to disciplinary action, up to and including termination of employment.

On January 14, 1997, the union filed the complaint charging unfair labor practices in this proceeding, alleging the employer refused to bargain in violation of RCW 41.56.140(3). In particular, the union alleged that the employer implemented a policy barring the use of tobacco on January 1, 1997, that the implemented policy would subject members of the bargaining unit to discipline for violations of the policy, that the union demanded to bargain upon learning of the employer's planned implementation of the policy, and that the employer implemented the policy prior to the completion of bargaining. The union alleged that the employer failed in its duty to notify the union of proposed changes in areas constituting mandatory subjects of bargaining, and failed to bargain in good faith. The union requested that the Commission order the employer to: Rescind its policy, cease and desist enforcement of the policy and any similar or related policies, bargain with respect to the policy to agreement or impasse, and upon impasse submit the matter to interest arbitration.[2]

Examiner Walter M. Stuteville held a hearing on April 9, 1997, and later issued a decision finding the employer refused to bargain on the smoking policy in violation of RCW 41.56.140(4). The Examiner ordered the employer to withdraw its proposals and policies on the subject of smoking and/or tobacco use, and to meet with the union to bargain collectively on the subject. The employer petitioned for review of that decision by the Commission.

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[2] The bargaining unit contains at least some employees who are eligible for interest arbitration under RCW 41.56.430, et seq. Although the union mentioned "temporary relief" among it remedy requests, it did not pursue that request under WAC 391-45-430.

POSITIONS OF THE PARTIES

The employer first argues that the unfair labor practice complaint should be dismissed as untimely; that the employer communicated on May 23, 1996, that a change in the tobacco policy had been made; and that the union complained of "drastic changes" in the tobacco policy on June 12, 1997. The employer also argues that the bargaining unit represented by the union is inappropriate, because it commingles both uniformed and non-uniformed personnel, and that the Examiner improperly placed the burden of assuring an appropriate bargaining unit solely on the employer. The employer next contends that the tobacco policy is not a mandatory subject of bargaining, and that the union waived its bargaining rights by inaction and by contract. The employer asserts that it remains willing to meet with the union to discuss the effects of the decision to implement the tobacco policy.

The union contends that the employer's smoking policy is a mandatory subject of collective bargaining, that the employer failed to provide the union with adequate notice of its planned changes in its tobacco policy, and that the employer failed to bargain in good faith. The union argues that it did not waive bargaining by inaction, and that the employer's change in policy was presented as a "fait accompli", so that any demand to bargain would have been futile. Noting that the employer's nuclear plant security personnel are "uniformed personnel", the union urges that the employer must submit any disagreement to interest arbitration. The union argues that the employer's willingness to engage in "effects" bargaining furnishes no defense, since the union is only charging the employer with a failure to bargain with respect to the decision itself.

DISCUSSION

Timeliness of the Complaint

RCW 41.56.160(1) both authorizes and limits the processing of unfair labor practice charges, stating as follows:

> The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That **a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of a complaint with the commission. ...**

[Emphasis by **bold** supplied]

That six-month period begins to run with the date of notice or constructive notice of the complained-of action. City of Pasco, Decision 4197-A and 4198-A (PECB, 1994); Port of Seattle, Decision 2796, 2796-A (PECB, 1987); Emergency Dispatch Center, Decision 3255-3255-B (PECB, 1990).

The complaint filed in this matter on January 14, 1997 was timely as to events occurring on or after July 14, 1996. The complaint was well within the statute of limitations period as to the change of tobacco policy implemented by the employer January 1, 1997.

The burden rests with the employer to prove that the disputed change was actually implemented before July 14, 1996, and the union had knowledge of the change at an earlier date. City of Pasco, supra. The employer argues that the six-month period should be computed from its May 23, 1996 memorandum to employees, and that the union's June 12, 1996 letter acknowledged awareness of "drastic changes" in the tobacco policy, but we reject those arguments.

The Employer's May 23, 1996 Memorandum -

The May 23rd memorandum did not announce any contemporaneous change, instead stating that, "The smoking areas will remain in effect ...". Thus, it neither implemented the complained of change nor resulted in serious adverse action to employees at that time.[3] See, Seattle School District, Decision 5237-B (PECB, 1996), affirmed, (King County Superior Court, No. 96-2-17727-O KNT, 1997), where the Commission rejected an employer argument that the statute of limitations period should be computed from the date when the employee involved was put on probation. The Commission noted that probation does not always result in nonrenewal, that a "notice of probable cause for nonrenewal" was required to begin a process from which a termination of employment could actually result, and that the period of limitations was properly computed from the date of the employer's affirmative action of issuing a "notice of probable cause of nonrenewal" to the employee.

The May 23rd memorandum only predicted an unspecified future change, stating that in "early 1997 ... the Supply System will issue a revised policy mandating a total tobacco-free work environment." For the purpose of implementing RCW 41.56.160, the information conveyed does not constitute a unilateral change in and of itself. Both the "early 1997" and "a revised policy" terms are too vague and general to commence the statute of limitations computation. Even its letter dated November 18 and delivered on November 19 had characterized the material transmitted as a "draft of the proposed modifications" to the smoking policy. Only when it implemented the total ban on use of tobacco products in its December 23, 1996

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[3] As the Examiner stated, if the union had filed a charge of unfair labor practices based upon the May 23, 1996, memo, the employer could have easily defended itself by denying that the memo actually changed any working condition.

letter (with a specific effective date of January 1, 1997), could it be said that the employer actually affected the wages, hours or working conditions of bargaining unit employees.

