STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17, Complainant, vs. MUNICIPALITY OF METROPOLITAN SEATTLE (METRO), Respondent.	CASE 7526-U-88-1576 DECISION 3218 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

Preston, Thorgrimson, Ellis & Holman, by J. Markham Marshall, Attorney at Law, appeared on behalf of the respondent.

International Federation of Professional and Technical Engineers, Local 17, filed a complaint charging unfair labor practices with the Public Employment Relations Commission on August 15, 1988, alleging that the Municipality of Metropolitan Seattle (METRO) had violated RCW 41.56.140(1), (2) and (4), by unilateral changes in reprisal for an organizational attempt among its employees. The matter was set for hearing on April 6, 1989, before William A. Lang, Examiner. On the day of the hearing, the parties jointly filed a statement of "Agreed Facts". Post-hearing briefs were filed by both parties on April 28, 1989.

BACKGROUND

METRO and Local 17 have been involved in litigation since 1984 with respect to the recognition of Local 17 as exclusive bargaining representative of certain METRO employees.[1] The "Agreed Facts" submitted at the hearing in this matter are:

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1 In April, 1984, the City of Seattle and METRO entered into an intergovernmental agreement whereby "commuter pool" services operated by the City were transferred to METRO. City employees represented by Local 17 were involved in the transfer, and the intergovernmental agreement required METRO to succeed to the City's obligations under the collective bargaining agreement between the City and the union.

METRO refused to recognize the union, and filed a unit clarification petition with the Commission. Local 17 filed an unfair practice complaint with the Commission, alleging that METRO had failed to bargain, and brought a civil suit against METRO to enforce the intergovernmental agreement.

The Executive Director and Commission ruled against METRO in the unit clarification case. METRO, Decision 2358-A (PECB, 1986). METRO appealed to the Superior Court, where the decision of the Commission was affirmed. METRO then appealed to the Court of Appeals, where the case remains pending.

The Superior Court for King County ruled against METRO in Local 17's civil suit, and ordered METRO to comply with the intergovernmental agreement. Finding METRO's actions were in bad faith, the Superior Court ordered METRO to pay the union's attorney fees. METRO appealed to the Court of Appeals, where the case also remains pending.

The Examiner and the Commission found that METRO had committed unfair labor practices and ordered extraordinary remedies (including interest arbitration and the award of attorney fees to the union) based on a conclusion that METRO had asserted frivolous defenses. METRO, Decision 2845-A (PECB, 1988). METRO has petitioned for judicial review, and that case also remains pending in the courts.

METRO filed another representation case and another unit clarification petition, seeking to challenge Local 17's status as exclusive bargaining representative. Those petitions were dismissed. METRO, Decision 2985 (PECB, 1988).

1. On April 19, 1988, Ms. Bonnie McBryan, Acting Manager of Metro's Sales and Customer Services Division, directed a memo to managers of Metro's Public Transportation Development Department announcing that on April 21, 1988, Metro's Personnel Manager Gene Matt would "meet with interested staff to discuss Metro/ Local 17 issues." (Exhibit 1) The meeting was to respond to questions that had arisen among Metro employees as a result of an article published by the Seattle Post-Intelligencer that focused on litigation between Metro and Local 17 relating to the transfer of the City of Seattle's Commuter Pool to Metro (Exhibit 2).[2]

2. At the meeting on April 21, 1988, the following Metro employees were present:

1. Catelin Williams, Market Development Planner
2. Becky Davis, Senior Secretary
3. Sharron Shinbo, Supervisor, Sales and Promotion Section
4. Lois Watt, Pass Sales Program Coordinator
5. Dianna Sumabat, Pass Sales Coordinator
6. Cathy Cole, Commuter Service Representative
7. Victor Obeso, Commuter Service Representative
8. Heidi Stamm, Special Promotions Coordinator
9. Mary Peterson, Supervisor, Customer Services and Ridematch Section
10. Kay Porter, Chief, Telephone Information
11. Andrea Maillet, Ridematch Services and HERO Coordinator

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2 Examiner's note: The newspaper article was published on April 6, 1988. McBryan's April 19, 1988 memo, which was attached to the statement of "Agreed Facts", expressed the "hope that you will attend and invite your staff - particularly those formerly associated with Commuter Pool - to participate."

12. Mika Bucholtz, Ridematch Services and HERO Coordinator
13. Gwen Mighell, Customer Assistant Representative
14. Laurel Cruce, Customer Assistant Representative
15. Bonnie McBryan, Supervisor, Customized Services Section (then-Acting Manager, Sales and Customer Services Division)
16. Ann Haruki-Pinedo, Customized Services Coordinator
17. Dawn Billingsley, Vanpool Accounting Specialist
18. Karen Martin, Student Intern
19. Filomena Brauner, Clerical Services Coordinator
20. David Regnier, Supervisor, Employee and Labor Relations

This list was not based on a sign-up sheet but was reconstructed by Ms. Bonnie Bryan and Ms. Andrea Maillet the day following the April 21, 1988 meeting.

