STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LEE O. McCANE, Complainant, vs. CITY OF TACOMA, Respondent.	)	CASE NO. 4790-U-83-799 DECISION NO. 1916 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Griffin and Enslow, by James Imperiale, Attorney at Law, appeared on behalf of the complainant.

Andrew Michels, Labor Relations Specialist, appeared on behalf of the respondent.

On August 8, 1983, Lee O. McCane (complainant) filed a complaint charging unfair labor practices against the City of Tacoma (respondent), alleging that respondent violated RCW 41.56.140(1) and (3) by a series of actions surrounding a disciplinary suspension of the complainant. In making the preliminary ruling pursuant to WAC 391-45-110, the Executive Director determined that the only allegation that stated a cause of action concerned a claim that respondent interfered with complainant's right to process a grievance. Accordingly, further proceedings were conducted on the basis of that issue alone. A hearing was conducted on March 6, 1984, in Tacoma, Washington. The employer submitted a post-hearing brief, while the complainant waived his opportunity to do so.

BACKGROUND

The City of Tacoma has collective bargaining relationships with several employee organizations, including International Brotherhood of Electrical Workers, Local 483. The union represents certain employees working in the city's public utilities department.

Complainant has been employed in the city's light division for 12 years as an electrical inspector in the bargaining unit represented by Local 483. McCane has not enjoyed a peaceful employment history, and he has been disciplined for a number of infractions. Most of the charges against McCane related to absenteeism and tardiness.

Events leading to this unfair labor practice case began with two incidents which occurred in the Spring of 1983. Respondent received complaints that McCane had caused a disturbance at a local restaurant and, at a later date, took golf lessons during work hours. The matters were submitted through the employer's internal service procedures to a "factfinding" group of supervisory employees. On April 8, 1983, complainant was contacted by respondent and was directed to attend a meeting to discuss the two incidents. McCane was assured that he would not be punished for his appearance, and he understood that he was to discuss his version of the incidents before the "factfinding" group. He contacted union business manager Vern Stonecipher, and asked him to accompany complainant to the meeting. Stonecipher could not attend, and the local union president went with McCane. The meeting was chaired by Charles Kennedy, employee relations specialist for respondent's department of public utilities. Complainant answered questions and made comments, but was not permitted to make a formal presentation to explain his actions. Approximately one week after the meeting, McCane received notification that he was to be suspended for five days.

The suspension was originally scheduled to run from April 25 through April 29, 1983. Complainant discussed the situation with Kennedy, who informed him to "file documents" if he desired to protest the suspension. A "pre-disciplinary meeting" was scheduled for April 22, 1983, but, at complainant's request, the meeting was rescheduled for May 3, 1983. Accordingly, the suspension was held in abeyance to await the outcome of the meeting.

A meeting was held on May 3, 1983. McCane and Stonecipher attended. The employee relations manager of the public utilities department, Woodrow Jones, attended along with Kennedy and several other representatives of the department management. Evidently, the parties had different perceptions about the nature and scope of the meeting. McCane wanted an opportunity to cross-examine the people who made accusations against him and to present evidence in his defense. Jones testified that the meeting was to be used to review procedures already followed when respondent imposed the five day suspension. He further testified that the meeting was never intended to give complainant a forum to express his concerns with the disciplinary process. On several occasions, Stonecipher and McCane were ruled "out of order" when they tried to explain McCane's version of the incidents which led to the discpline.

On May 4, 1983, complainant received a memorandum re-affirming that the five day suspension would be imposed as discipline for the restaurant and golf incidents. The suspension was then re-scheduled to run from May 9 through May 13, 1983. Shortly after he received the memorandum, McCane spoke with Stonecipher. Together, they prepared a grievance to be processed through the

grievance procedure found in the collective bargaining agreement in effect between the parties, but then decided against such action. Stonecipher thereafter met with members of the utilities department's management. He was informed that several supervisors thought that McCane should have been terminated rather than suspended. With this warning in mind, Stonecipher met with complainant again and told him that the suspension, while objectionable, should be taken. McCane agreed, but conditioned his acceptance on removal of the restaurant incident from his personnel file. Stonecipher communicated McCane's request to respondent, who agreed to the proposal. Complainant served the five day suspension and then went on vacation leave.