Finally, the employer's affirmative defense is technically faulty, by reason of its failure to establish that union representatives actually received the May 23rd memorandum. The intended audience of that document was the employees. In order for an employer action to start the statute of limitations clock under RCW 41.56.160, the union must be aware of the implementation of a change in working conditions. See, e.g., City of Pasco, Decision 4197-A, 4198-A (PECB, 1994), where a period when the violation was concealed from the union was excluded in computing the period of limitation. The exclusive bargaining representative of employees has legal existence and standing separate and apart from the employees it represents. This communication cannot be characterized as "notice to the union" of the type required by the collective bargaining process.[4]

The Union's Letter of June 12, 1996 -

Rather than an acknowledgment that the union knew in June of a change already implemented with a January 1, 1997 effective date, the union's June 12th letter only refers to the employer planning "some drastic changes", and states that the union had not heard about a change in policy. Such vague terms cannot be taken as

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[4] Numerous decisions of the Commission and its Examiners have stated and re-stated the principles that: (1) An employer must give notice to the exclusive bargaining representative of its employees and provide opportunity for collective bargaining before implementing changes of employee wages, hours or working conditions; and (2) A communication of changes directly to employees prior to fulfilling the statutory bargaining obligation constitutes an unlawful circumvention of the union.

proof that the employer had given the union clear notice of a specific change in working conditions.

Even if it indicates that the union was aware of something "in the wind", the union's June 12th letter does not acknowledge that any actionable change has taken place. As the Examiner stated, the sending of notice of a contemplated policy change is not itself an actionable offense, and is required if a party to a collective bargaining relationship is to fulfill its statutory obligations. See, Lake Washington Technical College, Decision 4721 (PECB, 1994). The fact that the union's letter demanded that the parties meet and bargain on the issue if the employer "plans to change their Smoking Policy" evidences that the union saw the decisionmaking process as incomplete as of June 12th.

Conclusions on Timeliness -

The union certainly cannot be charged with knowledge of a total ban on use of tobacco products prior to the July 16th meeting. While much of what occurred at the meeting is disputed, it is clear that the employer had created a committee to study the subject matter, and that the committee continued to exist and function after July 16, 1996. There is substantial evidence showing that meeting participants understood the union's concerns were to be taken to senior management, so that the issue was still open for debate. At the least, the union was unsure about whether the employer was definitely going to implement its plan for a total ban on use of tobacco products, and was expecting to hear more from the employer. While an employer witness testified that the employer consistently declined to negotiate its policies,[5] that contradicts its June, 1996 letter indicating a willingness to "discuss any item brought

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[5] Tr. 142 - 148.

up by the union". The record indicates the employer did not share its unwillingness to bargain the tobacco policy with the union until well within the six-month statute of limitations period.

In City of Dayton, Decision 2111-A (PECB, 1985) the Commission rejected a "timeliness" defense based on an employer's announcement of a change months before it was to take effect, noting a "potential for mischief" in circumstances comparable to this case. The Commission wrote there:

> So long as the union does not accept the entire package, the employer cannot cut off a union's bargaining rights by deferring implementation of unfavorable portions of a package proposal for six months or more.

We affirm the Examiner's decision that the complaint filed in this matter soon after the January 1, 1997 implementation of actual changes of employee working conditions was timely.

The Propriety of the Bargaining Unit

The employer argues that the bargaining unit represented by the union in this case is inappropriate, because it commingles both "uniformed personnel" and employees who are not "uniformed personnel",[6] and that a union may not pursue a "refusal to bargain" claim regarding an inappropriate bargaining unit.[7] The employer

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[6] In support of this assertion, the employer cites City of Yakima, Decision 837 (PECB, 1980); Thurston County, Decision 4848-A (PECB, 1995); and Snohomish County, Decision 5375 (PECB, 1995).

[7] In support of this assertion, the employer cites King County Fire District 39, Decision 2160(PECB, 1985), and City of Mukilteo, Decision 1571-B (PECB, 1983).

contends that the union has a conflict of interest in its representation of groups of employees with dissimilar interests, and that it would be inconsistent with state public policy to permit a labor organization to proceed in the face of such a conflict of interest. It asserts that the Examiner improperly placed the burden of assuring an appropriate bargaining unit solely on the employer.

The Origin of the Bargaining Relationship -

This case arises out of a bargaining relationship which was a long time in the making. See, Washington Public Power Supply System, Decisions 2065 and 2065-A (PECB, 1984) and Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1985). To summarize: The union petitioned the Commission in 1981, seeking certification as exclusive bargaining representative of security employees at a time when the employer had five nuclear power plants under construction. A dispute about the applicability of Chapter 41.56 RCW was litigated in Nucleonics, supra, where the Supreme Court of the State of Washington concluded that this employer is a public employer under Chapter 41.56 RCW. Although some of the nuclear facilities had been terminated or mothballed by the time the union was certified, in 1985, that was not a factor in the unit determination made at that time.

Origin of the Unit Determination Issue -

In 1973, the Legislature had established an "interest arbitration" process to resolve collective bargaining disputes involving limited classes of "uniformed personnel" defined in RCW 41.56.030(7), but RCW 41.56.430 et seq. then had no application to this employer or its employees. In a series of decisions dating back to at least City of Yakima, Decision 837 (PECB, 1980) and including King County Fire District 39, supra, units which mixed "uniformed personnel" with employees who were not eligible for interest arbitration were

divided into separate units reflecting eligibility for the interest arbitration process.

