STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 483, Complainant vs. CITY OF TACOMA, WASHINGTON, Respondent	CASE NO. 722-U-77-83 DECISION NO. 319-PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES:

DAVID B. CONDON, Griffin & Enslow, P.S., for the Complainant

ROBERT T. HAMILTON, City Attorney, for the Respondent

The International Brotherhood of Electrical Workers, Local No. 483, (hereinafter referred to as the "Complainant" or the "Union") filed a "Charge Against Employer" with the Public Employment Relations Commission on January 3, 1977. The Complaint, as amended, alleges that the City of Tacoma, Washington (hereinafter referred to as the "Respondent" or the "City") has committed certain unfair practices and seeks specific relief as follows:

BASIS OF CHARGE.

City of Tacoma, on December 28, 1976, passed an ordinance increasing unilaterally the contributions made by the employees to the City Retirement System for which Local 483 is exclusive bargaining representative. Said ordinance was made without bargaining or negotiating with Local 483.

RELIEF SOUGHT.

(1) Order prohibiting increased contributions without complying with requirements of Chapter 41.56 RCW; (2) order requiring return of all contributions wrongfully withheld from checks of Complainant's members.

The case was assigned by the Executive Director to Examiner Val Spangler, of the PERC staff, on April 5, 1977. A hearing was set for June 7, 1977. The matter was subsequently re-assigned to Examiner Willard G. Olson of the PERC staff. The hearing was continued, at the request of one of the parties, and was held on June 27, 1977 before Examiner Olson. The Complainant and the Respondent both submitted post-hearing briefs.

BACKGROUND

In January, 1941 the City of Tacoma established the City Charter Retirement System. The City employees, up to that time, had no retirement benefits of any kind as they were not covered by the Social Security System. The City Retirement Board (Board of Administration) is made up of three elected employee representatives; three administration representatives consisting of the Mayor, the Finance Director, and the City Treasurer; and a Public Member who cannot be a city employee or official. The Board administers the Retirement System and Retirement Fund under the direction of the City Council.

The Tacoma Retirement System covers all City employees except Police, Fire, and Belt Line Division employees. The Police Department and Fire Department employees are included in the state-wide Law Enforcement Officers and Fire Fighters (LEOFF) Retirement System pursuant to state statutes. The Belt Line Division employees are covered by the Federal Railroad Retirement Act. Of the two thousand (2000) employees covered by the City Retirement System, approximately sixteen hundred and fifty (1650) are represented in bargaining units by eight (8) labor organizations. The Complainant, Local 483, represents approximately four hundred (400) employees in their bargaining units. Seattle and Spokane have almost identical retirement systems.

From 1941 to 1955 there were no changes in the retirement plan. In 1955 the employees decided by a vote that they also wanted to be covered by the Social Security System, which is optional for public employees. In order to avoid excessive deductions, the City and the employees decreased their contributions to the City Retirement System. During that period and until 1962, benefits were computed based upon the amount of contributions to the fund, as though an annuity was purchased for the employee.

Major changes were made in the plan in 1962. Instead of contributions based upon life expectancy, sex, age, etc., the amount was to be a

fixed percentage of the income of each covered employee. Benefits were changed to be computed on a percentage (1½%) per year of service multiplied by the last two-year average salary. The pension payments had previously been based on a five-year average. Prior to implementing the 1962 changes, a general membership meeting was conducted by the Board.

Although the record does not provide the details, benefits, as well as contributions by employer and employee, were raised in both 1968 and 1973. It appears that the implementation of these changes took effect after a ballot had been sent to the employees.

During the 35-year history of the Retirement System none of the numerous changes in benefits and contributions have been the subject of collective bargaining. There is no reference to retirement in any of the contracts between the City and any of the Unions, nor has any labor organization previously requested bargaining on the subject.

On December 21, 1976 the City Council adopted Ordinance 20938 which established a longevity system for computing employee pay rates. While this did not constitute a change in benefits under the retirement system, it did result in an additional cost factor to the retirement fund.

