STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS, LOCAL 252, Complainant, vs. CITY OF CHEHALIS, Respondent.	)	CASE NO. 6583-U-86-1308 DECISION 2803 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

F. G. Enslow & Associates, by Marion G. Milosevich, Attorney at Law, appeared on behalf of the complainant.

Hall and Hillier, by William T. Hillier, Attorney at Law, appeared on behalf of the respondent.

On September 29, 1986, Teamsters Union Local 252 filed a complaint charging unfair labor practices against the city of Chehalis. The complaint alleged that the city refused to engage in good faith collective bargaining in violation of RCW 41.56-.140(1) and RCW 41.56.140(4), by unilaterally adopting a "no smoking" policy. A hearing was conducted April 24, 1987 in Chehalis, Washington by Examiner Katrina I. Boedecker. The parties submitted post-hearing briefs.

BACKGROUND

The police department for the city of Chehalis is located in a building which is approximately 60 years old. Although the building has always housed public offices, it was not originally built as a police facility. Over the past twenty years, one-half of the building has been converted into a police station, with subsequent renovations adding a city jail and a dispatch center. The other half of the building houses the fire department. At the time of the hearing, the city jail had been moved out of the

police building and the city's dispatch functions had been contracted to Lewis county.

The part of the building in which the police department is located has no exterior windows. The only ventilation system to service the department draws in air from the outside, but does not filter, circulate or expel any air. If the fire department parks one of its trucks outside and leaves it running, the ventilation system sucks in the exhaust fumes. With the present ventilation system, fumes dissipate over a long period of time. To have air move through the police department, the garage door at the rear of the building must be opened, as well as two interior hallway doors and the front door -- an approximate distance of 70 feet. This open-door arrangement has been unacceptable as a method of ventilation since the police department has to provide secured storage for properties and items of evidence that are brought into its custody.

The entrance foyer of the police department is approximately a ten foot by ten foot square. Members of the public may be in the foyer from time to time. There is no public access to other parts of the building.

Some police officers are assigned to a city patrol car while on shift. It is common that three different police officers are assigned to use the same patrol car over three different shifts. No other person would ride in a patrol car on a regular basis. The patrol cars contain electronically sensitive radio equipment.

The parties have a collective bargaining agreement effective from January 1, 1986 through December 31, 1987. Negotiations for this agreement began in the autumn of 1985 and concluded in January, 1986. The bargaining team for the city consisted of City Manager

Lloyd Willis, Administrative Assistant Dani Brosey and Police Chief Donald Swartz. The union bargaining team was composed of Teamsters Local 252 Business Agent Michael Mauermann, the shop steward and occasionally one other police officer. There was no discussion had, nor proposal made, dealing with a "no smoking" policy during these negotiations.

The collective bargaining agreement does not have a provision for binding grievance arbitration. One section of the Management Rights article reads:

> The Union agrees that its members shall comply in full with Police Department rules and regulations, including those relating to conduct and work performance. The Employer shall notify the Union of all changes in departmental rules and regulations at the time of implementation.
>
> Article 26.3

The chief testified that there was no difference in his mind between departmental "rules and regulations" and departmental "policies." Additionally, he testified that the establishment of policies was solely the discretion of the chief and did not involve the city council.

The collective bargaining agreement also contains a "zipper clause" which states:

> This Agreement constitutes the entire Agreement between the parties and no expressed, implied, written or oral statements shall be added to or supersede any of its provisions. Past practices shall not be binding on the parties. Therefore, the parties waive the right to bargain collectively with respect to any subject or

> matter, unless by mutual consent, for the life of this Agreement.
>
> Article 27.2

At the time the contract was negotiated, the bargaining unit consisted of 16 employees -- four of whom smoked cigarettes. Prior to being contracted to the county, the dispatch operations were run by five full time employees -- three of whom smoked cigarettes.

On August 1, 1986, Lynn S. Coney became Chief of Police for the city.