In 1993, the Legislature enacted multiple amendments to RCW 41.56.130(7), including one which added "security forces established under RCW 43.52.520" to the coverage of the interest arbitration statute. The 1993 amendment provided the first reason to question the propriety of the employer-wide security unit for which the union was certified in 1985, since the employees working at the four terminated nuclear projects arguably did not come within RCW 43.52.520.

The Parties' Responses to the Unit Determination Problem - These parties apparently had a collective bargaining agreement in effect when the 1993 legislation became operative. Since newly-enacted statutes are interpreted as not encroaching upon contractual rights, the first occasion for these parties to implement the Commission's separation precedents would have been in connection with the negotiation of a successor contract in 1994.

The employer, in fact, filed a unit clarification petition with the Commission on June 26, 1995. That proceeding under Chapter 391-35 WAC would clearly have provided a forum for debate on the applicability of the Commission's separation precedents. That petition remained pending when the parties signed their 1994-1997 collective bargaining agreement, on August 14, 1995.

WAC 391-35-310, which codified the precedents dating back to Yakima, supra, was made effective in April of 1996. It provides:

> WAC 391-35-310 Employees eligible for interest arbitration. Due to the separate impasse resolution procedures established for

> them, employees occupying positions eligible for interest arbitration shall not be included in bargaining units which include employees who are not eligible for interest arbitration.

Nevertheless, the parties truncated the unit clarification process by an agreement which postponed the division of the bargaining unit until the expiration of their 1994-1997 collective bargaining agreement. Specifically, they agreed to conduct separate negotiations at the expiration of their then-existing contract, with the intention of entering into separate contracts for: (1) the "security force established under RCW 43.52.520"; and (2) the rest of the historical bargaining unit. The parties also evidenced an intent to enter into a joint unit clarification petition in 1997, requesting that the Commission divide the historical unit into two and certify the union as the exclusive representative for both units. The employer thus withdrew its unit clarification petition on July 29, 1996.

The Examiner concluded that the duty to bargain was not eradicated by any impropriety of the bargaining unit in this case, reasoning that the history of the parties' past conduct and their agreement to effect the separation in the negotiation of the next contract was sufficient basis to withhold application of WAC 391-35-310. While we are troubled by both parties' past disregard of published Commission decisions, we affirm the Examiner's result.

The Commission has historically placed a high value on the contracts negotiated by parties. In Toppenish School District, Decision 1143-A (PECB, 1981), the Commission affirmed a decision in which the Executive Director had refused to exclude supervisors from a bargaining unit into which they had been placed by an existing collective bargaining agreement between those parties.

The Commission set forth a procedure, which has since been codified in WAC 391-35-020(2), under which unit clarifications are postponed until the termination of an existing contract. The Commission's reluctance to upset existing contracts was indicated by:

> Once a petition has been filed, the opposite party will be clearly on notice that any further bargaining concessions made or received relating to the unit status of disputed individuals would be subject to being lost through the results of the ensuing unit clarification proceedings.

Thus, the Commission limited unit clarifications mid-term in collective bargaining agreements to cases where there was proof of changed circumstances while the contract has been in effect. In like manner, the Commission upheld an agreement as between its immediate parties in Seattle School District, Decision 2079-A (PECB, 1985), even though it contravened RCW 41.56.070 and would not have bound third parties. In the case now before us, the parties arrived at the settlement of the unit clarification proceeding by an agreement between themselves. In view of the cited precedents, we hold them to their agreement.

An additional reason to honor the parties' agreement in this case flows from Article I, Section 23 of the Constitution of the State of Washington, which prohibits state action impairing existing contracts. Although circumstances such as those presented in this case were not discussed, we note that WAC 391-35-300 did not establish any particular deadline for compliance with its requirements. Since these parties had a collective bargaining agreement in effect for the historical unit when our rule was adopted in April of 1996, we hold that the first occasion to implement WAC 391-35-310 would be in the negotiation of a successor contract.

Essentially, the employer is asking us to say that *NO* unfair labor practice could be found as to conduct during any period of time when the parties had agreed to operate under an inappropriate bargaining unit configuration. The argument goes far beyond the logical consequences of the unit determination problem, however. Had these parties pursued the unit clarification proceeding initiated by the employer, the likely result under Yakima, Benton County, Decision 2221 (PECB, 1985), and Cowlitz County, Decision 2067 (PECB, 1984), would have been a division of the historical unit into two bargaining units represented by the same union.[8] The employer would have had an obligation to bargain with the union for both units. Thus, even if the historical unit had been separated into two units, the most that would have happened is that two unfair labor practice cases would have been docketed (reflecting those units) and the employer's alleged refusal to bargain would have been evaluated for two units instead of one. On these facts, we find that the result would have been the same.

Nor do we find King County Fire District 39, Decision 2160 (PECB, 1985) conclusive. In a preliminary ruling there, the Executive Director wrote that status as the exclusive bargaining representative of an appropriate bargaining unit was a necessary precondition to a union's "refusal to bargain" charge. Commission records did not disclose any certification of the bargaining unit, and a reference to inclusion of both "dispatchers" and "fire fighters" in the same unit raised doubts as to whether that unit was appropriate. In a subsequent decision in the same case, King County Fire District 39, Decision 2160-A (PECB, 1986), the Executive Director deemed that employer's historical concurrence in

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[8] That was, in fact, the outcome contemplated by the parties in their settlement agreement.

the bargaining unit configuration sufficient to overcome the "propriety of unit" problem.

