STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17, Complainant, vs. PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, Respondent.	CASE NO. 5382-U-84-977 DECISION 2045-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Richard D. Eadie, Attorney at Law, appeared on behalf of the complainant.

Davis, Wright and Jones, by Thomas A. Lemley, Attorney at Law, appeared on behalf of the respondent.

On August 1, 1984, International Federation of Professional and Technical Engineers, Local 17 (complainant or union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Public Utility District No. 1 of Clark County (respondent or employer) had violated RCW 41.56.140(1) and (4) by bargaining in bad faith and by directly contacting bargaining unit members while negotiations were in progress.

On September 12, 1984, the Executive Director of the Public Employment Relations Commission issued a preliminary ruling, pursuant to WAC 391-45-110, concluding that the Commission had jurisdiction over the employer pursuant to Chapter 41.56 RCW. Public Utility District No. 1 of Clark County, Decision 2045 (PECB, 1984).

The union thereafter amended the complaint on three separate occasions. On September 24, 1984, the union added an allegation that the employer placed pre-conditions on further negotiations. On October 24, 1984, the union added an allegation that the employer was using the threat of layoffs as a bargaining ploy. On November 2, 1984, the union alleged that the employer continued to use the threat of layoffs in the bargaining process, and that it had conditioned final agreement on the withdrawal of all pending legal actions filed by the union against the employer.

Further proceedings in this unfair labor practice case were held in abeyance while the employer petitioned the Commission for a declaratory ruling as to its jurisdiction. In Public Utility District No. 1 of Clark County, Decision 2125 (PECB, 1985), the Commission ruled that the employer was within its jurisdiction. The employer petitioned for judicial review of the Commission's declaratory ruling, and the matter was finally resolved by decision of the Washington State Supreme Court in Public Utility District No. 1 of Clark County vs. Public Employment Relations Commission, 110 Wn.2d 114 (1988), wherein the Court held that the Commission had jurisdiction over the employer pursuant to Chapter 41.56 RCW.

In light of the Supreme Court decision, the matter was assigned to Examiner Kenneth J. Latsch for further proceedings. A hearing was conducted on October 3 and 4, 1988, in Vancouver, Washington. The parties submitted post-hearing briefs, the last of which was received on December 20, 1988.

FACTUAL BACKGROUND

Public Utility District No. 1 of Clark County is organized pursuant to Title 54 RCW, and provides electrical service to residents in and around Vancouver, Washington.

At all times pertinent to the instant proceedings, the employer had collective bargaining relationships with three employee organizations. Interna-

tional Federation of Professional and Technical Engineers, Local 17, represented approximately 23 employees in a bargaining unit described in a April 1, 1983 through March 31, 1984 collective bargaining agreement as:

> ... full-time and regular part-time employees employed within the classifications listed below...
>
> Engineering Aide Trainee
> Engineering Aide
> Junior Engineer
> Assistant Engineer
> Engineer Specialist
> Associated Engineer
> Industrial Consultant
> Engineer
> Senior Engineer

International Brotherhood of Electrical Workers, Local 125, represented a bargaining unit of electrical linemen. Office and Professional Employees International Union, Local 11, represented a bargaining unit of office and clerical employees.

Historically, all three unions negotiated collective bargaining agreements which had common expiration dates. As a practical matter, the IBEW Local 125 contract set the bargaining pattern for the other two unions, and general terms of settlement were similar throughout all of the contracts.

The bargaining pattern changed in 1983. General Manager Bruce Bosch had initiated a review of the salaries paid by the employer in comparison with other employers in the Clark County vicinity, and had decided that the clerical and engineering groups were being paid at a disproportionately high rate. Using this information, the employer bargained a two year agreement with IBEW Local 125, while negotiating one year contracts with the office-clerical bargaining unit and the engineering bargaining unit. The staggered expiration dates ended the traditional pattern of bargaining.

Negotiations for a successor agreement between Local 17 and the employer commenced on March 26, 1984. By that time, the employer had already

concluded negotiations with the office-clerical bargaining unit for an agreement that contained substantial concessions in such areas as overtime, vacation accrual and hours of work.

At the initial bargaining session on March 26, the employer presented an initial contract proposal that contained 40 changes in the collective bargaining agreement, including a two-year wage freeze for a majority of the bargaining unit employees and a ten percent wage cut for the engineering aide trainee, engineering aide and junior engineer classifications. Additionally, the employer sought modifications in the "no strike/no lockout" provision, as well as a number of other language modifications.

The union also made its bargaining demands known at the March 26 meeting. The union sought a one-year agreement, and proposed wage increases whereby the classification of assistant engineer would be adjusted to the same level as that of a "journeyman lineman" represented by IBEW Local 125. The union also sought to maintain current "benchmark" practices for all other classifications in the bargaining unit, using the assistant engineer classification as the reference point.