The Official Code of the City of Tacoma requires that the Board must have an actuarial study made every four years and take appropriate action thereafter:

> 1.30.410 Duty to keep actuarial valuation of Fund. The Board shall keep in convenient form such data as shall be necessary for the actuarial valuation of the Retirement Fund created by this chapter and shall annually in each October, fix the amount of interest to be credited in the current year at a rate which shall be based upon the net annual earning of the Fund for the current year. At the end of the four-year period beginning with the year 1969, and at the end of every four-year period thereafter, the Board shall cause to be made an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries as defined by this chapter; and shall further cause to be made an actuarial valuation of the assets and liabilities of the Retirement Fund, and upon the basis of such investigation and valuation and subject to the approval of the City Council shall:
>
> (1) Make any necessary changes in the rate of interest subject to subsequent annual changes as hereinafter provided;
>
> (2) Adopt for the Retirement System such mortality, service and other tables as shall be necessary;

(3) Revise or change the rate of contributions by the city on basis of the actuarial investigation and valuation. (Ord. 18805 § 2 (part); passed April 22, 1969: prior Ord. 18032 § 2; passed March 22, 1966: Ord. 17014 § 4; passed March 20, 1962).

In accordance with the above requirement, the City had an actuarial study made of the fund by the firm of Milliman and Robertson, Inc., Consulting Actuaries. This firm submitted its actuarial valuation to the Retirement Board on September 21, 1976. The report stated that ". . . we find that an employer contribution rate of 9.21% of members' salaries will provide sound financing for the System." Prior to 1977, the City had been contributing 7.57% and the employees 6.5%, which was a 54% - 46% employer-employee ratio. The increase in contributions was necessary to compensate for anticipated future inflation.

The report did not take into consideration the longevity system which was later put into effect by passage of Ordinance No. 20938 on December 21, 1976.

The Retirement Board directed that Roger Howeiler, Executive Secretary, prepare an ordinance which would reflect the recommendations of the actuarial study for presentation to the City Council. The original Ordinance No. 20929 proposed to change the City's contribution to 9.21% while the employee contribution would have remained unchanged.

On December 7, 1976 a meeting was held between the Retirement Board and the City Council in a "study session" regarding proposed increases in contributions. A representative of the actuarial firm was present and participated in the meeting. Discussions included the effect of a proposed longevity pay program on the Retirement Fund and several Council members brought up the "unfairness" of the City absorbing the entire cost of increased contributions.

At the regular City Council meeting of December 21, 1976 the final reading of the above-mentioned Ordinance No. 20938 (longevity pay) took place and was passed by a vote of 5 to 4. Substitute Ordinance No. 20929 was then introduced for first reading. Mr. Erling Mork, City Manager, explained that the Substitute Ordinance took into consideration the longevity pay plan and would increase the City's contribution to the Retirement Fund from 7.57% to 8.88%, and the employees' contribution from 6.50% to 7.56%. The Substitute Ordinance, which also included an emergency clause so that it could

become effective as of January 1, 1977, was passed by a voice vote. It is estimated that the increased contributions will amount to $650,000 a year. While the Ordinance raised the contributions of both the City and the employees, the ratio of 54% (City) to 46% (employees) remained unchanged.

James Diggs, Business Manager and Financial Secretary of IBEW Local No. 483 was present at the December 21, 1976 City Council meeting. Mr. Diggs was aware of the original Ordinance 20929 being on the agenda, but had "wind" that the sharing of the increased contributions may be proposed. When Substitute Ordinance 20929 was presented for first reading, Mr. Diggs took the podium and requested a meeting with the City negotiating team regarding the matter before the second and final reading of the Ordinance the following week. Thereafter Mr. Diggs did talk to Hugh Judd, Labor Relations Director for the City, who indicated that he was not in a position to negotiate the matter at that time.