We also find City of Mukilteo, Decision 1571-B (PECB, 1983) to be inapposite here. In that case, a union had been properly certified as exclusive bargaining representative of a unit that included only police officers.[9] A union representative later asked the mayor for voluntary recognition for an enlarged unit consisting of Police Department, clerical, and public works employees, and the mayor granted that request. The Commission found the enlarged unit to be inappropriate and dismissed a "refusal to bargain" charge, but the situations are not comparable. The defect in Mukilteo concerned that union's status as exclusive bargaining representative, since the voluntary recognition for the enlarged unit had been granted without any verification that the union actually had the support of a majority of the employees in the larger unit. In the case now before us, the union is entitled to a presumption of an ongoing majority status in the unit for which it was certified in 1985, and the employer has never questioned the union's majority status or filed a representation petition under WAC 391-25-090.

Nor do we find any merit in the employer's claim that the Examiner improperly placed some "burden" of non-compliance upon the employer. Both parties to a collective bargaining relationship have statutory obligations, and the bargaining unit employees have additional rights which flow directly from the statute. As a party to an agreement which maintained a unit structure that was arguably

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[9] Those employees were likely not "uniformed personnel" in 1983, when the population required for cities to qualify for interest arbitration was 15,000. The official state population estimates issued April 1, 1997 indicate that Mukilteo, which is in one of the fastest-growing parts of the state, now has a population of only 15,890.

inappropriate under Commission precedent (but not under any rule in effect at that time), the employer cannot now use an "inappropriate unit" defense to avoid its bargaining obligations vis-a-vis the union party to that agreement. Both the filing of the complaint in this case (on January 14, 1997) and the hearing (on April 9, 1997) occurred while the parties' 1994-1997 collective bargaining agreement was in effect. The decision must be based on the unit configuration and circumstances which existed prior to and between those dates. The parties' agreement was for action to take place in anticipation of or following the expiration of their 1994-1997 contract in October of 1997. To allow either the employer or union to evade its agreement on such a basis would prejudice the rights of the affected employees under Chapter 41.56 RCW.[10]

From its vigorous defense to this complaint, we infer that the employer does not take lightly the possibility of being found guilty of an unfair labor practice. If the employer's actions between July of 1996 and January of 1997 are viewed as having been founded on knowledge that the bargaining unit was inappropriate, that would merely give rise to different violations of the law:

- The employer continued to recognize and bargain with the union, which would be tantamount to providing assistance to a "company union" and an unfair labor practice under RCW

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[10] The employer contends there is no support in the record for the Examiner's statement that the employer "initiated an agreement between the parties" to resolve the union's representation of an inappropriate bargaining unit. The Examiner may or may not have mis-stated who was the moving party in the negotiations which led to withdrawal of the unit clarification petition, but we find the distinction irrelevant. The employer clearly held the reins on whether to withdraw its unit clarification petition, and it did so in July of 1996.

41.56.140(1) and (2), unless done in context of a lawful bargaining relationship under RCW 41.56.090; and

- The union continued to claim status as the exclusive bargaining representative of the employees and to bargain with the employer, which would have made it a "company union" under RCW 41.56.140(2) and would have violated RCW 41.56.150(1), unless done in context of a lawful bargaining relationship under RCW 41.56.090.

The parties' agreement to resolve the unit clarification case did not prevent the union from exercising its rights under the collective bargaining statute, and did not prevent the union from filing this unfair labor practice.

The Duty to Bargain

The duty to bargain is defined in the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, as follows:

> RCW 41.56.030 Definitions.
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> ...
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> (4) "Collective bargaining" means ... 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 ...
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> [Emphasis by **bold** supplied.]

That definition is patterned after the definition found in the National Labor Relations Act (NLRA). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA

are persuasive in interpreting state labor acts which are similar to the NLRA. Nucleonics Alliance v. WPPSS, supra.

The potential subjects for bargaining between an employer and union are commonly divided into categories of "mandatory", "permissive" and "illegal". Matters affecting wages, hours, and working conditions are mandatory subjects of bargaining, while matters considered remote from "terms and conditions of employment" or which are regarded as a prerogative of employers or of unions have been categorized as "nonmandatory" or "permissive". See, Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), affirmed, WPERR CD-57 (King County Superior Court, 1978).

In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which the issue effects personnel matters. Where a subject relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. International Association of Fire Fighters, Local 1051 v. Public Employment Relations Commission (City of Richland), 113 Wn.2d 197 (1989). The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit. Spokane County Fire District 9, Decision 3661-A (PECB, 1991).

The duty to bargain includes a duty to give notice and provide opportunity for bargaining prior to changing employee wages, hours or working conditions. A party to a bargaining relationship commits an unfair labor practice if it fails to give notice of a change affecting a mandatory subject of bargaining (i.e., presents

the other party with a fait accompli), or fails to bargain in good faith upon request. Federal Way School District, supra.[11]

In order for there to be a "unilateral change" giving rise to a duty to bargain, there must be some change in the status quo. No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours or working conditions. Clark County Fire District 6, Decision 3428 (PECB, 1990); City of Yakima, Decision 3564-A (PECB, 1991); Evergreen School District, Decision 3954 (PECB, 1991); and Green River Community College, supra.[12] To be part of the status quo, a rule or policy must be a precedent which the employer has used during the relevant past, not merely a written policy which is pulled off the shelf just in time to fend off an unfair labor practice charge. Pierce County Fire District 3, supra.

Application of Legal Standards - The Balancing Test -
The employer argues that its tobacco policy is not a mandatory subject of collective bargaining, and urges the application of the balancing test of Richland, supra. The record shows that the employer has, at various times, expressed the following reasons for its ban on use of tobacco products:

- For reasons of personal health, because the use of tobacco adversely impacts the health and well-being of smokers and non-smokers;

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[11] See, also, NLRB v. Katz, 369 U.S. 736 (1962); Green River Community College, Decision 4008-A (CCOL, 1993); City of Brier, Decision 5089-A (PECB, 1995).