The parties discussed their proposals during the March 26 meeting, and Bosch spoke about the utility's economic condition. At the end of the meeting, Bosch presented a letter to Business Representative William Kalibak, reiterating the employer's position. In pertinent part, that letter set forth the employer's rationale on the 1984 negotiations:

> With our employees being a major asset of the District, job stability becomes a major goal for the District. The road to stability will be a long one and will require mutual cooperation. The formula for job stability is competitiveness and flexibility and has two major factors: (1) positions within the District must be cost-effective and remain competitive to the alternatives such as automation, outside contracting and the local job market; (2) there must a greater degree of flexibility allowing for maximum productivity and utilization of employees. The District has always paid excellent wages and benefits to allow the opportunity to hire excellent

> employees. While wages and benefits continue to remain well above the local market, stability becomes, likewise, extremely important.
>
> The proposal before you provides the basis for the District and Local 17 to achieve an appropriate level of stability, flexibility and a cost-effective operation ....

The parties met five more times through April, May, and the early part of June of 1984.

On June 13, 1984, the employer presented the union a "final offer" which contained the two-year wage freeze and the ten percent salary reduction for specific classifications, but "grandfathered" incumbent employees in the job classifications that would be subject to the wage reduction.

On July 2, 1984, the bargaining unit membership rejected the employer's offer. On the same day, Kalibak sent a letter to Byron Hanke, the employer's director of communications and human resources, informing him of the rejection, and suggesting that the parties resume bargaining.

During the period from July 2 until July 17, Kalibak and Hanke had several discussions about the negotiations, but the record does not reflect the substance of those conversations.[1]

The parties next met on July 17, 1984. At that meeting, General Manager Bosch was present as part of the employer's bargaining team and the employer introduced Thomas Lemley as its new chief negotiator. During the course of the meeting, Lemley presented a letter to Kalibak which summarized the status of bargaining from the employer's perspective. In part, the letter responded to union proposals to submit the unresolved issues to mediation under the auspices of the Public Employment Relations Commission, or to pursue legal

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[1] Mr. Hanke no longer works for the employer, but still resides in the Vancouver area. His availability as a potential witness was a factor in scheduling the hearing on this matter, and he was present at the hearing under subpoena, but he was not called as a witness.

action if the employer decided to implement its final offer. The letter expressed the employer's view that the Commission did not have jurisdiction over public utility districts, and also noted that mediation, in any forum, would not force the employer to modify its bargaining position. Lemley's letter also expressed the employer's view that the parties had reached impasse, using the following terms:

> It is clear to me that Clark County PUD and Local 17 are now at impasse. The contract negotiated with Office and Professional Employees Union, Local 11, a month or so ago has set the pattern for this contract with Local 17. You and the employees in this unit have received the Employer's final offer.
>
> We shall assume that the parties are still at impasse unless you come forward with specific facts to indicate otherwise, or unless the parties reach agreement during the week of July 16, 1984. If we have not reached agreement by the end of that week, the Employer shall implement its final offer effective 12:00 a.m. midnight, July 22, 1984.
>
> In closing, let me pass along the Employer's sincere hope that you will share this information with the employees in this bargaining unit and reconsider the earlier rejection of our final offer. Neither PERC nor any court has any authority to force Clark County PUD to change its final offer or to accept any different offer you may propose. This is a fair and reasonable offer, and one that has been accepted by a much larger bargaining unit at Clark County PUD. There may be some provisions in this final offer that are not fully satisfactory in your eyes, but all negotiations involve compromises and concessions. Like utilities throughout the state, Clark County PUD is under tremendous pressure from the citizens in this area to provide high quality service at reasonable costs. The management of Clark County PUD has done the best it can under the circumstances it faces today.
>
> We sincerely hope that you do not sacrifice these 28 employees for reasons important only to the union as a whole. That could be a grave mistake. (emphasis supplied)

The employer did not suggest that it was "starting over" because of its new bargaining team, and did not prevent the union from advancing proposals.

Kalibak testified, however, that he did not believe the meeting to be a "negotiating session", and that the union was not comfortable in making any proposals with the new management bargaining team in place.

The employer sent a copy of its July 17 letter to each of the employees in the bargaining unit represented by Local 17.

Further negotiations were tentatively scheduled for July 24, but Kalibak was concerned about the employer's new bargaining team, and wanted to have Richard Eadie, the union's attorney, participate in further meetings. Kalibak learned that Eadie was not available on July 24, so on July 18, Kalibak cancelled the meeting.[2]

On July 19, 1984, Lemley sent a letter to Kalibak, expressing his concern about the cancellation of the upcoming meeting, as follows:

> ... You and the union have let the employees in this bargaining unit down by not giving them adequate representation when they most needed it.
>
> We indicated to you in my letter of July 17 that the District and I are convinced that the parties are at impasse in the current contract negotiations. There have been no significant movements whatsoever in the last several meetings. We made it very clear in our letter and during the meeting Tuesday that we felt we were at impasse, and we urged you to give us some concrete sign if you felt this was not an accurate assessment of the situation. We suggested a reasonable deadline for your response.
>
> You stated in the barest and most general of terms that the union was prepared to make significant movement and thus break the impasse, but you flatly refused to indicate even one issue you were prepared to move on. Furthermore, you refused to meet prior to the end of the week, even though we indicated that we would be prepared to meet on Saturday or Sunday if that were necessary. When you requested that we meet again on Tuesday, July

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2 The record indicates that Eadie never actually took part in any negotiations on behalf of the union.