On August 28, 1986, Mauermann went to the Chehalis police department. While he was there, he saw Chief Coney standing by the duplicating machine. Coney advised him that he was copying the new no-smoking policy. Mauermann requested a copy of the materials. Coney supplied them. One document was:

> INTER-DEPARTMENT MEMORANDUM
>
> TO: All Personnel
>
> FROM: Lynn S. Coney, Chief of Police
>
> DATE: August 27, 1986
>
> SUBJECT: SMOKING POLICY, CHEHALIS POLICE DEPARTMENT Effective 0800 hours, September 1, 1986
>
> At the above time and date, the Chehalis Police Department building will be officially designated as a non-smoking work place.
>
> On or before that time and date all employees are advised to remove all tobacco products, matches, lighters and ashtrays from their work place.
>
> This order includes, but is not limited to, the jail, training area, kitchen area,

> dispatch room, front entry, bathrooms, administrative offices and hallways.
>
> This order will be extended to include all police vehicles effective January 1, 1987, at 0800.
>
> Employees and citizens will be advised of this order by proper signing.
>
> An official department policies and procedures will follow.

Coney told Mauermann the purpose of the policy was to meet the mandate of a new state statute. Coney was referring to the Washington Clean Indoor Air Act, Chapter 70.160 RCW, which had become effective May 10, 1985. The statute reads in part:

> The legislature recognizes the increasing evidence that tobacco smoke in closely confined places may create a danger to the health of some citizens of this state. In order to protect the health and welfare of those citizens, it is necessary to prohibit smoking in public places except in areas designated as smoking areas.

70.160.010

> A smoking area may be designated in a public place ... except in:
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> * * *
>
> office reception areas and waiting rooms of any building owned or leased by the state of Washington or by any city ...
>
> * * *
>
> ... no public place, other than a bar, tavern bowling alley, tobacco shop, or restaurant, may be designated as a smoking area in its entirety.
>
> * * *

> Except as otherwise provided in this chapter, a facility or area may be designated in its entirety as a nonsmoking area by the owner or other person in charge.
>
> 70.160.040

> This chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers, excepting places in which smoking is prohibited by the state fire marshal or by other law, ordinance, or regulation.
>
> 70.160.060

On August 29, 1986, Mauermann wrote to Coney claiming that the implementation of the proposed smoking policy would constitute an unilateral change of working conditions. Mauermann contended that, at most, the Washington Clean Indoor Air Act only allowed the entrance/reception area to be a no-smoking area. No other portion of the facility, he advanced, qualified under the Act as a "public place." Mauermann requested that the policy be withdrawn. Mauermann left telephone messages for the chief September 11 and 12, 1986.

Coney denied Mauermann's request on September 15, 1986, writing that the policy would remain in effect for "the benefit of the health of all our employees."

Within a few weeks of the September 1st implementation, the chief allowed employees to smoke in the garage of the police department.

POSITIONS OF THE PARTIES

The union advances that the unilateral implementation of the smoking policy by the employer constitutes a change in working conditions without bargaining with the union. The union contends that Chapter 70.160 RCW does not mandate a smoking prohibition in the Chehalis Police Department. The union argues that the zipper clause in the present collective bargaining agreement neither precludes the employer from having to bargain over the smoking policy, nor does it waive the union's right to require bargaining over a change in working conditions.

The employer defends that the collective bargaining agreement allows the city to implement rules governing employee conduct. Furthermore, it argues that regulation of employee smoking by an employer does not constitute a change in working conditions. The city contends that the Washington Clean Indoor Air Act requires the imposition of a no smoking policy in the event of a regulation requiring the same.

DISCUSSION

It is unrefuted that Chief Coney established the smoking ban without bargaining the decision with the union. The employer's justification for its action has been, alternatively: a requirement of the state law; a lawful exercise of its management prerogatives; and/or a concern for the health and safety of its employees.