[12] The decisions in Kitsap County Fire District 7, Decision 2872-A (PECB, 1988) and Pierce County Fire District 3, Decision 4146 (PECB, 1992) distinguish between restatements of old policies and new policies.

- Because smoking interferes with productivity, and disrupts the workplace and work continuity, when employees leave their work sites periodically for smoking;

- To avoid the supervisory burden of keeping track of employees who would leave their work sites for smoking;

- To get rid of the mess and loitering associated with smoking;

- To avoid comments from people about having to walk through doors with smokers standing around;

- That the new policy was, overall, in the best interest of the employer and its employees;

- Because of concerns about the cost of maintaining facilities, and that smoking contributes to escalated health insurance premiums;

- A desire to provide an improved appearance of professionalism and vigilantly ensuring health and safety which, the employer argues, is critical to the employer's existence and the continued operation of the nuclear power plant.

The employer contends that its concerns relate directly to the employer's entrepreneurial interests, demonstrate its public responsibility and accountability through maintenance of a professional work environment, and that its tobacco policy furthers legitimate, compelling, and significant management interests.

While the employer argues that the union did not present information on how the ability to use tobacco products in the workplace

bears upon wages, hours or working conditions, we find that the record shows the union presented proposals to the employer and expressed employee concerns. The union's expressed concerns about designating outside smoking areas, establishing smoking clinics, having the employer supply nicotine patches and gum, etc., all indicate that there is a strong employee interest in the employer's tobacco use policy. Moreover, the fact that employees can be disciplined for violating the policy supports a finding that the matter significantly affects employee working conditions.

The employer nevertheless argues that the Examiner made a subjective assessment that the employer's rationale was not overriding or compelling, and that the Examiner erred in relying solely on prior case precedent and ignoring the Supreme Court's direction to examine the scope of bargaining on a case-by-case basis. The employer notes that Kitsap County Fire District 7, Decision 2872-A (PECB, 1988) and Mason County, Decision 3706-A (PECB, 1991), both of which were cited by the Examiner, predated Fire Fighters. We have considered the employer's arguments, but find them to be without merit.

In Richland, the Supreme Court did not establish a new approach, but rather found the Commission's analysis in that particular case was inconsistent with agency precedent. It was essentially reminding the Commission to use a balancing test that had been applied as early as Edmonds School District, Decision 207 (EDUC, 1977) and Federal Way School District, Decision 232-A (EDUC, 1977), weighing employer needs for entrepreneurial judgment against employee interests in their terms and conditions of employment when the subject does not directly involve wages or hours. Thus, even though they were decided before Richland, the cases cited by the Examiner have precedential value.

Determinations on mandatory subjects of bargaining are made in the context of a long line of Supreme Court precedent which have described Chapter 41.56 RCW as remedial legislation and have sought to maximize the collective bargaining rights of public employees. In Roza Irrigation District v. State, 80 Wn.2d 633 (1972), the law was made applicable to the maximum number of local government employees; in Zylstra v. Piva, 85 Wn.2d 743 (1975), the right to bargain was "maximized" for employees jointly employed by counties and the state judicial branch; in Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), collective bargaining rights were extended to "supervisors" in the absence of a specific statutory exclusion comparable to Section 2(11) of the National Labor Relations Act; in IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978), the exclusion of "confidential" employees was given a very narrow interpretation. Our precedents have thus permitted employers to avoid bargaining on the broad "wages, hours and working conditions" listed in RCW 41.56.030(4) only when they show some compelling need to do so. Against that background:

- In Kitsap County Fire District, Decisions 2872, 2872-A (PECB, 1988), the employer arguments were based on studies showing that smokers cause economic losses from absenteeism and lost productivity, and higher insurance premiums. The Commission found, however that such general concerns as to costs were "hardly compelling".

- In City of Seattle, Decision 3051-A through 3054-A (PECB, 1989), the Commission found that the employer did not establish a sufficient business necessity or compelling need to unilaterally implement a smoking policy, and that it was a mandatory subject of collective bargaining. When that case

reached the Supreme Court of the State of Washington on a procedural issue, a concurring opinion signed by three members of the Court indicated they would have found the employer's smoking policy was a mandatory subject of bargaining. City of Seattle v. PERC, 116 Wn.2d 923 (1991).

- In Mason County, Decision 3108 (PECB, 1989), the employer failed to establish any compelling need for its restrictions on smoking in the workplace, and its policy was found to be a mandatory subject of collective bargaining.[13]

The employer argues that proper application of the appropriate standard would yield a result consistent with City of Chehalis, Decision 2803 (PECB, 1987),[14] but that case was decided by the same analysis used in Kitsap County Fire District 7 and other cases cited above. The difference of results was driven by different facts which supported a finding that the employer had a compelling need to prohibit smoking in its old and poorly ventilated building. In concluding that the policy prohibiting smoking within that building was not a mandatory subject of bargaining, it was also significant that the employer was operating vehicles equipped with sensitive electronic equipment. There is no similar evidence in this case, where the employer had previously banned smoking within its buildings and the dispute only concerns smoking in outside

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[13] An earlier decision involving that employer, Mason County, Decision 3706-A (PECB, 1991), found that a smoking policy was a mandatory subject of bargaining.

[14] The employer seems to ignore the fact that the Chehalis decision also occurred before Richland. To make an argument contrary to its own position just because a case resulted in the same result the employer desires, here, does not help our analysis of the issue.

areas and in the employees' private automobiles while parked in outside parking lots.