> 24, the District reluctantly agreed to extend its deadline. We made it very clear to you at that time that we were skeptical that the union was willing or able to break out of the current deadlock.
>
> Your actions have simply confirmed that our skepticism was warranted, and that the impasse continues. Based on that impasse, and in accord with my earlier letter to you of July 17, the District will implement the basic terms of its final offer effective 12:01 a.m. (midnight) Sunday, July 22, 1984. ...

(emphasis supplied)

The letter went on to detail some of the effects of implementation, including termination of the grievance procedure and union security provision which had been in the previous contract.

As in the case of the July 17 letter, the employer sent a copy of its July 19, 1984, letter to each of the employees in the bargaining unit represented by Local 17.

On July 20, 1984, Michael Waske, Local 17 Business Manager, sent a letter to Lemley, denying that the parties were at impasse, and formally requesting mediation to assist the parties in reaching a final agreement. Waske expressed the union's position that concessions could be made, but the letter did not detail any specific proposals in that regard. Waske also warned that implementation of unilateral changes would lead to unfair labor practice charges, and he blamed Lemley's presence for the confrontational attitude that marked the negotiations up to that point.

After July 20, 1984, the parties discussed the use of a mediator from the Public Employment Relations Commission or from the Federal Mediation and Conciliation Service (FMCS).

On July 30, 1984, Bosch sent a letter to Waske, denying that the employer sought confrontation, and expressing concern about the potential success of mediation. While not anticipating progress in mediation, Bosch expressed the

employer's desire to utilize the services of the FMCS, rather than the Public Employment Relations Commission.[3] Bosch also noted that the union had not provided new proposals, while continuing to claim that no impasse existed. As in the case of the July 17 and July 19 letters, the employer sent copies of the July 30, 1984 letter to all bargaining unit employees.

On August 3, 1984, Kalibak sent a completed FMCS mediation request form to Hanke. The accompanying letter referred to this unfair labor practice case, which had been filed with the Commission on August 1, 1984.

Discussions were held between the parties about scheduling a mediation session, and Lemley sent a letter to Kalibak on August 16, 1984, expressing the employer's displeasure with the union's inability to meet until after the upcoming Labor Day holiday. Lemley asserted that the scheduling difficulty was symptomatic of the union's failure to make any proposals to facilitate settlement.

Apart from problems with finding a meeting date, the parties disagreed over the location of a mediation meeting. On September 11, Lemley sent a letter to Kalibak, summarizing the employer's understanding of the location issue. According to the employer, the parties had discussed the possibility of meeting in Seattle, Washington, but the union changed its position on the matter, and insisted on meeting in Portland, Oregon. Lemley went on to characterize the disagreement over location as further evidence that the parties were deadlocked in negotiations.

On September 17, 1984, Kalibak sent Lemley a letter, denying that the union had changed its position on the location for mediation. Kalibak pointed out that he had been contacted by a mediator from the FMCS Portland office, and that the union was ready to commence mediation as soon as possible.

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[3] Bosch's letter also identified the members of the employer's bargaining team for mediation as including himself, Lemley, Hanke, and Donald Russo, an attorney from a local law firm.

In a letter also sent on September 17, 1984, Lemley advised Kalibak of the employer's intention to lay off eight bargaining unit employees. The letter explained that the employer had been conducting an ongoing examination of personnel needs, and had determined that a reduction in force was necessary.[4] No proposal on layoffs had been made by the employer in the negotiations up to that time, and this was the first that the union had heard of the matter.

On September 19, 1984, Bosch sent layoff notices to six of the employees in the bargaining unit represented by Local 17. A notice about the layoff situation was sent by the employer to all bargaining unit employees.

Kalibak wrote to Lemley on September 21, 1984, requesting a meeting on the layoff issue. The record does not indicate whether the parties met to address the layoffs separately from the collective bargaining negotiations.[5]

The parties met in mediation in Portland, Oregon, on October 8, 1984. Both parties made proposals on the issues, and progress was made in the negotiations. At one point in the process, the employer offered to reduce the number of layoffs from six to three, if the union would accept a two-year wage freeze. The union continued to seek a two percent wage increase, and the meeting ended without the parties reaching final settlement.[6]

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4 The record does indicate that the employer had been studying its personnel levels since June, 1984, and that a comprehensive report had been prepared on September 4, 1984, at Bosch's request, by the employer's Director of Finance. The report stated that the engineering department was overstaffed in comparison with districts of similar size, and concluded that a reduction in the engineering area was appropriate.

5 On September 24, 1984, the union amended its unfair labor practice complaint to allege that the employer was pre-conditioning further bargaining.

6 Bosch testified that the union simply left the meeting without informing the employer or the mediator of its intentions, but the employer has not filed or processed any unfair labor practice charges against the union in that regard.