The union correctly points out that Chapter 70.160 RCW does not mandate a smoking ban in the Chehalis Police Department. RCW 70.160.040 grants the use of discretion so that the "person in charge" "may" designate a facility as a nonsmoking area.

Additionally, RCW 70.160.060 clearly states that "this chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers" unless smoking has been prohibited there "by the state fire marshal or by other law, ordinance, or regulation." There is no evidence that the State Fire Marshal banned smoking in the building. To hold that Coney's no smoking policy is an "other regulation" would be a twist of the intent of the statute that would evade harmonizing it with the employer's duty to bargain found in Chapter 41.56 RCW. The employer had to have a right to issue the regulation in the first place.

The employer bases its claim of management rights on two different sources: the management rights and "zipper" articles of the collective bargaining agreement and an inherent management prerogative.

The parties' collective bargaining agreement is not controlling in this complaint of unfair labor practices.[1] The Commission does not have the authority to remedy violations of collective bargaining agreements through the unfair labor practice procedures [City of Walla Walla, Decision 104 (PECB, 1976)], but the Commission does have authority to interpret the contract to evaluate "waiver by contract" defenses asserted in an unfair labor practice case. Stevens County, Decision 2602 (PECB, 1986). As the union correctly argues, a "zipper clause" in a labor agreement cannot be used as a defense to avoid the duty to bargain over a mid-contract change in working conditions which the employer would like to institute. N.L.R.B. v. Jacobs, Mfg, Co., 196 F.2d 680 (CA 2, 1952) (enf'd).

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[1] The complaint was not deferred to arbitration because there is no provision in the labor agreement for final and binding grievance arbitration.

The employer's claim that it has an inherent management right to control its buildings and vehicles has merit only in part. The question must be subdivided. An employer can decide, without input from its union, whether it will have lawn or gravel in front of the entrance; whether it will have an escalator or elevator between its floors; and whether the walls will be painted or paneled. An employer faced with a compelling need can unilaterally decide under its right to manage its facilities, whether or not there will be smoke in the air. Here, the employer was operating with an antiquated building having little or no ventilation and was using vehicles which had sensitive electronic equipment.[2] There was a compelling need for the chief to ban smoking from the Chehalis police facilities.

However, the employer's decision not to allow smoke in the air in its facilities affected the working conditions of employees who smoke. Therefore, the employees' exclusive bargaining representative should have been allowed the opportunity to bargain over the impact of the decision. The impact bargaining obligation would also allow the employer the opportunity to express its concern over the safety and health of all its employees.[3] Through mutual agreement, the parties could decide

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[2] During the hearing, at the request of the employer, the parties stipulated that the Examiner should conduct a site visit of the employer's facilities. This was done.

[3] As the union points out, if the employer were to justify its smoking ban merely on the basis of concern for the safety of its employees, the decision as well as the effects would be a mandatory subject of bargaining.

> We hold, therefore, in agreement with the Board, that the phrase "other terms and conditions of employment" contained in Sec. 8(d) of the act is sufficiently broad to include safety rules and practices which are undoubtedly conditions of employment.

Gulf Power Co., 384 F.2d 822 (1967).

when the ban was to be effective; if or where there would be a designated smoking area; whether, and at whose expense, employees who smoked would be offered the opportunity to join a smoke-ending program and so forth.

Deciding whether a no smoking policy is a mandatory subject of bargaining is a question of first impression for the Commission. Neither party to this matter advanced citations for consideration regarding smoking bans in the legal arguments which were filed.