"Significant" Policy Change -

The employer argues that the Examiner erred in concluding that its smoking policy was a mandatory subject of bargaining because the change in policy was "significant". The employer argues that the establishment of a change as significant only establishes a need to assess whether the change involves a mandatory subject of bargaining. If the employer is claiming that the significance of a change should not be considered, we disagree. Under decisions of the National Labor Relations Board (NLRB), a change must be "material, substantial, and significant" to give rise to a duty to bargain or constitute an unlawful unilateral change. Murphy Diesel Company, 184 NLRB 757 (1970), enforced, 454 F.2d 303 (7th Cir. 1971). In this case involving a total ban on tobacco use, we find it persuasive that the NLRB has found employer policies which prohibited employee smoking "nearly everywhere" in a plant to be significant changes, and thus a mandatory subject of bargaining. Allied Signal, Inc., 307 NLRB 752 (1992).

The Commission applied a "significance" test in City of Brier, Decision 5089-A (PECB, 1995), and a consideration of how significant the change is to employees is an important part of the analysis in cases such as this one. The question of whether to use or refrain from using tobacco products is an individual decision, even in the face of required warnings on package labels, media reports on the addictive nature of tobacco, public statements against smoking by officials such as the Surgeon General of the United States, and lawsuits by the State of Washington and other governmental bodies against tobacco manufacturers. The employer has not cited any state or federal law which absolutely prohibits

the use of tobacco products, and reasonable persons may have strongly-held and widely-differing views on invasion of their right to make decisions affecting their own lives. To employees who spend a high percentage of their waking hours in their workplaces, the issue is important to both smokers and non-smokers alike. We infer from the record that by the implementation of the employer's smoking policy, employees who may be "addicted" to tobacco would be inconvenienced by having to leave the employer's premises during their breaks, or would be compelled to suffer privately. The fact that the employer was also taking steps to provide assistance for employees who desired to quit smoking confirms that it also considered these issues to be significant. Under these circumstances, the union's attempt to bargain for accommodations and assistance for employees who desired to quit smoking were very appropriate issues for bargaining.

Productivity and Supervisory Burdens -

From the employer's interest in improving productivity, and supervisory burden in keeping track of employees, we detect that it had genuine concerns about the time employees spent smoking. Break time is clearly a working condition, however, subject to the duty to bargain as part of both "hours" and "working conditions". Having established a practice where employees became accustomed to leaving their workplaces to go to the outside smoking areas, the employer cannot now change that practice without bargaining with the exclusive bargaining representatives of its affected employees.

The Peculiar "Peculiar" Language -

The employer contends the collective bargaining act limits the duty to bargain to matters "peculiar" to the bargaining unit, that the disputed policy is not directed solely at employees, and that the

changes to the tobacco policy have such broad application and scope they should not be viewed as "peculiar" to the bargaining unit.

In City of Pasco v. Public Employment Relations Commission, 119 Wn.2d 504 (1992), the Supreme Court accepted the employer's assertion that the word "peculiar" rendered RCW 41.56.030(4) ambiguous, but it gave deference to the Commission's historical interpretation of that ambiguous language. In City of Seattle, Decision 3051-A through 3054-A (PECB, 1989), the Commission had concluded that it was not the intent of the Legislature, by including the "peculiar" language in the statute, to limit collective bargaining to issues that only arise within a particular bargaining unit. Any matter which employees within a bargaining unit consider important to them, and which affect their wages, hours and working conditions, could be bargained for standards to be applicable within their unit. By the very nature of the collective bargaining process, each exclusive bargaining representative will negotiate mandatory subjects for the employees it represents and the wages, hours and working conditions of unrepresented employees (and visitors) will be controlled by employer policies.[15] Accepting the Commission's interpretation, the Court wrote in Pasco:

> [U]nder the City's analysis, the matters of (1) grievance procedures, (2) personnel matters, (3) wages, (4) hours and (5) working

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[15] Previously, in City of Wenatchee, Decision 2216 (PECB, 1985), the "peculiar" language was interpreted as meaning that an exclusive bargaining representative has no right to bargain for the wages, hours and working conditions of employees outside of the bargaining unit it represents. A "no bargaining obligations on standardized terms made applicable across bargaining unit lines" interpretation similar to that advanced by the employer in this case, was specifically rejected.

> conditions would have to be peculiar to the bargaining unit before they were mandatory subjects of collective bargaining. Such a reading of the statute would reduce the mandatory subjects of collective bargaining to a very narrow and unpredictable segment of employer-employee relations. We do not perceive legislative intent to so narrowly restrict the right to collectively bargain.

The Court thus concluded that the "peculiar" language did not apply to the grievance procedure at issue in that case even though other bargaining units had grievance procedures. The employer's interpretation of the statute to mean here that the "peculiar" language applies because its tobacco policy would apply to other bargaining units, unrepresented employees and/or visitors is likewise unduly restrictive.