During his time away from work, McCane had a change of heart about the suspension. Upon his return, he contacted Stonecipher and expressed a desire to contest the suspension he had just completed. Stonecipher contacted respondent, and a meeting was set for May 27, 1983. On that date, McCane and Stonecipher met with Kennedy and Jones. During the course of the meeting Jones expressed his concern that McCane was "backing out of a negotiated settlement" to settle the suspension issue. There is a conflict in testimony concerning the exchange which is central to this unfair labor practice case. McCane testified that Jones told him that he would be fired if he pursued a grievance on the suspension. Jones testified that he told McCane that his entire employment record would be taken into account if complainant "sought further review" of the suspension, and such examination could lead to more severe discipline, including discharge. On May 31, 1983, McCane sent a letter to Superintendent of Light Division, James Thompson, outlining the procedure respondent followed in disciplining him and stating his belief that such action violated Article 1.24.955 of the existing personnel rules. In a post-script to the letter, complainant informed Thompson that:

> I was informed by Woodrow Jones of the possibility of being terminated if I filed this grievance.

On June 2, 1983, a meeting was scheduled in response to McCane's letter. At the meeting, McCane raised his concerns about the lack of cross-examination of witnesses and access to documents that he claims to have occurred in the earlier proceedings. On June 10, 1983, Thompson sent complainant a letter stating that he was satisfied with the procedures followed, and he considered the matter to be closed. McCane filed a complaint charging unfair labor practices on August 8, 1983.

POSITIONS OF THE PARTIES

Complainant argues that respondent violated RCW 41.56.140(1) and (3) by threatening him with dismissal if he filed a grievance over a five day

suspension he received. Complainant asserts that he was attempting to exercise a right of "concerted activity" in filing the grievance, and was restrained and coerced by respondent when he attempted to raise the issue. As a remedy, complainant asks that he receive backpay for the five days spent on suspension, and removal of the suspension from his personnel records.

Respondent maintains that it did not commit an unfair labor practice in this matter. Given the context of complainant's employment history, respondent argues that any statement made was merely a statement of fact that could not be construed as a threat. Respondent points to the decision in City of Tacoma, Decision No. 1342 (PECB, 1981) and urges a similar result in this case.

DISCUSSION

Given the nature of these allegations, it is appropriate to establish the scope of the Examiner's inquiry. The Examiner is not at liberty to rule on whether the employer had "just cause" for the discplinary measures imposed on the complainant. The underlying discplinary process only provides a context in which the alleged threat was made. If a violation of RCW 41.56.140 (1) and (3) is found, complainant would be entitled the opportunity to submit the dispute to the contractual grievance procedure free from interference by the employer or defenses tainted by employer misconduct. The Examiner cannot prejudice the ultimate resolution of that process by discussing the merits of the discplinary action. Complainant asks that his five day suspension be removed from his personnel file and that he receive backpay to compensate him for time lost. Regardless of the final decision in this unfair labor practice case, such remedies cannot be granted in this forum.

Complainant asserts that he was engaged in a protected "concerted activity" when respondent made the threat against him. Chapter 41.56 RCW does not contain a "concerted activities" clause which protects employees in processing of matters under procedures unilaterally promulgated by the employer. City of Seattle, Decision No. 489-A (PECB, 1978). However, the Public Employment Relations Commission has consistently held that processing a grievance through a contractual grievance procedure is a right protected by the statute. See: Valley General Hospital, Decision No. 1195-A (PECB, 1981), City of Mercer Island, Decision No. 1580 (PECB, 1983), and King County, Decision No. 1698 (PECB, 1983). Several elements of this case bear strong resemblance to the situation encountered in City of Mercer Island, supra. Both there and here, the complainant sought to use a dispute resolution procedure separate from the grievance procedure found in the collective bargaining agreement. Both individuals were dissatisfied with the final decisions reached through the alternative procedure, and both filed unfair labor practice complaints.