Research in this area has shown some precedents.[4] Other states have also adopted the split scheme of allowing the management, upon a showing of a compelling need, to unilaterally make the decision to ban smoking, and then requiring impact bargaining. In Town of Rocky Hill and Local 1303-112 of Council 4 AFSCME and Town of Rocky Hill and International Brotherhood of Police Officers Local 316, BLR No. 2501 (1986), the Connecticut Board of Labor Relations held that the effects of posting "no smoking" signs in two areas of the police department office complex must be bargained. In that case, the town could only get a service contract on its new computer system if certain conditions were met -- including banning smoking from the areas in which the computers were located. The board found that the protection of the town's investment in its computer equipment was a prerogative of management which may be accomplished without bargaining with the employees' representatives. But since the effect of the measures taken to protect that investment had a significant

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[4] Some cases are not applicable. The National Labor Relations Board has considered a unilateral change in an employer's smoking policy in at least two cases. Alberts, Inc., 213 NLRB 686 (1974); Chemtronics, Inc., 236 NLRB 178 (1978). Neither of these cases is controlling in the present fact situation since the complaints in both Alberts and Chemtronics arose from pervasive anti-union animus during organizing campaigns.

impact on an important condition of employment, the town was obligated to bargain over that impact with the unions. The Connecticut Board wrote:

> By ordering the town to bargain over the impact of the decision to protect the computers, it should be made very clear that we are not ordering any particular outcome to the bargaining process. We are not saying here, any more than in other situations, that the duty to bargain is the duty to agree. It is, as always, the duty to bargain in good faith in an effort to reach a resolution of a problem. And, as always, if an agreed-upon resolution eludes the parties and impasse is reached despite good faith bargaining, the town may then take action unilaterally to protect its investment.
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> * * *
>
> We do not base our decision on principles either of morality or of health; rather, we are bound to consider the issue, as we have done, in terms of what must be done when the exercise of management prerogatives has a substantial impact on the conditions of employment in the workplace.

Without evidence of a compelling need, the Connecticut Board had held that no-smoking rules impinge directly on workers' employment conditions and thus constitute a mandatory bargaining subject. City of Middletown and International Association of Fire Fighters Local 1073, Conn. Board No. 2581 (September 9, 1987).

The Commonwealth Court in Pennsylvania has held that a ban on smoking in all public school buildings was an inherent managerial policy and not a mandatory subject of bargaining, writing:

> Even if [the ban on smoking] is a working condition, we are convinced that in striking a balance the educational motive behind the policy outweighs any impact on the employees' interests. We repeat that the paramount consideration in reaching this balance is the public interest in providing effective and efficient education for the School District's students. [5]

Chambers Area School District, 430 A.2d 740 (1981).

In contrast, the Rhode Island State Labor Relations Board has held that since smoking had been allowed in all of a school district's buildings prior to a unilateral implementation of a smoking ban, that smoking was a proper subject of bargaining between the employer and the collective bargaining representative. The school district was ordered to negotiate no-smoking policies. Rhode Island State Labor Relations Board and Pawtucket School Committee, RI SLRB No. ULP-4113 (June 11, 1987). The present case does not involve a school district as the employer; therefore, no comment is made balancing a school

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[5] It should be noted that later the same court dealing with a public employer that was not a school district held:

> The subject of whether employees may smoke at their workplace appears to us to be at the center of those subjects properly described as "conditions of employment" and to be entirely unrelated to those entrepreneurial or managerial judgments fundamental to the basic direction of the enterprise and removed from the scope of mandatory bargaining by PERA Section 702.

Commonwealth v. PLRB, 459 A.2d 452 (1983).

There is no evidence that this court had to consider a compelling need presented by the employer in question.

district's role-modeling mission as an employer's compelling need and employees' right to bargain over working conditions.

In Minnesota, a district court has ruled that a city may continue to implement a policy of hiring only non-smokers for firefighting jobs, but that the city must negotiate with the firefighters over how its new work standards will be implemented. International Association of Fire Fighters Local 101 v. City of Duluth, Minn. Dist. Ct.6, No. 8720508 (June 19, 1987).

On the federal level, current rules of the Office of Personnel Management permit sections of office to be designated for smoking if non-smokers can be protected from second-hand smoke by an adequate ventilation system. Managers are to negotiate with employee organizations where appropriate. The emphasis has shifted away from restricting the smoker; "the enemy now is smoke itself." Individual Employment Rights, Bureau of National Affairs, Inc., December 23, 1987.