Conclusions on Duty to Bargain -

The Commission is mindful of the court's admonition in Richland, supra, that resolving scope-of-bargaining questions is a task which requires particularity and sensitivity to the diverse interests of the public, the employer, the employees, and the union. Where the Commission has found an employer's assertions of an entrepreneurial prerogative compelling, the employees' interests have been minor. In King County, Decision 4893-A (PECB, 1995), no bargaining obligation was found to exist as to performance expectations that were clearly intended to ensure the safe operation of police vehicles. In City of Brier, Decision 5089-A (PECB, 1995), however, the Commission's application of the balancing test resulted in a conclusion that cost considerations put forth by the employer as its only reasons for its claim of a business need to discontinue a past practice were outweighed by employee interests in the use of patrol vehicles for commuting. The costs had existed all along, and the practice had been in existence for a sufficient period, to

conclude that the costs were not a compelling business need which would justify a change of practice without bargaining. In the case now before the Commission, the conditions that the employer uses to justify the change of practice (i.e., concerns about productivity, health issues and insurance costs, the cost of maintaining facilities, the appearance of professionalism, etc.) have similarly existed all along. As in City of Brier, however, the matter is of direct concern to employees. We are not persuaded by the employer's arguments as to its interest in maintaining a professional image, which are general and are outweighed by the union's specific right to bargain the working conditions of the employees it represents. As to employees in the bargaining unit represented by this union, we hold that the employer had a duty to bargain the change of tobacco policy which it implemented on January 1, 1997.

Waiver by Contract

The employer contends the management rights clause of the collective bargaining agreement allows the employer to exercise complete control over its policies, and that the union has contractually waived its right to negotiate with regard to the tobacco policy. It is true that, if a union waives its bargaining rights by contract language, an action in conformity with that contract will not be an unlawful "unilateral change". City of Yakima, Decision 3564-A (PECB, 1991). Waiver by contract is, however, an affirmative defense on which the employer has the burden of proof. Lakewood School District, Decision 755-A (PECB, 1980).

The Supreme Court of the State of Washington has long adhered to an "objective manifestation" theory of contracts, and imputes to a person an intention corresponding to the reasonable meaning of the person's words and acts. Plumbing Shop, Inc. v. Pitts, 67 Wn.2d

514 (1965).[16] In Lynott v. National Union Fire Insurance Company, 123 Wn.2d 678, 684 (1994), the Supreme Court wrote, "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions". In Yakima, supra, the Commission wrote:

> In order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer.

The Commission then found no waiver on certain issues in Yakima, because contract provisions were either ambiguous or added no substance to the matter at issue. Where the contract provisions are not ambiguous, and when the contract terms themselves evidence a meeting of the minds, we need go no further to determine what was intended. See, Chelan County, Decision 5469-A (PECB, 1996), where the Commission determined that if the union had an individual intent as to the bargaining of normal work schedules, it became

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[16] Our Supreme Court quoted from Judge Learned Hand in Everett v. Estate of Sumstad, 95 Wn.2d 853 (1981):

> **A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.** A contract is an obligation attached by the mere force of law to certain acts of the parties, usually **words**, which ordinarily accompany and **represent a known intent.** If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held ... Everett v. Estate of Sumstad, supra.

[Emphasis by **bold** supplied]..

subsumed by the mutual intent expressed by both parties in the contract.

The employer nevertheless argues that the rule that a general management rights clause does not act as a specific waiver does not apply here. It argues that the testimony of a witness to the effect that the union was put on notice, during the bargaining that resulted in the clause, that the management rights clause incorporated the employer's authority to control its policy manual, was uncontradicted. The employer's evidence at variance with the written agreement is not convincing, however. A reasonable interpretation of the collective bargaining agreement does not evidence an intent of the parties that policies would be the prerogative of management. The employer has not proved its contentions.[17]

Even if it had provided persuasive evidence about the bargaining history, the subjective intention of the parties is irrelevant under Washington law and Commission precedent. The Supreme Court has required that agreements reached in collective bargaining be put in writing to be enforceable,[18] and the contract terms relied upon by the employer here are too general to give rise to a specific waiver of the union's right to negotiate. In City of Kelso, Decision 2633-A (PECB, 1988), a management rights clause stated:

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[17] The testimony of the witness in this case is insufficient proof, where the contract terms themselves evidence a meeting of the minds.

[18] State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970).

> The employer retains the exclusive right to manage the fire department. Therefore, all powers, authorities, functions and rights not specifically and expressly restricted by this Agreement are subject to exclusive management control.

The Commission found the clause too general to give rise to a specific waiver of a decision to lay off employees. In the case now before us, Article III, 3.1.1. of the parties' collective bargaining agreement states, in part, as follows:

> The Supply System retains the exclusive right to manage and operate its business, subject only to the express terms of this Agreement. All management functions, rights and responsibilities which the Supply System has not modified or restricted by this Agreement are retained and vested exclusively in the Supply system. ...

In the absence of a specific written waiver, no waiver by contract can be found in this case.[19]

Waiver by Inaction

The employer argues that the union waived its right to bargain by inaction. Again, however, the arguments are not persuasive.

Historical Inaction -

The employer claims that the tobacco use policy has never been a subject of bargaining since the parties negotiated the management rights clause, but that fact is not determinative. The fact that a union waives its statutory bargaining rights at one or more

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[19] See, City of Anacortes, Decision 5668 (PECB, 1996).

points in time may simply indicate that it lacked concern about the changes being made by the employer at those times. A waiver at one point in time does not constitute an ongoing waiver of bargaining rights. City of Wenatchee, Decision 2194 (PECB, 1985), citing City of Seattle, Decision 651 (PECB, 1979); Miller Brewing Company, 166 NLRB 831, affirmed, 408 F.2d 12 (9th Cir. 1969); Ciba-Geigy, 264 NLRB 1013, affirmed, 722 F.2d 1120 (3rd Cir 1983).

The employer also argues that a final decision had been made, as of May 23, 1996, to implement a total ban on the use of tobacco products, and that the union was informed of this decision on that date. The employer contends that information was repeated to the union on June 12, 1996, and again after the meeting of July 16, 1996, but that the union did not request bargaining until November. The employer argues that this delay demonstrates a waiver.