Shortly after the mediation session, Kalibak and Hanke had a series of meetings to discuss the remaining issues. As a result of those discussions, the employer agreed to rescind the layoffs in exchange for the union's acceptance of a two-year wage freeze. Bosch testified that he understood that the union had also agreed to withdraw all pending litigation arising from the bargaining process.[7]

On October 25, 1984, the employer presented an "Addendum No. 1 to Final Offer", which reflected a number of language changes made during mediation, as well as a statement that the union would withdraw outstanding litigation against the employer. On the same day, the bargaining unit membership met to consider the employer's latest offer. Kalibak and Waske both attended the union meeting. The bargaining unit members accepted the offer by a vote of 12 to 11. Immediately after the vote was taken, Waske announced that the union could not be a party to the agreement because the employer sought a disclaimer concerning unresolved litigation.

On October 26, 1984, Waske delivered a letter to Lemley. Apart from notifying Lemley of the acceptance of the employer's modified offer by the members of the bargaining unit, the letter explained:

> Because Addendum No. 1 contains language which would require Local 17 to accept coercive and intimidating tactics of the PUD which constitute Unfair Labor Practices, Local 17 will decline to sign the Agreement and does withdraw its interest in the bargaining unit.

Terms of the new contract were put into effect, and the record reflects that no layoffs were made within the bargaining unit.

After the employer received Waske's October 26, 1984 letter, it took the position that the union no longer had any interest in the bargaining unit.

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[7] On October 24, 1984, the union further amended its unfair labor practice complaint to allege that the employer was illegally using the threat of layoffs to gain bargaining leverage.

The record reflects several attempts by the union to contact bargaining unit employees, and employer responses which limited the union's access to its premises.[8]

POSITION OF THE COMPLAINANT

The union contends that the employer committed a number of unfair labor practices by its conduct in bargaining. It argues that the employer did not bargain in good faith, and repeatedly interfered with the union's representation rights by communicating directly with bargaining unit members while negotiations were still in progress. The union argues, further, that the employer unlawfully used the threat of layoffs to gain an unfair bargaining advantage, and unlawfully conditioned acceptance of its amended final offer upon withdrawal of unfair labor practice litigation. The union maintains that its action to disclaim interest in the bargaining unit was a direct result of the employer's illegal acts.

As a remedy, the union seeks reinstatement of its bargaining rights with "certification bar" protection, and imposition of interest arbitration. Additionally, the union seeks reimbursement for all of its costs associated with the prosecution of the instant unfair labor practice case and the related judicial proceedings that were needed to establish the Commission's jurisdiction over the employer.

POSITION OF THE RESPONDENT

The employer denies that it committed any unfair labor practices. It notes that the negotiations in question took place in the context of severe changes

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8 On November 2, 1984, the union filed its third amendment to the unfair labor practice complaint, re-asserting that the employer improperly used the threat of layoff, and further alleging that the employer illegally conditioned acceptance of the modified offer upon withdrawal of litigation.

in its operations, and that it made difficult decisions in light of falling revenues. It argues that it was always willing to meet and negotiate with the union concerning the impact such decisions would have on bargaining unit members, and that the union stalled bargaining on several occasions, one of which was for a period of over three months. The employer contends that the union's decision and action to disclaim the bargaining unit were not coerced, so that the union no longer has standing to pursue the instant case.

DISCUSSION

Applicable Statutes

This is a case of first application of RCW 54.04.170 and .180 within the jurisdiction of the Public Employment Relations Commission. RCW 41.56.020 recognizes the existence of several collective bargaining statutes, but also specifies the broad applicability of Chapter 41.56 RCW:

> This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington except as provided by RCW 54.04.170, 54.04-.180, and chapters 41.59, 47.64, and 53.18 RCW .... (emphasis supplied)

Traditionally, local government public employers in Washington State and their employees bargain within the statutory framework established by Chapter 41.56 RCW. Employees of public utility districts also derive bargaining rights from RCW 54.04.170, which provides:

> Employees of public utility districts are hereby authorized and entitled to enter into collective bargaining relations with their employers with all the rights and privileges incident thereto as are accorded to similar employees in private industry.

In like manner, public utility districts are empowered to bargain collectively by the terms of RCW 54.04.180:

> Any public utility district may enter into collective bargaining relations with its employees in the same manner that a private employer might do and may agree to be bound by the result of such collective bargaining.

Adjudication of public utility district labor relations matters must take into account the clear legislative directive to compare public utility districts and their employees with their private sector counterparts. While the above-quoted statutes do not contain a great deal of specificity, it must be assumed that labor relations matters arising in such private sector settings are governed by the National Labor Relations Board (NLRB), interpreting the federal Labor Management Relations Act (LMRA). The LMRA is applicable to labor disputes arising between private electrical utilities and unions representing their employees. See, Consolidated Edison Co., 132 NLRB 1518 (1961), supplemented 134 NLRB 1137 (1961). See, also, Iowa Electric Light and Power Co., 668 F.2d 413 (8th Circuit, 1982), where the Court ruled that it did not have jurisdiction to decide a representation issue properly before the NLRB, and Connecticut Light and Power Co., 271 NLRB 766 (1984), wherein the employer properly refused to bargain a mid-term modification of a collective bargaining agreement where the contract did not contain provision for a "reopener clause".