In summary, regarding this area of current concern for the workplace, an employer faced with a compelling need, may unilaterally decide to ban smoke from the air of its premises because of its inherent management right to control its facilities; but the employer must bargain the impact and effects of its decision, upon demand, with the exclusive bargaining representative of its employees.

FINDINGS OF FACT

1. The city of Chehalis, Washington is a "public employer" within the meaning of RCW 41.56.030(1). At the time in

question, the city manager was Lloyd Willis and the police chief was Lynn Coney.

2. The Teamsters Local 252 is a "bargaining representative" within the meaning of RCW 41.56.030(3), and is the certified exclusive bargaining representative of a bargaining unit of employees in the city of Chehalis Police Department. At the time in question, the business agent was Michael Mauermann.

3. The police department for the city of Chehalis is located in an antiquated building which has little or no effective ventilation. Under current circumstances, to circulate air through the department, doors must be left open in such a manner which jeopardizes the security of items of evidence that are brought into the department's custody.

4. Some police officers are assigned to patrol cars which contain electronically sensitive radio equipment.

5. The parties have a collective bargaining agreement effective from January 1, 1986 through December 31, 1987. Negotiations for this agreement began in autumn, 1985 and concluded in January, 1986. A no smoking policy was never proposed by the employer during bargaining.

6. Chief Coney unilaterally adopted a no smoking policy which banned smoking throughout the police department and in all the police vehicles on or about August 28, 1986. The policy became effective September 1, 1986.

7. Mauermann became aware of the policy August 28, 1986. The next day Mauermann made a demand of Chief Coney to bargain the policy. The chief did not bargain with Mauermann regarding the smoking ban.

CONCLUSIONS OF LAW

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

2. By unilaterally adopting a policy to ban smoke in the air of its worksites, when faced with a compelling need, the employer did not violate RCW 41.56.140(4) and (1).

3. By refusing to bargain the impact and effects of its decision to ban smoke in the air of its worksites, with the exclusive bargaining representative of its employees, the employer has violated RCW 41.56.140(4) and (1).

Based on sworn testimony given at the hearing, the exhibits received into evidence and the record as a whole, it is

ORDERED

Pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered the city of Chehalis, Washington, its officers, elected officials, and agents, shall immediately:

1. Cease and desist from:

   A. Refusing to bargain collectively with Teamsters Local Union 252 regarding the impact and effects of the decision to ban smoke in the air of its facilities;

   B. Interfering with, restraining or coercing its employees in any other manner in the free exercise of their rights guaranteed them by the Act.

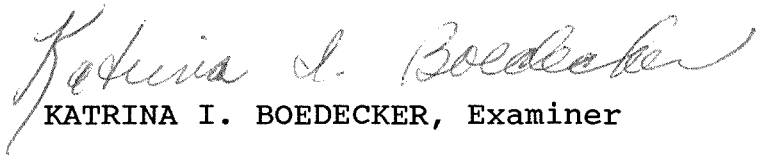
2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes and policies of Chapter 41.56 RCW:

A. Post, in conspicuous places on the employer's premises where notices to all employees are customarily posted, copies of the notice attached hereto and marked "Appendix." Such notice shall, after being duly signed by an authorized representative of the city of Chehalis, Washington, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the city of Chehalis to ensure that said notices are not removed, altered, defaced, or covered by other material.

B. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the proceeding.

DATED at Olympia, Washington, this 13th day of November, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KATRINA I. BOEDECKER, Examiner

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

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, CHAPTER 41.56 RCW, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively with Teamsters Local 252 regarding the impact and effects of our decision to ban smoke in the air of our facilities;

WE WILL NOT interfere with, restrain or coerce our employees in any manner in the free exercise of their rights guaranteed them by the Public Employees Collective Bargaining Act.

CITY OF CHEHALIS

By: _____
Authorized Representative

Dated _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 754-3444.