When given notice of a contemplated change affecting a mandatory subject of bargaining, a union that desires to influence the employer's decision must make a timely request for bargaining. The Commission does not find waivers by inaction easily, and only where the union fails to request bargaining, or fails to make timely proposals for the employer to consider. Lake Washington Technical College, Decision 4721-A (PECB, 1995). A key ingredient in finding a waiver by inaction is, however, a finding that the employer gave adequate notice to the union. Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. If the employer's action has already occurred when the union is given notice, the notice would not be considered timely and the union will be excused from the need to demand bargaining on a fait accompli. See, Clover Park School District, Decision 3266 (PECB, 1989), and cases cited therein; City of Centralia, Decision 1534-A

(PECB, 1983). Formal notice is not required. In the absence of formal notice, however, it must be shown that the union had actual, timely knowledge of the contemplated change. The Commission's focus should be on the circumstances as a whole, and on whether an opportunity for meaningful bargaining existed. If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a fait accompli should not be found.[20] In Lake Washington Technical College, supra, the Commission ruled that it was not appropriate to apply the fait accompli doctrine in a case where the employer invited input and the union chose to be silent until the employer implemented its proposed change.

The record in the case at hand clearly shows that the union was presented with a fait accompli and is thus excused from demanding to bargain the smoking policy:

- As noted above, in discussion of the statute of limitation issue in this case, there is substantial doubt as to whether the May 23, 1996 memo was even sent to the union. That memo was clearly directed to the employees.

- In its letter to the union in June, the employer indicated a willingness to discuss "any items brought up by the union".

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[20] In Lake Washington Technical College, an employer's casual reference to contemplated changes and reorganization made in an offhand way occurring at the close of a meeting on another subject did not satisfy the employer's obligation to give notice, and the union's informing the employer it was out of compliance with the contract was not sufficient for the Commission to infer that the union made a demand for bargaining at the time.

If the testimony of a senior management official responsible for labor relations is to be taken at face value,[21] the June letter would have to be taken as misdirection to the union about the employer's intentions.

- While union witnesses gave credible testimony and other evidence supports their understanding that the issue remained open for debate at that time, employer witnesses testified that the total ban on tobacco use was already decided upon within the employer's own circles by the July 16, 1996 meeting.

- The employer's evidence shows that it considered the union's contacts in November of 1996 to be "too little and too late", but the employer itself characterized the policy document provided to the union at that time as a "draft".

Thus, the evidence in the record shows that the employer did not give the union clear written notice of its views, that it gave the union ambiguous indications, and that it may even have misled the union about its intentions.

The employer maintains that it was always willing to discuss the effects of the smoking policy, but this case does not deal with the effects. A willingness to engage in statutorily-mandatory

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[21] See, testimony of Arthur Miller, assistant to the vice president of nuclear operations/labor issues, Transcript, pp. 148, 165, 173, 178-181, and 189-190. That testimony suggests that employer had approached the issue from the beginning as if its policies were outside of the collective bargaining process, that the tobacco policy was not a mandatory subject of bargaining, and that the employer had considered policies to be outside bargaining parameters ever since the negotiations in 1985.

discussion of the effects of a management decision is insufficient as a defense for a failure or refusal to engage in statutorily-mandatory bargaining on the decision itself. The union had no duty to act because it was presented with a fait accompli.

The Employer's Actions After The Fact

The employer transmitted data regarding overall costs to the union on February 11, 1997, but the record is unclear as to whether that specific information was used in the employer's decision. The information is not specific to this employer, and while we recognize the credibility and value of such statistics, they do not provide support for a conclusion that the employer's interests outweigh the employees' interests in a working condition to which they were accustomed. In Kitsap County, supra, such reasons were found "hardly compelling". Moreover, information provided and bargaining offered after the fact cannot justify or excuse an unlawful action previously taken.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law issued by Examiner Walter M. Stuteville in the above-captioned matter on October 7, 1997, are AFFIRMED and adopted as the Findings of Fact and Conclusions of Law of the Commission.

2. The Washington Public Power Supply System, 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 Oil, Chemical and Atomic Workers International Union, Local Union 1-369, concerning policies on smoking and tobacco use by the employees represented by that union.

(2) In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights under Chapter 41.56 RCW.

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

(1) Withdraw all changes of policy implemented on January 1, 1997 with regard to smoking and/or tobacco use by employees represented by Oil, Chemical and Atomic Workers, Local Union 1-369.

(2) Give notice to, and upon request bargain collectively with, Oil, Chemical and Atomic Workers International Union, Local Union 1-369, concerning any proposed changes of policy with regard to smoking and/or tobacco use by employees represented by that union.

(3) Post, in conspicuous places on the employer's premises where notices to 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.

(4) Read the notice attached hereto and marked "Appendix" into the record of the next public meeting of the employer's Board of Directors, and append a copy thereof to the minutes of such meeting.

(5) Notify the above-named complainant, in writing, within 30 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.

(6) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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, on the 5th day of March, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

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 OUR EMPLOYEES:

WE WILL withdraw all proposals and policies presented to the union on the subject of smoking and/or tobacco use.

WE WILL meet with the Oil, Chemical and Atomic Workers International Union, Local 1-369, at mutually agreed-upon times and places to bargain collectively concerning smoking and tobacco use on the employer's premises.

WE WILL NOT refuse to bargain collectively in good faith with Oil, Chemical and Atomic Workers International Union, Local 1-369, at mutually agreed-upon times and places to bargain collectively concerning smoking and tobacco use on the employer's premises.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

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.