The second reading of Ordinance 20929 took place on December 28, 1976 and was passed by a vote of 8 to 0. The Council Minutes reveal there was no discussion or objections to the Ordinance raised at that Council meeting. On January 3, 1977, the Union filed an Unfair Labor Practice Charge with the Public Employment Relations Commission.

POSITION OF THE UNION

The Union argues that the City of Tacoma had a duty to bargain over any changes in the Retirement System pursuant to Washington State statutes. The Public Employees' Collective Bargaining Act, in RCW 41.56.030(4) defines collective bargaining as:

> "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargarining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

The Union cites the Washington State Supreme Court decision in Bakenhus v. Seattle, 48 Wn. 2d 695, 296 P.(2d) 536 (1956) wherein the court found that a ". . . pension granted to a public employee is not a gratuity but is deferred compensation. . ." Thus, the Complainant contends, the Tacoma retirement plan must be considered the same as wages for the purposes of collective bargaining.

The Union relies on several cases in both the private and public sector in support of the theory that there is a duty to bargain over a retirement plan. Most of the cases cited look to the precedent set in Inland Steel Co. v. NLRB, 77 NLRB 1, 21 LRRM 1310, enforced 170 F. 2d 247, 22 LRRM 2506 (CA 7 1948) certiorari denied 336 U.S. 960, 24 LRRM 2019 (1949). Subsequent cases cited in accord with the above were Tide Water Associated Oil Co., 85 NLRB 89, 24 LRRM 1518, and Jacobs Manufacturing Co., 94 NLRB No. 175, 28 LRRM 1162. In the public sector the Union cites the Michigan Supreme Court in Police Officers Association v. City of Detroit, 85 ORRM 2536 (1974) and the New York Supreme Court in Albany v. Helsby, 370 NYS 2d 215, 90 LRRM 2184 (1975).

The Union further contends that there has been no waiver of its rights in this case. In support it cites Tide Water Associated, supra, and NLRB v. Item Co., (CA 5, 1955) 35 LRRM 2709. Both of these cases set forth the principle that a waiver of bargaining rights must be "clear and unmistakable." Also, both cases rejected the argument that it would be impossible or impractical to negotiate a pension system with a multiplicity of bargaining units.

POSITION OF THE CITY

The City of Tacoma points out that never, since the Retirement System's inception in 1941, has it ever been the subject of collective bargaining. The City argues that under Bakenhus v. Seattle, supra, it has the legal obligation to keep the retirement plan solvent. The City states that since the system is regulated by a Retirement Board, subject to approval of the City Council, and exists pursuant to the City Ordinance, it had no alternative except to increase the contributions of all parties in the face of the actuarial study. The City argues that since the Retirement System covers all the employees, represented and unrepresented alike, it should not be required to negotiate

with an organization which represents only a portion of their employees. The City points out that the Retirement Board contains three representatives of employees, one of whom is the President of the Complainant Union.

The City further argues that the language in the definition of collective bargaining in RCW 41.56.030(4), supra, would exclude retirement from the bargaining process. It relies on the words ". . . which may be peculiar to an appropriate bargaining unit of such public employer,. . . " to support such exclusion. The City states that since the Retirement System is not peculiar to the Local 483 bargaining unit, but in fact applies to all but two of the bargaining units, it is excluded from the statutory definition of collective bargaining.

The City denies making a unilateral change in working conditions. The increased contributions, it argues, were required by law to preserve the integrity of the system; but there was no change in the ratio of employer-employee contributions, which remain the same: 54% employer and 46% employee.

The City argues that if it were required to bargain with each Union over the Retirement System this would inevitably result in variable benefits and variable contributions. This type of a system, which would be different for each bargaining unit, would be impossible to administer and could lead to a complete destruction of the present Retirement System.