3. Attendance by Metro employees at the meeting of April 21, 1988, was voluntary. The meeting was on Metro's premises during normal work hours. Local 17 does not contend that anything said during the meeting constitutes an unfair labor practice.

4. Following the meeting, later on April 21, 1988, Mr. Michael T. Waske, Business Manager for Local 17, telephoned Metro Personnel Manager Matt. Waske told Matt he was aware that Matt had conducted the meeting earlier that day, and that Local 17 members had attended the meeting. Waske told Matt that he did not consider it appropriate for Metro to have had the meeting. Matt told Waske that the reason for the meeting was to respond to employee questions regarding the newspaper article published by the Post-Intelligencer. Waske told Matt that he wanted to have a reciprocal right to have a meeting and to post the announcement of the meeting in the same manner as Metro had posted the announcement of the April 21st meeting and

> to have no restrictions on what Waske could say at the meeting. Matt replied that he would have to discuss the matter with Metro's legal counsel.
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> 5. Still later on April 21, 1988, Local 17's legal counsel Richard D. Eadie telephoned Metro's legal counsel J. Markham Marshall. Marshall was then unaware that the meeting had been held. Eadie told Marshall that Local 17 wanted equal time for a meeting with Metro employees. Marshall said he would have to find out information about the meeting and that he would respond to Eadie. Subsequently, on April 27, 1988, Marshall wrote a letter to Eadie about the subject.[3] . . . Local 17 rejected the offer stated in Marshall's letter. On August 15, 1988 Local 17 filed the unfair practice complaint.

The documents referred to were also stipulated in evidence. The parties rested without calling any witnesses.

POSITIONS OF THE PARTIES

The complainant argues that, in the context of the long history of litigation between Local 17 and METRO, a captive audience meeting with employees in the contested bargaining unit to discuss the litigation unfairly undermines and interferes with the employees rights under RCW 41.56.140.

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[3] Examiner's note: Marshall's letter, which is attached to the statement of "Agreed Facts" offered a one hour meeting on METRO's premises at which a Local 17 representative could discuss the issues discussed at METRO's April 21, 1988 meeting. METRO was willing to send the notice to the same employees who had attended the April 21 meeting. METRO emphasized that attendance at the meeting would be voluntary.

METRO contends that the employer has free speech rights to address its employees, so long as the communication is non-coercive and doesn't invite direct bargaining. It contends that it acted within those limitations.

DISCUSSION

This controversy has a history of litigation unusual in the public sector in Washington. METRO and its officials have been sharply criticized for their conduct by the Commission and the Superior Court. The situation remains unresolved after more than five years of litigation. The affected employees have been unable to implement their collective bargaining rights throughout that period.

Local 17's claim of a per se violation fails to persuade. The union contends that the meeting at issue in the instant case must be viewed in the context of the findings by both the Commission and the Court that METRO was acting in bad faith in its refusal to recognize the union as the exclusive bargaining representative of the employees performing the "commuter pool" functions transferred from the City of Seattle. In other words, the union argues that any actions touching on the litigation (and, hence, on the refusal of recognition) is per se an unlawful interference with employee rights under Chapter 41.56 RCW.

As authority for its arguments the union cites Royal School District, Decision 1419 (PECB, 1982) and several other decisions along the same line, but those decisions generally involve attempts by employers to circumvent the exclusive bargaining representative of its employees, and to bargain directly with the employees. Those are not the facts in the

case at hand. There are no allegations that METRO was or is bargaining with the employees involved in the litigation. To the contrary, the issues in the litigation now pending in the courts concern the employer's abject refusal to engage in any bargaining concerning a separate unit of "commuter pool" employees. The "Agreed Facts" include that "Local 17 does not contend that anything said during the meeting constitutes an unfair labor practice."

Local 17 cites, but would distinguish, METRO, Decision 2197 (PECB, 1985). The Examiner in that case dismissed a complaint alleging that a meeting held by METRO with certain of its employees represented by the Amalgamated Transit Union (ATU) was an unfair labor practice. The Examiner found that the meeting at issue in that case was informational and non-coercive. The meeting had been called at the request of employees, after an agreement had been reached between METRO and their union, to deal with questions concerning a job audit. As in the instant case, the meeting occurred without the knowledge of the union involved. Local 17 cites the case, but argues that the ATU case that it is distinguishable from the case at bar. The Examiner agrees. Decision 2197 rests on the fact that the parties had already reached an agreement on the subject discussed in the meeting, so that the issue of direct dealing was not relevant.

The facts in this controversy, together with the history of litigation, describe a unique situation which is not addressed by precedent. It involves neither a "circumvention" in a bargaining setting nor an "interference", as in an election campaign setting. It was not inherently unlawful for METRO to announce and hold its April 21, 1988 meeting. The case comes down to the union's demand for "equal time".