As a practical matter, this means that disputes arising in public utility district collective bargaining must be adjudicated within the framework of decisions rendered by the NLRB. See, Local Union No. 77, International Brotherhood of Electrical Workers v. Public Utility District No. 1, 40 Wn. App. 61 (1985). As the respondent correctly notes in its closing brief, application of federal precedent is also consistent with the Supreme Court's decision in Public Utility District No. 1 of Clark County v. Public Employment Relations Commission, 110 Wn.2d 114 (1988).

Chapter 41.56 RCW, the Public Employees' Collective Bargaining Act, and Chapter 41.58 RCW, creating the Public Employment Relations Commission, are both modeled after the LMRA. A comparison of the federal and state statutes

discloses a number of similarities in approach to labor-management administration and dispute resolution:

* RCW 41.58.020(4) endorses grievance arbitration in much the same language as Section 204(d) of the LMRA, and the Commission maintains a panel of impartial arbitrators, as does the Federal Mediation and Conciliation Service.[9]

* RCW 41.56.060 through .080 and the Commission's representation case procedures are similar to Section 9 of the LMRA and the NLRB's representation case procedures.

* Turning to their unfair labor practice provisions, the state and federal statutes have many basic similarities. For example, RCW 41.56.140(1) and Section 8(a)(1) of the LMRA both prohibit employers from interfering with, restraining or coercing employees in the pursuit of their collective bargaining rights. RCW 41.56.140(4) and Section 8(a)(5) similarly require employers to bargain in good faith.

* As in the case of the federal model, Commission precedent has been developed through decisions rendered by Examiners who occupy the role of the NLRB's Administrative Law Judges, by the Commission occupying the role of the National Labor Relations Board en banc, and by the Courts.

Accordingly, it is appropriate to follow Commission precedent interpreting Chapter 41.56 RCW, to the extent that it does not conflict with the LMRA or NLRB precedent. In the rare instances that NLRB decisions differ substantively from Commission decisions, the federal cases shall be given due consideration in the following analysis.[10]

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9 The Commission provides additional service by offering the use of its professional staff as grievance arbitrators at no cost to the parties. See: RCW 41.56.125.

10 In practice, the Commission has "considered" NLRB precedents, but has not found itself to be bound to follow them when dealing with unfair labor practice complaints filed under Chapter 41.56 RCW. In the instant matter, closer adherence to NLRB decisions is required by RCW 54.04.170 and 180.

The Course of Bargaining

Whether under terms of Chapter 41.56 RCW or the IMRA, parties are encouraged to discuss a full range of issues, but are not required to make any concessions during the course of negotiations. RCW 41.56.030 (4); IMRA Section 8(d). In like manner, neither statute prohibits "hard bargaining" on mandatory bargaining subjects. See, City of Snohomish, Decision 1661 (PECB, 1983), citing with approval Chevron Chemical Co., 261 NLRB 44 (1982), wherein the Examiner concluded that unacceptability of a particular proposal does not, in itself, prove that the party advancing the proposal committed an unfair labor practice.

A unilateral change in wages, hours or working conditions while negotiations are still in progress would typically constitute an unlawful refusal to bargain under either statute. City of Vancouver, Decision 808 (PECB, 1980); NLRB v. Katz, 369 U.S. 736 (1962).

If the parties have reached a genuine impasse, however, an employer may implement its final offer on a mandatory subject of bargaining. See, Pierce County, Decision 1710 (PECB, 1983), citing Taft Broadcasting Co., 163 NLRB 475 (1967); enforced, sub nom. American Federation of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).[11] Absent the finding of good faith bargaining, an impasse could not be reached lawfully, and resulting implementation would also be illegal. The Taft decision recognizes the difficulty of determining whether an impasse has been reached:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the

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11 A similar result was reached in Spokane County, Decision 2167-A (PECB, 1986), aff. Thurston County Superior Court (1988), where the public employer implemented certain changes based upon its final offer to the union. As in Pierce County, it was determined that the employer had bargained to impasse in good faith.

> parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. Id at 478

The Public Employment Relations Commission addressed the issues of impasse and unilateral change as early as 1977, in Federal Way School District, Decision 232-A (EDUC, 1977), where the Commission found that a bargaining "impasse" exists "where there are irreconcilable differences in the positions of the parties after good faith negotiations."[12] See, also, NLRB v. Independent Association of Steel Fabricators, 582 F.2d 135, 147 (2nd Cir. 1978), where "impasse" was defined as a situation where the parties could reasonably conclude that "there was no realistic prospect that continuation of discussion at that time would have been fruitful".

The employer argues here that the union lacks standing to bring the instant unfair labor practice complaint because it disclaimed the affected bargaining unit. Typically, the disclaimer argument would be addressed first because it raises a jurisdictional issue, but the essence of the union's case deals with the course of conduct leading up to the time that the complainant disclaimed the unit. Accordingly, the course of events preceding the disclaimer must be examined before the disclaimer itself is addressed.