DISCUSSION

The Examiner cannot accept the City's argument that because the Retirement System is not "peculiar" to Local 483's bargaining unit it is therefore excluded from the definition of collective bargaining under RCW 41.56.030(4). Under this type of interpretation, fringe benefits such as vacations, holidays, sick leave, etc., would have to be "peculiar" to a bargaining unit before a public employer would be required to bargain over them. It is not reasonable to believe that the Legislature intended such a construction would be placed on this definition.

There is no question but that in the private sector the weight of authority lies with the principle that there is a duty to bargain over retirement and pension plans. It appears that in the private sector cases there were no boards or commissions which included employee participation, nor was the matter complicated by various statutes and ordinances. The question has not been raised under

the statutes of the State of Washington and this Examiner is of the opinion that it need not be addressed in this case.

In the 35-year history of the Tacoma Retirement System, no union has requested that it be a subject of bargaining. Local 483 has consistently had representation on the Retirement Board and thus participated in the administration of the system. The Complainant's last-minute request to bargain about the increased contributions cannot be considred as a "timely" request, expecially in view of the fact that the parties were mid-way through a collective bargaining agreement. The long bargaining history, and the extended silence and inaction by the union, constituted a "clear and unmistakable" waiver of the right to bargain over this matter.

Even assuming, for purposes of discussion, that a duty to bargain did exist in December, 1976, there is a very real question as to whether there was a "change" made in the system. The City was required by the Retirement ordinance to keep the Retirement Fund actuarily sound. The contribution ratio of 54%:46% was maintained as it had been for many years with no previous objections from any organization.

It is the opinion of the Examiner that I.B.E.W. Local No. 483 waived its right to bargain over the Tacoma Retirement System, and that no unilateral change was made in the system. Therefore, the complaint should be dismissed and the remedy sought denied.

FINDINGS OF FACT

I.

The City of Tacoma, Washington is a "public employer" within the meaning of RCW 41.56.020 and RCW 41.56.030(1).

II.

The International Brotherhood of Electrical Workers, Local 483, is a "labor organization" within the meaning of RCW 41.56.010 and is the "bargaining representative" of certain employees of the City.

III.

The City has, by ordinance, created and maintained a retirement system for its employees. During the 35-year existence of the Tacoma Retirement System no facet of the system has been the subject of collective bargaining, nor has any Union requested that the City bargain on the subject.

IV.

As of December, 1976, the City and the Union were bound by a collective bargaining agreement which did not expire until March 31, 1977. The agreement contains no mention of the Retirement System.

V.

The City of Tacoma, upon recommendation of an actuarial study, did pass Substitute Ordinance No. 20929 on December 28, 1976, thereby increasing the contribution amounts to the Retirement Fund by both the City and all employees.

VI.

The ratio of contributions, which had been 54% City and 46% employees for many years, was maintained at the same level by Substitute Ordinance No. 20929.

VII.

Mr. James Diggs, President of Local 483, I.B.E.W. appeared at the City Council meeting of December 21, 1976, when the Ordinance was first read, and did then request a meeting with the City negotiators over the matter.

VIII.

The City of Tacoma declined to negotiate regarding the increased contributions stating as its reasons the urgency of the matter and the long history of not bargaining on the subject.

CONCLUSIONS OF LAW

I.

The Public Employment Relations Commission has jurisdiction over this matter pursuant to RCW 41.56.160.

II.

The increases in contributions instituted by the City of Tacoma were made pursuant to ordinance requirements that the City Retirement System be kept actuarily sound, and did not constitute a change or alteration in the System.

III.

I.B.E.W. Local No. 483, by its collective bargaining agreement and a long history of silence and inaction, effected a clear and unmistakable waiver of any rights it may have had to bargain over the City of Tacoma Retirement System as of December, 1976.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, it is hereby ordered:

That the complaint filed by the International Brotherhood of Electrical Workers, Local No. 483, against the City of Tacoma, Washington, be, and it hereby is, dismissed.

Dated at Olympia, Washington this 12th day of December, 1977.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Willard G. Olson

WILLARD G. OLSON, Examiner