The principles governing union rights of access to employees on the employer's property in the private sector are of interest here, notwithstanding any differences of "property rights" between private and public employers. In NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956), the Supreme Court restricted union organizers' access to the premises of a private employer where other means of communication with employees were reasonable. Babcock also served as the basis for resolving issues concerning union access to counter "captive audience" speeches by the employer.

In United Steelworkers of America v. NLRB, 646 F.2d 616 (D.C. Circuit, 1981), the court gave a union access to the employer's premises to offset the employer's pervasive unlawful conduct. The employer in that case appeared dedicated to defeat the union at any cost, and it was found guilty of unfair labor practices in 10 out of 12 instances involving surveillance and interrogation of employees, discrimination, discharge and unilateral changes. The NLRB had ordered that the employer's premises be opened to union access as a remedy for yet another unfair labor practice, in order to counter the coercive effects of the employer's pattern of conduct. The remedy was ordered even though there was no finding that the union would be unable to reach the employees by other means.

METRO assumes that Babcock is good law in the public sector, and argues here that the exception to Babcock enunciated in United Steelworkers should not be granted, because there is no unlawful conduct to be offset. Local 17 counters that the history of bad faith and frivolous defenses requires access. Importantly, the union insisted upon access to a group that was larger than the group which attended METRO's April 21, 1988 meeting, and upon a scope of discussion that was broader than that discussed at METRO's April 21, 1988 meeting.

The Public Employment Relations Commission, like its counterpart in private industry, has broad remedial authority to neutralize and counter the harmful effects of unlawful conduct. The Superior Court has found that METRO's failure to live up to its obligations under the intergovernmental agreement was in bad faith and the Commission has found that METRO's conduct warranted the imposition of extraordinary remedies, but METRO is pursuing its statutory appeal rights on those decisions. While the employer may seem dedicated to defeating the union at considerable cost, the Examiner must evaluate the April 21 meeting based on what was said and done at that time. As the union concedes in the "Agreed Facts", the content of that meeting was not unlawful. In the absence of a violation, no remedy may be ordered.

FINDINGS OF FACT

1. The Municipality of Metropolitan Seattle (METRO) is a "public employer" within the meaning of RCW 41.56.030(1). At all times pertinent hereto, Gene Matt was Personnel Manager of METRO.

2. International Federation of Professional and Technical Engineers, Local 17, a "bargaining representative" within the meaning of RCW 41.56.030(3), claims to be the exclusive bargaining representative of METRO employees transferred to METRO from the City of Seattle in 1984 pursuant to an intergovernmental agreement.

3. METRO has refused to recognize or bargain with Local 17 as the exclusive bargaining representative of its employees, and the parties have engaged in a protracted course of litigation on that matter.

4. The Public Employment Relations Commission and the Superior Court for King County have issued decisions supporting the claim of Local 17 to be exclusive bargaining representative of the METRO employees referred to in paragraph 2 of these findings of fact. METRO has asserted its statutory right to pursue appeals on those matters.

5. The Public Employment Relations Commission has found that METRO committed an unfair practice by refusing to bargain with Local 17, and that METRO asserted frivolous defenses warranting the imposition of extraordinary remedies. METRO has asserted its statutory right to petition for judicial review of the Commission decision in that matter.

6. On April 6, 1988, the Seattle Post-Intelligencer newspaper published an article describing the history of litigation between METRO and Local 17 concerning representation of the commuter pool employees.

7. On April 21, 1988, Matt conducted a meeting of supervisors and interested employees for the purpose of discussing the newspaper article described in paragraph 6 of these findings of fact. The parties stipulated that nothing was said at the meeting that constituted an unfair labor practice.

CONCLUSIONS OF LAW

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

2. Notwithstanding the pattern of litigation referred to in paragraphs 3, 4 and 5 of the foregoing findings of fact,

METRO's conduct of the meeting on April 21, 1988 was not per se an unfair labor practice under RCW 41.56.140(1).

3. In the absence of claim or evidence that METRO made any threats of reprisal or force or promises of benefit, or otherwise interfered with, restrained or coerced its employees at the April 21, 1988 meeting, METRO has not committed an unfair labor practice under RCW 41.56.140(1).

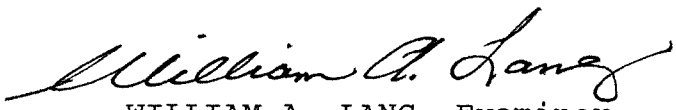
4. In the absence of claim or evidence that METRO attempted to negotiate with employees at the April 21, 1988 meeting concerning their wages, hours or working conditions, METRO has not committed an unfair labor practice under RCW 41.56.140(4).

ORDER

Upon the foregoing findings of fact and conclusions of law, and pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, the complaint charging unfair labor practices filed in this matter is DISMISSED.

DATED at Olympia, Washington, this 30th day of May, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WILLIAM A. LANG, Examiner

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