It is clear that the parties were destined to engage in a difficult round of negotiations. The union sought a wage increase that would tie its classifications to a separate craft group in another bargaining unit. From its original decision to eliminate common expiration dates for all three collective bargaining agreements, the employer approached the 1984 negotiations with an agenda different from that advanced in earlier bargaining, and it presented proposals that were difficult for the union to accept. The question is whether the employer's new agenda was advanced in violation of the applicable collective bargaining statutes.

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12 Federal Way School District was decided under terms of Chapter 41.59 RCW, the Educational Employees Relations Act (EERA), which is also modeled after the IMRA in all pertinent aspects.

The record is silent as to negotiations held prior to July 17, 1984. Absent evidence to the contrary, it must be concluded that the parties had bargained in good faith until July 17, 1984.

The July 17, 1984 Letter -

Events beginning on July 17 cast serious doubt as to the employer's intentions in the bargaining process. At the same time that the employer expressed its opinion concerning the existence of a bargaining deadlock, it sent a letter to each bargaining unit member casting doubt on the union's effectiveness as a bargaining representative.

The Commission has examined the question of "circumvention" on a number of occasions. See, for example, Seattle-King County Health Department, Decision 1458 (PECB, 1982), wherein the employer was found to have committed an unfair labor practice by negotiating directly with bargaining unit employees concerning possible layoffs; and City of Raymond, Decision 2475 (PECB, 1986), where the employer illegally dealt with bargaining unit employees concerning proposed changes in wages and working conditions. In rejecting several charges it was found that a public employer does not commit an unfair labor practice by truthfully explaining to bargaining unit members the proposals it had previously communicated to the union. Spokane County, Decision 2793 (PECB, 1987). The employer in the instant case particularly relies on the reasoning in NLRB v. Pratt & Whitney Aircraft Division, 789 F.2d 121 (2d Cir. 1986), wherein an employer's direct communication with bargaining unit employees was not to violate its bargaining obligation:

> None of the employer's communications to its employees were coercive. While strong language was used, stating that the union was on "a collision course", that their proartation was "thoughtless and irresponsible", and that their offers were "unrealistic", the employer never directly said - nor even implied - that the workers would be better off without the union. Further each substantive proposal brought to the workers' attention was first presented to the union at the bargaining table. Id., at 135.

Each of the above-cited cases revolves around two elements: (1) the employer's truthful recitation of bargaining positions already communicated to the union, and (2) the absence of coercive language. As noted in Pratt & Whitney, supra, even an implication that employees should decertify their union representative may be enough to find an unfair labor practice. In like manner, the United States Supreme Court recognized that an employer's "free speech" right is tempered by the very existence of the employment relationship. As explained in NLRB v. Gissel Packing Co., 391 U.S. 575 (1969), balancing of the employer's right to directly communicate with the employees' right to form and join labor organizations:

> ... must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Id at p. 617-18.

In the instant case, the employer's July 17, 1984, letter cannot be characterized as a simple statement of bargaining positions. The employer pointedly remarked that the union could be "sacrificing" bargaining unit members. Such a comment goes beyond questioning bargaining strategy, and makes an implied threat to the job security of the employees, while directly attacks the union's credibility as their representative. Even if coercion was not intended, the employees could reasonably have perceived the statement as coercive. The employer could certainly have foreseen such a result.

The July 19, 1984 Letter -

The language found in the July 19, 1984, letter was also objectionable, clearly accusing the union of failing to represent the bargaining unit at a crucial point in the unit's relationship with the employer.

In addition, the July 19 letter announced a firm implementation date for the employer's final offer which had not been communicated previously to the union. Thus, the union was not given an opportunity to react to the possibility of implementation before bargaining unit employees were contacted.

Despite the difficulties in bargaining up to that time, the employer should have given the union a chance to alter its negotiating stance before the implementation was announced to the bargaining unit members.

Taking the July 19 letter together in context with the July 17 letter, it must be concluded that the employer unlawfully circumvented the union by its contacts with bargaining unit employees during the course of collective bargaining negotiations.[13]

The Threatened Layoffs -

Given the inflammatory and unlawful nature of the employer's contacts with bargaining unit members, events following July 19, 1984, must be scrutinized closely.

An employer may properly rely upon economic justifications for bargaining positions it takes. See, Seattle School District, Decision 1803 (PECB, 1983), wherein the employer proved that union-requested wage increases were illegal in light of salary limitations imposed on school districts by state law, and Snohomish County, Decision 1868 (PECB, 1984), wherein the employer properly notified the union that subcontracting was a possibility due to poor economic positions. As noted in Island County, Decision 857 (PECB, 1980), however:

> Any practice of increasing demands during bargaining or adding new demands assuredly hinders achievement of complete agreement, and one must be suspect of the good faith of a party which moves the target during bargaining or as the moment of agreement approaches.