Turning to McCane's complaint, it must be remembered that the context in which a statement is made has much to do with how that statement could reasonably be perceived by an employee. As noted in City of Mercer Island, supra, a finding of employer intent to interfere is not necessary to find a violation of RCW 41.56.140(1). It is sufficient that the statement made or action in question was reasonably perceived by the employee as a threat of reprisal or force or a promise of benefit to dissuade the employee from the exercise of rights guaranteed by the statute. McCane had been invited to a pre-disciplinary conference. He had requested, and was allowed, union representation on that occasion, when his employment record was reviewed and a decision was made on the severity of discipline to be imposed. He subsequently had his opportunity to file and process a grievance under the grievance procedure contained in the collective bargaining agreement. Had he done so, he would clearly have been engaged in a protected activity. But he did not, and instead bargained through his union to accept the same quantum of discipline on narrowed grounds. He returned from the suspension and a vaction concerned about an absence of due process, and asked that the matter be reopened. Still, he did not file a grievance. Albeit with assistance and representation from the union, he went back to the management and asked for review of the discipline again through management's procedures. It must be emphasized that Jones' remarks were made in the context of a request to reopen management's determination as to the level of discipline to be imposed. The record does not indicate that Jones was referring to a grievance filed under the contractual grievance procedure. The record does not indicate that a grievance was ever filed under the contract. In a different context, Jones' statement could easily be interpreted as a threat of reprisal for processing of a grievance, but in the context here present, such an inference is beyond the complainant's grasp. Confirming this view of the evidence is that McCane was not satisfied with Jones' response, and requested that Jones' superior review the matter. It is clear that McCane was looking for relief within the management structure rather than through a contractual forum. Employee dissatisfaction with management decision making does not, in and of itself, constitute the basis for finding an unfair labor practice. City of Renton, Decision No. 1825 (PECB, 1984). McCane has not demonstrated that he was attempting to initiate a contractual grievance when Jones spoke to him about the possibility that a re-opening of management review of the level of discipline could lead to a conclusion that the level of discipline should be greater than that already imposed. Absent such proof, complainant has not shown that he was engaged in the type of activity protected by Chapter 41.56 RCW, and the unfair labor practice complaint must be dismissed.

FINDINGS OF FACT

1. The City of Tacoma is a municipality located in Pierce County and is a "public employer" within the meaning of RCW 41.56.030(1)

2. International Brotherhood of Electrical Workers, Local 483, represents certain employees employed in the city's public utilities department, and is a "bargaining representative" within the meaning of RCW 41.56.030(3).

3. Lee O. McCane, a bargaining unit employee, has worked as an electrical inspector for 12 years. McCane has had an uneven employment history with the city, being reprimanded on a number of occasions for a variety of infractions.

4. In Spring, 1983, McCane was accused of causing a disturbance at a local restaurant and taking golf lessons during work hours. On April 8, 1983, McCane was directed to attend a "factfinding" meeting conducted by management personnel. McCane was accompanied by a union representative.

5. Approximately April 15, 1983, McCane was informed that the factfinding group had determined that he should receive a five (5) day suspension for the two incidents described in Finding of Fact No. 4. Before the suspension was served, McCane asked for review of the disciplinary action. A meeting was held on May 3, 1983. A meeting was held on May 3, 1983. McCane was again represented by a union official.

6. On May 4, 1983, McCane received a memorandum reconfirming the suspension. McCane met with Vern Stonecipher, union business manager, to discuss the situation. Stonecipher met with several management employees and determined that McCane should serve the suspension. McCane agreed to do so only if the city removed the restaurant incident from his personnel record. The employer agreed to McCane's request. No grievance was ever filed under the provisions of the collective bargaining agreement.

7. McCane served the suspension from May 9 through May 13, 1983. After he returned to work, he told Stonecipher that he desired further review of the discipline imposed on him by the employer. Stonecipher contacted Woodrow Jones, employee relations manager, and a meeting was arranged for May 27, 1983.

8. At that meeting the discipline was reviewed. During the course of discussions, Jones cautioned McCane that further review of the incidents could lead to close scrutiny of McCane's entire employment history and could lead to his discharge. In the absence of any active grievance concerning the suspension, and in the context made, the statement made by Jones should reasonably have been taken by the complainant to relate only to risks inherent in reopening management review of the level of discipline to be imposed for the infractions referred to in Finding of Fact No. 4.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By events described in the above Findings of Fact, the City of Tacoma did not commit an unfair labor practice within the meaning of RCW 41.56.140(1) and (3).

ORDER

Based on the foregoing and the record as a whole, the complaint charging unfair labor practices is DISMISSED.

DATED by Olympia, Washington, this 1st day of May, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kenneth J. Latsch

KENNETH J. LATSCH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.