While the employer here would characterize the layoff issue as a personnel matter unrelated to the collective bargaining process, the record clearly

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13 A similar violation was found in Texas Electric Coop., Inc., 197 NLRB 10 (1972), where an employer letter suggested that the union was subordinating employee interests in bargaining.

indicates that the potential layoffs became a central part of the contract negotiations, and that a final agreement was reached only after the union acceded to the employer's wage demand in lieu of layoffs.

The sequence of events also discredits the employer's argument. Within the context of the "stalled" negotiations and the two coercive letters, the employer announced that over 30% of the bargaining unit would be laid off.[14] Almost immediately thereafter, the employer changed the number of employees to be laid off from eight to six, without any indication of further study to justify modification of the initial recommendation which it would have the Examiner accept as persuasive. In later negotiations, the employer offered to withdraw its layoff position completely, in exchange for the union's acceptance of a two-year wage freeze. That wage "moratorium" was the same as originally proposed by the employer when bargaining commenced. Given these circumstances, a pattern emerges by which the employer was using the threat of layoffs to gain advantage in negotiations. Clearly, the employer injected the layoff issue to "move the target" in negotiations, thereby forcing the union to accept wage concessions it otherwise would not consider. The threat of layoffs was used only as a bargaining tactic, and as such, goes beyond permissible "hard bargaining".

The Insistence on Withdrawal of Unfair Labor Practice Charges -
In addition to other questionable conduct, the employer presented a modified final offer which contained a provision that specifically required the union to withdraw pending litigation against the public utility district. Among that litigation was, at a minimum, this unfair labor practice complaint. While the employer presented some testimony that the parties had discussed the withdrawal of litigation, the record does not support a conclusion that the union had, in fact, agreed to such a proposal. If the withdrawal of

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14 While the employer presented testimony that the layoff decision resulted from a great deal of study, evidence at the hearing indicated that the first study was submitted to utility management in June of 1984, well after the bargaining unit rejected the employer's first "final offer", and just before the employer's announcement of impasse.

litigation was a condition precedent to the conclusion of negotiations, a violation was committed. See, Patrick & Co., 248 NLRB 390 (1980), where an employer was found to have committed a violation of the IMRA by requiring the union to withdraw unfair labor practice charges.

Within the context of the employer's other bargaining activities in this case, such a pre-condition is found to be consistent with the employer's attempts to dominate the negotiating process. It must be concluded that a violation was committed.

The Disclaimer -

Having concluded that the employer committed several unfair labor practice violations during the course of bargaining, the disclaimer issue can now be addressed.[15] The union argues, and the Examiner concludes, that the purported disclaimer was a direct result of the employer's unlawful activities, which caused bargaining unit employees to accept the employer's proposal out of fear for their jobs. Therefore, it is concluded that the disclaimer was coerced and void, so that the union has standing to process the instant unfair labor practice to its conclusion.

REMEDY

To remedy the unfair labor practices, the employer shall be required to post notices to employees, acknowledging its unlawful acts, and to resume its bargaining relationship with the complainant union.

As a further remedy, the union additional protection for its status under terms similar to those issued in Gissel Packing Co., 395 U.S. 575 (1969).

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15 The union's additional charges concerning alleged preconditions on the location of mediation meetings are not factually supported, and are dismissed. The record indicates that the employer agreed with the union's request to meet in Portland, Oregon, even after the union had originally indicated it would be willing to meet in Seattle, Washington.

The normal "bargaining order" remedy reaches back to the onset of the unlawful activity and covers the entire period up to the date of the issuance of the order. Such an order is not appropriate here. The union cannot escape some responsibility for its own highly unusual tactic of purporting to "disclaim" the bargaining unit while pursuing these unfair labor practice charges. Healthy collective bargaining is not promoted if one of the parties simply walks away from the process because of the other party's bargaining strategies. The unfair labor practice provisions of the Act are available to fully restore a complainant to the position they would have occupied had no unfair labor practice violation been committed. Given the union's actions, the employer could reasonably have believed since the delivery of the union's October 26, 1984, letter that the affected employees were no longer represented, and it could have made personnel decisions based upon that assumption. Rather than inviting another round of litigation arising from changes made by the employer after the date of the voided disclaimer, the employer shall be ordered to bargain in good faith with the complainant only from the date of this Order, and from the status quo in effect on this date.

FINDINGS OF FACT

1. Public Utility District No. 1 of Clark County is a municipal corporation of the state of Washington which provides electrical services for residents in and around Vancouver, Washington, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Federation of Professional and Technical Engineers, Local 17, is a "bargaining representative" within the meaning of RCW 41.56-.030(3).

3. Local 17 is the exclusive bargaining representative of a bargaining unit of engineering employees of Public Utility District No. 1. The parties' bargaining relationship predates 1984.

4. Negotiations for a successor collective bargaining agreement commenced on March 26, 1984. The employer presented an initial bargaining demand which included a two-year wage freeze for the bargaining unit, and an additional ten percent wage cut for certain bargaining unit classifications. The union initially proposed a wage pattern which would tie the salary structure of employees in this bargaining unit to the wages of employees in a bargaining unit of electrical linemen represented by another labor organization.

5. Negotiations continued until June 13, 1984, when the employer presented a "final offer" to the union. The offer contained the two-year wage freeze and the proposed wage cuts, but specifically exempted incumbent employees in the affected classifications from wage cuts.

6. On July 2, 1984, the members of the bargaining unit rejected the employer's offer.

7. On July 17, 1984, the parties met in further negotiations. At that meeting, the employer's attorney presented a letter to the union, expressing the employer's belief that the parties were at impasse and stating:

> ... We sincerely hope that you do not sacrifice these 28 employees for reasons important only to the union as a whole. That could be a grave mistake.

The employer sent a copy of its July 17, 1984, letter to each bargaining unit employee.

8. The parties discussed the date for further meetings, and tentatively set July 24, 1984, for the next negotiation session. However, the union cancelled the meeting on July 18, 1984.

9. On July 19, 1984, the employer sent a letter to the union, expressing disappointment with the cancellation, expressing the employer's belief

that the union had "let the employees in this bargaining unit down by not giving them adequate representation when they most needed it", and indicating that the employer's final offer would be implemented on a date which had not previously been communicated to the union. The employer sent a copy of its July 19, 1984, letter to each bargaining unit employee.

10. The parties thereafter discussed the possibility of submitting unresolved issues to mediation, and the arrangements for mediation.

11. On September 17, 1984, the employer sent a letter to the union, announcing that it intended to lay off eight bargaining unit employees. The letter explained that the employer had conducted studies and had determined that such a reduction was necessary. The layoff issue had never been presented to the union before September 17, 1984.

12. Notwithstanding its notice to the union that eight employees were to be laid off, and without providing the union with any notice of changed circumstances affecting its decision, the employer sent layoff notices on September 19, 1984, to only six bargaining unit employees.

13. On October 8, 1984, the parties met in mediation under the auspices of the Federal Mediation and Conciliation Service, in Portland, Oregon. Several issues were resolved and the employer offered to rescind three of the six layoffs if the union accepted the two-year wage freeze originally proposed by the employer at the outset of negotiations.

14. The parties had subsequent discussions and, on October 25, 1984, the employer presented the union a document entitled "Addendum No. 1 to Final Offer". The new proposal specified that the employer would not lay off any bargaining unit employee, in return for the union's acceptance of the two-year wage freeze. The employer further conditioned the settlement upon the union's withdrawal of all pending litigation against the employer, including this unfair labor practice case.

15. On October 25, 1984, the members of the bargaining unit voted to accept the employer's offer, as amended by "Addendum No. 1".

16. After the members of the bargaining unit voted to accept the employer's proposal, the union purported to disclaim interest in the bargaining unit because of the requirement that it withdraw pending litigation against the employer. Contrary to such a disclaimer, the union then amended its complaint in this proceeding to allege a violation by reason of the employer's insistence upon withdrawal of these unfair labor practice charges, and it has subsequently pursued this litigation.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 54.04 RCW.

2. By events described in Findings of Fact 7, 9, 11, 12, 13, and 14, Public Utility District No. 1 of Clark County has interfered with, restrained and coerced employees in the exercise of their right to engage in collective bargaining and has refused to bargain, and so has committed unfair labor practices within the meaning of RCW 41.56.140(1) and (4).

3. By events described in the above Findings of Fact, any impasse in collective bargaining between Public Utility District No. 1 of Clark County and International Federation of Professional and Technical Engineers, Local 17, after July 17, 1984, was caused or contributed to by the employer's conduct in violation of RCW 41.56.140.

4. Under the circumstances presented in this case, the disclaimer made by International Federation of Professional and Technical Engineers, Local 17, was coerced by the employer's conduct in violation of RCW 41.56.140 and was void, so that the complainant did not waive its right to litigate the instant unfair labor practice matter.

ORDER

Pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that Public Utility District No. 1 of Clark County, its officers and agents immediately:

1. Cease and desist from:

   a. Interfering, restraining and coercing employees in the bargaining unit of its engineering employees represented by International Federation of Professional and Technical Engineers, Local 17.

   b. Refusing to bargain in good faith with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions for its engineering employees.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes of Chapter 41.56 RCW and Chapter 54.04 RCW:

   a. Upon request, bargain collectively with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions for the bargaining unit of engineering employees. Such bargaining shall cover the time period from the date of this Order henceforth, and shall be based on the status quo marked by the wages, hours and working conditions in effect on the date of this Order.

   b. Post, in conspicuous places on the employer's premises where notices to 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 Public Utility District No. 1 of Clark County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the employer

to ensure that said notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainant, 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 complainant with a signed copy of the notice required by this Order.

d. 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 this Order.

DATED at Olympia, Washington, this 24th day of February, 1989.

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.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their collective bargaining rights.

WE WILL NOT refuse to bargain with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions.

WE WILL, upon request, bargain collectively with International Federation of Professional and Technical Engineers, Local 17, concerning wages, hours, and working conditions.

PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY

By:_____
Authorized Representative

DATED_____

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

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by 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) 753-3444.